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No. 11-517

In The
Supreme Court of the United States

POLICE CHIEF MATTHEW T. BYRNE, Individually and in his Official Capacity, LT. PAUL RICKARD, in his Individual Capacity and LT. PATRICK FREEMAN, in his Individual and Official Capacity,

Petitioners,

v.

JASON M. JACKLER,

Respondent.

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

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the First Amendment prohibits supervisory police officers from terminating a probationary officer who refuses an unlawful directive to engage in criminal activity by filing a false eyewitness report that would exonerate a sergeant who engaged in police brutality against an arrestee?

2. Whether, on the unique facts of this case, petitioners correctly identify a split among the circuits on the scope of *Garcetti v. Ceballos*, 547 U.S. 410 (2006), which holds that the First Amendment does not protect public employee speech that is made pursuant to the plaintiff's official job duties?

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COUNTERSTATEMENT OF THE CASE

A. Factual background

Respondent, Jason M. Jackler, brought this action, *inter alia*, under 42 U.S.C. § 1983, alleging that he was terminated from his position as a probationary police officer in retaliation for his protected speech. Petitioners are City of Middletown, New York, Police Chief Matthew T. Byrne and Lieutenants Patrick Freeman and Paul Rickard.

As this case was resolved on a motion to dismiss under Rule 12(c), the factual allegations in the complaint are deemed true. On January 5, 2006, respondent was directed to help Sgt. Gregory W. Metakes arrest and transport Zachary T. Jones. (JA 9 ¶ 14).[1] After respondent arrived on the scene, Jones was placed in a police car and handcuffed behind his back. *Id.* at ¶¶ 15-16. After Jones called Sgt. Metakes a derogatory name, Metakes struck Jones in the face, in violation of city policy. (JA 9 ¶ 17; JA 27-28). Respondent saw Sgt. Metakes strike Jones, who was in handcuffs. *Id.* at ¶¶ 17-18.

On the day of his arrest, Jones filed a civilian complaint with the city, alleging that Sgt. Metakes used excessive force against him. (JA 32-33). Two other city officers helped Jones file the civilian complaint and noted the physical injuries to Jones' face.

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[1] "JA-___" refers to the joint appendix filed in the Second Circuit.

(JA 10 ¶ 21). Petitioners, meanwhile, investigated Jones' civilian complaint. *Id.* at ¶¶ 23-25. These officers had close personal and professional relationships with Sgt. Metakes. *Id.* at ¶ 22. At Lt. Freeman's behest, respondent drafted a police report describing the incident. Dated January 11, 2006, the report implicated Sgt. Metakes:

> On 1/5/06, at approx. 8:55 pm, I, officer Jackler, responded to Mobile [sic] on the Run to assist Sgt. Metakes of the Narcotics Unit. Upon arrival, Sgt. Metakes had a subject, now known to me as Zachary Jones, handcuffed and up against the narcotics car for disorderly conduct. I observed Jones to have multiple abrasions on his face. I opened up the driver's side rear-door of my patrol unit #6 and Sgt. Metakes placed Jones in the back seat. Upon closing the door, Jones uttered the word "dick". Sgt. Metakes then reopened the door and struck Jones in the face, then re-closed the door. While I was transporting Jones back to 370 he asked me "Is he allowed to do that"? I stated to Jones to discuss the situation with the other officer once we get back to 370. (JA 35).

Shortly after respondent drafted his truthful report, petitioners tried to coerce him to withdraw that report and to file a new one containing false, incomplete and misleading information. Petitioners wanted a new report from respondent to conceal Sgt. Metakes' illegal conduct. (JA 12 ¶¶ 30-31). Meanwhile, petitioners recovered video footage that corroborated the

civilian's complaint and respondent's supplemental report. *Id.* at ¶ 32. As petitioners acknowledge, respondent refused to alter his report. (Pet. 3).

On January 19, 2006, petitioners appeared before the City of Middletown Board of Police Commissioners to determine whether to retain the employment of respondent, a probationary employee, as a permanent police officer. (JA 13 ¶ 36; JA 42). Petitioners gave the commissioners false and misleading information about respondent's job performance. This action alleges that, in violation of the First Amendment, petitioners prevented respondent's permanent employment in retaliation for his refusal to alter the report that implicated Sgt. Metakes in the assault against Jones. (JA 13 ¶ 37). Although the City had never previously terminated a probationary officer, the Police Commission dismissed respondent on petitioners' recommendation. *Id.* at ¶ 38.

B. Procedural history

Prior to any discovery, petitioners filed a motion to dismiss under Rule 12(c). Relying on *Garcetti* and the Second Circuit's opinion in *Weintraub v. Board of Educ.*, 593 F.3d 196 (2d Cir. 2010), the district court reluctantly granted the motion, noting that this case was an anomaly: "Jackler's refusal to alter his report was done in his capacity as a police officer, and that refusal only occurred because he was an officer. Ironically, it is because he was a public employee with a

duty to tell the truth that his insistence on fulfilling that duty is unprotected." (Pet. App. 50a).

The Court of Appeals unanimously reversed. After surveying this Court's jurisprudence on the First Amendment rights of public employees, the Second Circuit noted that, in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), this Court identified two relevant inquiries: "(1) whether the subject of the employee's speech was a matter of public concern and (2) whether the employee spoke as a 'citizen' rather than solely as an employee." (Pet. App. 16a) (citing *Garcetti*, 547 U.S. at 420-22). Moreover, the Second Circuit observed, "[t]o constitute speech on a matter of public concern, an employee's expression must 'be fairly considered as relating to any matter of political, social, or other concern to the community.'" (Pet. App. 17a) (citing *Connick v. Myers*, 461 U.S. 138, 146 (1983)). Under that standard, the Second Circuit held that respondent's speech touched upon a matter of public concern because "[e]xposure of official misconduct, especially within the police department, is generally of great consequence to the public." (Pet. App. 18a) (quoting *Branton v. City of Dallas*, 272 F.3d 730, 740 (5th Cir. 2001)). *See also*, Pet. App. 19a ("for several reasons, including public safety and welfare – as well as preservation of the public fisc – police malfeasance consisting of the use of excessive force is plainly a matter of public concern") (citations omitted).

In resolving this case, the Court of Appeals carefully noted how the complaint alleges that petitioners tried to coerce respondent into filing a false report, a

crime under state and federal law. The Second Circuit noted that most First Amendment retaliation cases "dealt with government employees who complained that they were penalized by their employers on account of statements the employees affirmatively made. Jackler, in contrast, contends that he was penalized for his refusals to follow defendants' instructions that he retract his Report and make statements that would have been untrue, and that his refusals are protected by the First Amendment." (Pet. App. 22a). After noting that this Court has long held that compelled speech may violate the First Amendment, *id.* (citing *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988) and *Wooley v. Maynard*, 430 U.S. 705 (1977)), the Court of Appeals stated that "[i]n the context of an official investigation into possible wrongdoing, a citizen has a right – and indeed, in some circumstances, a duty – to give evidence to the investigators." (Pet. App. 23a) (citations omitted). Moreover, "when a person does give evidence, he has an obligation to speak truthfully." (Pet. App. 24a). The Court of Appeals proceeded to outline the various ways that petitioners ran afoul of state and federal law in pressuring respondent to alter the report.

The Court of Appeals stated that "it is a federal offense to make 'any materially false, fictitious, or fraudulent statement or representation' in any matter within the jurisdiction of the federal government." (Pet. App. 24a) (citing 18 U.S.C. § 1001). The Court of Appeals noted that N.Y. Penal Law § 240.50 makes it

illegal to file a false crime report. (Pet. App. 24a). The Second Circuit further noted that N.Y. Penal Law § 175.30 makes it unlawful for anyone to knowingly offer a false instrument "to a public office or public servant with the knowledge or belief that it will be filed with, registered or recorded in or otherwise become a part of the records of such public office or public servant." (Pet. App. 25a). The Court noted that "the [Middletown Police Department] Complaint Form signed by Jones warned that any false statement made on such a form would expose him to criminal liability under N.Y. Penal Law § 210.45, which provides that '[a] person is guilty of making a punishable false written statement when he knowingly makes a false statement, which he does not believe to be true, in a written instrument bearing a legally authorized form notice to the effect that false statements made therein are punishable.' The term 'person' in such provisions plainly includes police officers." (Pet. App. 25a). Similarly, the Court noted, under N.Y. Penal Law § 175.20, "A person is guilty of tampering with public records in the second degree when, knowing that he does not have the authority of anyone entitled to grant it, he knowingly removes, . . . makes a false entry in or falsely alters any record or other written instrument filed with, deposited in, or otherwise constituting a record of a public office." (Pet. App. 25a).

Further supporting its focus on the illegality of petitioners' demand that respondent falsify his police report, the Second Circuit cited 18 U.S.C. § 1512(c), which makes it a crime to "alter[] . . . or conceal[] a

record . . . with the intent to impair [its] integrity or availability for use in an official [federal] proceeding." (Pet. App. 26a). Likewise, 18 U.S.C. § 1519 makes it a crime to "knowingly alter, . . . falsify, or make a false entry in any record . . . with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any [federal] department or agency." (Pet. App. 26a). The Second Circuit thus concluded, "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." (Pet. App. 26a). These state and federal laws – prominent in the Second Circuit's ruling but absent from the certiorari petition – place respondent's case in context.

Finally, the Court held that "Jackler's refusal to accede to defendants' demands that he falsely exculpate Metakes has a civilian analogue." (Pet. App. 28a). In addressing this issue, the Court of Appeals drew from this Court's most recent public employee First Amendment retaliation case, *Garcetti v. Ceballos*, 547 U.S. 410 (2006), which held that "[e]mployees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. . . . When a public employee speaks pursuant to employment responsibilities, . . . there is no relevant analogue to speech by

citizens who are not government employees." *Id.* at 423-24. The Second Circuit explained:

> [A] citizen has a First Amendment right to decide what to say and what not to say, and, accordingly, the right to reject governmental efforts to require him to make statements he believes are false. Thus, a citizen who has truthfully reported a crime has the indisputable right to reject pressure from the police to have him rescind his accusation and falsely exculpate the accused. And, . . . a civilian who acceded to such pressure would subject himself to criminal liability, as would a police officer. Of course a police officer has a duty not to substitute a falsehood for the truth, *i.e.*, a duty to tell "nothing but the truth"; but he plainly has that duty as a citizen as well.

(Pet. App. 28a-29a).

The Court of Appeals held that respondent's speech had a citizen analogue for another reason. Citing its ruling in *Weintraub*, the Second Circuit noted that "an indicium that speech by a public employee has a civilian analogue is that the employee's speech was to 'an independent state agency' responsible for entertaining complaints by 'any citizen in a democratic society regardless of his status as a public employee.' A police department plainly is such an agency." (Pet. App. 29a). As Jones, a civilian, filed an excessive force complaint with the Middletown Police Department, the department "could not, consistent with the First Amendment, have forced Jones to

withdraw his complaint and say falsely that Metakes had done no wrong." *Id.* Likewise, having witnessed Metakes's attack, respondent "was entitled to the same constitutional protection as Jones against being forced to retract his true statement and instead make a statement that would exculpate Metakes falsely." *Id.*

REASONS FOR DENYING THE PETITION

Petitioners argue that, pursuant to *Garcetti v. Ceballos*, 547 U.S. 410 (2006), respondent's refusal to file the false police report was made pursuant to his job duties and that this constituted unprotected speech for which his employment may be terminated. Petitioners maintain that the Second Circuit's ruling cannot be reconciled with a recent decision by the D.C. Court of Appeals, *Bowie v. Maddox*, 642 F.3d 1122 (D.C. Cir. 2011), *reh'g denied*, 653 F.3d 45 (D.C. Cir. 2011). In fact, as outlined below, the conflict highlighted by petitioners is illusory. While *Bowie* criticizes the Second Circuit's ruling in this case, that language is *dicta*. Moreover, while *Bowie* is a routine First Amendment retaliation case, the facts giving rise to this action are unique and *sui generis*. As the Second Circuit noted, petitioners tried to coerce respondent into committing a crime in falsifying the police report to exculpate a superior officer who brutalized an arrestee. Few cases arise from these factual circumstances. Any ruling by this Court on the applicability of *Garcetti* to this case would be of

limited utility in the more typical First Amendment retaliation cases involving traditional whistleblowing and affirmative workplace speech. Accordingly, the petition does not raise a recurring issue, and this case is not the appropriate vehicle for this Court to further develop *Garcetti*'s rule that the First Amendment does not protect public employee speech made pursuant to official job duties. In any event, the Second Circuit's ruling in this case correctly interprets *Garcetti*. Certiorari is not warranted, and this petition should be denied.

I. The Second Circuit's ruling does not materially conflict with the D.C. Circuit's analysis in *Bowie v. Maddox*

Petitioners primarily argue that the Second Circuit's ruling creates an irreconcilable conflict with *Bowie v. Maddox*, 642 F.3d 1122 (D.C. Cir. 2011) ("*Bowie I*"), *reh'g denied*, 653 F.3d 45 (D.C. Cir. 2011) ("*Bowie II*"). However, while the D.C. Circuit criticizes the Second Circuit's reasoning in *Jackler v. Byrne*, 658 F.3d 225 (2d Cir. 2011), that criticism is *dicta* and, in any event, the cases are materially distinguishable. The speech in *Jackler* is entirely different from the speech in *Bowie*, and the Second Circuit's reasoning in *Jackler* would not compel a contrary result in *Bowie*.

In *Bowie*, the plaintiff was an Assistant Inspector General at the Office of Inspector General ("OIG"). 642 F.3d at 1126. After Bowie's colleague, Emanuel Johnson, filed a racial discrimination charge with the

EEOC, Deputy Attorney General Gail Davis prepared for Bowie's signature on an affidavit that critiqued Johnson's job performance. *Id.* at 1126-27. However, as he disagreed with "misstatements of fact" and "language that would convey impressions that [he] would not agree with," Bowie refused to sign the affidavit. *Id.* at 1127. At the behest of General Counsel Karen Branson, Bowie drafted an affidavit of his own. *Id.* While Bowie's revised affidavit criticized Johnson's job performance, he also stated 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 [performance improvement plan] would have been a better course of action than firing him." *Id.* Davis decided not to submit this affidavit to the EEOC in opposition to Johnson's discrimination claim because it included irrelevant information. *Id.* The D.C. Circuit noted that "Bowie claim[ed] 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." *Id.* at 1133.

Rejecting Bowie's First Amendment retaliation claim, the D.C. Circuit held that he was not speaking as a citizen when he refused to sign the draft affidavit and prepared his own affidavit. Rather, Bowie was speaking in his official capacity as

Assistant Inspector General. The Court of Appeals reasoned:

> 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.

Id. at 1134.

More than two months after the D.C. Circuit decided *Bowie*, the panel resolved Bowie's motion for rehearing. 653 F.3d 45 (D.C. Cir. 2011). As the Second Circuit had issued *Jackler* after the D.C. Circuit issued *Bowie I*, this was the first time that the D.C. Circuit had analyzed *Jackler*'s reasoning. Although the D.C. Circuit in *Bowie II* criticized the Second

Circuit's ruling in *Jackler*, *id.* at 48, that critique is *dicta*. That court had already definitively ruled against Bowie's claim in *Bowie I*. *See*, 642 F.3d 1122 (D.C. Cir. 2011). The conflict highlighted by petitioners is not concrete.[2]

Moreover, *Bowie* is quite unlike the instant case. Unlike in *Jackler*, which involved police misconduct, the speech in *Bowie* involved an internal personnel dispute of little interest to the outside community. As the Second Circuit noted in *Jackler*, respondent's superiors essentially asked him to commit a crime in coercing him to submit a false police report. The Second Circuit ruled that respondent's refusal to comply with this unlawful demand constituted protected speech in that "police malfeasance consisting of the use of excessive force is plainly a matter of public concern." (Pet. App. 19a). Respondent witnessed the police misconduct outside the workplace. He would have had an obligation to report this incident truthfully had he witnessed it off-duty like any other citizen. Moreover, Jackler's refusal to submit a false report for his superiors had a citizen analogue, as expressly contemplated in *Garcetti*. *See*, 547 U.S. at 424. As the Second Circuit explained,

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[2] As the D.C. Circuit noted, the Second Circuit issued *Jackler* one day after Bowie sought rehearing. *See*, 653 F.3d at 47. The D.C. Circuit did not even have the benefit of counsel's analysis of *Jackler*, as Bowie's rehearing brief does not cite the Second Circuit's ruling. *See*, *Bowie v. Maddox*, D.C. Circuit 08-5111, Document No. 1319967.

> a citizen has a First Amendment right to decide what to say and what not to say, and, accordingly, the right to reject governmental efforts to require him to make statements he believes are false. Thus, a citizen who has truthfully reported a crime has the indisputable right to reject pressure from the police to have him rescind his accusation and falsely exculpate the accused. And, as indicated by laws such as the state and federal statutory provisions described in the Second Circuit opinion, a civilian who acceded to such pressure would subject himself to criminal liability, as would a police officer. Of course a police officer has a duty not to substitute a falsehood for the truth, *i.e.*, a duty to tell "nothing but the truth"; but he plainly has that duty as a citizen as well.

(Pet. App. 28a-29a).

While *Jackler* involves a probationary officer who resisted a supervisory demand to commit a crime in submitting a false police report, the sole basis for Bowie's First Amendment claim was that "[d]efendants started setting him up for termination after he expressed support for Johnson." *Bowie I*, 642 F.3d at 1127. The citizen analogue in *Jackler* is stark: anyone, be it a civilian or a uniformed police officer, must resist pressure to mislead any government agency, including a police department. (Pet. App. 28a-29a). Yet, while petitioners in this case state that Bowie's claim was "predicated on a refusal to submit a false affidavit" (Pet. 10) and that Bowie claimed the "right to refuse to submit false testimony to the EEOC"

(Pet. 7), Bowie did *not* claim in his action that anyone *coerced* him into submitting a *false* affidavit. Bowie's only claim was that management rejected his alternative affidavit and that he was terminated after he supported Johnson in management's efforts to justify his termination. *See, Bowie I*, 642 F.3d at 1126 ("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 had fired over Bowie's dissent"). *See also, Bowie II*, 653 F.3d at 46 ("Bowie . . . 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"). Bowie's case was not premised on management's retaliatory response to his refusal to submit a false affidavit.

Bowie is further distinct from *Jackler* because the dispute over Bowie's affidavit related to an EEOC charge. Nearly all EEOC affidavits originate in the workplace where the alleged discrimination took place, and Bowie was asked to submit an affidavit as Johnson's superior. Few citizens would find themselves in Bowie's position. Bowie was a supervisory official in a government office whose input was necessary to help the agency respond to an EEOC charge. Bowie's attempt to submit a revised affidavit thus had no citizen analogue. Yet, as noted above, all citizens have the right to refuse to submit a false statement to

the police. The stark factual distinction between *Bowie* and *Jackler* confirms that the reasoning in *Jackler* would not have necessarily compelled the D.C. Circuit to issue a contrary ruling in *Bowie*. The Circuit split highlighted by petitioners is illusory. There is no reason for this Court to grant certiorari.

II. There is no meaningful Circuit split on the "citizen analogue" test

In *Garcetti*, this Court noted that public employees continue to enjoy rights under the First Amendment "for expressions made at work." 547 U.S. at 420 (citation omitted). Also, "[t]he First Amendment protects some expressions related to the speaker's job." *Id.* at 421 (citations omitted). This Court added, "[e]mployees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. . . . When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees." *Id.* at 423-24.

Petitioners argue that the "citizen analogue" in *Garcetti* merely explains "this Court's rationale for its conclusion that speech made pursuant to official duties is not protected, *i.e.*, because there is no citizen analogue to speech that is made pursuant to the employee's official duties." (Pet. 17). This misreads *Garcetti*, which distinguished "official-duties" speech

from "the kind of activity engaged in by citizens who do not work for the government." 547 U.S. at 423. In other words, employees who engage in job-related speech outside the workplace may still enjoy First Amendment protection. It is only unprotected when the speech is made in the course of performing official duties. *Id.* at 423. If the speech is comparable to that enjoyed by all citizens, be it writing a letter to the editor or making work-related statements in public, then that speech is protected under the First Amendment. If the speech is commissioned by the employer and it owes its existence to the plaintiff's job duties, it is not protected and there is no citizen analogue. In this case, respondent's refusal to commit a crime at the behest of his superiors who wanted a false report had a citizen analogue. It was not respondent's job to commit a crime in the workplace, and his speech in refusing to alter his initial truthful police report was not "commissioned or created" by petitioners. *Id.* at 422. *See*, Pet. App. 30a ("Jackler was not simply doing his job in refusing to obey those orders from the department's top administrative officers and the chief of police"). Simply put, when respondent drafted the initial police report that described the police brutality that took place in his presence, that report discharged his duties as a police officer. In contrast, in rejecting petitioners' invitation to commit a crime in altering that report, respondent invoked his right as a private citizen.

Petitioners attempt to highlight a Circuit split on the meaning of *Garcetti*'s "citizen analogue" test.

There is no such split. Petitioners' reliance on *Bowie* is misplaced for the reasons outlined above; the D.C. Circuit's language in *Bowie* criticizing *Jackler* is *dicta*. However, even under petitioners' argument, the Second Circuit's ruling in *Jackler* only conflicts with one other case, *Bowie*, on the central issue posed by this petition: whether the First Amendment permits a police department to fire an officer for refusing to file a false witness statement. Other cases in the petition are both distinguishable and necessarily fact-intensive such that petitioners' attempt to highlight a conflict based on these cases falls short.

While the First Circuit in *Foley v. Town of Randolph*, 598 F.3d 1 (1st Cir. 2010), held that a fire chief's public speech – criticizing municipal funding for the fire department – lacked any civilian analogue, that was because the plaintiff "spoke while in uniform and on duty; he spoke from the scene of a fire where he had been in command as the Chief of the Fire Department; and his comments were bookended by those of another official – the State Fire Marshal." His speech thus "took on a degree of official significance that has 'no relevant analogue to speech by citizens.'" *Id.* at 8. Unlike *Jackler*, the plaintiff in *Foley* spoke pursuant to his official duties. The First Circuit in *Foley* faithfully applied *Garcetti*. While petitioners further cite *Abdur-Rahman v. Walker*, 567 F.3d 1278 (11th Cir. 2009), the Eleventh Circuit merely held that two county sewer inspectors did not engage in citizen speech when they issued a report to their supervisors about sewer overflows. *Id.* at

1283. As the speech in *Abdur-Rahman* owed its existence to the plaintiffs' official duties and the plaintiff in that case was not asked by superiors to commit a crime, it carried no citizen analogue. *Id.* at 1285-86. The rulings in *Foley* and *Abdur-Rahman* are not irreconcilable with the Second Circuit's approach in *Jackler*. Not only do these cases arise from entirely different factual circumstances, but no citizen could have made the public statements that the fire chief offered in *Foley*. Only a city sewer inspector could have issued the report in *Abdur-Rahman*. Yet any citizen could have stood in Jackler's shoes in refusing to submit a false report to the police department.

Not only have petitioners failed to highlight a concrete split in the application of *Garcetti*'s citizen analogue test, but, as petitioners point out, "other Circuits have also considered [citizen analogue] a factor in determining whether speech is protected." Those circuits include the First Circuit, upon whose ruling in *Foley* petitioners rely in minimizing *Garcetti*'s "citizen analogue." *See*, Pet. 21 (citing *Decotiis v. Whittlemore*, 635 F.3d 22, 32 (1st Cir. 2011); *Rohrbough v. Univ. of Colo. Hosp. Auth.*, 596 F.3d 741 (10th Cir. 2010); *Alaska v. EEOC*, 564 F.3d 1062 (9th Cir. 2009); *Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007)). As these cases, like *Jackler*, have faithfully applied *Garcetti*, there is no meaningful Circuit split on the citizen analogue test, and certiorari is unwarranted.

III. The unique facts of this case make it an inappropriate vehicle to further develop *Garcetti*'s analysis

Petitioners urge this Court to grant certiorari to iron out any inter-Circuit conflicts on the meaning of "official duty" speech. However, this case is not the right vehicle to further develop *Garcetti*'s holdings. That is because the facts giving rise to this action are unique and do not present a recurring issue. Few, if any, First Amendment cases involve claims that a police officer was terminated from employment over his refusal to knowingly submit a false internal report on police brutality. As the Second Circuit noted, petitioners essentially wanted respondent to commit a *crime* in submitting a false police report. (Pet. App. 24a-26a). The stark facts of this case will rarely surface in litigation under 42 U.S.C. § 1983. Any ruling by this Court in this case would necessarily turn on the unique facts alleged in respondent's complaint. This case is quite unlike the typical *Garcetti* case, which involves a municipal employee who either blows the whistle on government malfeasance or otherwise criticizes a public employer on work-related or policy matters.

Petitioners argue that the Circuits have split on what constitutes official-duty speech under *Garcetti*. They summarize the findings from a law review article that notes, for example, that some Circuits interpret official-duty speech "to broadly unprotect speech related to the completion of the employee's work duties" while other Circuits "require that the

act of speaking was an official duty itself and not merely that the speech related to the subject matter of an employee's job or fulfilled a general duty." (Pet. 20) (citing Norcross, *Comment: Separating the Employee from the Citizen: The Social Science Implications of Garcetti v. Ceballos*, 40 U. Balt. L. Rev. 543 (2011)). Petitioners fail to show how any of these conflicts would affect the outcome of this case. While petitioners state that "*Jackler* seems to hold that the refusal to make a false statement is never 'pursuant to official duties' and, thus, always protected" (Pet. 21), that does not accurately summarize the Second Circuit's holding. It was not the refusal to make a false statement that the Court of Appeals held unprotected in *Jackler*. It was respondent's "right to reject governmental efforts to require him to make statements he believes are false. Thus, a citizen who has truthfully reported a crime has the indisputable right to reject pressure from the police to rescind his accusation and falsely exculpate the accused," particularly if he would expose himself to criminal liability in falsifying the report. (Pet. App. 29a). Petitioners do not explain how any general Circuit split in interpreting *Garcetti*'s "official duties" test would affect the Second Circuit's reasoning in this case. Put another way, this case would provide little guidance to the more common First Amendment retaliation cases that routinely wind their way through the federal courts. Certiorari is inappropriate.

IV. The Second Circuit's decision was correctly decided

Petitioners urge this Court to grant certiorari because the Second Circuit's ruling was unfaithful to *Garcetti* by improperly asking whether the speech has a "relevant citizen analogue." Rather, petitioners argue, *Garcetti* deems unprotected all speech made in the plaintiff's official capacity. (Pet. 11-18). Petitioners are incorrect. As the Second Circuit properly interpreted *Garcetti*, certiorari is unwarranted.

A. Respondent's speech was not pursuant to his official duties

In *Garcetti*, plaintiff Ceballos was a deputy district attorney with supervisory responsibilities over other lawyers. 547 U.S. at 413. After determining that a search warrant affidavit contained serious misrepresentations, Ceballos circulated an office memorandum that outlined his concerns and recommended dismissal of the case. *Id.* at 414. After management allegedly retaliated against him for drafting the memorandum, Ceballos filed suit under the First Amendment. This Court held that the First Amendment did not protect Ceballos' speech because he offered it pursuant to his official job duties.

Summarizing its jurisprudence in this area, this Court stated that "public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to

speak as a citizen addressing matters of public concern." *Id.* at 417 (citations omitted). This Court further

> identif[ied] two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.

Id. at 418 (citations omitted).

This Court next set forth the operative rule: "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.*

Under these principles, the First Amendment did not protect Ceballos' speech.

> Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do. . . . The significant point is that the memo was written pursuant to Ceballos' official duties. Restricting speech

> that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.

Id. at 421-22.

In other words, Ceballos was *mandated* to speak on the propriety of the search warrant affidavit; it was his job to speak in this manner. He did not speak as a citizen but as an employee. *See, id.* at 422 ("When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance").

In fleshing out the rule in *Garcetti*, this Court noted that it has long held that

> [e]mployees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. . . . When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees.

Id. at 423 (citations omitted).

Consistent with this Court's emphasis that public employees may still engage in protected speech in the workplace that relates to their job duties, the Second Circuit in this case held that respondent's refusal to commit a crime at the direction of his superiors carried a relevant citizen analogue.

> [A] citizen has a First Amendment right to decide what to say and what not to say, and, accordingly, the right to reject governmental efforts to require him to make statements he believes are false. Thus, a citizen who has truthfully reported a crime has the indisputable right to reject pressure from the police to have him rescind his accusation and falsely exculpate the accused. And . . . a civilian who acceded to such pressure would subject himself to criminal liability, as would a police officer. Of course a police officer has a duty not to substitute a falsehood for the truth, *i.e.*, a duty to tell 'nothing but the truth'; but he plainly has that duty as a citizen as well.

(Pet. App. 28a-29a).

The Second Circuit further noted that "an indicium that speech by a public employee has a civilian analogue is that the employee's speech was to 'an independent state agency' responsible for entertaining complaints by 'any citizen in a democratic society regardless of his status as a public employee.'" (Pet. App. 29a) (citing *Weintraub v. Board of Education*, 593 F.3d at 204 and *Freitag v. Ayers*, 468 F.3d 528, 545 (9th Cir. 2006)). As respondent's speech was made

to a state agency, *i.e.*, the Middletown Police Department, the Second Circuit faithfully applied *Garcetti*'s "citizen analogue" standard.

Petitioners argue that even the plaintiff in *Garcetti* would have prevailed under the Second Circuit's analysis in *Jackler*. (Pet. 17-18). This is not true. Ceballos was simply doing his job when he objected to the search warrant affidavit. Fairly or not, his superiors had the right to discipline Ceballos if they disagreed with his speech. No one asked Ceballos to revise his memorandum in a manner that would constitute a crime. Contrary to petitioners' argument, the law interpreting *Garcetti*'s "citizen analogue" test has not evolved to the point that any municipal employee may invoke the First Amendment's protections by comparing his actions to a hypothetical community speaker. What distinguishes respondent from Ceballos was that, after Jackler performed his routine job duty in drafting a truthful police report, his superiors wanted him to break the law in submitting a revised report that covered-up police brutality. While it was Ceballos' job to prepare the memorandum that criticized the search warrant affidavit, it was not respondent's job to commit a crime at the behest of his superiors. *Garcetti* does not sweep as broadly as petitioners would suggest. Indeed, in *Garcetti*, this Court noted that "[e]mployees in some cases may receive First Amendment protection for expressions made at work." 547 U.S. at 420 (citation omitted). Also, "[t]he First Amendment protects some expressions related to the speaker's job."

Id. at 421 (citations omitted). The Second Circuit properly applied *Garcetti* and certiorari is unwarranted.

B. The Second Circuit's ruling is consistent with the principle that honest testimony and sworn accounts are critical to the judicial system

The Court of Appeals resolved this case consistent with the settled view that honest and impartial testimony and sworn accounts are critical to the effective functioning of the judicial system. Citizens also have a duty to report any crimes that they personally eye-witnessed. This reflects a nearly universal value in federal courts around the country. This Court held more than 100 years ago that it is every citizen's "right and his duty to communicate to the executive officers any information which he has of the commission of an offense against [the] laws" of this country. *In re Quarles*, 158 U.S. 532, 535 (1895). Also, "it is the duty of th[e] government to see that he may exercise this right freely, and to protect him from violence while so doing, or on account of so doing." *Id.* at 536.

In refusing to lie for his superiors about an act of police misconduct that was under investigation and could potentially give rise to a criminal or civil proceeding, respondent honored the values expressed in *Quarles*. Simply put, the investigatory process will fall apart if police officers change their sworn accounts to avoid retaliatory termination. *See also*,

Dobosz v. Walsh, 892 F.2d 1135, 1141 (2d Cir. 1989) (First Amendment prohibited public officials from retaliating against police officer who, *inter alia*, cooperated with FBI investigation into allegation that another officer "threw down" a weapon near a police misconduct victim to create a bogus self-defense justification).

Similarly, public employees are broadly protected against retaliation for providing truthful sworn testimony in court. In *Reilly v. City of Atlantic City*, 532 F.3d 218 (3d Cir. 2008), the Court of Appeals summarized the state of the law in this area:

> It is axiomatic that "[e]very citizen . . . owes to his society the duty of giving testimony to aid in the enforcement of the law." *Piemonte v. United States*, 367 U.S. 556, 559 n. 2 (1961); accord *United States v. Mandujano*, 425 U.S. 564, 576 (1976) (recognizing that "the duty to give testimony" is an "obligation imposed upon all citizens"); *United States v. Calandra*, 414 U.S. 338, 345 (1974) ("The duty to testify has long been recognized as a basic obligation that every citizen owes his Government"); *New York v. O'Neill*, 359 U.S. 1, 11 (1959) ("A citizen cannot shirk his duty, no matter how inconvenienced thereby, to testify in criminal proceedings and grand jury investigations in a State where he is found"); *Blackmer v. United States*, 284 U.S. 421, 438 (1932) ("It is . . . beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts

> and giving his testimony whenever he is properly summoned"); *Blair v. United States*, 250 U.S. 273, 281 (1919) ("[I]t is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned").

Id. at 228. *See also, id.* at 231 ("When a government employee testifies truthfully, s/he is not 'simply performing his or her job duties'; rather, the employee is acting as a citizen and is bound by the dictates of the court and the rules of evidence") (quoting *Garcetti*, 547 U.S. at 423).

The Third Circuit further noted that circuit courts around the country have invoked the First Amendment "in recognizing the fundamental role in-court testimony plays in our society and its importance to the question whether a public employee's speech is protected by the First Amendment." *Id.* at 230 (citing *Herts v. Smith*, 345 F.3d 581, 586 (8th Cir. 2003); *Catletti ex rel. Estate of Catletti v. Rampe*, 334 F.3d 225, 229-30 (2d Cir. 2003); *Worrell v. Henry*, 219 F.3d 1197, 1204-05 (10th Cir. 2000); *Wright v. Ill. Dep't of Children & Family Servs.*, 40 F.3d 1492, 1505 (7th Cir. 1994)).

Under petitioners' argument, a police department may terminate a probationary officer who refuses to lie in the course of an investigation into police misconduct. At the time of the events giving rise to this

action, this case had not yet proceeded in a court of law. However, the principles in the above cases apply here. Respondent witnessed a lawless act against an arrestee. The police department was investigating the arrestee's complaint of police misconduct, and this complaint had the potential to result in a criminal proceeding. Witnesses to acts of police misconduct are not merely acting as employees; they are playing a critical role in the justice system, a role that every citizen must play. Importantly, after careful analysis, the Third Circuit in *Reilly* held that the above-cited First Amendment cases protecting the right of public employees to give evidence in court survives the rationale in *Garcetti*. 532 F.3d at 231-32. As petitioners have articulated no reason for this Court to depart from the settled views that the Third Circuit summarized in *Reilly*, certiorari is unwarranted.

C. The Second Circuit has not eviscerated *Garcetti*

Petitioners sound the alarm in suggesting that the Second Circuit's analysis in this case eviscerates settled law and "it is hard to see what is left of *Garcetti* in the Second Circuit." (Pet.18). This is hyperbole. Even post-*Jackler*, the Second Circuit, in 2011 alone, has rejected First Amendment claims in a variety of contexts, specifically finding that not all public employee speech has a civilian analogue. For example, in *Bearss v. Wilton*, 2011 U.S. App. LEXIS 22410 (2d Cir. Nov. 3, 2011), newspaper statements by city's information technology coordinator on municipal computer matters were unprotected because

the comments owed their existence to plaintiff's job responsibilities. *Id.* at *4-5. Moreover, plaintiff's comments before a municipal board were also unprotected and lacked a citizen analogue because they did not advance a public purpose and "were made in a forum not available to citizens who are not employees of the City of Rutland." *Id.* at *8. *See also, Anemone v. Metropolitan Transit Auth.*, 629 F.3d 97, 116-17 (2d Cir. 2011) (Director of Security at the MTA, who regularly interacted and cooperated with district attorneys as among his duties, engaged in unprotected speech where, against the wishes of his superiors, he spoke outside the chain of command in urging the district attorney to investigate alleged misconduct); *Otte v. Brusinski*, 2011 U.S. App. LEXIS 18892, at *2 (2d Cir. Sept. 12, 2011) (plaintiff's speech that certain patients at a psychiatric center should not use a potentially dangerous microwave oven was unprotected because it was "'part-and-parcel of his concerns about his ability to properly execute his duties' as a security hospital treatment assistant – namely, to maintain a safe environment for other patients and employees"); *Carter v. Inc. Vill. of Ocean Beach*, 415 Fed. App'x 290, 293 (2d Cir. 2011) (police officers did not engage in protected speech in "report[ing] what they believed to be misconduct by a supervisor up the chain of command – misconduct they knew of only by virtue of their jobs as police officers and which they reported as 'part-and-parcel of [their] concerns about [their] ability to properly execute [their] duties'"); *Morey v. Somers Cent. Sch. Dist.*, 410 Fed. App'x 398, 399-400 (2d Cir. 2011) (head custodian who was "responsible for overseeing the general cleaning and

upkeep of the school building" did not engage in protected speech in complaining about asbestos in high school gymnasium, and since he raised his concerns internally, there was no "relevant citizen analogue"). As the Second Circuit is not charting an independent path from *Garcetti* in resolving § 1983 retaliation claims, certiorari is unwarranted.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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