No. _____

IN THE

Supreme Court of the United States

DAVID M. BOWIE,

Petitioner,

v.

CHARLES C. MADDOX, Inspector General for the District of Columbia, in his official and individual capacities; AUSTIN A. ANDERSEN, Deputy Inspector General, in his official and individual capacities; KAREN BRANSON, in her official and individual capacities; & the DISTRICT OF COLUMBIA;

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a government employee who provides truthful sworn testimony (or declines to give false sworn testimony) about facts related to his job in connection with an official proceeding may be deprived of First Amendment protection for his speech on the ground that it was made "pursuant to his official duties," under *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

PARTIES TO THE PROCEEDING

The Plaintiff-Appellant below, who is the Petitioner before this Court, is David M. Bowie.

The Defendant-Appellees below who are Respondents before this Court are the District of Columbia and five current or former officials in the District of Columbia's Office of the Inspector General, each named in his or her official and individual capacities: Charles C. Maddox, Inspector General; Austin A. Andersen, Deputy Inspector General; and Karen Branson. Additional Defendant-Appellees below, who are not Respondents before this Court, are Jerome A. Campane, former Deputy Inspector General for Investigations and former Assistant Inspector General for Investigations; and Alvin Wright, Jr.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS, STATUTES

OTHER SOURCES

INTRODUCTION

In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), this Court distinguished between speech by public employees "as citizens" and speech by such employees "made pursuant to their official duties." *Id.* at 421. Citizen speech is protected by the First Amendment, and an employee disciplined for speaking as a citizen may have a constitutional remedy. Speech pursuant to official duties is not protected. This case presents a question regarding how to classify an important and recurring type of government employee speech: an employee's truthful sworn statements, or his refusal to swear to statements he perceives to be false, when those statements relate to his government job.

That question has produced a deep divide among the lower courts. Three circuits—the Second, Third, and Seventh—have held that sworn statements, even when made at a government employer's direction or related to the employee's job, are citizen speech entitled to First Amendment protection. The D.C. Circuit took a contrary view in this case. Joining the Ninth Circuit, the court below asserted that "[t]he Second Circuit gets *Garcetti* backwards," Pet. App. 58a, and held that speech undertaken in response to a government employer's direction never can be protected by the First Amendment. The result is that an employee has no constitutional remedy when his government employer asks him to give false testimony, he refuses, and the employer retaliates. That is what happened in this case: David M. Bowie was retaliated against, and ultimately fired, after he

refused to sign a false affidavit supporting his employer's position in an Equal Employment Opportunity Commission investigation and prepared a truthful alternative affidavit. *Garcetti* would not have barred his claim in three other circuits.

The marked circuit split that has emerged in the past few years is a departure from historical precedent. Prior to *Garcetti*, the overwhelming weight of authority over a period of forty years supported First Amendment protection for government employees who made statements under penalty of perjury to courts, legislatures, and administrative tribunals. These decisions rested on two significant principles: the employee's "constitutionally protected interest in freedom of expression," *Connick v. Myers*, 461 U.S. 138, 142 (1983), and the societal interest in "the integrity of the truth seeking process," *Green v. Philadelphia Housing Auth.*, 105 F.3d 882, 887 (3d Cir. 1997). The decision of the D.C. Circuit in this case (and the earlier Ninth Circuit decision reaching a similar result) break from this established tradition, subordinating these interests to the interest in "affording government employers sufficient discretion to manage their operations." *Garcetti*, 547 U.S. at 422.

The divide of authority regarding the treatment of sworn statements is symptomatic of a more general conflict regarding the interpretation of *Garcetti*'s statement that speech "made pursuant to [government employees'] official duties" is outside the reach of the First Amendment. 547 U.S. at 421. In *Garcetti*, there was no dispute about how to

classify the employee's speech: he conceded that he had spoken pursuant to his duties as a prosecutor. *Id.* at 421. As a result, the Court had no occasion to provide guidance regarding how to distinguish citizen speech from speech pursuant to official duties in contested cases. In subsequent cases, however, the lower courts have adopted disparate and conflicting approaches. This case would provide an ideal vehicle to clarify how *Garcetti* should be applied.

Given the importance of the competing interests at stake—preserving truthful testimony and protecting the right of government employees to speak as citizens, on one hand; allowing the government to manage its employees, on the other—this Court's review is warranted to resolve the conflict among the lower courts.

OPINIONS BELOW

The opinion on panel rehearing of the United States Court of Appeals for the District of Columbia Circuit reversing the district court's grant of summary judgment for Petitioners is reported at 653 F.3d 45. Pet. App. 54a. The D.C. Circuit's original panel opinion is reported at 642 F.3d 1122. Pet. App. 1a. The opinion of the District Court (D.D.C.) is reported at 433 F. Supp. 2d 24. Pet. App. 28a.

JURISDICTION

The District of Columbia Circuit issued its decision on panel rehearing on August 31, 2011. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the U.S. Constitution, which states in relevant part that "Congress shall make no law … abridging the freedom of speech," and 42 U.S.C. § 1983, which provides for a civil right of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." These provisions are set forth in full in the Appendix to the Petition (Pet. App. 61a).

STATEMENT OF THE CASE

David M. Bowie was fired by the District of Columbia Office of the Inspector General after he refused to sign an affidavit justifying a colleague's termination to the Equal Employment Opportunity Commission and re-wrote the affidavit to criticize the termination decision. He believed the original version of the affidavit was inaccurate, and that he could not sign it consistent with his duty to give only truthful testimony to the EEOC. Nevertheless, the D.C. Circuit held that his decision not to sign the original affidavit and his statements in the replacement affidavit could receive no First Amendment protection in light of *Garcetti*. The D.C. Circuit's decision expressly acknowledges a conflict with the Second Circuit's decision in *Jackler v. Byrne*, 658 F.3d 225 (2d Cir. 2011), and also conflicts with the decisions of two other circuits.

A. Bowie Faces Retaliation for Refusing to Sign a False Affidavit and Drafting a Truthful Affidavit.

1. Bowie joined the Office of the Inspector General ("OIG") as Assistant Inspector General for Investigations in 1997 after 24 years of distinguished service as an FBI Special Agent. For three years, until 2000, he received uniformly excellent performance reviews. JA 545-52.[1]

Bowie supervised Emmanuel Johnson from June 1999, when Johnson joined the OIG, until February 2000, when Johnson was fired. Johnson, like Bowie, previously had worked for the FBI, where Johnson was a plaintiff in a successful class action lawsuit challenging the FBI's failure to promote African-American agents. Shortly after Johnson came to the OIG, an FBI Assistant Director threatened not to assist the OIG in investigative matters if Johnson was involved, apparently because of animosity related to the lawsuit. JA 11-13.

On February 7, 2000, Defendants Charles Maddox, the Inspector General, and Austin Andersen, the newly appointed Deputy Inspector General, made the decision to fire Johnson. For the first time, they told Bowie of purported concerns regarding the quality of Johnson's work. Bowie told Maddox and Andersen that he disagreed with their view of Johnson's performance. Maddox rejected Bowie's view and ordered Bowie to inform Johnson that he must resign or be fired. When Bowie refused

[1] Citations to "JA" refer to the Joint Appendix filed in the Court of Appeals.

to make a formal recommendation supporting the termination decision, asserting that Johnson was being treated differently than similarly situated white employees, Maddox and Andersen castigated him for "not stepping up to the plate." JA 13-17, 22-24, 553-54.

2. Johnson filed a complaint challenging his termination with the EEOC. JA 24. The EEOC ordered the OIG to submit a statement of its position regarding the allegations. On May 10, 2000, while preparing that statement, Defendant Karen Branson, the OIG General Counsel, sent Bowie a pre-drafted affidavit supporting Maddox and Andersen's conclusion that Johnson had performed poorly. JA 283-85. The affidavit, prepared without any consultation with Bowie, contained no positive statements about Johnson's work performance and focused solely on Johnson's purported failure to meet OIG standards. Bowie did not believe the affidavit was accurate and refused to sign it. He wrote in an email to Branson that the proposed affidavit "contains some misstatements of fact" and that "certain matters are couched in language that would convey impressions that I would not agree with." JA 286.

Bowie then prepared and signed his own affidavit that, while balanced in tone, rejected the performance rationale for Johnson's dismissal. His affidavit stated that:

- "[D]uring conversations with both the first and second line supervisors of Mr. Johnson,

neither shared the views being expressed toward Mr. Johnson's performance."

- "[Johnson's] immediate supervisor … had given SA Johnson an exceptional performance rating in a July 1999 interim evaluation."
- "[O]n two separate occasions, in meetings with my staff, both the current IG and former DIG publicly praised SA Johnson, describing him as a model investigator."

JA 288-89. The implication was that the allegations of poor performance were a pretext to mask discrimination or retaliation for Johnson's participation in the earlier class action, as Johnson had claimed in his EEOC complaint. JA 567.

Bowie signed the affidavit he drafted before a notary and believed it would be submitted to the EEOC. JA 27, 418-20. Instead, Branson submitted only affidavits prepared by Maddox and Andersen, along with the OIG's official position statement on the allegations. She did not submit Bowie's affidavit or otherwise mention Bowie's disagreement with that position. JA 27. Bowie did not learn until years later that his affidavit had not been submitted. *Id.*

3. Maddox and Andersen admonished Bowie for his refusal to submit an affidavit endorsing Johnson's termination. JA 558-59. In the following months, they removed him from a high-profile investigation, effectively demoted him by creating a new position above his in the reporting structure, downgraded his performance evaluations, and began a pattern of what Bowie described as "workplace hostility, harassment, intimidation, coercion, and

abuse." JA 29, 328-32, 571-78. The chain of retaliatory acts culminated in Bowie's own firing in August 2002.

B. The D.C. Circuit Relies on *Garcetti* to Affirm the Dismissal of Bowie's First Amendment Retaliation Claim.

Proceeding *pro se*, Bowie filed suit in the U.S. District Court for the District of Columbia. He raised several claims, including a claim under 42 U.S.C. § 1983 alleging a violation of his right to free speech.

1. The district court granted summary judgment against Bowie with respect to the First Amendment claim. In *Connick*, this Court held that courts must balance "the interests of the [employee], 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." 461 U.S. at 142. Applying *Connick*, the district court concluded that the affidavit Bowie drafted was not entitled to First Amendment protection because it did not relate to a matter of public concern: "Speech on individual personnel disputes and grievances is not relevant to the public's evaluation of governmental agencies' performance." Pet. App. 44a. The district court did not separately address Bowie's rejection of the pre-drafted affidavit.

2. Within a month after the district court's decision, this Court decided *Garcetti v. Ceballos*, considering "whether the First Amendment protects a government employee from discipline based on

speech made pursuant to the employee's official duties." 547 U.S. at 413. Ceballos, a calendar deputy in a district attorney's office, claimed he suffered retaliation for writing a memorandum to his supervisors raising concerns about the accuracy of an affidavit used to support a search warrant. *Id.* at 413-14. He acknowledged that he wrote the memorandum not as a citizen, but "as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case." *Id.* at 421. This fact, the Court held, rendered Ceballos's speech unprotected: "[T]he First Amendment does not prohibit managerial discipline based on an employee's expressions pursuant to his official responsibilities." *Id.* at 422.[2]

Thus, *Garcetti* added an additional layer to the *Connick* First Amendment analysis applied by the district court. Under *Connick*, courts first asked whether the employee's speech was on a matter of public concern; then, if so, whether the employee's constitutionally protected interest in free expression outweighed the government employer's need to operate effectively. 461 U.S. at 142. Under *Garcetti*,

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[2] Ceballos also testified at a hearing about the search warrant after being called by the defense. *Id.* at 414-15. This Court, however, limited its holding to Ceballos's memorandum, because that was the only speech the Ninth Circuit had considered in the opinion under review. *See id.* at 441 (Souter, J., dissenting). Indeed, Justice Souter's dissent suggested that, even under the rule announced in the majority opinion, Ceballos's testimony likely *was* protected speech, noting that "Ceballos charges retaliation for some speech apparently outside the ambit of utterances 'pursuant to their official duties.'" *Id.* at 441-42 (Souter, J., dissenting).

before addressing these two questions, courts were instructed to determine whether the employee spoke as a citizen or pursuant to official duties. 547 U.S. at 424.

The *Garcetti* Court had no occasion to detail how to make that determination, because Ceballos had conceded that his speech was pursuant to official duties. *Id.* at 421 ("Ceballos does not dispute that he prepared the memorandum pursuant to his official duties as a prosecutor."). Nevertheless, the Court emphasized that its holding should not be read too expansively. For example, not all speech that is "made at work" or "related to the speaker's job" is made pursuant to official duties, *id.* at 420, 421, and restrictions on free expression are justified only to ensure "the efficient provision of public services" by allowing "managerial discipline based on an employee's expressions made pursuant to official responsibilities," *id.* at 418, 424.

3. After its decision on Bowie's First Amendment claim, and without ever discussing *Garcetti*, the district court held a jury trial addressing another claim, for retaliation in employment under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e. Bowie then filed a timely appeal.

4. The D.C. Circuit declined to endorse the district court's "public concern" rationale. Pet. App. 19a. Nevertheless, it affirmed the dismissal of Bowie's First Amendment claim, relying on *Garcetti* and concluding that Bowie "was acting 'pursuant to [his] official duties' as an employee of OIG." Pet. App. 19a (quoting *Garcetti*, 547 U.S. at 421). The

D.C. Circuit reasoned that "Bowie's efforts to produce an affidavit were undertaken at the direction of his employer and in his capacity as Assistant Inspector General for Investigations and Johnson's superior." Pet. App. 20a.[3]

5. Bowie sought rehearing, arguing that his refusal to sign the pre-drafted affidavit and his statements in the replacement affidavit are citizen speech because they are "analogous to the speech of private citizens who submit testimony to the EEOC." Pet. App. 56a-57a. The Court of Appeals acknowledged that his position "finds support in a Second Circuit opinion that issued the day after he filed his petition for rehearing." Pet. App. 57a (citing *Jackler*, 658 F.3d 225). Nevertheless, it rejected the Second Circuit's approach and denied Bowie's petition.

Jackler involved a police officer's refusal to withdraw a truthful report and replace it with a false one. According to the D.C. Circuit, "[t]he Second Circuit reasoned that Jackler's disobedience was analogous to a private citizen's lawful refusal to rescind a true accusation, to make a false one, and to file a false police report, and that Jackler's conduct

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[3] The D.C. Circuit reversed the dismissal of another claim, a conspiracy claim under 42 U.S.C. § 1985(2). That claim is unrelated to the EEOC affidavits. It involves a distinct allegation of retaliation pertaining to Bowie's planned testimony in support of Johnson in district court. The D.C. Circuit has withheld issuance of the mandate remanding the Section 1985(2) claim to the district court for further proceedings until this Court's final disposition of this Petition.

was therefore protected by the First Amendment." Pet. App. 57a-58a. This reasoning, the court concluded, "gets *Garcetti* backwards":

> 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.

Pet. App. 58a-59a. Although the D.C. Circuit acknowledged that "it is not difficult to sympathize with" the Second Circuit's interpretation of *Garcetti*, it dismissed that interpretation as "dubious." Pet. App. 60a.

In explaining the "mosquito net made of chicken wire" analogy, the D.C. Circuit assumed that *Jackler* held that a government employee's speech would be protected if there were a civilian analogue to that speech. It did not address the possibility that the required civilian analogue was not to the speech itself but rather to the source of the government employee's duty to speak. Nor did the D.C. Circuit address Bowie's argument that the "pursuant to official duties" inquiry should focus on his official job responsibilities, which did not include submitting testimony to the EEOC.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE SPLIT REGARDING FIRST AMENDMENT PROTECTION FOR PUBLIC EMPLOYEES' SWORN STATEMENTS.

The D.C. Circuit acknowledged that its holding that *Garcetti* forecloses First Amendment protection for sworn statements related to a government employee's job conflicts with the Second Circuit's decision in *Jackler*. The decision in this case also conflicts with the Third Circuit's decision in *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008), and the Seventh Circuit's decision in *Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007). But the D.C. Circuit's decision is consistent with the Ninth Circuit's decision in *Huppert v. City of Pittsburg*, 574 F.3d 696 (9th Cir. 2009). This clear circuit split on an important and recurring issue calls out for this Court's resolution.

A. The Decision Below Explicitly Rejected the Second Circuit's Grounds for Protecting Substantially Similar Speech, and Also Conflicts with the Decisions of Two Other Circuits.

This case would have come out differently if it had been brought in a different circuit. Addressing analogous examples of sworn statements by public employees related to their jobs, the Second, Third, and Seventh Circuits held that those statements were protected by the First Amendment.

1. *Jackler* involved a probationary police officer's report that a fellow officer had used excessive force on an arrestee. *Jackler v. Byrne*, 658 F.3d 225, 230-

31 (2d Cir. 2011). Resisting pressure from his supervisors, the officer "refused to alter [the report] and refused to provide a false report." *Id.* at 231. In response, the supervisors "recommended … that Jackler not be retained as a permanent police officer and that he be terminated as a probationary officer." *Id.*

The Second Circuit held that Jackler did not act pursuant to official duties. *Id.* at 234. "In the context of an official investigation into possible wrongdoing," the court wrote, "a citizen has a right—and indeed, in some circumstances, a duty—to give evidence to the investigators." *Id.* at 239. And "when a person does give evidence, he has an obligation to speak truthfully." *Id.* Thus, Jackler acted as he did pursuant to his obligations as a citizen, not as a public employee: "retracting a truthful statement to law enforcement officials and substituting one that is false would expose the speaker—whether he be a police officer or a civilian—to criminal liability." *Id.* at 240 (citing, *inter alia*, 18 U.S.C. § 1001, 18 U.S.C. § 1512(c), and 18 U.S.C. § 1519). There was a "civilian analogue" to the duty animating his speech. *Id.* at 241-42.

The court acknowledged that Jackler's job required him to file a report of some kind. *Id.* at 241. Nevertheless, it held that the specific speech that prompted retaliation was citizen speech. "In the context of the demands that Jackler retract his truthful statements and make statements that were false," the court wrote, "we conclude that his refusals to accede to [his supervisors'] demands constituted speech activity that was significantly different from

the mere filing of his initial Report." *Id.* It held that his speech was protected by the First Amendment.

2. Likewise, in *Reilly*, the Third Circuit held that, "[w]hen a government employee testifies truthfully, s/he is not 'simply performing his or her job duties,' *Garcetti*, 547 U.S. at 423; rather, the employee is acting as a citizen and is bound by the dictates of the court and the rules of evidence." 532 F.3d at 231. Reilly, a police officer, testified at the criminal trial of a former colleague in a case he had investigated. The Chief of Police and Director of Public Safety, who were friends of the defendant, later filed a "formal recommendation … that Reilly be demoted from his position as sergeant and be suspended for ninety days," ultimately leading to Reilly's forced retirement. *Id.* at 219-20.

As in *Jackler*, it was undisputed that Reilly's speech concerned his job responsibilities—and, indeed, that Reilly's "official responsibilities provided the initial impetus to appear in court." *Id.* at 231. The court nevertheless held that Reilly's testimony was protected by the First Amendment. That is because the initial impetus to appear "is immaterial to his/her independent obligation as a citizen to testify truthfully." *Id.* "Ensuring that truthful testimony is protected by the First Amendment promotes 'the individual and societal interests' served when citizens play their vital role in the judicial process." *Id.* (quoting *Garcetti*, 547 U.S. at 420).

3. The Seventh Circuit reached the same result in *Morales*, albeit on slightly different grounds.

Morales and a fellow police officer "gave depositions in … a case in which [the Chief of Police] was accused of transferring a police officer in violation of the officer's First Amendment rights." 494 F.3d at 595. Morales, who was not otherwise involved in that case, was asked to testify about ongoing investigations he was conducting; his testimony proved harmful to the Chief's litigation position. *Id.* After he testified, Morales was reassigned to a less desirable position. *Id.*

The court held that Morales spoke as a citizen in his deposition, reasoning that "[b]eing deposed in a civil suit … was not part of what he was employed to do." *Id.* at 598. It acknowledged that "Morales testified about speech he made pursuant to his official duties," but concluded that this fact does not "render[] his deposition unprotected." *Id.* The court of appeals therefore permitted the First Amendment claim to proceed. Concurring in this disposition, Judge Rovner further explained that "[a]lthough the subject matter of the deposition related to information Lt. Morales learned on his job, his testimony owed its existence not to his job but rather to a subpoena in a lawsuit" that independently obligated him to give truthful testimony. *Id.* at 603 (Rovner, J., concurring in part and dissenting in part).

The Seventh Circuit majority noted that the distinction between citizen speech and speech pursuant to official duties could produce an anomalous result. Even if a sworn statement regarding an employee's work-related speech is protected, the underlying speech might not be. *Id.* at

598. The court described this result as an "oddity," but concluded that "*Garcetti* established just such a framework, and we are obliged to apply it." *Id.* And two years later, in *Fairley v. Andrews*, 578 F.3d 518 (7th Cir. 2009) (Easterbrook, J.), the Seventh Circuit embraced the distinction between sworn and unsworn statements, holding that *Garcetti* barred claims based on an internal report but not claims based on trial testimony to the same effect. *Id.* at 525 ("Even if offering (adverse) testimony is a job duty, courts rather than employers are entitled to supervise the process. A government cannot tell its employees what to say in court, *see* 18 U.S.C. § 1512, nor can it prevent them from testifying against it.").

4. If the D.C. Circuit had followed the rule announced in *Jackler*, *Reilly*, or *Morales*, it would have reversed the dismissal of Bowie's First Amendment claim. *Jackler* and *Reilly* rested on the principle that a person giving evidence has a duty as a citizen to speak truthfully, and that this duty—not any duty of government employment—animated the speech at issue. *Morales* adopted the narrower principle that, in most circumstances, offering sworn statements is not part of a public employee's official duties, even if those statements relate to his job. The application of either principle would have compelled a different result in this case.

The D.C. Circuit, however, declined to apply those principles. Instead, the court found it dispositive that the relevant speech was "ordered by his government employer." Pet. App. 55a; *see also* Pet. App. 20a ("Bowie's efforts to produce an affidavit were undertaken at the direction of his employer and

in his capacity as Assistant Inspector General for Investigations and Johnson's superior."). In its view, the critical facts were that the "first version of the affidavit was drafted for OIG's convenience by a Deputy Attorney General as counsel for OIG" and that Bowie's "affidavit, like the draft he refused to sign, identified him in the first paragraph and signature block as 'Assistant Inspector General for Investigations.'" *Id.*

Those facts would have been irrelevant in the other circuits. Bowie refused to sign an affidavit he believed to be false and prepared an alternative affidavit he believed to be truthful. His speech almost exactly parallels the speech the Second Circuit held was protected in *Jackler*—the refusal to withdraw a truthful report and to submit in its place a false one.[4] It would not have mattered, under the other circuits' approaches, that the request from OIG counsel to sign the pre-drafted affidavit was the "initial impetus" to provide testimony; that initial impetus is "immaterial to [Bowie's] independent obligation as a citizen to testify truthfully." *Reilly*, 532 F.3d at 231. Nor would the use of his job title and the description of events related to his job have altered the conclusion that giving testimony to the

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[4] Jackler's speech was the refusal to alter an internal police report, which the court of appeals treated as equivalent to testimony in light of the criminal laws against submitting false police reports. *Jackler*, 658 F.3d at 241. Bowie prepared his affidavit for the purpose of providing testimony to the EEOC, and reasonably believed that it had been provided to the EEOC. *See* JA 27, 418-20. There is no basis to treat Bowie's speech differently from submitted testimony simply because the Defendants, unbeknownst to Bowie, refused to submit it.

EEOC "was not part of what he was employed to do," *Morales*, 494 F.3d at 598, and that the "testimony owed its existence not to his job" but to a preexisting and universal duty. *Id.* at 603 (Rovner, J., concurring in part and dissenting in part).

5. Instead of following the Second, Third, and Seventh Circuits, the D.C. Circuit held that Bowie's refusal to sign a false affidavit and preparation of a truthful affidavit were entitled to no First Amendment protection. Its holding is similar to the conclusion of the Ninth Circuit panel majority in *Huppert*, 574 F.3d 696. There, the court held that a police officer's testimony before a grand jury about alleged corruption in his department was pursuant to official duties rather than citizen speech. *Id.* at 707. Declining to follow *Reilly*, the majority indicated that there is no need to inquire into the nature of an employee's obligation to give a sworn statement as long as that statement "'aros[e] out of the employee's official responsibilities.'" *Id.* at 708 (emphasis omitted) (quoting *Reilly*, 532 F.3d at 230).[5]

Judge William Fletcher dissented. He would have held, consistent with *Reilly* and *Morales*, that "where there is an independent legal duty to speak (in our case, to testify before the grand jury pursuant to a subpoena), the employee has First Amendment protection for truthful speech uttered in performance of that independent legal duty." *Id.* at 722 (W.

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[5] The Eleventh Circuit reached a similar result to *Huppert*, but in an unpublished decision. *Green v. Barrett*, 226 F. App'x 883, 886 (11th Cir. 2007).

Fletcher, J., dissenting). "The fact that the employer may require its employees to obey a law that exists independent of the employment relationship"—such as the criminal law prohibiting false sworn statements, 18 U.S.C. § 1001, in Bowie's case—"does not allow the employer to retaliate against an employee for obeying the law." *Id.*

Judge Fletcher added that the result reached by the Ninth Circuit majority "would result in a Catch 22." *Id.* An employee asked to give testimony could make a false statement and risk criminal charges. Alternatively, he could risk retaliation by making a truthful statement or by refusing to make a statement at all. Under the majority opinion in *Huppert*, the First Amendment does not protect an employee who chooses either one of these courses of action. The source of the Catch 22, according to Judge Fletcher, was the majority's failure to identify the duty animating Huppert's speech: "He also appeared pursuant to his duty as a citizen, independent from his duty as a public employee, to comply with the subpoena." *Id.* at 722. The D.C. Circuit's decision in this case creates the same Catch 22.

As Judge Fletcher recognized, *Huppert*, like the D.C. Circuit's decision here, cannot be harmonized with the approach taken by the majority of circuits. It explicitly rejects *Reilly*, struggles to distinguish *Morales*, and plainly conflicts with *Jackler* as well.

6. In sum, the decisions of the circuit courts of appeals reflect a clear split of authority regarding whether sworn statements relating to a government

employee's job are barred from receiving First Amendment protection. That split is outcome determinative of Bowie's First Amendment claim. This Court should grant certiorari to resolve it.

B. The Conflict Presented in This Case Is Emblematic of General Confusion Regarding How to Distinguish Speech Pursuant to Official Duties from Citizen Speech Under *Garcetti*.

The conflict as to the treatment of sworn statements is symptomatic of disparate, and often inconsistent, standards applied by the courts of appeals to determine whether a public employee speaks as a citizen or "pursuant to official duties." This inconsistency is a product of the fact that in *Garcetti* this Court had "no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." 547 U.S. at 424. A decision by this Court on the proper treatment of public-employee testimony would have the salutary effect of clarifying the application of *Garcetti* in this regard.

In *Garcetti*, the government employee was a deputy district attorney, and his speech was a memorandum recommending the dismissal of a pending criminal case. *Id.* at 413-14. As the Court noted, he "wrote his disposition memorandum because that is part of what he, as a calendar deputy, was employed to do." *Id.* at 421. There was no dispute about whether the speech was made pursuant to official duties; the employee conceded that it was. *Id.* The Court had no need to address

how to apply *Garcetti* in contested cases. It left that question open.

As a result, the lower courts have been forced to develop standards by "dissect[ing] the sentences of the United States Reports as though they were the United States Code." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993) (describing such parsing as "generally undesirable"). In the five years since *Garcetti*, the courts of appeals have used widely varying approaches to distinguish public employees' speech as citizens from their speech pursuant to official duties.

Many courts have focused on whether the speech at issue is among "the type of activities that the employee was paid to do." *Chavez-Rodriguez v. City of Santa Fe*, 596 F.3d 708, 713 (10th Cir. 2010); *accord Decotiis v. Whittemore*, 635 F.3d 22, 31 (1st Cir. 2011) ("First, a court must ask, 'what are the employee's official responsibilities?,' and second, 'was the speech at issue made pursuant to those responsibilities?'").[6] Several other courts, instead of asking whether the speech itself was an activity required by the job, have asked whether *the subject matter the employee addressed in the speech* was an activity required by the job. *E.g., Renken v. Gregory*, 541 F.3d 769, 774 (7th Cir. 2008);[7] *D'Angelo v. Sch.*

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[6] *See also Fairley*, 578 F.3d at 523 (7th Cir.) (Easterbrook, J.); *Alaska v. EEOC*, 564 F.3d 1062, 1070 (9th Cir. 2009) (en banc) (Kozinski, J.); *Gorum v. Sessions*, 561 F.3d 179, 185-86 (3d Cir. 2009).

[7] The Seventh Circuit is one of several circuits that appears to have taken different approaches in different cases. *Compare Renken*, 541 F.3d at 774, *with Fairley*, 578 F.3d at 523.

Bd. of Polk County, 497 F.3d 1203, 1207 (11th Cir. 2007); *Haynes v. City of Circleville*, 474 F.3d 357, 364 (6th Cir. 2007). Finally, a few courts have held that "[a]ctivities undertaken in the course of performing one's job are activities pursuant to official duties." *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 693 (5th Cir. 2007); *e.g., Fox v. Traverse City Area Pub. Sch. Bd. of Educ.*, 605 F.3d 345, 349-50 (6th Cir. 2010); *Weintraub v. Bd. of Educ.*, 593 F.3d 196, 203 (2d Cir. 2010). The differences among the lower courts' approaches to identifying speech pursuant to official duties are not merely cosmetic. They can impact whether particular examples of public employee speech receive constitutional protection. *Compare, e.g., Williams*, 480 F.3d at 693-94, *with Reinhardt v. Albuquerque Pub. Sch. Bd. of Educ.*, 595 F.3d 1126, 1136 (10th Cir. 2010).

The D.C. Circuit's decision in Bowie's case is most closely aligned with the approach taken by the courts that ask whether the speech was "undertaken in the course of performing one's job." *Williams*, 480 F.3d at 693. The court below made no inquiry into whether EEOC testimony was a responsibility of Bowie's job as Assistant Inspector General for Investigations (although Bowie argued that it was not). Instead, the court concluded that Bowie's speech necessarily was "pursuant to official duties" because it was "undertaken at the direction of his employer" and "identified him in the first paragraph and signature block as 'Assistant Inspector General for Investigations.'" Pet. App. 20a. Had the court instead considered whether Bowie's speech falls within "the type of activities that the employee was

paid to do," *Chavez-Rodriguez*, 596 F.3d at 713, it likely would have reached a different result, since Bowie was not paid to submit testimony to the EEOC; the affidavits were ancillary to, not part of, his job responsibilities.

In addressing the clear split regarding the treatment of sworn statements under *Garcetti*, this Court could clarify the more general distinction between speech as a citizen and speech pursuant to official duties, and provide guidance helping to ameliorate the confusion on this score that has arisen since *Garcetti*.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS AND THREATENS TO UNDERMINE THE INTEGRITY OF PUBLIC PROCEEDINGS.

The D.C. Circuit's decision merits review not only because it conflicts with the decisions of other circuits but also because it is a flawed interpretation of the speech rights of government employees that threatens to seriously undermine the integrity of judicial and administrative proceedings. This Court has "made clear that public employees do not surrender all their First Amendment rights by reason of their employment." *Garcetti*, 547 U.S. at 417. "[A] citizen who works for the government is nonetheless a citizen," *id.* at 419, and the Court has acknowledged a "responsibility … to ensure that citizens are not deprived of fundamental rights by virtue of working for the government," *Connick v. Myers*, 461 U.S. 138, 143 (1982). The countervailing interest in "affording government employers

sufficient discretion to manage their operations," *Garcetti*, 547 U.S. at 422, is limited, and does not extend to directing employees to give false testimony. Thus, the court of appeals erred in holding that *Garcetti* abrogated the longstanding First Amendment protection for sworn statements.

Moreover, this is a circumstance where "the potential societal value of employee speech," *id.*, is extremely high. The testimony of public employees often is critical to obtaining a just result in judicial and administrative proceedings. If employees either must "testify truthfully and lose their jobs" or "lie to the tribunal and protect their job security," *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1578 (5th Cir. 1989), many inevitably and rationally will choose to lie. As a result, the perverse incentive created by the D.C. Circuit's rule would undermine trust in all public employee testimony, imposing significant costs on courts and agencies, the parties to public proceedings, and the public employees themselves. Accordingly, the decision below threatens the integrity of judicial and administrative proceedings in which public employees testify, and should not be allowed to stand.

A. The Decision Below Conflicts with *Garcetti* and This Court's Pre-*Garcetti* Precedents.

1. This Court's pre-*Garcetti* decisions recognize that restrictions on public employee speech rights must be limited to those necessary to protect government functions. This narrow tailoring principle dates back to *Pickering v. Board of*

Education, 391 U.S. 563 (1968), in which the Court addressed a teacher's public criticism of the school board's plans for raising revenue. Such statements, the Court held, cannot lose First Amendment protection when they "are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." *Id.* at 572-73. Absent a specific harm to job functions, "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." *Id.* at 573; *accord Board of Cnty Comm'rs v. Umbehr*, 518 U.S. 668, 678-80 (1996) (praising *Pickering* approach for allowing context-specific weighing of government and citizen interests).

The decisions following *Pickering* echoed this result. Thus, in *Perry v. Sinderman*, 408 U.S. 593 (1972), this Court concluded that allegations of retaliation for "testimony before legislative committees" "[p]lainly … present a bona fide constitutional claim." *Id.* at 598. In *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), the Court held that a teacher's criticism of "employment policies and practices … conceived to be racially discriminatory in purpose or effect" was protected by the First Amendment even though it was expressed only internally (to the school principal) and related to her job activities. *Id.* at 413. And in *Connick*, the Court engaged in a detailed factual analysis of whether an Assistant

District Attorney's circulation of a pointed questionnaire "would disrupt the office, undermine [the District Attorney's] authority, and destroy close working relationships." 461 U.S. at 154.

Garcetti did not disturb this established body of law. To the contrary, the Court's opinion in *Garcetti* confirmed that speech restrictions must derive from legitimate management needs. Government employee speech may remain protected even if it is "made at work" or "related to the speaker's job." 547 U.S. at 420, 421. Limitations are justified only to ensure "the efficient provision of public services" by allowing "managerial discipline based on an employee's expressions made pursuant to official responsibilities." *Id.* at 418, 424. An employee's speech pursuant to official duties does not receive First Amendment protection because to hold otherwise would "mean his supervisors were prohibited from evaluating his performance." *Id.* at 422. As the *Garcetti* Court explained, this result is a "[p]roper application of our precedents," not a departure from them. *Id.* at 424.

2. In this context, it is clear that truthful sworn statements, and the refusal to swear to false statements, should not fall within the unprotected category of "speech pursuant to official duties."[8]

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[8] There is no dispute that refusing to speak falsely is entitled to the same First Amendment protection as speaking truthfully. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988) ("There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance … ."); *accord Eldred v. Ashcroft*, 537 U.S. 186, 191

It is axiomatic that "the duty to give testimony" is an "obligation imposed upon all citizens." *United States v. Mandujano*, 425 U.S. 564, 576 (1976); *accord Piemonte v. United States*, 367 U.S. 556, 559 n.2 (1961) ("Every citizen … owes to his society the duty of giving testimony to aid in the enforcement of law."). Further, "when a person does give evidence, he has an obligation to speak truthfully." *Jackler*, 658 F.3d at 239; *accord* 18 U.S.C. § 1001(a) ("[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully … makes any materially false, fictitious, or fraudulent statement or representation … shall be fined under this title, imprisoned not more than 5 years … , or both."). Thus, independent of any job responsibilities, Bowie had an obligation as a citizen to give only truthful testimony to the EEOC. His speech acts were undertaken pursuant to that duty of citizenship, not pursuant to any official duty.

Nothing in the language of *Garcetti* compels a contrary result. Nor do the theoretical underpinnings of *Garcetti* justify treating testimonial statements as made pursuant to official duties. The management-oriented rationale for

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(2003) ("The First Amendment securely protects the freedom to make—or decline to make—one's own speech."); *Wooley v. Maynard*, 430 U.S. 705, 708 (1977). Indeed, if anything, compelled speech may "receive *more* solicitude than compelled silence." *Jackler*, 658 F.3d at 245 (Sack, J., concurring); *accord W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) ("It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence.").

restricting ordinary employee speech does not apply with the same force to an employee's giving of truthful testimony or abstaining from false testimony. Even as an employer, the government has no legitimate interest in suborning perjury. *See* 18 U.S.C. § 1512(b) ("Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to … influence, delay, or prevent the testimony of any person in an official proceeding … shall be fined under this title or imprisoned not more than 20 years, or both"); *accord Fairley*, 578 F.3d at 525 ("A government cannot tell its employees what to say in court … ."). Indeed, the unfettered ability to discipline employees for true but adverse statements in judicial or administrative proceedings would discourage, not promote, effective management by allowing managers to cover up mistakes.

Further, a holding that sworn statements are made pursuant to an obligation of citizenship rather than an official duty would not render all testimony subject to absolute First Amendment protection. To the contrary, the employee still would have to demonstrate, first, that his speech was on a matter of public concern and, second, that the government had no adequate justification for treating him differently than a member of the general public. *Pickering*, 391 U.S. at 568.[9]

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[9] The court of appeals in this case expressly declined to endorse the district court's conclusion that Bowie did not speak on a matter of public concern. Pet. App. 19a. And for good reason:

The law is clear that giving only truthful testimony is a duty of citizenship. Neither *Garcetti* nor this Court's other decisions abrogate this preexisting duty for government employees, or convert it into a job responsibility. As such, the decision below rests on a flawed interpretation of "pursuant to official duties" and should be reversed.

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the district court's conclusion ignored the context of Bowie's speech and conflicted with precedent. Speech about "employment policies and practices … which [an employee] conceived to be racially discriminatory in purpose or effect," *Givhan*, 439 U.S. at 413, necessarily contributes to "[t]he public interest in having free and unhindered debate on matters of public importance," *Pickering*, 391 U.S. at 573. *Accord Tao v. Freeh*, 27 F.3d 635, 640 (D.C. Cir. 1994). Although the affidavit Bowie drafted did not explicitly state that Johnson's termination was racially motivated or retaliatory, as the district court noted, *see* Pet. App. 44a, the affidavit's main point was that the OIG's performance rationale was false. That necessarily lends credence to the only alternative explanations proffered—race discrimination and retaliation. Moreover, the mere fact that Bowie's speech consisted of sworn testimony indicates that it was on a matter of public concern. *See Johnston*, 869 F.2d at 1978 ("When an employee testifies before an official government adjudicatory or fact-finding body he speaks in a context that is inherently of public concern."). And both this Court and the D.C. Circuit have recognized that speech does not lose its protected status simply because it relates to a "personnel dispute." *Givhan*, 439 U.S. at 413; *LeFande v. Dist. of Columbia*, 613 F.3d 1155, 1161 (D.C. Cir. 2010).

B. First Amendment Protection for Sworn Statements Is Necessary to Ensure the Integrity of Judicial and Administrative Proceedings.

The D.C. Circuit's erroneous interpretation of *Garcetti* is especially significant because it threatens the integrity of any judicial or administrative proceeding involving the testimony of a public employee. The decision below and the Ninth Circuit's decision in *Huppert* are a dramatic break from the traditional First Amendment protection afforded to truthful sworn statements. This change in the law threatens to create perverse incentives for public employees to give false testimony. Other possible sources of legal protection are incomplete or inadequate. The vital need to protect the integrity of judicial and administrative testimony alone is sufficient to justify granting the petition.

1. Prior to *Garcetti*, "federal courts have afforded additional protection to witnesses who are employed by the government, concluding that truthful testimony is protected by the First Amendment and that a government employee may not be fired or subjected to other adverse action as a result of such testimony." *Worrell v. Henry*, 219 F.3d 1197, 1204-05 (10th Cir. 2000). The overwhelming majority of circuit court decisions treated sworn statements—both in court and otherwise—as protected.[10] This

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[10] *See, e.g., Kirby v. City of Elizabeth City*, 388 F.3d 440, 450 (4th Cir. 2004) (holding that plaintiff's allegation "that he was reprimanded based on his testimony at a disciplinary hearing" does "implicate[] a matter of public concern even though the testimony itself related to a private matter"); *Herts v. Smith*,

established view of the law reflected a concern over the incentives of government employees who chose or were required to give testimony: "The utility of uninhibited testimony and the integrity of the judicial process would be damaged if we were to permit unchecked retaliation for appearance and truthful testimony at such proceedings." *Green v. Philadelphia Housing Auth.*, 105 F.3d at 887.

2. By removing even the possibility of First Amendment protection from Bowie's sworn statements, the D.C. Circuit's decision introduces a substantial reason for government employees to give false testimony. Without any constitutional

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345 F.3d 581, 586 (8th Cir. 2003) ("Subpoenaed testimony on a matter of public concern in ongoing litigation … can hardly be characterized as defeating the interests of the state. … Dr. Herts's speech therefore qualifies as protected speech."); *Catletti v. Rampe*, 334 F.3d 225, 229-30 (2d Cir. 2003) ("In this case the context of Catletti's speech—testimony offered at a trial—is significant. … The paramount importance of judicial truth-seeking means that truthful trial testimony is almost always of public concern."); *Robinson v. Balog*, 160 F.3d 183, 189 (4th Cir. 1998) ("By responding to the Board's invitation to testify at a public hearing," the plaintiffs "spoke not in their capacity … as public employees, but as citizens upon matters of public concern." (citations and internal quotation marks omitted)); *Green v. Philadelphia Housing Auth.*, 105 F.3d at 886 (3d Cir.) ("[T]here is a compelling reason to find Green's appearance to be a matter of public concern regardless of its voluntary nature. That reason, of course, is the integrity of the truth seeking process."); *Wright v. Ill. Dep't of Children & Family Servs.*, 40 F.3d 1492, 1505 (7th Cir. 1994) ("[A]n employee summoned to give sworn testimony … has a compelling interest in testifying *truthfully* and the government employer can have an offsetting interest in preventing her from doing so only in the rarest of cases.").

protection for their testimony, employees may face the "difficult choice" to "testify truthfully and lose their jobs" or "lie to the tribunal and protect their job security." *Johnston*, 869 F.2d at 1578; *accord Pro v. Donatucci*, 81 F.3d 1283, 1290-91 (3d Cir. 1996) (similar). "Those able to risk job security would suffer state-sponsored retaliation for speaking the truth before a body entrusted with the task of discovering the truth." *Johnston*, 869 F.2d at 1578. "Those unwilling or unable to risk unemployment would scuttle our efforts to arrive at the truth." *Id.*

The risk under the D.C. Circuit's rule that a credible threat of retaliation will "scuttle our efforts to arrive at the truth" in judicial or administrative proceedings is significant. Government employees are frequently critical witnesses, especially in criminal cases and in proceedings involving issues of public accountability. This Court consistently has recognized the need to eliminate barriers to open and honest testimony, concluding that "the perpetration of perjury well may affect the dearest concerns of the parties before a tribunal." *Bronston v. United States*, 409 U.S. 352, 357 (1973) (internal quotation marks and citation omitted); *accord United States v. Nixon*, 418 U.S. 683, 719 (1974) ("[J]ustice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts."). For example, in *Bronston*, the Court confirmed the applicability of a prohibition on perjury to bankruptcy proceedings. 409 U.S. at 352. In *Nixon*, the Court rejected an assertion of privilege over Presidential communications, reasoning that "[t]he very integrity of the judicial system and public

confidence in the system depend on full disclosure of all the facts." 418 U.S. at 709. And in *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Court held that the "newsman's privilege," although justified for its role in promoting the First Amendment right to freedom of the press, "was outweighed by the general obligation of a citizen to appear … and give what information he possesses." *Id.* at 686.

In sum, this Court has recognized the crucial importance of eliminating threats to the integrity of public proceedings, even when there are competing constitutional interests at stake. This case involves just such a threat.

3. The decision below suggests that other safeguards, such as federal and state whistleblower statutes, could fill the void left by the removal of First Amendment protection. Pet. App. 60a. That is irrelevant to the constitutional question: "[t]he applicability of a provision of the Constitution has never depended on the vagaries of state or federal law." *Umbehr*, 518 U.S. at 680. It is also too optimistic.

The federal Whistleblower Protection Act, 5 U.S.C. § 1213, protects only employees who can show that "a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee would reasonably conclude that the actions of the government evidence gross mismanagement." *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999). Federal employees are afforded no protection for disclosures made to immediate supervisors, *see Willis v. Dep't of Agric.*,

141 F.3d 1139, 1143 (Fed. Cir. 1998), or for statements of facts already publicly known, *Francisco v. Office of Pers. Mgmt.*, 295 F.3d 1310, 1314 (Fed. Cir. 2002). Indeed, as of 2010, the Federal Circuit—the only court with jurisdiction to hear claims under the Act—had ruled for the plaintiff in only three of 203 cases decided on the merits since the Act last was amended in 1994. Peter Eisler, *Whistle-blowers' rights get second look*, USA TODAY, March 15, 2010, *available at* http://www.usatoday.com/news/washington/2010-03-14-whistleblowers_N.htm.

State whistleblower laws suffer from similar limitations. *See Garcetti*, 547 U.S. at 440 & nn. 8-11 (Souter, J., dissenting) (cataloging and describing limited scope of state statutes). For example, as the *Garcetti* dissent noted, the successful First Amendment plaintiff in *Givhan* would not have qualified for protection under most whistleblower laws because she reported biased hiring practices to her supervisor rather than to the public. *Id.* And other federal laws, such as the anti-retaliation provision of Title VII, 42 U.S.C. § §2000e–3(a), are too limited in scope to substitute effectively for First Amendment protection for truthful testimony. If the decision below stands, a significant number of state and federal employees will be entirely unprotected from retaliation for truthful testimony related to the facts of their jobs.

4. Public employees have a compelling interest in speaking freely and without fear of retaliation. That interest is even stronger with respect to truthful

testimony, given that making a false sworn statement is a violation of the law.

Adjudicative and legislative bodies, including the federal courts, have a compelling interest in ensuring that the testimony they receive is honest and complete. A disincentive to truthful testimony undermines their ability to function effectively.

The public at large has a compelling interest in the integrity of public proceedings, and especially in the integrity of proceedings that bear on the responsibility and accountability of government. Those are the kinds of proceedings that most often depend on the truthful testimony of government employees about facts related to their jobs. If government employees lose the historical protection afforded to such truthful testimony, it would undermine public confidence.

The decision below failed adequately to account for any of these interests. Given their critical importance, this Court's guidance is urgently needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

INDEX

APPENDIX A

**United States Court of Appeals,
District of Columbia Circuit.**

**David M. BOWIE, Appellant
v.
Charles C. MADDOX, Inspector General, in his official and individual capacities, et al., Appellees.**

**No. 08–5111.
Argued Dec. 6, 2010.
Decided June 21, 2011.**

Opinion for the Court filed by Circuit Judge BROWN.

Appellant David M. Bowie, a former official of the District of Columbia Office of the Inspector General ("OIG"), was fired after five years on the job, purportedly for poor performance. Bowie brought this suit against the District and officers of the OIG ("Defendants") after he was fired, alleging that they conspired to deter his testimony in a subordinate's employment discrimination trial and ultimately fired him in retaliation for his refusal to help sabotage his fellow employee. The district court entered judgment in favor of Defendants on Bowie's § 1985(2) conspiracy claim, a related claim under § 1986 for failure to prevent the conspiracy, and his First Amendment retaliation claim. After a trial on Bowie's Title VII retaliation claim, the jury found in favor of Defendants. We vacate the dismissal of Bowie's §§ 1985(2) and 1986 conspiracy claims, because the district court erroneously required an invidious,

class-based motive for the alleged conspiracy and because the district court concluded, without support, that Title VII was the exclusive remedy for this type of retaliation. McCord v. Bailey, 636 F.2d 606, 614 (D.C. Cir. 1980). We affirm in all other respects.

I

Bowie was the Assistant Inspector General of the Investigations Division at the OIG from November 1997 until his termination in August 2002. Defendants say Bowie was fired for performance problems. But Bowie says his termination was the culmination of a retaliatory conspiracy by his superiors to punish him for supporting Emanuel Johnson, a subordinate whom the OIG fired over Bowie's dissent.

Bowie's professional relationship with Johnson dated back to the years they overlapped at the Federal Bureau of Investigation ("FBI"). (Bowie had worked for the FBI for twenty-four years before he joined the OIG.) Back in 1993, Bowie and Johnson had initiated a class action against the FBI, alleging a discriminatory failure to promote black agents. Bowie claims that in 1999, after Johnson followed him from the FBI to OIG's Investigations Division, Bowie's boss, Inspector General Charles C. Maddox, told Bowie that FBI Assistant Director Jimmy C. Carter had threatened not to "provide any assistance or cooperation with the [OIG] in investigative matters" if Johnson was involved. Bowie interpreted this as "a direct demand that Maddox fire Johnson" or "suffer a severed FBI/[OIG] relationship." Bowie suspects Carter's ultimatum was motivated by his anger at

Johnson for filing several discrimination complaints—some against Carter himself—with the FBI's Equal Employment Office.

Maddox met with OIG supervisors, including Bowie, on February 7, 2000, to discuss Johnson's future with the office. Bowie says he warned Maddox that firing Johnson would violate office policy and federal law, and he recommended putting Johnson on a sixty-day Performance Improvement Plan ("PIP") instead. After the meeting, Maddox ordered Bowie to give Johnson notice that he could either resign or be fired. Bowie did so two days later on February 9, 2000, and Johnson was terminated effective March 1, 2000. *See Johnson v. Maddox,* 270 F. Supp. 2d 38, 43 (D.D.C. 2003), *aff'd* 117 Fed. Appx. 769 (D.C. Cir. 2004).

Johnson filed a discrimination charge against OIG with the Equal Employment Opportunity Commission ("EEOC") on March 28, 2000. Deputy Attorney General Gail Davis, who was representing the District before the EEOC, drafted an affidavit for Bowie to sign that detailed Johnson's "failure to perform his duties in a satisfactory manner" in three investigations. OIG General Counsel Karen Branson sent the draft to Bowie with instructions to sign it that day. Bowie refused, citing "misstatements of fact" and "language that would convey impressions that [he] would not agree with." Branson then asked Bowie to submit an affidavit in his own words by the following day. Bowie's substantially revised affidavit still noted problems with one investigative report Johnson had drafted and related his "sense that Mr.

Johnson clearly did not yet understand the mechanics of how things are done in [the OIG] compared to his former employer." But Bowie also opined that the harshest criticism leveled at Johnson was inconsonant with the views of Johnson's immediate supervisors, who had praised him as a "model investigator." Bowie's affidavit repeated his view that putting Johnson on a PIP would have been a better course of action than firing him. Bowie submitted his affidavit to Branson, but Davis decided not to file it with the OIG's position statement before the EEOC because "it included too much information that was not relevant to the issue at hand," and which Bowie was unwilling to eliminate.

Bowie claims Defendants started setting him up for termination after he expressed support for Johnson. Bowie had received top-notch performance reviews for his first three years at the OIG, but his standing in the office took a turn for the worse in 2000. Bowie says that on February 11, 2000, days after he objected to the plan to fire Johnson, Bowie's superiors accused him of "not stepping up to the plate." In February 2001—about three months after Johnson filed a Title VII complaint in district court—Maddox removed Bowie from a high-profile investigation. In December 2001, Maddox elevated a former subordinate, Jerome Campane, to a newly created position, Deputy Inspector General for Investigations, one step above Bowie. Around this same time, Bowie's performance rating began to fall. In October 2001, his rating dropped from 4.9 to 4.1 on a five-point scale; that is, from "significantly exceeds expectations" to "exceeds expectations."

In May 2002—within a month after Bowie's name appeared on Johnson's witness list—a mid-year performance evaluation criticized Bowie's management, the quality and quantity of his office's Reports of Investigation ("ROIs"), and his overprotectiveness toward his subordinates. Defendants point out that a prior report, issued in December 1999 by the Inspections and Evaluations Division, had forecast some of these problems. According to the 2002 mid-year evaluation, Bowie had failed to remedy faults identified in an individual performance plan created for him sometime in 2001. Soon after the mid-year performance evaluation issued, Maddox ordered the Inspections and Evaluations Division to reassess the Investigations Division because it had failed to begin internal preparations for a statutorily mandated peer review. Al Wright, the Assistant Inspector General for the Inspections and Evaluations Division had recommended the reinspection, suggesting it would provide "a roadmap of options ... to make changes and lay the groundwork for [Campane's] new management team." Wright issued the reinspection report on July 26, 2002, and it repeated the mid-year evaluation's criticism of Bowie. Bowie was fired less than three weeks later, on August 16, 2002.

Bowie filed suit in April 2003 against the District and OIG officials in their official and individual capacities.[1] Relevant to this appeal, Bowie alleged a

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[1] Bowie's complaint also named Attorney General John Ashcroft, former FBI Assistant Director Jimmy C. Carter, and Mayor Anthony Williams. Bowie voluntarily dismissed the fed-

conspiracy to deter him from testifying in support of Johnson under 42 U.S.C. §§ 1985(2) and 1986 (failure to prevent the conspiracy), infringement of his First Amendment freedom of speech under 42 U.S.C. § 1983, and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* and the D.C. Human Rights Act, D.C. Code § 2–1401.01 *et seq.*

The district court dismissed Bowie's conspiracy and First Amendment claims, and his retaliation claims proceeded to trial. The jury returned a verdict for Defendants, and the district court denied Bowie's motions for judgment as a matter of law and for a new trial. Bowie timely appealed.

II

A

Bowie alleges Defendants "knowingly and willfully conspire[d]" to "obstruct [ ] [his] testimony before a Federal Court" in violation of 42 U.S.C. § 1985(2) and failed to prevent that conspiracy in violation of § 1986. The first clause of § 1985(2) permits an action for damages when

> two or more persons in any State or Territory[2] conspire to deter, by force, intimidation, or

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eral defendants, Dist. Ct. Docket No. 22, and the district court granted an unopposed motion to dismiss the mayor. Dist. Ct. Docket No. 32.

[2] The phrase "State or Territory" in this provision embraces the District of Columbia. *See Georgetown Univ. Hosp. v. Sullivan,*

> threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified.

42 U.S.C. § 1985(2). The next section of the Civil Rights Act permits recovery against any "person who, having knowledge that any of the wrongs conspired to be done, and mentioned in [§ 1985], are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do." *Id.* § 1986. Recovery under § 1986 depends on the existence of a conspiracy under § 1985.

The district court dismissed Bowie's conspiracy claims in a one-page order with a cryptic reference to the previous day's court proceedings: "Upon review of plaintiff's Amended Complaint and after discussion with counsel for the parties at the pretrial conference, it is obvious to the Court that there are no facts alleged that could sustain plaintiff's claim under 42 U.S.C. § 1985." Dist. Ct. Docket No. 113. At the pretrial conference mentioned in the order, the district court had articulated two possible grounds for dismissal, but each is based on a misunderstanding of the nature of Bowie's conspiracy claims.

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934 F.2d 1280, 1285 (D.C. Cir. 1991) (citing *McCord v. Bailey,* 636 F.2d 606, 617 n.15 (D.C. Cir. 1980)).

1

Our review of the transcript from the pretrial conference suggests the district court's dismissal of Bowie's § 1985 claim relied first and foremost on his failure to produce evidence of class-based animus. Addressing that claim, the district court said, "[i]t can't be a race question if Wright is also black." Tr. of Pretrial Conference (May 10, 2007), at 9, *reprinted at* Joint Appendix ("J.A.") 481; *see id.* at 10 ("If Wright is also black, then I don't get what the 1985 claim could be."). But Bowie's claim of a conspiracy to deter his testimony does not require evidence of race discrimination. Lack of invidious motive is an inadequate basis for dismissing a claim under the first clause of § 1985(2), because that clause "contain[s] no language requiring that the conspirators act with intent to deprive their victims of the equal protection of the laws." *Kush v. Rutledge,* 460 U.S. 719, 725, 103 S. Ct. 1483, 75 L. Ed. 2d 413 (1983).[3] Therefore, to the extent the district court

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[3] The Supreme Court explained that

> the sponsors of the 1871 bill added the 'equal protection' language [in the second clause of § 1985(2) and the first two clauses of § 1985(3)] in response to objections that the 'enormous sweep of the original language' vastly extended federal authority and displaced state control over private conduct. That legislative background does not apply to the portions of the statute [like the first clause of § 1985(2)] that prohibit interference with federal officers, federal courts, or federal elections.

Kush, 460 U.S. at 726, 103 S. Ct. 1483. As in *Kush,* "the statutory language that provides the textual basis for the 'class-based, invidiously discriminatory animus' requirement

based its dismissal of Bowie's § 1985(2) claim on the fact that defendants were of the same race and gender as Bowie, the court erred.

2

At the same pretrial conference, the district court also suggested Bowie's § 1985 claim was foreclosed because it "would be covered by Title [VII]." J.A. 482. The court reasoned that as an at-will employee, Bowie had no right to continued employment, and therefore "the only right he has here would be to not be retaliated against[,] which is covered by Title [VII]." *Id.* 483. This rationale is based on another misconception about Bowie's § 1985 claim—namely, that it is coterminous with Bowie's Title VII claim of retaliatory termination for supporting Johnson. *Cf. Ethnic Emps. of the Library of Cong. v. Boorstin,* 751 F.2d 1405, 1414–15 (D.C. Cir. 1985) ("[T]he district court properly dismissed those constitutional claims that simply restated claims of racial, ethnic or other discrimination cognizable under Title VII, or claims of retaliation for the invocation of Title VII rights."). But Bowie's § 1985(2) claim specifically alleged a conspiracy to deter him from testifying in support of Johnson in federal court. The corresponding right is created by § 1985(2), not Title VII. *See Irizarry v. Quiros,* 722 F.2d 869, 872 (1st Cir. 1983); *cf. Great Am. Fed. Sav. & Loan Ass'n v. Novotny,* 442 U.S. 366, 378, 99 S. Ct. 2345, 60 L. Ed. 2d 957 (1979)

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simply does not appear in the portion of the statute that applies to this case." *Id.*

("[D]eprivation of a right created by Title VII cannot be the basis for a cause of action under § 1985(3).").

Defendants have not attempted to explain how Title VII preempts such a claim, and our research suggests it does not. *See Serzysko v. Chase Manhattan Bank,* 461 F.2d 699, 703 (2d Cir. 1972) ("Our investigation of ... Title VII ... has failed to reveal any provision that might conceivably cover appellant's ... allegation of infringement of his right of access to the courts [which] is suggestive of an action based upon 42 U.S.C. § 1985(2)...."). The dismissal of Bowie's conspiracy claim under clause one of § 1985(2) cannot be sustained on the district court's unsupported belief that "Title [VII] is [the] exclusive remedy for that type of retaliation." J.A. 482.

3

Although the district court's statements at the pretrial conference were limited to the two theories we have just rejected, Defendants rely on a third theory to defend the dismissal of Bowie's conspiracy claim. Defendants argue they could not have engaged in a conspiracy because they are all employees of the same District agency, and a single corporate entity cannot conspire with itself. The intracorporate conspiracy doctrine, as it is called, originated in the antitrust context, *see Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984), and its application

to civil rights conspiracies is an open question in this circuit.[4]

At least seven circuits have held the intracorporate conspiracy doctrine applies to civil rights conspiracies. *See Grider v. City of Auburn,* 618 F.3d 1240, 1261–62 (11th Cir. 2010); *Hartline v. Gallo,* 546 F.3d 95, 99 n.3 (2d Cir. 2008); *Amadasu v. Christ Hosp.,* 514 F.3d 504, 507 (6th Cir. 2008); *Benningfield v. City of Houston,* 157 F.3d 369, 378 (5th Cir. 1998), *cert. denied,* 526 U.S. 1065, 119 S. Ct. 1457, 143 L. Ed. 2d 543 (1999); *Hartman v. Bd. of Trustees of Cmty. Coll. Dist. No. 508,* 4 F.3d 465, 469–71 (7th Cir. 1993); *Richmond v. Bd. of Regents of Univ. of Minnesota,* 957 F.2d 595, 598 (8th Cir. 1992); *Buschi v. Kirven,* 775 F.2d 1240, 1252–53 (4th Cir. 1985). *But see Dussouy v. Gulf Coast Inv. Corp.,* 660 F.2d 594, 603 (5th Cir. 1981) (questioning the doctrine in dicta). Of those, four courts have applied the doctrine to bar the specific cause of action at issue here—a claim brought under the first clause of § 1985(2) for conspiracy to deter attendance at or testimony in a federal court. *Meyers v. Starke,* 420 F.3d 738, 742 (8th Cir. 2005); *Wright v. Ill. Dep't of Children & Family Servs.,* 40 F.3d 1492, 1507–09 (7th

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[4] Amicus curiae, arguing on behalf of Bowie, points to one case in which we affirmed a damages award under § 1985(3), even though one of the relevant conspiracies involved only FBI agents. *See Hobson v. Wilson,* 737 F.2d 1, 13 (D.C. Cir. 1984). But we did not mention the intracorporate conspiracy doctrine in that case. We have yet to pick sides in the circuit split regarding the doctrine's applicability to civil rights cases in general and the first clause of § 1985(2) in particular.

Cir. 1994); *Doherty v. Am. Motors Corp.,* 728 F.2d 334, 339–40 (6th Cir. 1984); *Herrmann v. Moore,* 576 F.2d 453, 459 (2d Cir. 1978). But another court has explicitly excepted such claims from the doctrine's reach. *McAndrew v. Lockheed Martin Corp.,* 206 F.3d 1031, 1035–41 (11th Cir. 2000). And some of the same courts that apply the intracorporate conspiracy doctrine in the civil rights context have recognized other exceptions that Bowie argues would allow his § 1985(2) claim to proceed. In some jurisdictions, for example, the doctrine does not apply where the civil rights conspiracy consists of "a series of discriminatory acts," *Volk v. Coler,* 845 F.2d 1422, 1435 (7th Cir. 1988); *cf. Baker v. Stuart Broad. Co.,* 505 F.2d 181, 183 (8th Cir. 1974) (applying the doctrine where "the challenged conduct is essentially a single act of discrimination by a single business entity"); *Dombrowski v. Dowling,* 459 F.2d 190, 196 (7th Cir. 1972) (same), or where the corporate agents' actions were either unauthorized or motivated by "an independent personal stake in achieving the corporation's illegal objective," *Buschi,* 775 F.2d at 1252; *see Benningfield,* 157 F.3d at 378 (noting a "possible exception ... where corporate employees act for their own personal purposes").

In contrast with the majority rule, two circuits have held the intracorporate conspiracy doctrine does not preclude liability for a civil rights conspiracy by the individual officers and employees of a single corporate entity. *See Brever v. Rockwell Int'l Corp.,* 40 F.3d 1119, 1127 (10th Cir. 1994); *Novotny v. Great Am. Fed. Sav. & Loan Ass'n,* 584 F.2d 1235, 1256–59 & n.121 (3d Cir. 1978) (en banc), vacated on other

grounds, 442 U.S. 366, 99 S. Ct. 2345, 60 L. Ed. 2d 957 (1979); *cf. Robison v. Canterbury Vill., Inc.,* 848 F.2d 424, 430–31 (3d Cir. 1988) (applying the doctrine to affirm the dismissal of a § 1985(3) claim against a corporation and its president "in his corporate capacity"). A third court declined to apply the doctrine on the narrower ground that the conspiracy "went beyond 'a single act' of discrimination," but expressed skepticism about the doctrine's place in any civil rights case. *Stathos v. Bowden,* 728 F.2d 15, 20–21 (1st Cir. 1984) (Breyer, J.). But *see Rice v. President & Fellows of Harvard Coll.,* 663 F.2d 336, 338 (1st Cir. 1981) (affirming the dismissal of a claim against "the President and Fellows of Harvard College, which is a single corporate entity and, therefore, unable to conspire with itself in violation of § 1985(3)").

Finally, the Ninth Circuit has managed to avoid deciding whether the intracorporate conspiracy doctrine applies in the civil rights context, *see Mustafa v. Clark County Sch. Dist.,* 157 F.3d 1169, 1181 (9th Cir. 1998), but has declined to extend the doctrine to criminal cases, *see United States v. Hughes Aircraft Co.,* 20 F.3d 974, 979 (9th Cir. 1994).

The parties and amicus curiae tacitly agree the intracorporate conspiracy doctrine was the controlling rationale for the district court's decision, but the record does not support that assumption. The court's order itself is devoid of explanation; although Defendants consistently argued there could be no conspiracy under § 1985 where all of them worked for the same agency, the pretrial conference transcript gives us no reason to believe the district court was

persuaded by that argument. The court's only reference to the intracorporate conspiracy doctrine occurred in a prior order dismissing Bowie's § 1985 claim on that ground. Dist. Ct. Docket No. 57, at 10 ("Since all of the people in the alleged conspiracy were acting within the scope of their employment for the District of Columbia, they could not have legally conspired because of the intracorporate conspiracy doctrine."). But the district court subsequently reversed itself, reinstating Bowie's § 1985 claim against District officials only and thereby implicitly rejecting the intracorporate conspiracy doctrine. Dist. Ct. Docket No. 82, at 8. Defendants have pointed to nothing, other than their own arguments before the district court, to indicate the court dismissed Bowie's conspiracy claim on that ground a second time.

Mindful of "the general rule ... that a federal appellate court does not consider an issue not passed upon below," *Singleton v. Wulff,* 428 U.S. 106, 120, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976), we decline to decide the validity of Defendants' intracorporate conspiracy defense in the absence of a relevant decision by the district court. We may, of course, affirm the district court's dismissal "for any reason properly raised by the parties." *Aktieselskabet AF 21 Nov. 2001 v. Fame Jeans Inc.,* 525 F.3d 8, 17 (D.C. Cir. 2008). But Defendants' invocation of the intracorporate conspiracy doctrine raises several questions of first impression in this circuit that would benefit from the trial court's consideration—whether the doctrine applies at all in the civil rights context; whether in particular it makes sense to attribute the acts of an agency's employees to the agency itself

when what is alleged is a conspiracy to deter testimony in federal court; and whether any other relevant exception applies. In appropriate circumstances, we may consider a novel legal question in the first instance without the benefit of the district court's initial view. *See Empagran S.A. v. F. Hoffman–LaRoche, Ltd.,* 388 F.3d 337, 345 (D.C. Cir. 2004); *Defenders of Wildlife, Inc. v. Endangered Species Scientific Auth.,* 659 F.2d 168, 179 (D.C. Cir. 1981). But "this court's 'normal rule' is to avoid such consideration." *Liberty Prop. Trust v. Republic Props. Corp.,* 577 F.3d 335, 341 (D.C. Cir. 2009) (quoting *District of Columbia v. Air Fla., Inc.,* 750 F.2d 1077, 1085 (D.C. Cir. 1984)). Because the district court suggested no viable rationale for its order, we vacate the dismissal of Bowie's conspiracy claims under §§ 1985(2) and 1986.

4

Bowie sought to thwart the intracorporate conspiracy defense by adding federal officers and lawyers from the District's Office of the Attorney General to his roster of OIG defendants, but the district court rebuffed that effort as futile. We affirm the district court's denial of Bowie's motion to reinstate Jimmy Carter and to add Gail Davis and Teresa Quon as defendants. According to Bowie's proposed amendments to his complaint, the adverse employment actions designed to control or silence Bowie's testimony pertain only to the OIG Defendants, not Carter. Dist. Ct. Docket No. 45–2, at 22–45. Carter's alleged participation in, and knowledge about, the purported conspiracy ended

with Johnson's termination, *i.e.,* before any conspiracy relating to Bowie's testimony is alleged to have started. *Id.* at 14–22. "[T]here are two substantive limitations on a defendant's responsibility for acts undertaken by co-conspirators: Those acts must be 'in furtherance of' the same conspiracy to which the defendant has agreed, and they must be reasonably foreseeable to the defendant." *United States v. Childress,* 58 F.3d 693, 722 (D.C. Cir. 1995); *see also United States v. Saro,* 24 F.3d 283, 288 (D.C. Cir. 1994) ("The extent of a defendant's vicarious liability under conspiracy law is always determined by the scope of his agreement with his coconspirators. Mere foreseeability is not enough."). Because Bowie does not allege Carter was privy to any conspiracy to deter Bowie's testimony, Carter could not have been held liable under § 1985(2).

As for Davis and Quon, Bowie alleges, at best, that they interfered with his attempt to offer testimony before the EEOC. Dist. Ct. Docket No. 45–2, at 28, 50–51. But § 1985(2) creates a cause of action against one who deters the plaintiff from attending or testifying in "any court of the United States." 42 U.S.C. § 1985(2). We have never interpreted that phrase to include an administrative agency like the EEOC, and other courts have explicitly foreclosed such a broad reading of the statute. *See Seeley v. Bhd. of Painters, Decorators and Paper Hangers of Am.,* 308 F.2d 52, 58 (5th Cir. 1962); *Graves v. United States,* 961 F. Supp. 314, 319 (D.D.C. 1997); *see also McAndrew,* 206 F.3d at 1039–40 & n.10 (contrasting § 1985(2) with the broader scope of 18 U.S.C. § 1512(b),

which criminalizes interference with testimony "in any official proceeding," including one before a federal agency).

Finally, Bowie does not state a claim under § 1986 as to Carter, Davis, or Quon, as he alleges neither that they had knowledge of the alleged conspiratorial acts against Bowie, nor that they would have had the power to prevent them. *See* 42 U.S.C. § 1986. Because adding these defendants to Bowie's complaint would have been futile, the district court did not abuse its discretion in denying his motion for leave to amend. *See Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.,* 366 F.3d 930, 945 (D.C. Cir. 2004).[5]

B

Bowie appeals the district court's grant of summary judgment for Defendants on the First Amendment retaliation claim he brought under 42 U.S.C. § 1983. Bowie claims he was terminated in retaliation for refusing to sign the affidavit drafted for him in response to Johnson's EEOC charge and for drafting his own affidavit which implicitly criticized Maddox's decision to terminate Johnson.

> It is true that individuals do not "relinquish the First Amendment rights they would otherwise enjoy as citizens" when they accept

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[5] We also affirm the denial of leave to amend as to Quon on the alternative ground that Bowie waived this argument in the district court. *See* Dist. Ct. Docket No. 64–1, at 10–11 ("Plaintiff agrees that Teresa Quon should be dismissed as a defendant to this litigation as her role differs substantially from that of Gail Davis.").

> employment with the government.... However, "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."

Navab–Safavi v. Glassman, 637 F.3d 311, 315 (D.C. Cir. 2011) (quoting *Pickering v. Bd. of Educ.,* 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968)). To balance these competing interests in First Amendment retaliation claims by government employees, we apply a four-factor test:

> First, the public employee must have spoken as a citizen on a matter of public concern. Second, the court must consider whether the governmental interest in promoting the efficiency of the public services it performs through its employees outweighs the employee's interest, as a citizen, in commenting upon matters of public concern. Third, the employee must show that [his] speech was a substantial or motivating factor in prompting the retaliatory or punitive act. Finally, the employee must refute the government employer's showing, if made, that it would have reached the same decision in the absence of the protected speech.

Wilburn v. Robinson, 480 F.3d 1140, 1149 (D.C. Cir. 2007) (quotation marks, citations, and alterations omitted).

The district court dismissed Bowie's First Amendment claim on the first of these prongs,

holding that "[s]peech regarding 'individual personnel disputes and grievances' is not relevant to the public's evaluation of governmental agencies' performance." *Bowie v. Gonzales,* 433 F. Supp. 2d 24, 33 (D.D.C. 2006) (quoting *Murray v. Gardner,* 741 F.2d 434, 438 (D.C. Cir. 1984)). Bowie points out that we have since "reject[ed] the proposition that a personnel matter per se cannot be a matter of public concern." *LeFande v. District of Columbia,* 613 F.3d 1155, 1161 (D.C. Cir. 2010). He argues that his speech was on a matter of public concern because he composed his affidavit for the purpose of submitting it to the EEOC. *See Johnston v. Harris County Flood Control Dist.,* 869 F.2d 1565, 1578 (5th Cir. 1989) ("When an employee testifies before an official government adjudicatory or fact-finding body[,] he speaks in a context that is inherently of public concern.").

We need not decide whether an affidavit prepared for an EEOC proceeding is necessarily speech on a matter of public concern, because Bowie's claim fails for another reason. "[W]hen 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." *Garcetti v. Ceballos,* 547 U.S. 410, 421, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006). Even if the draft affidavit and Bowie's revision of it were "on a matter of public concern," *Wilburn,* 480 F.3d at 1149, he was not speaking "as a citizen," *id.,* when he refused to sign the former or when he composed the latter. In both instances, Bowie was acting "pursuant

to [his] official duties" as an employee of OIG. *Garcetti,* 547 U.S. at 421, 126 S. Ct. 1951.

Bowie's efforts to produce an affidavit were undertaken at the direction of his employer and in his capacity as Assistant Inspector General for Investigations and Johnson's superior. The first version of the affidavit was drafted for OIG's convenience by a Deputy Attorney General as counsel for OIG, and it was given to Bowie for his signature by the OIG's general counsel. Bowie revised the affidavit on a timetable approved by the general counsel, and then submitted it to her for submission with the OIG's position statement in the EEOC. Bowie does not allege Defendants stymied any personal effort to submit his affidavit to the EEOC or to Johnson directly. Indeed, Bowie made no such effort. His affidavit, like the draft he refused to sign, identified him in the first paragraph and signature block as "Assistant Inspector General for Investigations." All the speech underlying Bowie's First Amendment claim occurred in his official capacity. Government employers, like their private-sector counterparts, necessarily exert control over their employees' speech in the course of operating an agency. "[T]he First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities." *Wilburn,* 480 F.3d at 1150 (quoting *Garcetti,* 547 U.S. at 424, 126 S. Ct. 1951). We therefore affirm the district court's grant of summary judgment on Bowie's First Amendment claim.

C

Finally, Bowie attacks the jury verdict on his Title VII and D.C. Human Rights Act claims by appealing the district court's evidentiary decisions. "[W]e review a trial court's evidentiary rulings for abuse of discretion and even if we find error, we will not reverse an otherwise valid judgment unless appellant demonstrates that such error affected [his] substantial rights." *United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.,* 608 F.3d 871, 911 (D.C. Cir. 2010) (alterations and quotation marks omitted) (quoting *Whitbeck v. Vital Signs, Inc.,* 159 F.3d 1369, 1372 (D.C. Cir. 1998)). We find no abuse of discretion in the evidentiary rulings Bowie challenges.

1

The district court did not abuse its discretion in excluding testimony from Alfred Miller, a Deputy Assistant Inspector General in the Investigations Division. Miller was allowed to testify about the number of ROIs the Investigations Division produced during Bowie's tenure. But when Defendants objected to Miller's testimony about ROI production volume after Bowie's termination, the district court sustained the objection on relevance grounds. Bowie argues the post-termination statistics were relevant because they would have revealed as pretext one of the stated reasons for Bowie's termination—his purportedly inadequate ROI production.

The relevance of post-termination evidence in a Title VII case depends on the nature of the evidence, the purpose for which it is offered, and the context in which it arises. In some circumstances, post-termination data is relevant to the employer's

state of mind before termination. *See Greene v. Safeway Stores, Inc.,* 98 F.3d 554, 561 (10th Cir. 1996) (permitting plaintiff to introduce evidence that other employees in the protected age class were replaced, because "evidence concerning the make-up of the employment force and events which occurred after plaintiff's termination were entirely relevant to the question of whether or not age was one of the determinative reasons for plaintiff's termination"), *cited in Hall v. Giant Food, Inc.,* 175 F.3d 1074, 1080 (D.C. Cir. 1999). In other circumstances, post-termination data is irrelevant to pre-termination events and motives. *See Warren v. Prejean,* 301 F.3d 893, 905 (8th Cir. 2002) (affirming the exclusion of testimony about information that was not previously available to the employer and was therefore "irrelevant as to the information known to [the employer] at the time of the termination"). This is an inquiry best suited to the district court, and our review is appropriately deferential.

Although, sitting as a trial court, we may have allowed Miller to testify, we cannot say the district court's decision to exclude testimony about ROI production following Bowie's termination was an abuse of discretion. Defendants could not possibly have known for certain how ROI production would change after Bowie left the OIG. At the time they made the decision to fire Bowie, the only available ROI data was the data from his own tenure. Under Bowie, the Investigations Division issued 22 reports in 1998, 26 in 1999, 87 in 2000, 46 in 2001, and 25 in 2002. Bowie was allowed to, and did, try to explain the reasons for the sharp decline between 2000 and

2002. Evidence that even fewer ROIs were issued by the succeeding Assistant Inspector General, without more, would not have been probative of Defendants' state of mind when they fired Bowie. The district court did not abuse its discretion in deciding the specific post-termination evidence in this case was irrelevant to the purpose for which it was admitted—proving pretext. *See, e.g., Green v. City of St. Louis,* 507 F.3d 662, 669 (8th Cir. 2007) ("The district court did not purport to state a rule that post-termination statements are never relevant to state of mind at the time of termination; instead, the court assessed the evidence as presented to it and concluded that the statements here were only relevant to later events. There was no abuse of discretion.").

2

At Defendants' request, and over Bowie's objection, the district court informed the jury that Johnson had lost his Title VII case. *See Johnson,* 270 F. Supp. 2d 38. Under Rule 403 of the Federal Rules of Evidence, the district court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed. R. Evid. 403. "We review the district court's Rule 403 determinations with great deference, reversing only for grave abuse of discretion." *Stevenson v. D.C. Metro. Police Dep't,* 248 F.3d 1187, 1191 (D.C. Cir. 2001).

Amicus argues that the outcome of Johnson's case was irrelevant to whether Defendants retaliated

against Bowie for supporting Johnson and that its admission risked confusing the issues and prejudicing Bowie because the jury might have equated the merits of his Title VII case with Johnson's failed claim. [6] Defendants respond that taking judicial notice of the judgment in Johnson's case "decrease[d] the chance that the jury would improperly speculate on the outcome and the merits of Johnson's (and Bowie's) complaints," Appellees' Br. 21, and that Bowie could have offered a jury instruction to limit any prejudicial side effects. We acknowledge the risks inherent in informing the jury about the outcome of the very case Bowie claims he was fired for supporting. *Cf. Johnson v. Colt Indus. Operating Corp.,* 797 F.2d 1530, 1534 (10th Cir. 1986) ("[T]he admission of a judicial opinion as substantive evidence presents obvious dangers. The most significant possible problem posed by the admission of a judicial opinion is that the jury might be confused as to the proper weight to give such evidence. It is

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[6] We have no qualms about addressing an argument raised by court-appointed amicus curiae and not by the pro se party on whose behalf he was appointed to present arguments. It is precisely because an untrained pro se party may be unable to identify and articulate the potentially meritorious arguments in his case that we sometimes exercise our discretion to appoint amici. *See* D.C. Cir. Rule 29 ("The rules stated below apply with respect to the brief for an amicus curiae not appointed by the court. A brief for an amicus curiae appointed by the court is governed by the provisions of Circuit Rule 28 [pertaining to briefs for appellants, *inter alia*]."); *cf. Edison Elec. Inst. v. OSHA,* 849 F.2d 611, 625 (D.C. Cir. 1988) (citing the predecessor to Rule 29 in declining to address an issue raised exclusively by a non-court-appointed amicus).

possible that a jury might be confused into believing that the opinion's findings are somehow binding in the case at bar."). But we cannot conclude any prejudice Bowie may have suffered was the fault of the district court. The court invited Bowie to submit a limiting instruction, and Bowie failed to do so. Under these circumstances, we conclude the district court did not abuse its discretion. *See United States v. Edwards,* 388 F.3d 896, 902–03 (D.C. Cir. 2004).

3

In discovery, Bowie requested all Investigative Reports in Defendants' possession, including drafts that Defendants contemplated using "to show 'poor work performance' by Plaintiff." Bowie moved to compel, complaining Defendants had disclosed cover sheets without the corresponding "reports, drafts, [and] tracking sheet[s] to show where the report was at a given time." The court denied the motion to compel in relevant part, pointing out that the relevant disclosure request had asked for only those reports and drafts that Defendants contemplated using—it had not mentioned tracking documents. "We review district court rulings on discovery matters solely for abuse of discretion," reversing only if the party challenging the decision can show it was "clearly unreasonable, arbitrary, or fanciful." *Charter Oil Co. v. Am. Emp'rs' Ins. Co.,* 69 F.3d 1160, 1171 (D.C. Cir. 1995). We find no such abuse of discretion in the district court's partial denial of Bowie's motion to compel. On appeal, Bowie points to a letter he wrote to Defendants' counsel in which he complained of Defendants' failure to produce "routing slips"

pertinent to a different disclosure request. We assume, for the sake of argument, that "routing slip" and "tracking document" are synonyms. But Bowie's motion to compel, which lists eight other disclosure requests by number and describes them in detail, does not mention that one.

Finally, Bowie points to no specific document that Defendants used against him in court yet failed to disclose in advance. Since the relevant disclosure request specified only documents that Defendants contemplated using to prove his poor work performance, Bowie's argument that Defendants failed to supplement their disclosure is without merit. *See* Fed. R. Civ. P. 26(e).

III

For the foregoing reasons, we vacate the district court's order dismissing Bowie's conspiracy claims under 42 U.S.C. §§ 1985(2) and 1986 and remand for further proceedings consistent with this opinion. We affirm in all other respects.[7]

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[7] Bowie asks us to reinstate his wrongful termination claim under 42 U.S.C. §§ 1981 and 1983 and D.C. law, and his D.C. Whistleblower Protection Act claim, but neither his brief nor the brief submitted on his behalf by court-appointed amicus curiae attempts a legal argument in support of those claims. We need not address claims that are barely mentioned in a party's brief. *See United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.,* 608 F.3d 871, 879 (D.C. Cir. 2010) ("A litigant does not properly raise an issue by addressing it in a cursory fashion with only bare-bones arguments." (quoting *Cement Kiln Recycling Coal. v. EPA,* 255 F.3d 855, 869 (D.C. Cir. 2001))).

So ordered.

APPENDIX B

United States District Court
For the District of Columbia

David M. Bowie, Plaintiff,

v.

Alberto Gonzales, et al.,

Defendants.

Civil Action No. 03-948 (RCL)

May 4, 2006, Decided

May 4, 2006, Filed

JUDGES: **Royce C. Lamberth, United States District Judge.**

OPINION BY: **Royce C. Lamberth**

This case comes before the Court on plaintiff's Motion for Summary Judgment, or in the Alternative, Motion for Partial Summary Judgment, filed on behalf of David M. Bowie, appearing *pro se*, as well as defendants' Motion for Summary Judgment, filed on behalf of Alvin Wright, Jr., Karen Branson, Anthony A. Williams, Charles C. Maddox, Austin A. Andersen, and Jerome A. Campane. Pursuant to Order denying plaintiff's Motion for Leave to File Second Amended Complaint, six claims remain under which the plaintiff proceeds: wrongful termination against all

defendants, pursuant to common law and 42 U.S.C. § 1983, [1] *First Amendment* claims against all defendants, under the District of Columbia Whistleblowers Protection Act ("WPA"), D.C. Code § 2-223.01, claims against the District of Columbia, retaliation in violation of the District of Columbia Human Rights Act ("DCHRA"), D.C. Code § 2-1402.61, against all defendants, aiding and abetting retaliation in violation of the DCHRA, D.C. Code § 2-1402.62, against all defendants, and unlawful retaliation in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e*, et seq*.

For the reasons set forth herein, plaintiff's motion will be denied and defendant's motion will be granted in part and denied in part.

I. FACTUAL BACKGROUND

Plaintiff was employed from November 1997 to August 2002, as the Assistant Inspector General for Investigations ("AIGI") for the District of Columbia Office of Inspector General ("DCOIG"). (Compl. 7.) Terrence Wyllie was hired in February of 1998. (Pl.'s Mot. 35.) During his employment, on June 21, 1999,

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[1] Plaintiff asserted claims under 42 U.S.C. § 1981 for wrongful termination in his complaint (Compl. 53, 61), however plaintiff now asserts wrongful termination under § 1983 (Pl. Resp. to Mot. Summ. J. Ex. 34.). Based on the policy favoring liberal construction of complaints, and the fact that the plaintiff is proceeding *pro se*, the Court will consider wrongful termination under § 1983. Further, it appears defendants addressed wrongful termination pursuant to common law. (Def. Mot. Summ. J. 12-14.) The Court will consider the common law claim as well.

plaintiff, Inspector General ("IG") Charles C. Maddox, and Deputy Inspector General Austin A. Andersen, attended a meeting at the Federal Bureau of Investigations ("FBI") Washington Field Office ("WFO") Headquarters. WFO's Assistant Director in Charge, Jimmy C. Carter, also attended. At the end of the meeting, Carter took Maddox aside for a private conversation, where he "indicated that the FBI would not make its resources available to Maddox's office in any police corruption case because, in Carter's view, [Emmanuel] Johnson [a member of the IG's office] had a conflict of interest that might compromise his work."[2] *Johnson v. Maddox,* 270 F. Supp. 2d 38, 40 (D.D.C. 2003).

In February 2000, plaintiff participated in a meeting with Maddox, Andersen, and plaintiff's deputy at the time Alfred Miller, regarding the unsatisfactory performance of Emmanuel Johnson. (Compl. 13.) Remedial measures were considered, but in the end, the decision was made to dismiss Johnson. (Compl. 16-17.) Plaintiff disagreed with this decision, but informed Johnson of his termination. (*Id.*)

On March 28, 2000, Johnson filed a discrimination complaint against Maddox and Carter, alleging wrongful termination. (Compl. 24.) Gail Davis, Deputy Attorney General for the Office of the Attorney General for the District of Columbia, was

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[2] Plaintiff, Carter, and Johnson had all previously worked in the FBI/WFO. Plaintiff and Johnson were involved in a class action lawsuit against the FBI, *Emmanuel Johnson, Jr. v. Reno*, Civ. No. 93-0206 (TFH).

assigned, in May of 2000, to represent and draft a position statement for DCOIG in response to the discrimination complaint filed by Johnson. (Pl.'s Mot. Summ. J. Ex. 20.) Davis, unable to meet with plaintiff, drafted an affidavit regarding the February meeting on Johnson's performance based on facts learned from Maddox and Andersen. (*Id.*)

Plaintiff, dissatisfied with the accuracy of the draft provided by Davis, prepared his own affidavit, which he submitted to Karen Branson, DCOIG General Counsel. (Compl. 27.) Davis decided to submit the position statement without plaintiff's affidavit, as "it included too much information that was not relevant to the issue at hand," and which the plaintiff was unwilling to eliminate. (Pl.'s Mot. Summ. J. Ex. 20.)

In June 2002, in preparation for a mandatory peer review required by DCOIG's enabling statute, several DCOIG divisions began internal preparations. (Defs.' Mot. Summ. J. 9.) Plaintiff's division, the Investigations Division ("ID") did not. (*Id.*) In response, and based on the scope of previously identified problems in that division, Maddox directed the Inspections and Evaluations Division ("I&E") to conduct an internal re-inspection (a repeat of an inspection that took place in 1999). (*Id.*) The re-inspection occurred June 1 to July 12, 2002. (*Id.*) This inspection had several irregular characteristics (as compared to other I&E inspections), in that it was: unexpected, rushed, not completed in accordance with normal procedures, and did not include ID leadership. (Pl. Mot. Summ. J. Ex. 31 at 2.) Further, neither the

inspectors nor the ID leadership were given an opportunity to see the report until IG Maddox's briefing. (*Id.*)

On July 30, 2002, Andersen and Jerome Campane, Deputy Inspector General for Investigations, informed plaintiff that he was being terminated from DCOIG, with his last day of work to be August 2, 2002. (Compl. 48-49.) Plaintiff's official separation date was August 16, 2002. Plaintiff filed an Equal Employment Opportunity Commission ("EEOC") claim on February 25, 2003. (Compl. 49.)

II. DISCUSSION

A. Standard of Review

Summary judgment is warranted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." FED. R. CIV. P. 56(c). The presence of disputed facts alone is insufficient to defeat summary judgment; "the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). An issue is genuine if there is evidence on which a jury could base a verdict for the nonmoving party. *Id.* at 248. A fact is material if the dispute over it could determine the outcome of the suit under governing law. *Holcomb v. Powell*, 369 U.S. App. D.C. 122, 433 F.3d 889, 895 (D.C. Cir. 2006).

The party seeking summary judgment bears the responsibility of demonstrating that no genuine

issues of material fact are in dispute. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The moving party is entitled to summary judgment as a matter of law if the party opposing summary judgment "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. In making this determination, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962)).

B. Count I: Wrongful Termination

1. Common Law Claim Against the District of Columbia[3]

To the extent that he seeks unliquidated damages,[4] plaintiff's claim against the District of Columbia based on wrongful termination is barred by

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[3] "District of Columbia" includes all employees of the district being sued in their official capacities. *Kentucky v. Graham*, 473 U.S. 159, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985) (quoting *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 658 n.55, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)).

[4] The term "unliquidated damages" is defined as "damages that cannot be determined by a fixed formula and must be established by a judge or jury." *See* BLACK'S LAW DICTIONARY 419 (8th ed. 2004); *cf. id.* at 418 ("liquidated damages").

the mandatory notice provision of D.C. Code § 12-309. *See Beeton v. District of Columbia*, 779 A.2d 918, 925-26 (D.C. 2001) (application of § 12-309 barring unliquidated damages based on a wrongful termination claim); *see also McRae v. Olive*, 368 F. Supp. 2d 91, 95 (D.D.C. 2005) (citing *District of Columbia v. Dunmore*, 662 A.2d 1356, 1359 (D.C. 1995)); *Gwinn v. District of Columbia*, 434 A.2d 1376, 1378 (D.C. 1981)). The Code provides in relevant part:

> An action may not be maintained against the District of Columbia for *unliquidated* damages to person or property unless, within six months after the injury or damage was sustained, the claimant . . . has given notice in writing to the Mayor of the District of Columbia of the approximate time, place, cause, and circumstances of the injury or damage.

D.C. Code § 12-309 (2006) (emphasis added). The statute's purpose is "to protect the District of Columbia against unreasonable claims and to assist it in the defense of the public interest where claims are made within the 3-year statute of limitations but so long after the event that it is impossible for the District of Columbia to obtain evidence" for the resulting litigation. *George v. Dade*, 769 A.2d 760, 764 (D.C. 2001) (quoting the legislative history of § 12-309 as set forth in H.R. Rep. No. 2010, 72d Cong., 2d Sess. (1933)).

The question whether plaintiff's notice to the District complied with § 12-309 is one of law. *Wharton v. District of Columbia*, 666 A.2d 1227, 1230 (D.C. 1995) (citing *Washington v. District of Columbia*, 429

A.2d 1362, 1366 n.15 (D.C. 1981) (en banc)). The requirements of the statute are to be strictly construed. *See Winder v. Erste*, 2005 U.S. Dist. LEXIS 5190, *29-30 (D.D.C. 2005) (submissions to DCOIG and the Office of Employee Appeals were found inadequate); *District of Columbia v. Ross*, 697 A.2d 14, 19 n.6 (D.C. 1997) (rejecting claim that a questionnaire prepared by a D.C. employee documenting a lead poisoning incident satisfied § 12-309); *Campbell v. District of Columbia*, 568 A.2d 1076, 1078 (D.C. 1977) ("The statutory exception to formal notice ... is limited to police reports."). As a matter of law in the present case the statute's requirements have not been met, as at no point does plaintiff assert written notice was given. (Pl.'s Resp. Mot. Summ. J. Ex. 34.) Therefore, summary judgment must be granted in favor of the District of Columbia on plaintiff's common law claim of wrongful termination.

2. 42 U.S.C. § 1983 Claim Against the District of Columbia

Plaintiff correctly argues (Pl.'s Resp. Mot. Summ. J. Ex. 34.), that the defendants' notice argument based on § 12-309 is without merit as it pertains to *§ 1983* claims. *See Gabriel v. Corr. Corp. of Am.,* 211 F. Supp. 2d 132, 139 (D.D.C. 2002) (citing *Felder v. Casey*, 487 U.S. 131, 140-41, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988) (adopting the near-unanimous conclusion of the federal courts that notice-of-claim statutes are inapplicable to federal-court *§ 1983* litigation)); *Johnson-El v. District of Columbia,* 579 A.2d 163, 170 (D.C. 1990) (holding that claims

brought under 42 U.S.C. § 1983 are not subject to the notice provisions of D.C. Code § 12-309)). In *Felder*, the Supreme Court concluded:

> In enacting § 1983, Congress entitled those deprived of their civil rights to recover full compensation from the governmental officials responsible for those deprivations. A state law that conditions that right of recovery upon compliance with a rule designed to minimize governmental liability, and that directs injured persons to seek redress in the first instance from the very targets of the federal legislation, is inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law. Principles of federalism, as well as the *Supremacy Clause*, dictate that such a state law must give way to vindication of the federal right when that right is asserted in state court.

487 U.S. at 153. Thus, as failure to meet the requirements of D.C. Code § 12-309 is irrelevant to plaintiff's claim under § 1983, summary judgment on that basis must be denied.

Ultimately, however, the defense is entitled to summary judgment as plaintiff fails to state a claim for which relief can be granted under *§* 1983. Section 1983 creates no rights of its own, but is merely an enforcement mechanism for individual rights guaranteed under either the Constitution or federal statutes. *City of Rancho Palos Verdes v. Abrams,* 544 U.S. 113, 119, 125 S. Ct. 1453, 161 L. Ed. 2d 316 (U.S. 2005). In his wrongful termination claim, plaintiff

asserts many "public policies" that the defendants allegedly violated, however nearly all of them are based in District of Columbia law, outside the scope of § 1983. (Compl. 55-61.)

The only federal rights violation alleged by plaintiff in conjunction with his wrongful termination claim (*First Amendment* and Title VII[5] allegations will be dealt with separately *infra*, as they are contained in distinct counts) is of the Civil Rights Act of 1991, 42 U.S.C. § 1981. It provides in relevant part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a).

This equal rights provision was "meant, by its broad terms, to proscribe discrimination in [among other things] the making or enforcement of contracts against, or in favor of, any race." *Gratz v. Bollinger*,

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[5] While there may be concurrent causes of action under each, § 1983 may not be invoked to redress rights created under Title VII. *Cf. Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 378, 99 S. Ct. 2345, 60 L. Ed. 2d 957 (U.S. 1979); 4-106 Labor and Employment Law § 106.07.

539 U.S. 244, 276, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003) (citing *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295-96, 96 S. Ct. 2574, 49 L. Ed. 2d 493 (1976)). In the present case the plaintiff makes no allegation that he was discriminated against and suffered wrongful termination based on his race. Accordingly, plaintiff cannot sustain a claim of wrongful termination based on an equal protection violation and summary judgment must be granted.

3. Claims Against Individual Defendants

In the District of Columbia, wrongful termination in violation of a clear public policy is an exception to the traditional at-will employment doctrine.[6] *District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633, 645 (D.C. 2005). Whether a discharge violates public policy[7] is determined on a case-by-case basis, guided by the concept that a wrongful termination cause of action must be "firmly anchored in either the Constitution or in a statute or regulation which clearly

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[6] "It has long been settled in the District of Columbia that an employer may discharge an at-will employee at any time and for any reason, or for no reason at all." *Adams v. George W. Cochran & Co.*, 597 A.2d 28, 30 (D.C. 1991).

[7] Defendants argue that based on *Adams*, 597 A.2d at 30, the only narrow exception to at-will employment doctrine is where the sole reason for termination was the employee's refusal to violate the law. (Defs.' Mot. Summ. J. at 15.) As the *pro se* plaintiff correctly points out, defense counsel should note that the *Adams* exception has been specifically interpreted on a broader level to allow for additional public policy exceptions and cases interpreting it otherwise have been expressly overruled. Carl *v. Children's Hosp.*, 702 A.2d 159, 160 (D.C. 1997).

reflects the particular 'public policy' being relied upon." *Warren v. Coastal Int'l Secs., Inc.*, 96 Fed. Appx. 722, 722-23 (D.C. Cir. 2004) (citing *Fingerhut v. Children's Nat'l Med. Ctr.*, 738 A.2d 799, 803 n.7 (D.C. 1999)) (plaintiff contended she was discharged in violation of the alleged public policies undergirding assorted District and federal workplace safety and whistleblower laws) (internal quotations and citations omitted). Further, "there must be a close fit between the policy thus declared and the conduct at issue in the allegedly wrongful termination." *Warren*, 96 Fed. Appx. at 722-23.

In the present case, plaintiff alleges that defendants violated public policy by attempting to compel him to support Johnson's termination, though he did not believe it was justified, both in conference before Johnson was fired and via affidavit in Johnson's EEOC investigation. (Pl.'s Resp. Mot. Summ. J. Ex. 35.) Additionally, plaintiff claims that he was "taken to the wood shed" by Maddox and Andersen for his failure to "step up to the plate" and support Johnson's discharge. (*Id.*) Plaintiff does not, however, allege that either Maddox or Andersen conditioned his employment on his support of terminating Johnson.

It has been determined by Magistrate Judge John M. Facciola of this Court, that the disagreement surrounding Johnson's termination was "at most a legitimate dispute among reasonable people as to whether Johnson should stay or go" and that Johnson's termination was lawful. *Johnson*, 270 F. Supp. 2d at 44. Therefore, while attempts to strong-arm plaintiff into supporting Johnson's dismissal are not

admirable actions, they do not rise to the level necessary for a public policy violation supporting an exception to at-will employment doctrine in a wrongful termination claim. Accordingly, the individual defendants must be granted summary judgment.

C. Count II: *First Amendment* Violations

1. *First Amendment* Claim Against the District of Columbia

Section 1983 supplies a cause of action for constitutional violations, providing in pertinent part that:

> 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 citizens 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.

42 U.S.C. 1983. For the purposes of § 1983, the District of Columbia is treated as a municipality. *Bridges v. Kelly*, 977 F. Supp. 503, 506 (D.D.C. 1997) (Lamberth, J.) (citing *Dorman v. District of Columbia*, 281 U.S. App. D.C. 146, 888 F.2d 159, 162 (D.C. Cir. 1989)).

Municipalities are liable under § 1983 "only if their agents acted pursuant to municipal policy or custom." *People for the Ethical Treatment of Animals*

v. Gittens, 364 U.S. App. D.C. 386, 396 F.3d 416, 425 (D.C. Cir. 2005) (quoting *Warren v. District of Columbia*, 359 U.S. App. D.C. 179, 353 F.3d 36, 38 (D.C. Cir. 2004)). "The action of an official with final decision-making authority in a particular area can amount to a municipal '"policy."' *Gittens*, 364 U.S. App. D.C. at 386 (citing *McMillian v. Monroe County*, 520 U.S. 781, 117 S. Ct. 1734, 138 L. Ed. 2d 1 (1997); *Bd. of Comm'rs v. Brown*, 520 U.S. 397, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997); *Pembaur v. Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986) (plurality opinion). Identification of officials with policymaking authority is a question of state law. *St. Louis v. Praprotnik*, 485 U.S. 112, 124-25, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988). "Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority." *Id.* (citing *Pembaur*, 475 U.S. at 483).

Plaintiff asserts that Gail Davis,[8] Deputy Attorney General for the Office of the Attorney General for the District of Columbia, acted in concert with other defendants to obstruct his testimony regarding Johnson's EEOC investigation. (Pl.'s Resp. Mot. Summ. J. Ex. 37.) However, while Davis did not include plaintiff's affidavit in DCOIG's position statement for the investigation, there was nothing to pre-

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[8] This Court denied plaintiff's attempt to join Davis by amending his complaint a second time, on the basis that plaintiff failed to state a claim against Davis which would survive a motion to dismiss.

vent plaintiff from submitting the affidavit to EEOC of his own accord. Further, neither Davis nor the named defendants were required, in their official capacities, to submit plaintiff's affidavit which they felt "included too much information that was not relevant to the issue at hand." (Pl.'s Mot. Summ. J. Ex. 20.)

None of the named defendants had "final decision-making authority" over whether EEOC received plaintiff's affidavit -- only over whether it was included in DCOIG's position statement. This ground is insufficient to support a *First Amendment* violation claim. Accordingly, as plaintiff is unable to show a municipal policy which resulted in the violation of his *First Amendment* rights or indeed that any violation occurred, defendants are entitled to summary judgment.

2. *First Amendment* Claim Against Individual Defendants

For a public employee to make out a prima facie case of retaliation violating the First Amendment, he must meet a four-factor test. *O'Donnell v. Barry*, 331 U.S. App. D.C. 272, 148 F.3d 1126, 1133 (D.C. Cir. 1998) (citing *Hall v. Ford*, 272 U.S. App. D.C. 301, 856 F.2d 255, 258 (D.C. Cir. 1988)). The plaintiff must establish [1] that the public employee was speaking on a matter of public concern; [2] that the government's interest in efficient performance of public services is outweighed by the plaintiff's interest "as a citizen, in commenting upon matters of public concern," combined with the interest of plaintiff's potential audience in hearing the plaintiff's comments; [3]

the plaintiff's speech was the motivating factor for the employer's retaliatory action; and last, [4] the adverse employment action was not motivated by legitimate, non-pretextual grounds. *O'Donnell*, 148 F.3d at 1133 (citing *Tao v. Freeh*, 307 U.S. App. D.C. 185, 27 F.3d 635, 638-39 (D.C. Cir. 1994) (citations omitted)); *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968); *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 468, 115 S. Ct. 1003, 130 L. Ed. 2d 964 (1995); *Mt. Healthy City Sch Bd of Education v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). "The first two factors under the *Pickering* test are questions of law for the court to resolve, while the latter are questions of fact ordinarily for the jury." *Tao*, 27 F.3d at 639.

Plaintiff's claim fails on the first prong of the test: the requirement that the speech involve a matter of public concern. Plaintiff asserts that the defendants retaliated against him, and ultimately fired him, for his affidavit regarding Johnson's EEOC investigation. (Pl.'s Resp. Mot. Summ. J. Ex. 38.) It is well-settled that:

> when employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the *First Amendment*. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or appli-

> cable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable. . . . We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Murray v. Gardner, 239 U.S. App. D.C. 212, 741 F.2d 434, 438 (D.C. Cir. 1984) (quoting *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983)). Speech regarding "individual personnel disputes and grievances" is not relevant to the public's evaluation of governmental agencies' performance. *Murray*, 741 F.2d at 438 (citing *Connick*, 461 U.S. at 138). Plaintiff's affidavit specifically targeted an individual personnel dispute. In the affidavit, plaintiff questioned Johnson's termination, but did not indicate that it was racially motivated or that it was retaliatory. (Pl.'s Mot. Summ. J. Ex. 21.) The affidavit lacked any issue of public concern, and instead revolved entirely around Johnson's work performance and the possibility of remedial measures. (*Id.*) In fact, plaintiff even indicated that, "it was [his] sense that Mr. Johnson clearly did not yet understand the mechanics of how things are done in this Office." (Id.)

Where the plaintiff's speech was not of public concern, it is not necessary to examine the basis for

the employer's adverse action absent the most unusual circumstances. *O'Donnell*, 148 F.3d at 1133 (citing *Tao*, 27 F.3d at 638-39). There is a lack of unusual circumstances in the present case to merit moving forward with the *First Amendment* violation analysis in the absence of speech on a matter of public concern. Accordingly, defendants must be granted summary judgment on this issue.[9]

D. Count III: District of Columbia Whistleblower's Protection Act

Plaintiff's failure to comply with the D.C. Code § 12-309 pre-suit notice requirements must result in summary judgment in favor of the District of Columbia for the claims under the WPA. *Winder v. Erste*, 2005 U.S. Dist. LEXIS 5190 (D.D.C. 2005). This includes any claim for liquidated damages, as WPA specifies that compliance with § 12-309 is required before bringing a civil action for any of the remedies authorized thereunder. D.C. Code § 1-615.54(a). *Id.*

Accordingly, summary judgment must be granted in favor of the defendants regarding plaintiff's WPA claims.

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[9] As summary judgment must be granted for all *First Amendment* claims, the Court will not reach the merits of defendants' argument regarding qualified immunity on the claims for individual defendants. (Defs.' Mot. Summ. J. 25.) The issue is moot.

E. Counts IV & V: DCHRA Violations

1. Jurisdiction Over DCHRA Claims

Defendants assert that this Court lacks jurisdiction over the DCHRA claims based on the premise that plaintiff, being a government employee, must exclusively seek redress through the District of Columbia's Office of Human Rights ("OHR"). (Defs.' Mot. Summ. J. at 17.) "The District of Columbia is a deferral jurisdiction for purposes of processing discrimination complaints." *Banks v. District of Columbia*, 377 F. Supp. 2d 85, 90 (D.D.C. 2005) (Lamberth, J.) (citing *Palmer v. Barry*, 282 U.S. App. D.C. 290, 894 F.2d 449, 451 n.2 (D.C. Cir. 1990)). OHR is the local agency that manages employment discrimination claims. *Id.* (citing 29 C.F.R. § 1601.74 (1989)).

A complainant in a deferral jurisdiction "need only file his charge within 240 days of the alleged discriminatory employment practice in order to insure that his federal rights will be preserved." *Mohasco Corp. v. Silver*, 447 U.S. 807, 815 n.16, 100 S. Ct. 2486, 65 L. Ed. 2d 532 (1980) (interpreting § 2000e-5 (e)(1)). The complainant must file by day 240 to allow the 60 day deferral period of 42 U.S.C. § 2000e-5 (c) to pass. *See id.* When a complainant files with the EEOC before the end of the deferral period, EEOC will wait until the termination of local proceedings or the end of the deferral period before asserting concurrent jurisdiction. *See Love v. Pullman Co.*, 404 U.S. 522, 526, 92 S. Ct. 616, 30 L. Ed. 2d 679 (1972). However, OHR has chosen to waive its right to exclusive jurisdiction over Title VII cases during that 60-day deferral period.

Banks, 377 F. Supp. 2d at 90 (citing *Fowler v. District of Columbia*, 122 F. Supp. 2d 37, 42 (D.D.C. 2000)).

A District of Columbia employee pursuing a cause of action under DCHRA, D.C. Code § must exhaust the available administrative remedies. *Kennedy v. District of Columbia*, 654 A.2d 847, 863 (D.C. 1995). The court in *Fowler* addressed this issue in detail, and concluded that the District of Columbia's OHR-EEOC "worksharing agreement relieved the plaintiff of the burden of exhausting his remedies with the state agency." 122 F. Supp. 2d at 42. Plaintiff was "entitled to bring a Title VII action in federal court and was not required to first file his complaint with the District of Columbia agency." *Id.* The court further determined that "it would be contrary to the policy of cooperation embodied in Title VII (and, the court notes, in the Worksharing Agreement) for the court to accept the defendant's interpretation of the DCHRA as requiring the plaintiff to pursue separate administrative remedies for state and federal discrimination claims." *Id.* at 43.

Accordingly, this Court properly maintains jurisdiction over plaintiff's DCHRA claims, and summary judgment must be denied.

2. Analysis of DCHRA Claims

The standard for a prima facie case of retaliation under the DCHRA mirrors the standard under Title VII. *Chandamuri v. Georgetown Univ.*, 274 F. Supp. 2d 71, 85 (D.D.C. 2003) (Lamberth, J.) (citing *Howard Univ. v. Green*, 652 A.2d 41, 45 (D.C. 1994)); *Stith v. Chadbourne & Parke, LLP*, 160 F. Supp. 2d 1, 11 (D.D.C. 2001) (Lamberth, J.) (DCHRA claims are

"analyzed in the same manner as claims arising under Title VII . . . under the framework established by the Supreme Court in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)") (citing *Mungin v. Katten Muchin & Zavis*, 325 U.S. App. D.C. 373, 116 F.3d 1549, 1553 (D.C. Cir. 1997)). Therefore, analysis regarding the merits of plaintiff's DCHRA claims will be conducted simultaneously with plaintiff's Title VII claims (see Section F, *infra*).

F. Count VI: Unlawful Retaliation in Violation of Title VII

Title VII retaliation claims, like discrimination claims, are analyzed under the *McDonnell Douglas* framework, however the prima facie requirements for retaliation are "slightly different": plaintiff must demonstrate that [1] he engaged in a statutorily protected activity; [2] the employer took an adverse employment action; and [3] there is a causal relationship between the two. *Clipper v. Billington*, 414 F. Supp. 2d 16, 25 (D.D.C. 2006) (Lamberth, J.) (citing *Romero-Ostolaza v. Ridge*, 370 F. Supp. 2d 139, 145 (D.D.C. 2005) (Lamberth, J.); *Brown v. Brody*, 339 U.S. App. D.C. 233, 199 F.3d 446, 452 (D.C. Cir. 1999); *Morgan v. Fed. Home Loan Mortgage Corp.*, 356 U.S. App. D.C. 109, 328 F.3d 647, 651 (D.C. Cir. 2003)). It is undisputed that plaintiff engaged in statutorily protected activities. (Defs.' Mot. Summ. J. at 27-33.) Defendants assert, however, that plaintiff fails to establish a prima facie case for retaliation on the third prong, causation, and further that defen-

dants had "legitimate, nonretaliatory reasons" for his dismissal. (*Id.*)

1. Causation

"At the prima facie stage of a retaliation claim, a plaintiff's burden 'is not great; [he] merely needs to establish facts adequate to permit an inference of retaliatory motive.'" *Clipper*, 414 F. Supp. 2d at 25 (quoting *Holcomb v. Powell*, 369 U.S. App. D.C. 122, 433 F.3d 889, 903 (D.C. Cir. 2006)) (citation omitted). Typically, a plaintiff satisfies this burden regarding causation, by demonstrating both that the employer was aware of plaintiff's protected activity and a close temporal relationship between the activity and the adverse employment action plaintiff suffered. *Holcomb*, 433 F.3d at 903 (citing *Mitchell v. Baldrige*, 245 U.S. App. D.C. 60, 759 F.2d 80, 86 (D.C. Cir. 1985)); *Holbrook v. Reno*, 339 U.S. App. D.C. 4, 196 F.3d 255, 263 (D.C. Cir. 1999)).

Defendants urge that because there was a sixteen month lapse between plaintiff being asked to submit an affidavit in response to Johnson's EEOC investigation and his termination, the element of a causal relationship between the protected activity and the adverse employment action is defeated. (Defs.' Mot. Summ. J. 31.) Plaintiff, however, responds with a "Relevant Temporal Activity Matrix" that indicates a pattern of behavior beginning in May 2000, and escalating until plaintiff's dismissal in August 2002. (Pl.'s Resp. Mot. Summ. J. Ex. 38-A.) During this time frame, plaintiff demonstrates steadily declining performance appraisals, evidence of increasing supervision over himself and his division, changes in oper-

ating procedures which appear to have adversely affected plaintiff, and an increasing sense of animosity directed towards plaintiff. (*Id.)*

Plaintiff alleges that this gradual behavior was contemplated by defendants to achieve the end result of terminating plaintiff after establishing a sufficient basis to avoid the appearance of retaliation. As it is possible that a jury could infer defendants had a retaliatory motive from the defendants' behavior throughout the time period between the requested EEOC affidavit and plaintiff's termination, summary judgment may not be granted for failure to demonstrate causation.

2. Defendants' "Legitimate, Non-Retaliatory Reasons" for Plaintiff's Dismissal

Under the *McDonnell Douglas* framework, once a plaintiff has demonstrated a prima facie case of retaliation, the burden shifts to defendants to provide legitimate, non-discriminatory reasons supporting the adverse employment action taken against plaintiff. *Holcomb*, 369 U.S. App. D.C. 122, 433 F.3d 889, 896 (citing *Reeves v. Sanderson Plumbing Prods.*, Inc., 530 U.S. 133, 142, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (U.S. 2000); *Lathram v. Snow*, 357 U.S. App. D.C. 413, 336 F.3d 1085, 1088 (D.C. Cir. 2003)). "If the defendant satisfies that burden, 'the McDonnell Douglas framework--with its presumptions and burdens--disappears, and the sole remaining issue [is] discrimination vel non.'" *Lathram*, 336 F.3d at 1088 (quoting *Reeves*, 530 U.S. at 142-43) (citations and internal quotation marks omitted). "At this point, to survive summary judgment the plaintiff must show

that a reasonable jury could conclude from all of the evidence that the adverse employment decision was made for a discriminatory reason." *Lathram*, 336 F.3d at 1088 (citing *Aka v. Washington Hosp. Ctr.*, 332 U.S. App. D.C. 256, 156 F.3d 1284, 1290 (D.C. Cir. 1998) (en banc)).

In the present case, defendants assert that plaintiff was properly terminated for failing to perform his duties in a "skillful, timely, and efficient manner" and for failing to correct deficiencies identified by a 1999 inspection before his division was re-inspected in 2002. (Defs.' Mot. Summ. J. 31-32.) Plaintiff dedicated his entire Motion for Summary Judgment to rebutting these assertions. The most powerful pieces of evidence in plaintiff's arsenal, that could lead a reasonable jury to conclude his termination was retaliatory, as opposed to stemming from defendants' proffered nondiscriminatory reasons, include: his performance evaluations (which until May 2002 reflect declining but consistently high marks), monetary incentive awards and salary increases plaintiff received (the last of which occurred in August 2001 for "outstanding performance"), and an affidavit from Melvina L. Coakley, previous Director of Planning and Inspections for DCOIG and one of three inspectors who conducted the 2002 re-inspection of plaintiff's division. (Pl.'s Mot. Summ. J.)

In her affidavit, Coakley indicated that the inspection of plaintiff's division was "totally unexpected . . . not done in accordance with our normal procedures (with no inspection plan scope or objectives)." (Pl.'s Mot. Summ. J. Ex. 31.) Coakley further stated

that it was odd for ID's leadership (plaintiff) to have not been involved with the inspection, as inspections were normally collaborative efforts. (*Id.*) Another aspect of the re-inspection which Coakley found different was that, even as a contributing inspector, she was not provided a copy of the draft report until walking in to present it to IG Maddox. (*Id.*) Finally, Coakley maintained that while this re-inspection was unique to ID, the problems which the re-inspection identified were not. (*Id.*) Coakley expressed that the morale problems in ID were systemic in DCOIG and that none of the inspection's findings were sufficient to justify plaintiff's termination. (*Id.*)

Additional evidence of the state in which ID functioned during the last eight months of plaintiff's tenure can be gleaned from a peer review conducted by the Office of Inspector General for the City of Philadelphia, which reviewed DCOIG for a period beginning January 1, 2002, and ending April 1, 2003. (Pl.'s Mot. Summ. J. Ex. 33.) This peer review concluded that ID had a qualified staff who conducted investigations "in a diligent and complete manner," among numerous other positive findings. (*Id.*)

Based on this evidence, it is possible that a reasonable jury could conclude that the defendants terminated plaintiff for retaliatory reasons. Plaintiff's retaliation claim raises genuine issues of material fact that on this record may not be resolved on summary judgment.

III. CONCLUSION

For the foregoing reasons, this Court concludes that the plaintiff has not met his burden for summary

judgment in his favor. Accordingly, and for the reasons stated herein, plaintiff's motion for summary judgment will be hereby DENIED. Further, the Court hereby concludes that defendants have partially met their burden for summary judgment. Accordingly, and for the reasons stated herein, defendants' motion for summary judgment will be hereby GRANTED in part and DENIED in part. It will be GRANTED as to plaintiff's wrongful termination claim, *First Amendment* claim, and WPA claim, and DENIED as to plaintiff's DCHRA claims, and Title VII claim. Plaintiff's claims of conspiracy under *42 U.S.C. §§ 1985-1986* remain pending pursuant to a separate opinion issued this date.

A separate Order shall issue this date.

Signed by Royce C. Lamberth, United States District Judge, May 4, 2006.

APPENDIX C

**United States Court of Appeals,
District of Columbia Circuit.**

**David M. BOWIE, Appellant
v.
Charles C. MADDOX, Inspector General, in his official and individual capacities, et al.,
Appellees.**

**No. 08–5111.
Argued Dec. 6, 2010.
Decided Aug. 31, 2011.**

On Petition for Rehearing

***BROWN,* Circuit Judge:**

David M. Bowie, a former official of the District of Columbia Office of the Inspector General ("OIG"), says he was fired in retaliation for exercising his First Amendment rights. Bowie refused to sign an affidavit his employer drafted for him in response to a former subordinate's employment discrimination claim; instead, Bowie re-wrote the affidavit in a manner critical of OIG's decision to terminate the subordinate. We affirmed the district court's grant of summary judgment in favor of OIG on Bowie's First Amendment retaliation claim, because Bowie's speech was "pursuant to his official duties." *Bowie v. Maddox,* 642 F.3d 1122, 1134 (D.C. Cir. 2011) (alteration omitted) (quoting *Garcetti v. Ceballos,* 547 U.S. 410, 421, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006)). Bowie petitioned for rehearing.

In *Garcetti,* the Supreme Court affirmed that "[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." 547 U.S. at 419, 126 S. Ct. 1951. But the Court also held "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." *Id.* at 421, 126 S. Ct. 1951. Applying that holding to the facts, the Court concluded that Ceballos, a deputy district attorney "did not speak as a citizen by writing a memo [to his supervisors] that addressed the proper disposition of a pending criminal case." *Id.* at 422, 126 S. Ct. 1951. Instead, "[w]hen he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee." *Id.* Therefore, his First Amendment retaliation claim failed.

In Bowie's petition for rehearing, he denies that *Garcetti* bars his claim. He argues that even if the relevant speech was ordered by his government employer,[1] it is protected by the First Amendment

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[1] Bowie argues in the alternative that his speech was not pursuant to official duties. This argument fails for reasons we have already explained:

> Bowie's efforts to produce an affidavit were undertaken at the direction of his employer and in his capacity as Assistant Inspector General for Investigations and Johnson's superior. The first version of the affidavit was drafted for OIG's convenience by a Deputy Attorney

because it is analogous to the speech of private

> General as counsel for OIG, and it was given to Bowie for his signature by ... OIG's general counsel. Bowie revised the affidavit on a timetable approved by the general counsel, and then submitted it to her for submission with ... OIG's position statement in the EEOC. Bowie does not allege Defendants stymied any personal effort to submit his affidavit to the EEOC or to Johnson directly. Indeed, Bowie made no such effort. His affidavit, like the draft he refused to sign, identified him in the first paragraph and signature block as 'Assistant Inspector General for Investigations.' All the speech underlying Bowie's First Amendment claim occurred in his official capacity.
>
> *Bowie,* 642 F.3d at 1134.

In his petition, Bowie points out that the EEOC has administrative subpoena power. Petition at 7; *see* 42 U.S.C. § 2000e–9; 29 U.S.C. § 161. But Bowie has never alleged that the EEOC subpoenaed his testimony individually or that he tried to submit his affidavit to the EEOC as a private citizen. *See* Petition at 14 ("Neither Johnson nor the EEOC ever asked Bowie directly for the affidavit."). Instead, Bowie acknowledges it was OIG that, in response to an EEOC request addressed to OIG's personnel director, "sought ... to have Bowie sign [OIG's] version" of the affidavit. Petition at 13. Because the EEOC never subpoenaed Bowie's individual testimony, and Bowie never composed or submitted any such testimony except as instructed by his employer, the only speech at issue was pursuant to his official duties. "[T]he government as employer is free to control the content of 'speech that owes its existence to a public employee's professional responsibilities.'" *Winder v. Erste,* 566 F.3d 209, 215 (D.C. Cir. 2009) (quoting *Garcetti,* 547 U.S. at 421, 126 S. Ct. 1951). *Contra Fairley v. Andrews,* 578 F.3d 518, 525 (7th Cir. 2009) ("Even if offering (adverse) testimony is a job duty, courts rather than employers are entitled to supervise the process. A government cannot tell its employees what to say in court, nor can it prevent them from testifying against it." (citation omitted)).

citizens who submit testimony to the EEOC. Petition at 8–9. The *Garcetti* Court did observe 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." 547 U.S. at 424, 126 S. Ct. 1951 (emphasis added). But this statement does not mean that whenever speech has a civilian analogue it is protected by the First Amendment. The Court 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.* at 423, 126 S. Ct. 1951. Only then is the analogy to private speech "relevant." *Id.* at 424, 126 S. Ct. 1951.

Bowie's argument to the contrary finds support in a Second Circuit opinion that issued the day after he filed his petition for rehearing. *Jackler v. Byrne,* —— F.3d —— (2d Cir. 2011). The plaintiff in *Jackler* was a probationary police officer who, pursuant to instructions from a superior, filed a report documenting a fellow officer's use of excessive physical force. *Id.* at ——. The chief of police and two administrative officers pressured Jackler to withdraw his report and file a false one. *Id.* at —— - ——. When Jackler refused, he was fired. *Id.* at —— - ——. The court concluded Jackler's refusal to "obey [his employer's] instructions ... is not beyond the scope of the First Amendment." *Id.* at ——.

The Second Circuit reasoned that Jackler's disobedience was analogous to a private citizen's lawful refusal to rescind a true accusation, to make a

false one, and to file a false police report, and that Jackler's conduct was therefore protected by the First Amendment. *Id.* at ——, —— - ——. Thus, the court 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.* at —— (emphasis added). The Second Circuit did not dispute the district court'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." *Id.* at —— (quoting *Jackler v. Byrne*, 708 F. Supp. 2d 319, 325 (S.D.N.Y. 2010)). Indeed, the Second Circuit agreed that "a police officer has a duty not to substitute a falsehood for the truth.' " *Id.* at ——. Even so, the court held Jackler's attempt to fulfill that professional responsibility by disobeying an order to the contrary was protected speech, because private citizens also have a duty not to file false statements. *Id.* at —— - ——.

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." 547 U.S. at 421, 126 S. Ct. 1951; *cf. Winder v. Erste,* 566 F.3d 209, 215 (D.C. Cir. 2009) ("[A]lthough testimony before a city council might otherwise be just the sort of citizen speech protected by the First Amendment, the uncommonly close relationship between [the plaintiff's] duties and his advocacy before the council

precludes protection."). 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." *Garcetti,* 547 U.S. at 426, 126 S. Ct. 1951.

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. *Jackler,* —— F.3d at ——. 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." *Garcetti,* 547 U.S. at 423, 424, 126 S. Ct. 1951. As all of the dissenting justices recognized, *Garcetti* "categorically" denies recovery under the First Amendment to plaintiffs who spoke "pursuant

to ... official duties." *Id.* at 430, 126 S. Ct. 1951 (Souter, J., dissenting); *see also id.* at 446, 126 S. Ct. 1951 (Breyer, J., dissenting) ("In a word, the majority says, 'never.'"); *id.* at 426, 126 S. Ct. 1951 (Stevens, J., dissenting) ("The proper answer to the question ... is 'Sometimes,' not 'Never.'").

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. *See Jackler,* ___ F.3d at ——— - ———. 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. *See Winder,* 566 F.3d at 216 ("Some remedy, such as a properly preserved claim under the whistleblower protection laws, may have been available to [the plaintiff]. But ... the First Amendment does not provide that remedy.").

Because Bowie spoke as a government employee, the district court rightly granted summary judgment in favor of Bowie's employer on his First Amendment retaliation claim. Therefore, the petition for rehearing is

Denied.

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. I:

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.

42 U.S.C. § 1983

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.