No. 11-670

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

REPLY BRIEF OF PETITIONER

PAUL M. SMITH
Counsel of Record
ELAINE J. GOLDENBERG
JESSIE K. LIU
JAMES C. COX
KRISTEN M. ROGERS
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
(202) 639-6000
psmith@jenner.com

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INTRODUCTION

The courts of appeals are firmly split about whether *Garcetti v. Ceballos*, 547 U.S. 210 (2006), eliminated the First Amendment protection afforded to a public employee's sworn statements about facts related to his job. Respondents' contention that there is no "clear conflict among the courts of appeals," Opp. 13, cannot survive even a cursory reading of the D.C. Circuit's opinion, which rejects the reasoning on the other side of the split in the clearest of language. Pet. 58a ("The Second Circuit gets *Garcetti* backwards"), 59a (the approach used by other circuits "is about as useful as a mosquito net made of chicken wire"), 60a (stating that "it is not difficult to sympathize with Second Circuit's dubious interpretation of *Garcetti*" and rejecting that interpretation). Petitioner's claim would have survived summary judgment in the Second, Third, and Seventh Circuits; based on the rule adopted by the Ninth Circuit and followed by the D.C. Circuit in this case, it was dismissed.

Nor is there any merit to respondents' suggestion that the Petition does not present a good vehicle to resolve the split. Contrary to respondents' distorted account of the summary judgment record, the facts easily support the inference that the pre-drafted affidavit Bowie refused to sign contained material misstatements to which Bowie could not lawfully have put his name. Indeed, this case is a far better vehicle to resolve the circuits' disagreement than *Jackler v. Byrne*, 658 F.3d 225 (2d Cir. 2011), *petition for cert. pending* (No. 11-517), where the key

issue is not one of the questions presented in the petition, and is in any event clouded by a difficult qualified immunity issue.

The decision below leaves public employees with an unpalatable choice that threatens the integrity of judicial and administrative proceedings: "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). Respondents contend that this Court intended that public employees be put to that choice. That is wrong, for the reasons stated in the Petition. Pet. 24-36. Regardless, only this Court can remove the confusion resulting from *Garcetti* about the status of public employees' sworn statements. This Court should grant the writ.

ARGUMENT

I. THE CIRCUITS ARE IRRECONCILABLY DIVIDED ON THE QUESTION PRESENTED.

As respondents acknowledge, the court below held that a public employee whose "job was the reason for his speech" never can receive First Amendment protection. Opp. 9; *accord* Pet. 55a. Three other courts of appeals have reached exactly the opposite conclusion, holding that, when an employee makes a truthful sworn statement or refuses to make a false one, he speaks pursuant to an obligation as a citizen to tell the truth—not "pursuant to [his] official duties," *see Garcetti*, 547 U.S. at 421—even if his speech relates to job responsibilities. *See Jackler*, 658 F.3d at 241 ("[T]he First Amendment protects the rights of a citizen to refuse to retract a

report . . . that he believes is true, to refuse to make a statement that he believes is false, and to refuse to engage in unlawful conduct by filing a false report."); *Reilly v. City of Atlantic City*, 532 F.3d 216, 231 (3d Cir. 2008) ("That an employee's official responsibilities provided the initial impetus to appear in court is immaterial to his/her independent obligation as a citizen to testify truthfully."); *Morales v. Jones*, 494 F.3d 590, 598 (7th Cir. 2007) (that "Morales testified about speech he made pursuant to his official duties" does not "render[] his deposition unprotected"). Respondents' contention that this case does not involve a "clear conflict" among the circuits is therefore simply wrong.

1. The First Amendment claim barred here by the D.C. Circuit's rule also would have failed in the Ninth Circuit under *Huppert v. City of Pittsburg*, 574 F.3d 396 (9th Cir. 2009), but would have been allowed to proceed in three other circuits. Conversely, the claims allowed by those three circuits in *Jackler*, *Reilly*, and *Morales* would have failed under the D.C. Circuit's (and Ninth Circuit's) approach.

In *Jackler*, a police officer submitted an internal report about an alleged incident of excessive force and refused to alter the report when his supervisors requested that he do so. 658 F.3d at 231. There is no question that, as with petitioner, the employee's job was the reason for his speech. The employee saw the incident because he was on duty; submitted the report because department policy required it; and was asked to change the report because he reported to the people making the request. *Id.* at 230-31.

There is also no question that, as with petitioner, the employee's speech "was ordered by his government employer." Pet. 55a.

In the D.C. Circuit, those considerations alone would have precluded First Amendment protection. Pet. 56a. But the Second Circuit reached the opposite result: "Jackler's refusals to retract his truthful Report and make statements that would have been false constituted speech by Jackler as a citizen on a matter of public concern, and hence were within the scope of the First Amendment." *Jackler*, 658 F.3d at 242.

The facts of Bowie's case differ only in that, rather than being asked to withdraw a truthful report and submit a false one, Bowie was asked to submit a false affidavit and then retaliated against for drafting a truthful one. Even respondents do not suggest that this difference could be legally relevant. Bowie's claim would have survived summary judgment in the Second Circuit.[1]

Reilly similarly addressed a public employee whose "official responsibilities provided the initial impetus" for the relevant speech. 532 F.3d at 231. Had the Third Circuit applied the D.C. Circuit's rule, its inquiry would have ended there, and it would have concluded that the employee's First Amendment claim was barred by *Garcetti*. Instead,

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[1] As the Petition explains, such a result, unlike the D.C. Circuit's result, would be consistent with *Garcetti* and this Court's pre-*Garcetti* precedents (*see* Pet. 25-30) and would safeguard the vital interest in obtaining truthful sworn statements (*see* Pet. 31-36).

the court allowed the claim to proceed, reasoning that "[w]hen a government employee testifies truthfully, s/he is not simply performing his or her job duties; rather, the employee is acting as a citizen." *Id.* at 231 (internal quotation marks omitted). Under the Third Circuit's reasoning, when Bowie refused to sign a false affidavit and prepared a truthful one, he too was "acting as a citizen." *Id.*

The same analysis applies to *Morales*, where an employee's deposition testimony would have been unprotected in the D.C. and Ninth Circuits because his "job was the reason for his speech." Opp. 9. But the Seventh Circuit nevertheless held that "his deposition testimony was protected." *Morales*, 494 F.3d at 598.

In short, there is serious division among the circuits about how to assess the First Amendment status of public employees' sworn statements, and the difference in approach is outcome-determinative in Bowie's case.[2] Respondents' half-hearted effort to deny the existence of a "clear" split is meritless.

2. Similarly meritless is respondents' attempt to argue that Bowie's case somehow falls outside the conflict among the circuits. Opp. 13-14. That argument rests on assertions of fact that are irrelevant, not established by the summary judgment record, or both.

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[2] As discussed in the Petition, the split also extends to the interpretation of "pursuant to official duties" generally. *See* Scott R. Bauries & Patrick Schach, *Coloring Outside the Lines:* Garcetti v. Ceballos *in the Federal Appellate Courts*, 262 EDUC. L. REP. 357 (2011).

First, respondents improperly minimize both Bowie's reasons for refusing to sign the pre-drafted affidavit (contending that "[h]is main reason . . . was that he 'did not write it,'" Opp. 14) and the changes he made in his alternative affidavit (asserting that "[a]s revised by Bowie, the affidavit continued to relate problems with Johnson's performance," Opp. 4). Respondents' characterization of the record is misleading, particularly given that inferences on the summary judgment record must be drawn in petitioner's favor. As respondents briefly acknowledge, *see* Opp. 3, but later ignore, Bowie contemporaneously stated that he would not sign the pre-drafted affidavit not only because he did not write it but also because it "contains some misstatements of fact" and "certain matters are couched in language that would convey impressions that I would not agree with." JA286.

Moreover, contrary to respondents' assertion that the revised affidavit did little more than correct petitioner's title, the new affidavit shows the depth of petitioner's disagreement with the pre-drafted affidavit's "misstatements" and "language." Whereas the pre-drafted affidavit repeated respondents' position that Johnson was terminated due to performance problems, not race discrimination or retaliation, and included no positive statements about Johnson, *see* JA283-85, the alternative affidavit made clear that Johnson's performance, although not perfect, was *not* a valid basis for his termination. *E.g.*, JA289 ("During conversations with both the first and second line supervisors of Mr. Johnson, neither shared the views being expressed

toward Mr. Johnson's performance."); JA288 (OIG leadership "publicly praised SA Johnson, describing him as a model investigator"); *id.* ("Johnson [received] an exceptional performance rating in a July 1999 interim evaluation," his last official review). By emphasizing that Johnson's performance did not merit termination, the revised affidavit contradicted the central thesis of the pre-drafted affidavit—that Johnson's EEOC claim must be baseless.

Second, respondents assert that this case is unlike *Jackler* because "Bowie never contends that he would have acted unlawfully in signing the draft affidavit." Opp. 13. But neither *Jackler* nor the opinion below turned on the legality of the statements in question. *Jackler*, 658 F.3d at 241 ("[A] citizen has a First Amendment right . . . to reject governmental efforts to require him to make statements he believes are false."); Pet. 59a (criticizing any exception to the rule that job-related speech receives no protection as transforming *Garcetti* into a "mosquito net of chicken wire").

In any event, if Bowie had signed the pre-drafted affidavit for submission to the EEOC, his statements would indeed have been illegal. As respondents acknowledge, a materially false statement violates 18 U.S.C. § 1001, which prohibits, "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . mak[ing] any materially false, fictitious, or fraudulent statement or representation." *Id.* § 1001(a)(2). The pre-drafted affidavit included statements that (the summary

judgment record confirms) Bowie believed were false—*e.g.*, that Johnson's termination "was predicated upon the Charging Party's failure to perform his duties in a satisfactory manner." JA284. And although respondents assert without support that the statements were not *materially* false, Pet. 14, it is difficult to imagine a statement more "capable of influencing[] the decision of the decisionmaking body to which it is addressed" than a false statement to the EEOC regarding a charging party's poor performance. *United States v. Gaudin*, 515 U.S. 506, 510 (1995).[3]

Third, respondents attach significance to the purported absence of an *ex ante* "order to speak or not to speak." Opp. 14. Setting aside the fact that one respondent *did* contemporaneously direct Bowie to state that "J[ohnson]'s performance at OIG was not satisfactory" and that "J[ohnson] was terminated b/c of unsatisfactory job performance," JA286, the First Amendment prohibits not only attempts to silence a speaker but also *ex post* "retaliation for protected speech." *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998). Especially viewed in the light most favorable to Bowie, *see Waters v. Churchill*, 511 U.S. 661, 682 (1994), the record shows that because Bowie refused to endorse Johnson's termination, respondents reduced Bowie's job responsibilities,

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[3] Respondents emphasize that the statements could not have been prosecuted as perjury. Opp. 14. Even if that is true, they nevertheless would have been unlawful under § 1001. *See Hubbard v. United States*, 514 U.S. 695, 697 (1995); *Julian v. United States*, 463 U.S. 1308, 1309 (1983).

downgraded his performance evaluations, and ultimately terminated him. *See* Pet. 7-8.

Fourth, respondents urge a distinction between a sworn statement "intended to be submitted by the government" and one "that was not ostensibly part of the government's own message." Opp. 19. None of the circuits has adopted this distinction, and for good reason. A government employer is free to decide what message it wants to convey on matters of public concern—but not to "coerce or intimidate its employees to engage in criminal conduct by filing reports that are false," *Jackler*, 658 F.3d at 242. And had the pre-drafted affidavit been signed by Bowie and submitted to the EEOC as part of a package of government materials, Bowie still would have been personally responsible for its falsity. Respondents' proposed distinction is simply not relevant to the question at hand: whether a public employee's sworn statements are made pursuant to official duties or pursuant to preexisting obligations of citizenship.

Thus, even if respondents' factual claims were accurate, none reasonably could have affected the outcome here. The outcome-determinative factor, as the D.C. Circuit itself indicated, *see* Pet. 57a, was the choice of a governing rule. If Bowie's case had been brought in the Second, Third, or Seventh Circuit, the result in this case would have been different.

II. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

Contrary to respondent's assertions, this case presents an excellent vehicle for this Court to address the question presented.

First, although a jury found in the government's favor on a separate claim Bowie brought under Title VII, *see* Opp. 11, respondents do not dispute that the jury's verdict has no preclusive effect on the First Amendment claim. Indeed, the elements of proof required to establish the two claims differ markedly. For example, although the Title VII jury likely could not have found actionable retaliation based on respondents' pre-termination criticism of Bowie, their transfer of high-profile work, and their downgrading of performance evaluations, "a § 1983 case does not require an adverse employment action within the meaning of the antidiscrimination statutes." *Spiegla v. Hull*, 371 F.3d 928, 941 (7th Cir. 2004), *overruled in part on other grounds by Garcetti*, 547 U.S. at 524-25.

Second, although respondents note that the court of appeals remanded for further proceedings on a separate conspiracy claim under 42 U.S.C. § 1985(2), Opp. 18, they do not explain why this posture counsels against certiorari. Respondents fail to mention that the remanded claim has been stayed pending this Court's review. *See Bowie v. Maddox*, No. 08-5111 (D.C. Cir Oct. 3, 2011) (order staying mandate). And, in any event, this Court frequently

grants review prior to a final judgment when doing so furthers the interests of judicial economy.[4]

Such is the case here. The First Amendment question has been fully decided. Delaying consideration of that question would risk the need for multiple trials—first on the conspiracy claim and then later (if after more proceedings in the lower courts this Court ultimately addresses the circuit split and rules in Bowie's favor) on the First Amendment claim—without improving the record for this Court's review. The remanded claim is based not on the EEOC affidavits but rather on a *later* "conspiracy to deter [Bowie] from testifying . . . in federal court." Pet. 9a. Accordingly, contrary to respondents' suggestion, *see* Opp. 18, Bowie's First Amendment damages do not "substantially overlap with" the damages under the conspiracy claim.

Third, respondents assert that Bowie's First Amendment claim could be resolved on alternative grounds. Opp. 20-23. Those grounds are meritless, for reasons explained in the Petition and strongly suggested in the D.C. Circuit's opinion. *See* Pet. 29-30 & n.9 and Pet. 18a-19a (public concern); Pet. 7-8 and Pet. 4a-5a (causation). More importantly, they are irrelevant here. The court of appeals explicitly declined to rule on the alternative grounds and based its rejection of Bowie's First Amendment claim solely

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[4] From just this term, *see, e.g., Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 131 S. Ct. 3057 (2011); *Martel v. Clair*, 131 S. Ct. 3064 (2011); *CompuCredit Corp. v. Greenwood*, 131 S. Ct. 2874 (2011); *Florence v. Bd. of Chosen Freeholders*, 131 S. Ct. 1816 (2011); *Maxwell-Jolly v. Santa Rosa Mem'l Hosp.*, 131 S. Ct. 996 (2011).

on its resolution of the *Garcetti* question. *See* Pet. 19a. That question is both critically important and cleanly presented in this case. This Court should grant certiorari, resolve the question presented, and then remand if necessary for consideration of other issues in the first instance. *See, e.g.*, *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2187 (2011).

2. The pending petition in *Jackler* does not present a similarly favorable vehicle for resolving the conflict. Unlike respondents here, the defendants in *Jackler* argued that, even if they violated the First Amendment, they were entitled to qualified immunity. 658 F.3d at 243. The Second Circuit declined to grant immunity, directing the district court to reconsider its availability "following the jury's resolution of any factual issues needed to inform that decision." *Id.* Thus, qualified immunity remains a way in which *Jackler*'s First Amendment claim could be rejected independent of the issue regarding truthful sworn statements that has divided the circuits. In contrast, Bowie's First Amendment claim has been finally dismissed based on the D.C. Circuit's resolution of that very issue, and will remain foreclosed unless this Court grants certiorari.

Finally, although the papers are somewhat murky, it appears that neither party in *Jackler* conceives of that case as presenting the question concerning sworn statements that has actually

divided the circuits.[5] Only the Petition in this case frames the issue in a manner that will facilitate this Court's resolution of the critical question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL M. SMITH
Counsel of Record
ELAINE J. GOLDENBERG
JESSIE K. LIU
JAMES C. COX
KRISTEN M. ROGERS
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
(202) 639-6000
psmith@jenner.com

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[5] The petitioner in *Jackler* lists two questions: "1. May a government employer, free of First Amendment liability, discipline an employee for his refusal to prepare a job-related report?" and "2. Is there an exception to Garcetti for law enforcement employees?" Petition for Cert., *Byrne v. Jackler*, No. 11-517 (filed Oct. 20, 2011).