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, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

When a government agency prepares a draft affidavit for a high-level employee about the justification for a disputed personnel decision, and he declines to sign the draft and instead provides a revised affidavit for submission by the agency as part of its official response to an external investigation of the decision, has the employee acted as a citizen entitled to First Amendment protection rather than pursuant to his official duties?

LIST OF PARTIES

The plaintiff-appellant below and petitioner before this Court is David M. Bowie.

The defendants-appellees below who are respondents before this Court are the District of Columbia and three current or former officials in its 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. The defendants-appellees who are not respondents before this Court, each again named in his official and individual capacities, are Jerome A. Campane, former Deputy Inspector General for Investigations and former Assistant Inspector General for Investigations; and Alvin Wright, Jr.

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STATEMENT

Petitioner David Bowie was terminated from his position as a high-level official at the District of Columbia Office of the Inspector General for poor performance. He sued and alleged that his termination was retaliation for his support of a lower-level employee, Emanuel Johnson, who alleged that his own termination was motivated by discrimination. Bowie asserted a number of constitutional, statutory, and common-law claims against respondents, the District of Columbia and several of its employees. The district court on dispositive motions and then a jury after trial together rejected all his claims. The court of appeals affirmed in part and vacated and remanded for further consideration in part.

Bowie seeks this Court's review only on his First Amendment claim. Picking from several alternative grounds for affirmance of summary judgment for respondents on this claim, the court of appeals chose a straightforward application of *Garcetti v. Ceballos*, 547 U.S. 410 (2006). That decision holds that the First Amendment does not protect a government employee from discipline based on speech activities pursuant to his official duties. Hence, Bowie had no viable claim even if, as he alleged, he suffered retaliation because he declined to sign one draft affidavit and instead prepared another in his official capacity as Johnson's supervisor. That is especially clear given that Bowie intended the affidavit to be submitted by the Office of the Inspector General itself as part of its official response to an external investigation into the alleged discrimination against Johnson.

1. a. From 1997 to 2002, David Bowie was employed as the head of the Investigations Division at

the District of Columbia Office of the Inspector General ("OIG"). Pet. App. 2a. Emanuel Johnson began working under Bowie in June 1999. Pet. 5.

In February 2000, Charles Maddox, head of the OIG and Bowie's supervisor, met with Bowie and other OIG managers to discuss concerns with Johnson's performance. Pet. App. 2a–3a. Some of them supported termination, while Bowie supported giving Johnson a sixty-day period in which to improve his performance. Pet. App. 3a; C.A. Joint App. ("J.A.") 15–16. Maddox terminated Johnson, effective March 1, 2000. Pet. App. 3a.

On March 28, 2000, Johnson filed a discrimination charge against the OIG at the United States Equal Employment Opportunity Commission ("EEOC"). Pet. App. 3a. As part of its initial investigation, the EEOC asked the OIG as the respondent for its "side of the story" through "submission of a position statement composed of evidence," and it suggested without requiring that statements from those with first-hand knowledge be sworn before a notary. J.A. 281.

Counsel representing the OIG, Gail Davis, asked Maddox and other OIG supervisors in May 2000 to prepare affidavits to support the position statement the OIG would submit to the EEOC. Pet. App. 3a; J.A. 342–43. Unable to meet with Bowie personally, she sent him a draft affidavit based on facts she had received from the other supervisors. J.A. 343. The draft affidavit described Johnson's poor performance, while disclosing that Bowie had suggested placing Johnson on a performance improvement plan rather than terminating him. J.A. 283–85. It also detailed how, when Bowie and Johnson had both previously worked for the Federal Bureau of Investigation

("FBI"), Johnson had instituted a class action against the FBI alleging racial discrimination and Bowie was a member of the class who assisted with the suit. J.A. 283. The blank signature line on the draft was for "David Bowie, Assistant Inspector General" of the "Office of the Inspector General." J.A. 285. The draft had a space for a notary to indicate that Bowie had "[s]ubscribed and sworn" to the affidavit, but did not say that he did so under penalty of perjury. J.A. 285.

Bowie declined to sign the draft, explaining in an e-mail to OIG general counsel Karen Branson:

> I briefly skimmed through the affidavit and I will not sign it due to the fact that (1) I did not write it, (2) it contains some misstatements of fact, and (3) certain matters are couched in language that would convey impressions that I would not agree with.
>
> . . .
>
> If I am to submit an affidavit in this, or any legal matter, I will take the liberty of writing it. Accordingly, it will be difficult for me to deal with this and several other forest fires today. I will spend whatever time is needed to deal with [it] by noon tomorrow. If that is a problem, please let me know.

J.A. 286. Branson responded that Bowie could revise the affidavit and could have the extra time he requested, because an "OCC atty"—that is, an attorney from the Office of the Corporation Counsel, the former name for the Office of the Attorney General for the District of Columbia—had gotten an extension for the OIG's position statement. J.A. 286.

Bowie revised the draft affidavit. Pet. App. 3a–4a. He shortened the material relating to the class action against the FBI brought by Johnson. J.A. 287. He added material about Johnson's earlier application for employment, which had been rejected by then-Inspector General E. Barrett Prettyman, Jr., and the decision to hire Johnson on his subsequent application. J.A. 287–88. As revised by Bowie, the affidavit continued to relate problems with Johnson's performance, noting that—almost a year after starting working under Bowie—"Johnson clearly did not yet understand the mechanics of how things are done in [the OIG]." J.A. 289. Much as in the draft, Bowie indicated that he had recommended placing Johnson on a performance improvement plan, but could not "guarantee the end results" and would have "recommend[ed] termination" if these "efforts prove[d] fruitless." J.A. 289. Bowie signed this affidavit before a notary, but not under penalty of perjury. J.A. 290.

Davis was unable to get Bowie to focus his affidavit on the issues in the EEOC charge and, facing a deadline, she decided to submit the OIG's response without Bowie's affidavit, as "it included too much information that was not relevant to the issue at hand" and Bowie had refused to revise it. Pet. App. 4a; J.A. 343. As she noted, Bowie was free to submit his affidavit to the EEOC on Johnson's or his own behalf, independent of the OIG's position statement. Pet. App. 20a; J.A. 343.

Following the EEOC proceedings, Johnson filed but lost a retaliation suit claiming that he had been terminated due to his successful suit against the FBI. *See Johnson v. Maddox*, 270 F. Supp. 2d 38 (D.D.C. 2003), *aff'd sub nom. Johnson v. Williams*, 117 F.

App'x 769 (D.C. Cir. 2004). The trial judge found no evidence of a causal connection between his filing of complaints against the FBI and his termination by the OIG, and no evidence of retaliation. *Id.* at 43.

b. In the meanwhile, concerns accumulated regarding Bowie's own performance. Pet. App. 5a. A report from January 2000—before any of the internal discussions relating to Johnson's termination—showed that Bowie's Investigations Division had significant deficiencies in management, investigative production, and internal policies and procedures. J.A. 163–77. Bowie agreed with many of the report's criticisms and recommendations. J.A. 179–84.

Bowie made little progress, and an individual performance plan was created for him in 2001. *See* Pet. App. 5a; J.A. 328. A mid-year evaluation in May 2002 found that managing his "stagnant" division "increasingly appear[ed] to be an overwhelming responsibility" for him. J.A. 328. "[T]here is a dysfunction in management responsibilities, assignments are frequently completed past reasonable deadlines, and morale among the investigators is poor." J.A. 328. The report went into great detail about numerous problems with his division—the "most significant component of the OIG"—and his personal performance. J.A. 328–32.

In June 2002, after Bowie's division failed to timely begin internal preparations for a statutorily required peer review, Maddox ordered a reinspection of the division. Pet. App. 31a. It revealed essentially the same deficiencies and made the same recommendations as the inspection three years earlier. C.A. Supp. App. ("S.A.") 1–19. Bowie was terminated in August 2002. Pet. App. 5a.

2. In April 2003, Bowie sued the District of Columbia and several of its employees (as well as some federal officials no longer involved in this case). Rec. Doc. 1. In addition to the First Amendment claim now at issue, Bowie claimed: wrongful termination, under both the common law and 42 U.S.C. §§ 1981 & 1983; violation of the District of Columbia Whistleblower Protection Act, D.C. Code § 1-615.51 *et seq.*; retaliation under the District of Columbia Human Rights Act, D.C. Code § 2-1401.01 *et seq.* and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*; and conspiracy under 42 U.S.C. §§ 1985(2) and 1986. Pet. App. 5a–6a, 28a–29a & n.1.

In May 2006, the district court granted summary judgment for the District of Columbia defendants on several claims including Bowie's First Amendment claim. Pet. App. 40a–45a, 52a–53a. On this claim, it reasoned that the OIG was not required to submit Bowie's affidavit as part of its position statement and "nothing . . . prevent[ed] [him] from submitting the affidavit to EEOC of his own accord." Pet. App. 41a–42a. It further reasoned that the speech at issue did not "involve a matter of public concern." Pet. App. 43a. Instead, it involved only 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. The affidavit lacked any issue of public concern, and instead revolved entirely around Johnson's work performance and the possibility of remedial measures." Pet. App. 44a (citations omitted).

By the time of the May 2007 jury trial, the only remaining claims were retaliation under the District of Columbia Human Rights Act and Title VII. Pet.

App. 6a. At trial, Bowie relied heavily on the episode relating to the affidavit for these claims, as "protected activity" under the relevant statutes and "where the retaliation start[ed]." J.A. 436–37. The jury returned a defense verdict. J.A. 233–37.

3. The court of appeals unanimously affirmed on most claims, including the First Amendment claim, but vacated and remanded on the claim under 42 U.S.C. §§ 1985(2) and 1986. Pet. App. 1a–2a. On the First Amendment, it did not need to decide whether the district court was correct to find Bowie had failed to identify a matter of public concern. Pet. App. 19a. The claim independently failed under *Garcetti* because the speech was "in his official capacity":

> 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."

Pet. App. 20a.

In a petition for rehearing, Bowie conceded that *Garcetti* leaves "unprotected employee speech . . . that is either commissioned or created by the government" and "foreclose[s] First Amend[ment] protections for employee testimonial speech that is speech on behalf of the government." C.A. Reh'g Pet. 4, 5, 11. He argued, however, that *Garcetti*'s "proscriptions do not apply to government employee speech where there is an analogue to that of non[-]government employees." C.A. Reh'g Pet. 9.

The court of appeals denied the petition with an opinion rejecting this last point. Pet. App. 54a–60a. It explained: "The [*Garcetti*] 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.' Only then is the analogy to private speech 'relevant.'" Pet. App. 57a. It criticized reasoning in a Second Circuit decision, *Jackler v. Byrne*, 658 F.3d 225 (2d Cir. 2011), that lent Bowie "support." Pet. App. 57a–60a. It did not indicate, however, how it would have ruled on *Jackler*'s facts, which involved police officials ordering a subordinate to commit a crime by retracting a truthful report and filing a false one to cover up police misconduct. Pet. App. 57a, 60a. Indeed, given how extreme those facts were, it allowed that, "[u]nder the circumstances, it is not difficult to sympathize with the Second Circuit's dubious interpretation of *Garcetti*." Pet. App. 60a.

ARGUMENT

The petition for a writ of certiorari should be denied. The decision of the court of appeals is correct and not in clear conflict with the decision of any other court of appeals, and in any event this case would be a poor vehicle for the issue petitioner presents.

1. The decision below straightforwardly applies this Court's decision in *Garcetti* and is correct. As the court of appeals explained, *Garcetti* unequivocally holds that the First Amendment does not protect the speech of a government employee "pursuant to his official duties." Pet. App. 19a–20a, 55a–57a; *see Garcetti*, 547 U.S. at 421.

The application of this test here is clear. Bowie does not dispute, nor could he dispute, that his job was the reason for his speech: he was asked to speak and purported to speak in his capacity as "Assistant Inspector General for Investigations" and Johnson's superior about Johnson's work performance. Pet. App. 20a. Bowie claims half-heartedly that he "was not paid to submit testimony to the EEOC," but he provides no citation or record support. Pet. 24. Nor is it reasonable to think that a high-level government employee would not be expected as part of his official duties to provide views on the performance of those he supervised. Bowie's position description in fact included "[h]andling . . . matters related to personnel management" and working with senior officials on "all issues affecting [the OIG] generally and major issues affecting [his] Division." S.A. 39–40.

Bowie's real argument is not that he satisfied the test the Court established in *Garcetti* but that *Garcetti* leaves room for an exception for a particular kind of speech undertaken pursuant to official du-

ties: sworn testimony. That contention is inconsistent not only with how the Court phrased its holding but also with its reasoning: "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." 547 U.S. at 421–22.

Without addressing this reasoning, Bowie says "*Garcetti* confirmed that speech restrictions must derive from legitimate management needs" and points to the Court's references to potential protection for statements "'made at work' or 'related to the speaker's job.'" Pet. 27 (quoting 547 U.S. at 420, 421). He ignores the point: *some* statements made at work and related to the speaker's job are protected, but *only* those made as a citizen rather than pursuant to the speaker's official duties. Similarly, though he says that limitations on government employee speech "are justified only to ensure 'the efficient provision of public services," Pet. 27 (quoting 547 U.S. at 418), *Garcetti* says that federal courts should engage in "delicate balancing" to evaluate such limitations only when an employee implicates the First Amendment by "speak[ing] as a citizen addressing a matter of public concern." 547 U.S. at 423.

Although Bowie suggests the application of *Garcetti* to sworn testimony will undermine the integrity of judicial and administrative proceedings, Pet. 31, this Court rejected just such an argument in *Garcetti* itself. The speech at issue was the internal memorandum of a prosecutor, Ceballos, detailing serious misrepresentations in a police affidavit supporting a

search warrant and suggesting dismissal of the associated criminal case. 547 U.S. at 413–14. That category of speech is important to judicial proceedings, and to the greater public interest. Indeed, the Court explicitly recognized that "[e]xposing governmental inefficiency and misconduct is a matter of considerable significance." *Id.* at 425. The Court nonetheless held the First Amendment did not provide protection and noted "the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing." *Id.* Indeed, here, Bowie sought protection under both federal and District of Columbia statutes for the same alleged retaliation based on the episode involving his affidavit, and the district court allowed him to reach a jury on these statutory claims. J.A. 436–37. The ultimate reason why he received no relief was not that the law left his asserted wrong unremediable, but that the jury rejected his claims on the facts. J.A. 233–37.

Moreover, even assuming *Garcetti* leaves room for a rule that some sworn testimony that owes its existence to a public employee's professional responsibilities nevertheless constitutes citizen speech, that rule would not apply to Bowie's speech. The problem with Bowie's theory is not just that he was speaking in his capacity as a high-level OIG official and Johnson's supervisor. The draft affidavit submitted to Bowie and the affidavit he drafted and signed were both intended to be submitted *by the government* for the OIG's own position statement.

It is one thing when an official speaks for himself, as Ceballos did in his internal memorandum in *Garcetti*, and there is no sense in which the speech was

meant to be on behalf of the greater government. It is another thing entirely when the speech is intended to be part of the government's own message to an outside body like the EEOC, as Bowie recognized below. C.A. Reh'g Pet. 4, 5, 11. The context here makes particularly plain that Bowie was speaking pursuant to his official duties in the sense that *Garcetti* meant.

On this point, Bowie is wrong to imply that he received some assurance that he believed the affidavit he signed would be submitted to the EEOC regardless of whether the OIG agreed with it, and that he "reasonably believed" it had been provided. Pet. 7, 18 n.4 (citing J.A. 27, 418–20). He cites his unverified complaint and his own testimony from the trial in Johnson's suit against the OIG. The complaint, however, indicates just that Bowie thought the OIG was "required" to submit the affidavit to the EEOC. J.A. 27. The reason he thought as much was that he perceived the OIG to have a "duty both legal and moral" to do so. C.A. Reply Br. 3. He did not say anyone actually told him the affidavit would be sent; instead, what he thought significant was that "[t]he defendants simply never made any mention . . . that his affidavit was not forwarded to the EEOC." C.A. Reh'g Pet. 13. As for his testimony, Bowie candidly admits therein that he "did not know" what was supposed to happen to the affidavit. J.A. 420.

Bowie no longer claims that the OIG had an obligation to include his affidavit with its position statement to the EEOC, and he has never alleged that the OIG interfered with any effort on his part to contact the EEOC himself. Pet. App. 20a, 41a–42a, 56a n.1. This case does not clearly present any ques-

tion about speech by a government employee for himself at all, but rather a question about the First Amendment's application to speech by a government employee that was, in a meaningful sense, on the government's behalf. That question is easily answered and does not warrant review.

2. Bowie also fails to identify a clear conflict among the courts of appeals. He relies on decisions of the Second, Third, and Seventh Circuits, but the cited decisions turn on critically different facts.

a. Although the court of appeals here criticized the reasoning of the Second Circuit's decision in *Jackler*, it did not "expressly acknowledge[ ] a conflict" in holdings, Pet. 4, nor is there a clear conflict.

Jackler involved police officials' order that a subordinate, Jackler, commit a crime by replacing a truthful report disclosing police misconduct with a false one covering up that misconduct. 658 F.3d at 229–32, 241–42. The Second Circuit emphasized that "retracting a truthful statement to law enforcement officials and substituting one that is false would expose the speaker . . . to criminal liability." *Id.* at 240. Similarly, it recognized that officials who order such behavior themselves act criminally. *Id.* In these extreme circumstances, the Second Circuit concluded: "In sum, it is clear that the First Amendment protects the rights of a citizen to refuse to retract a report to the police 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 with the police." *Id.* at 241.

This case does not resemble *Jackler*. Bowie never contends that he would have acted unlawfully in signing the draft affidavit, let alone point to any-

thing in the summary judgment record that would provide a basis for him to so contend. His main reason for refusing to sign the draft was that he "did not write it." J.A. 286. He explained: "If I am to submit an affidavit in this, or any legal matter, I will take the liberty of writing it." J.A. 286. Although he saw "some misstatements of fact" when he "briefly skimmed" the draft, he did not detail them or contend they were material. J.A. 286.[1] Further, the draft and final affidavits did not indicate that they would be signed "under penalty of perjury." J.A. 285, 290. A perjury prosecution based on an affidavit is proper under 18 U.S.C. § 1621 and 28 U.S.C. § 1746, however, only where the affiant "willfully subscribes as true any material matter which he does not believe to be true" and does so "under penalty of perjury." Similarly, false statements are punishable under 18 U.S.C. § 1001 only if they are materially false.

There are still further differences between *Jackler* and this case. Jackler spoke truthfully and was "order[ed]" to retract that speech and to speak falsely. 658 F.3d at 241–42. Here, there was no order to speak or not to speak. Bowie was presented with a draft affidavit, he was permitted to revise it on the timeline he suggested, and he did so. J.A. 283–90.

If the Second Circuit in the future is faced with facts like those here, it may distinguish *Jackler* based

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[1] Indeed, when Bowie revised the affidavit, he changed insignificant details such as that his titles at the FBI included "Special Agent" and "Special Agent Supervisor," not just the former, and that he "met" Johnson there but did not work as his "superior or subordinate." *Compare* J.A. 283 *with* J.A. 287.

on its unusual facts and rule as the court of appeals did here. There is no clear conflict in holdings.

b. The same is true regarding the Third Circuit decision Bowie cites, *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008). The case involved an assertion of retaliation for testimony a police official, Reilly, gave after being called by the prosecution in a criminal trial about public corruption. *Id.* at 220. The Third Circuit found this testimony protected by the First Amendment even though it "appears to have stemmed from his official duties in the investigation." *Id.* at 231. The ruling turned on the fact that this testimony was actually presented in court: "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." *Id.* (citation omitted).

This case is different in many ways. *First*, Reilly was called to testify. The Third Circuit relied heavily on cases emphasizing the duty to respond to court orders to testify, such as *Piemonte v. United States*, 367 U.S. 556 (1961). 532 F.3d at 228–29. Thus, in a dissenting opinion on which Bowie relies, Pet. 19–20, Judge William Fletcher of the Ninth Circuit recognized that *Reilly* is limited to circumstances "where there is an independent legal duty to speak" such as a subpoena. *Huppert v. City of Pittsburg*, 574 F.3d 696, 722 (9th Cir. 2009) (Fletcher, J., dissenting). Bowie, unlike Reilly, was not formally called to testify, *see* Pet. 56a n.1, and as discussed he should have known that the draft affidavit and the one he signed were both only for potential presentation with the OIG's position statement. Bowie has "point[ed] out

that the EEOC has administrative subpoena power," but "has never alleged that the EEOC subpoenaed his testimony individually." Pet. 56a n.1.[2]

Second, Reilly actually testified. Bowie's affidavit was not submitted to the EEOC and, as discussed, is not equivalent to testimony because it was not sworn under penalty of perjury.

Third, Reilly was involved in court proceedings for adjudication of a criminal case. Bowie's affidavit was intended for submission to the EEOC, an administrative body that was only investigating, not adjudicating, Johnson's claim. J.A. 281–82; *see* 42 U.S.C. §§ 2000e-5, 2000e-8.

These distinctions matter under Bowie's contention that what matters is "the source of the government employee's duty to speak." Pet. 12. The Third Circuit found Reilly's duty to speak based on cases dealing with witnesses' duty to testify truthfully after being called to do so in court proceedings. Bowie cannot claim the same duty animated his speech.

c. Similar distinctions also undermine Bowie's reliance on the Seventh Circuit decision in *Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007). The speech at issue there was the deposition testimony of a police officer, Morales, pursuant to a subpoena. *Id.* at 595, 598. The Seventh Circuit found the speech protected because "[b]eing deposed in a civil suit pursuant to a

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[2] The Third Circuit discussed how, in *Green v. Philadelphia Housing Authority*, 105 F.3d 882 (3d Cir. 1997), it had found testimony from a voluntary court appearance protected, 532 F.3d at 229–30, but that decision predated *Garcetti*.

subpoena was unquestionably not one of Morales' job duties because it was not part of what he was employed to do." *Id.* at 598. This decision too turns on the presence of "an independent legal duty to speak," which Morales had but Bowie did not. *Huppert*, 574 F.3d at 722 (Fletcher, J., dissenting).

Moreover, even to that extent, the Seventh Circuit's terse reasoning is based on the "circumstances," as Bowie recognizes. Pet. 17. Morales was a police officer in a vice division and the deposition was about an internal personnel matter involving another officer. 494 F.3d at 592, 595. The court concluded in that particular context that providing such testimony "was not part of what he was employed to do." *Id.* at 598. It did not indicate that testimony pursuant to an independent legal duty to speak would *always* be protected, or that it would think (despite *Garcetti*) that the First Amendment would apply when a high-level government employee is asked as part of his official duties to provide views on the performance of those he supervised. Again, there is no clear conflict with the decision of the court of appeals here.[3]

3. In any event, this case presents a poor vehicle for deciding Bowie's proffered issue. The petition

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[3] Bowie also refers briefly to the Seventh Circuit's later decision in *Fairley v. Andrews*, 578 F.3d 518 (7th Cir. 2009), but that decision dealt with a "prior-restraint claim" and, in particular, an allegation that government actors were attempting to prevent plaintiffs from testifying at all by "assaulting and threatening" them. *Id.* at 520–21, 524–26. Bowie's First Amendment claim does not involve anything of the sort.

comes to the Court in an interlocutory posture, unusual aspects of the case would limit the precedential effect of any ruling by this Court, and the Court might not even reach the issue presented if it grants review because of alternative reasons to affirm on the First Amendment claim.

a. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *VMI v. United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for a writ of certiorari). There is no final judgment here because the court of appeals remanded for further proceedings on Bowie's claims under 42 U.S.C. §§ 1985(2) and 1986. Pet. App. 26a.

Bowie argues that the claims are "distinct" from his First Amendment claim, Pet. 11 n.3, but that may not be so as a practical matter. Before the district court dismissed these statutory claims (wrongly, in the estimation of the court of appeals), Bowie indicated in a pretrial statement that he would seek damages for "back and front pay, compensatory and punitive damages against defendants, as well as damages for mental anguish, pain and suffering." Rec. Doc. 107, at 2–3, 27. Because any relief he might win on his First Amendment claim would substantially overlap with, if not be completely encompassed within, the same request, that claim may become moot or practically moot if this Court awaits a final judgment rather than accepting the case now.

Further, the court of appeals perceived a "circuit split" on an issue relating to Bowie's claims under 42 U.S.C. §§ 1985(2) and 1986. Pet. App. 10a–13a & n.4. These claims are not presented in the petition for certiorari. Depending on further proceedings,

however, one side or the other eventually may seek this Court's review of the resolution of those claims. It would promote judicial economy for this Court to consider all the issues potentially presented for review in this case at the same time rather piecemeal.

b. Nor would this case present a good vehicle for providing guidance on how to apply *Garcetti*. This case is not "[e]mblematic" of any confusion on that score, Pet. 21, but rather unusual, such that this Court's resolution of the case would have only limited precedential effect.

First, as discussed, the affidavit was intended to be submitted by the government for the OIG's own position statement. To the extent the lower courts need guidance on application of *Garcetti*, however, the issue will be whether speech that was not ostensibly part of the government's own message was taken pursuant to the employee's official duties or instead as a citizen.

Second, as discussed, Bowie does not appear to contend before this Court that he would have acted unlawfully in signing the draft affidavit presented to him, or that he revised the affidavit so as not to act unlawfully. This case is thus unlike most cases where sworn testimony is the speech at issue.

Third, as discussed, Bowie's affidavit was never submitted to the EEOC (and for good reason, Pet. App. 4a, 42a; J.A. 343). Most cases involving sworn testimony will involve situations where the testimony was actually received by a tribunal of some sort. Further, many of those will involve circumstances in which the person testifying was under some legal duty to do so.

c. Finally, there are good alternative grounds for affirmance, such that the Court might not reach Bowie's proffered issue even were it to grant review.

First, the district court was correct to hold that Bowie's speech was not on a matter of public concern, as necessary for the First Amendment to provide protection. Pet. App. 43a–45a; *Garcetti*, 547 U.S. at 418. (The court of appeals found that it had no "need [to] decide" the issue. Pet. App. 19a.)

Speech concerning only an individual personnel matter is not speech on a matter of public concern. Pet. App. 44a; *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2501 (2011); *Connick v. Myers*, 461 U.S. 138, 146–47 (1983). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147–48.

Neither the draft affidavit nor the final affidavit addressed a matter of public concern under this test. Bowie does not even assert as much as to the former. *See* Pet. 30 n.9. As to the latter, the district court explained: "plaintiff questioned Johnson's termination, but did not indicate that it was racially motivated or that it was retaliatory. The affidavit lacked any issue of public concern, and instead revolved entirely around Johnson's work performance and the possibility of remedial measures." Pet. App. 44a.[4]

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[4] The affidavit includes a short paragraph stating that Bowie was aware while at the FBI that Johnson "was the lead Plaintiff in a Class Action Lawsuit against the FBI alleging various acts of discrimination"; that Bowie was "familiar with

Unable to dispute as much, Bowie relies on the supposed "implication . . . that the allegations of poor performance were a pretext to mask discrimination or retaliation for Johnson's participation in the earlier class action." Pet. 7; *see* Pet. 30 n.9. The test is not, however, whether the speech is connected in some way with a matter of public concern, but whether it is speech "on" such a matter. *Borough of Duryea*, 131 S. Ct. at 2491; *Garcetti*, 547 U.S. at 418.

In any event, Bowie's "implication" is not even apparent from a fair reading of the content, form, and context of the affidavit. Far from suggesting that Maddox lacked a reasonable basis for terminating Johnson, Bowie explicitly agreed there were serious performance problems: almost a year after joining the OIG, "Johnson clearly did not yet understand the mechanics of how things are done." J.A. 289. Thus, Bowie himself recommended placing Johnson on a performance improvement plan. J.A. 289. Further, Bowie indicated that Maddox opted for termination only after asking whether it could be "guarantee[d] that the issues . . . would be resolved" pursuant to that plan. J.A. 289. Bowie could not do so and would have

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the issues leading to that action"; and that Bowie was "a participant in that litigation." J.A. 287. Bowie does not rely on that paragraph to assert that his affidavit addressed a matter of public concern, and for good reason. The affidavit does not place any import on this information or link it to Johnson's later EEOC matter. Moreover, the draft affidavit submitted to him included this information and more on Johnson's suit against the FBI. J.A. 283. Bowie thus does not claim, and could not claim, that the OIG would retaliate against him for including this information.

"recommend[ed] termination" if these "efforts prove[d] fruitless." J.A. 289. The affidavit thus implies not that Johnson's performance was a pretext but the opposite. Any disagreement between Maddox and Bowie fell within the category of reasonable disagreement between managers over the appropriate method of discipline. That is not a matter of public concern.

Bowie separately argues, citing *Johnston v. Harris County Flood Control District*, 869 F.2d 1565 (5th Cir. 1989), that *any* sworn testimony is inherently a matter of public concern. Pet. 30 n.9. That case, like others, turned on the fact that there was actual testimony submitted to a tribunal, and so is inapposite. 869 F.2d at 1578. Moreover, the rule that "[w]hen an employee testifies . . . he speaks in a context that is inherently of public concern," *id.*, is highly questionable given the decision last Term in *Borough of Duryea v. Guarnieri*. In the highly related context of the Petition Clause, this Court held that a government employee filing a suit does not automatically win First Amendment protection but rather must show that the suit involves a matter of public concern. 131 S. Ct. at 2491–92. That holding strongly suggests that testimony is not inherently of public concern for First Amendment purposes.

Second, causation presented another alternative ground for affirmance. Bowie made no affirmative connection in the evidence between the affidavits and his termination, and the circumstantial evidence was insufficient to allow a reasonable juror to find the "but-for" causation necessary to support his First Amendment claim. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285–87 (1977).

To the extent Bowie presented evidence of retaliatory motive, it centered on events having nothing to do with his First Amendment claim. Indeed, he details how, allegedly, Maddox pressured him to support the decision to terminate Johnson but Bowie refused to do so, well before anything having to do with the affidavits. Pet. 5–6. Meanwhile, Bowie's specific decision to replace the draft affidavit with one he drafted himself provided little incentive to retaliate because, as discussed, Bowie's own affidavit confirmed that Johnson had performance problems and did not state or even suggest that Maddox lacked good reason to think so. And in fact Bowie was not terminated until well more than two years later, based on compelling evidence of performance problems of his own. Pet. App. 5a; J.A. 163–84, 328–32; S.A. 1–19.

Bowie misstates the record in claiming, relevant to causation, that he was "admonished . . . for his refusal to submit an affidavit endorsing Johnson's termination." Pet. 7. The passage he cites says nothing about affidavits and indicates that he was admonished in February 2000—before Johnson was terminated, before the EEOC began an investigation, and before affidavits were being drafted in May 2000. J.A. 558–59. Moreover, what he cites was not summary judgment evidence, but testimony from the ensuing trial on his statutory retaliation claims, which the jury rejected.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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