No.

In the Supreme Court of the United States

KRISTINA KIEHLE,

Petitioner,

v.

COUNTY OF CORTLAND, AND KRISTEN MONROE, MAUREEN SPANN, AND TIFFANIE PARKER IN THEIR INDIVIDUAL CAPACITIES,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

JEFFREY A. MEYER
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

STEPHEN BERGSTEIN
Bergstein & Ullrich, LLP
15 Railroad Ave.
Chester, NY 10918

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioner

QUESTION PRESENTED

In *Garcetti* v. *Ceballos*, 547 U.S. 410 (2006), this Court addressed the extent to which the First Amendment protects a government employee from adverse action based on the employee's speech. "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 421. But "[w]hen an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences." *Id.* at 423. Only when the threshold standard is met—if "the employee spoke as a citizen on a matter of public concern"—does "the possibility of a First Amendment claim" arise. *Id.* at 418.

The federal courts of appeals have reached conflicting conclusions in applying *Garcetti*'s threshold standard in the sworn-testimony context—when a government employer takes adverse action against an employee on account of the employee's truthful testimony under oath in connection with an adjudicative proceeding. Two courts of appeals have held that such testimony satisfies *Garcetti*'s threshold standard, while three others have rejected that rule.

The question presented is:

Whether a government employee's truthful testimony under oath qualifies as speech "as a citizen on a matter of public concern," requiring a balancing of the interests surrounding the speech and its consequences in order to assess the constitutionality of the adverse government action?

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

STATUTES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Kristina Kiehle respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a) is reported at 2012 WL 2549823. The opinion of the United States District Court for the Northern District of New York (App., *infra*, 4a) is reported at 2011 WL 2680713.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 2012, and a timely petition for rehearing was denied on August 16, 2012. App., *infra*, 16a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATEMENT

This Court has recognized the government's "discretion to restrict speech when it acts in its role as employer," but at the same time has "made clear that public employees do not surrender all their First Amendment rights by reason of their employment." *Garcetti* v. *Ceballos*, 547 U.S. 410, 417-418 (2006).

Garcetti proscribed a two-stage inquiry for claims that a public employee was subjected to adverse action in violation of the First Amendment. First, the employee must establish that she spoke "as a citizen addressing a matter of public concern," rather than "pursuant to [her] official duties." *Id.* at 421-423. Only if the employee meets this threshold does "the First Amendment require[] a delicate balancing of

the competing interests surrounding the speech and its consequences." *Id.* at 423.

The courts of appeals are divided over how to apply *Garcetti*'s threshold requirement in the context of truthful sworn testimony. The Third and Seventh Circuits hold that sworn testimony meets this threshold. By contrast, the Second, Ninth, and Eleventh Circuits have declined to treat sworn testimony any differently than other forms of government employee statements—and as a result have regularly held that *Garcetti*'s threshold test is not satisfied. The Ninth Circuit has acknowledged the division among the courts of appeals.

This issue arises frequently in the lower courts: it has been addressed in more than thirty decisions in the six years since *Garcetti* was decided. Because the resolution of First Amendment claims should turn on their merits and not on the venue in which they are heard, the Court should grant review to clarify the application of *Garcetti* to this highly significant category of speech.

A. Factual background

Petitioner Kristina Kiehle served as a caseworker in New York State for the Department of Social Services of the County of Cortland from April 7, 2008 until August 18, 2008. App., *infra*, at 6a. Petitioner furnished support services to troubled families whose children were at risk of removal. *Ibid.*

One of petitioner's clients was a mother with two children, a daughter and a son. *Id.* at 7a. In the course of her work, petitioner visited this family several times, participated in a meeting with the mother and a mental health counselor, and served as a liaison between the family and the Department. *Ibid.*

This case arises from petitioner's testimony at a Family Court hearing involving this family, which took place on August 18, 2008. *Id.* at 8a. At the time of the hearing, the Department had removed both children from the mother's home. Ct. App. J.A. 394. The Family Court hearing concerned the mother's petition for the return of her son. *Id.* at 388-389.[1]

Petitioner's supervisor, Maureen Spann, was to testify on behalf of the Department at the hearing, and she instructed petitioner to attend to take notes. App., *infra*, at 8a. At the courthouse, however, another County employee (a mental health caseworker) who was working with the family asked petitioner to testify. Ct. App. J.A. 587. The mother's attorney identified petitioner to the Family Court as a witness for the mother. App., *infra*, at 8a. Both Spann and the Department's attorney were told that the mother's attorney intended to call petitioner as a witness; they did not raise any objection in advance of petitioner's testimony. Ct. App. J.A. 375, 419-424, 582, 587-588.[2]

On direct examination, petitioner was asked if she believed that the son could be sent home safely. *Id.* at 421. Petitioner answered that she believed the son could return home as long as his sister—who was more disruptive—remained in foster care. *Ibid.*

---

[1] In the decisions below, the district court and the court of appeals mistook the mother's petition as a request for the return of her daughter instead of her son. App., *infra*, at 2a, 8a, 9a.

[2] The Department did not have a policy or other requirement that caseworkers receive a subpoena in order to testify. Ct. App. J.A. 582, 587. Other than notifying her supervisor (which she did) if she were called by another party to testify, petitioner was not trained about what to do if asked to testify. *Id.* at 580, 587.

When asked if the mother was "unable to provide a minimum adequate supervision," petitioner responded that "I do not feel that that is true," and that, in her opinion, the mother "is not neglectful of these kids." *Id.* at 422.

The Family Court denied the mother's request to return her son to her home. App., *infra*, at 9a. Although the judge concluded that it would not yet be appropriate for the son to be returned to the home, he did not reject petitioner's testimony as untruthful.[3]

The Department had no plans to terminate petitioner's probationary employment before she testified. Ct. App. J.A. 578. Hours after petitioner testified in Family Court, however, Spann complained to her supervisor about petitioner's testimony. The Department's Director of Services and its Commissioner convened an impromptu meeting with Spann and the Department's attorney to discuss petitioner's employment status. App., *infra*, at 9a. Later that same day, the Commissioner terminated petitioner's employment. App., *infra*, at 10a.

Petitioner's termination was based on the content of her testimony. In Spann's "compilation of the problems that [she] felt [the Department] had with [petitioner]," Ct. App. J.A. 218, she specifically criti-

---

[3] Ct. App. J.A. 462 (statement of judge to mother acknowledging the testimony of the "experts" that "you're not neglectful *and I appreciate their opinion in that regard*, but nobody told me the problem's solved and that's why I made my decision") (emphasis added); see also *id.* at 452-453 (judge's findings expressed to mother that "I haven't heard any evidence that you're neglectful, that you're violent" and noting that "your attitude is great" but that "you lack parenting skills").

cized petitioner for testifying "to the opposite of what [the] Agency petition had stated." *Id.* at 363. Spann also testified that she "was disappointed in [petitioner's] testimony" because petitioner "said the mother was not neglectful." *Id.* at 196-197.

Indeed, respondents conceded below that petitioner's discharge rested, in part, on the content of her sworn testimony. C.A. Def. Br., 2011 WL 5909664, at *11 (asserting that petitioner's discharge was based on "providing testimony which reflected poor judgment in that she failed to see that the mother was completely unable to handle her children"); *id.* at 13 (arguing that "the content of [petitioner's] speech itself warranted her dismissal when considered in conjunction with her other errors in judgment and job performance").

B. Proceedings below

Following her discharge, petitioner brought suit against respondents under 42 U.S.C. § 1983 in the United States District Court for the Northern District of New York. Petitioner alleged that the County and the individual defendants terminated her in retaliation for exercising her First Amendment right to free speech. App., *infra*, at 4a.

After discovery, respondents moved for summary judgment. The district court granted respondents' motion, concluding that petitioner's testimony "was speech made pursuant to her official duties and was not made as a citizen." *Id.* at 14a. Relying on *Garcetti*, the court reasoned that petitioner's testimony was not "citizen" speech: "While any person may give testimony at a Family Court hearing, Plaintiff's testimony was relevant *only* because of the access she gained through her position as a caseworker." *Ibid.*

The Second Circuit affirmed. *Id.* at 1a-3a. The court reasoned that petitioner "testified as a government employee" because "her conclusions were based on information she obtained during the course of her public employment," and because she "did not distinguish her personal views from those of [the Department]." *Id.* at 2a-3a. The court concluded that the First Amendment therefore "'does not insulate [employees'] communications from employer discipline.'" *Id.* at 3a (quoting *Garcetti*, 547 U.S. at 421).

REASONS FOR GRANTING THE PETITION

The courts of appeals are deeply divided on the frequently recurring question of whether the First Amendment protects government employees against retaliation for truthful testimony in adjudicative proceedings. The Third and Seventh Circuits have concluded that sworn testimony in connection with an adjudicative proceeding always meets *Garcetti*'s threshold requirement and triggers application of a balancing test to assess the constitutionality of the government's adverse action. The Second, Ninth, and Eleventh Circuits, by contrast, do not distinguish testimony from other forms of employee speech when applying *Garcetti,* and have repeatedly held that testimony fails to satisfy *Garcetti*'s threshold requirement.

Lower courts have grappled with this issue frequently in the six years since *Garcetti* was decided—addressing First Amendment claims based on sworn testimony of government employees in more than thirty cases. Because protecting the integrity of sworn testimony is critical to our adversarial system, clarifying *Garcetti*'s relationship to the claims alleging retaliation for the sworn testimony of public ser-

vants is a pressing concern that should be addressed by this Court.

When a public employee testifies truthfully under oath in connection with an adjudicative proceeding, she necessarily speaks as a citizen addressing a matter of public concern. In the testimonial context, she takes her oath as an individual, and she alone bears ultimate responsibility for the truthfulness of her speech. Moreover, testimony relevant to an issue under adjudication always involves a matter of public concern, bearing on the resolution of public disputes and implicating the legitimacy of the judicial process.

The Second Circuit concluded that petitioner's testimony related to her official duties and therefore was entitled to no First Amendment protection. However, had petitioner been employed in New Jersey or Illinois instead of New York, the threshold test would have been satisfied, and her retaliation claim assessed based on consideration of the relevant First Amendment interests and the interests of her government employer in regulating the conduct of its employees. See *Garcetti*, 547 U.S. at 417-419 (describing the balancing test that applies to First Amendment claims by government employees). This Court should grant review and establish a uniform standard governing *Garcetti*'s application to sworn judicial testimony.

A. The courts of appeals are divided on whether a public employee's truthful testimony necessarily satisfies the threshold test of *Garcetti*.

The federal courts of appeals are sharply divided over how *Garcetti*'s threshold standard applies to

sworn testimony. Both the Third Circuit and the Seventh Circuit have concluded that sworn testimony satisfies *Garcetti*'s threshold test. The Second, Ninth, and Eleventh Circuits apply the standard they utilize for other forms of employee speech, and therefore regularly concludes that the *Garcetti* standard is not met.

The circuit split has been acknowledged by the Ninth Circuit. See, *e.g.*, *Huppert* v. *City of Pittsburg*, 574 F.3d 696, 708 (9th Cir. 2009) (noting in the context of public employee testimony case that "[w]e decline to follow the Third Circuit's decision in *Reilly* v. *Atlantic City*, 532 F.3d 216 (3d Cir. 2008)" and contending that "[t]he *Reilly* court impermissibly began chipping away at the plain holding in [*Garcetti* v.] *Ceballos*."); see also Leslie Pope, Comment, Huppert v. City of Pittsburg*: The Contested Status of Police Officers' Subpoenaed Testimony After* Garcetti v. Ceballos, 119 Yale L.J. 2143, 2143-2144 (2010) (describing conflict among the Third, Seventh, and Ninth Circuits).

1. The Third and Seventh Circuits hold that truthful sworn testimony satisfies Garcetti*'s threshold test.*

The Third Circuit has adopted a straightforward rule for applying *Garcetti* to sworn testimony: "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." *Reilly* v. *City of Atl. City*, 532 F.3d 216, 231 (3d Cir. 2008) (quoting *Garcetti*, 547 U.S. at 423). The plaintiff in *Reilly*, a police officer, cooperated with a corruption investigation by testifying at the trial of a colleague. *Id.* at 220. He was severely disciplined by the Police De-

partment as a result, and ultimately forced into retirement. *Id.* at 224.

The court of appeals explained that "the act of offering truthful testimony is the responsibility of every citizen, and the First Amendment protection associated with fulfilling that duty of citizenship is not vitiated by one's status as a public employee." *Id.* at 231. It added that whether "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." *Ibid.*

The Third Circuit has reaffirmed *Reilly*'s unambiguous rule in subsequent cases. See *Morris* v. *Philadelphia Hous. Auth.*, 2012 WL 2626991, at *3 (3d Cir. July 6, 2012) (noting that "[i]n *Reilly* * * * , we extended First Amendment protection to truthful in-court testimony arising out of an employee's official job responsibilities because an employee speaks as a citizen in that scenario" and that "[t]estimony in court is distinguishable from internal reporting because it is part of the official adjudication process"); *Knight* v. *Drye*, 375 F. App'x 280, 283 (3d Cir. 2010) ("In *Reilly,* we found that the truthful testimony by a police officer in court constituted 'citizen speech' and was therefore precluded from the 'official duties' doctrine set forth in *Garcetti*.").

The Seventh Circuit has similarly held that First Amendment retaliation claims relating to sworn testimony "fall[] outside *Garcetti*." *Fairley* v. *Andrews*, 578 F.3d 518, 524 (7th Cir. 2009). As Judge Easterbrook explained in holding that an intimidation claim satisfied *Garcetti*'s threshold requirement, "Even if offering (adverse) testimony is a job duty, courts rather than employers are entitled to supervise the process." *Id.* at 525.

Other Seventh Circuit decisions reach the same conclusion. In *Matrisciano* v. *Randle*, 569 F.3d 723 (7th Cir. 2009), abrogated on other grounds, *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009), a prison official voluntarily and without subpoena decided to testify on a prisoner's behalf before a parole board, offering his "professional opinion" to the board that the prisoner should be released and signing his statement with his senior-level job title. *Id.* at 728. Nevertheless, the Seventh Circuit found "no evidence that Matrisciano spoke to the Board pursuant to his official duties," *id.* at 731, and therefore that his First Amendment claim should be measured by *Garcetti*'s second-stage balancing test. *Id.* at 731-735. See also *Morales* v. *Jones*, 494 F.3d 590, 598 (7th Cir. 2007) (holding that plaintiff's "deposition testimony is a different story" for purposes of applying *Garcetti*, as "[b]eing deposed in a civil suit pursuant to a subpoena was unquestionably not one of Morales' job duties because it was not part of what he was employed to do," notwithstanding that his testimony related to earlier "speech he made pursuant to his official duties").

2. The Ninth, Eleventh, and Second Circuits have rejected the rule that truthful testimony necessarily satisfies Garcetti*'s threshold test.*

The Ninth Circuit has rejected the view that sworn testimony is per se citizen speech. In *Huppert* v. *City of Pittsburg*, 574 F.3d 696 (9th Cir. 2009), the court held that a police officer's testimony before a grand jury investigating corruption was not eligible for First Amendment protection. *Id.* at 707-708.

The court expressly rejected the Third Circuit's holding in *Reilly*, which it deemed to be "impermis-

sibly" inconsistent with "the plain holding in [*Garcetti* v.] *Ceballos*." *Id.* at 708. The *Huppert* court instead concluded that, in punishing a public employee for the content of his sworn testimony, a public employer simply "exercised control over what the employer itself has commissioned or created," such that "any speech Huppert gave during his grand jury testimony was 'pursuant to his duties as a [police officer],' and that speech is not protected by the First Amendment." *Ibid.* (quoting *Garcetti*, 547 U.S. at 421). Because the *Garcetti* threshold was not met, it was unnecessary in *Huppert* to balance First Amendment values against the employer's disciplinary prerogatives.

Judge William Fletcher dissented, observing that "the majority creates a circuit split with the Seventh Circuit's decision in *Morales* and the Third Circuit's decision in *Reilly*." *Id.* at 723 (Fletcher, J., dissenting). He further explained that the First Amendment should not force public employees to choose between the duty of all citizens to testify truthfully and their self-interest in keeping their jobs. *Id*. at 722; see also *Dahlia* v. *Rodriguez*, 689 F.3d 1094, 1104 (9th Cir. 2012), reh'g petition pending CV 10-55978-92 (following *Huppert* as binding circuit precedent despite "significant reservations" that it was "incorrectly decided" and "conflicts with the Supreme Court's First Amendment public employee speech doctrine").

The Eleventh Circuit has similarly rejected the rule that truthful testimony necessarily satisfies *Garcetti*'s threshold test. In *Green* v. *Barrett*, 226 F. App'x 883 (11th Cir. 2007), a jailer testified at an emergency hearing regarding the possible transfer of an inmate. She acknowledged in her testimony that

the jail was unsafe, and the county sheriff fired her the next day. *Id.* at 884.

The Eleventh Circuit concluded that the jailer's testimony was not citizen speech within the meaning of *Garcetti*, a determination that it said "is not affected by the fact that the plaintiff made the statements in testimony." *Id.* at 886; see also *ibid.* ("[T]he mere fact that [a plaintiff's] statements were made in the context of a civil deposition cannot transform them into constitutionally protected speech." (citation and quotation marks omitted).

With its decision below, the Second Circuit joined the Ninth and Eleventh Circuits in rejecting the principle that sworn testimony satisfies *Garcetti*'s threshold inquiry. Petitioner offered truthful testimony concerning a mother's suitability to reclaim custody of her son, and she was terminated because her employer was unhappy with the content of her speech. The Second Circuit concluded that petitioner spoke pursuant to her job responsibilities and that her sworn testimony therefore was not eligible for First Amendment protection. App., *infra*, at 3a.

B. This case presents a frequently recurring issue of substantial importance.

In the six years since *Garcetti* was decided, the question whether a public employee's testimonial speech passes *Garcetti*'s threshold has arisen with considerable frequency. We have identified more than thirty post-*Garcetti* cases related to the First Amendment status of the sworn testimony of a public employee in an adjudicatory proceeding. These cases

are spread among the federal district courts of thirteen states, located in eight circuits.[4]

This large number of decisions demonstrates that the uncertainty and variation regarding the legal standard applicable to a public employee's First

---

[4] See, *e.g.*, *Karl* v. *City of Mountlake Terrace*, 678 F.3d 1062 (9th Cir. 2012); *Clairmont* v. *Sound Mental Health*, 632 F.3d 1091 (9th Cir. 2011); *Huppert* v. *City of Pittsburg*, 574 F.3d 696 (9th Cir. 2009); *Fairley* v. *Andrews*, 578 F.3d 518, 524 (7th Cir. 2009); *Matrisciano* v. *Randle*, 569 F.3d 723, 730-731 (7th Cir. 2009); *Reilly* v. *City of Atl. City*, 532 F.3d 216 (3d Cir. 2008); *Morales* v. *Jones*, 494 F.3d 590 (7th Cir. 2007); *Green* v. *Barrett*, 226 F. App'x 883 (11th Cir. 2007); *Carr* v. *City of Camden*, 2012 WL 4051884 (D.N.J. 2012); *Hayburn* v. *City of Phila.*, 2012 WL 3238344 (E.D. Pa. 2012); *Chrzanowski* v. *Bianchi,* 2012 WL 2680800 (N.D. Ill. 2012); *Frisenda* v. *Inc. Vill. of Malverne*, 775 F. Supp. 2d 486 (E.D.N.Y. 2011); *Minten* v. *Weber*, 832 F. Supp. 2d 1007 (N.D. Iowa 2011); *Moore* v. *Money*, 2011 WL 5966957 (S.D. Ohio 2011); *Ramirez* v. *Cnty. of Marin*, 2011 WL 5080145 (N.D. Cal. 2011); *Proper* v. *Sch. Bd. of Calhoun Cnty. Fla.*, 2011 WL 3608678 (N.D. Fla. 2011); *Serianni* v. *City of Venice, Fla.*, 2011 WL 2533692 (M.D. Fla. 2011); *Matthews* v. *Lynch*, 2011 WL 1363783 (D. Conn. 2011), aff'd, 2012 WL 1873657 (2d Cir. May 24, 2012); *Whitfield* v. *Chartiers Valley Sch. Dist.*, 707 F. Supp. 2d 561 (W.D. Pa. 2010); *Vaticano* v. *Twp. of Edison*, 2010 WL 4628296 (D.N.J. 2010); *Reid* v. *City of Atlanta*, 2010 WL 1138456 (N.D. Ga. 2010); *Kerstetter* v. *Pa. Dep't of Corrs. SCI-Coal Twp.*, 2010 WL 936457 (M.D. Pa. 2010); *Mullins* v. *City of New York*, 634 F. Supp. 2d 373 (S.D.N.Y. 2009), aff'd, 626 F.3d 47 (2d Cir. 2010); *Foster* v. *Thompson*, 2008 WL 4682264 (N.D. Okla. 2008); *Davis* v. *City of E. Orange*, 2008 WL 4328218 (D.N.J. 2008); *Evans* v. *Hous. Auth. of City of Benicia*, 2008 WL 4177729 (E.D. Cal. 2008); *Hook* v. *Regents of Univ. of Cal.*, 576 F. Supp. 2d 1223 (D.N.M. 2008), aff'd, 394 F. App'x 522 (10th Cir. 2010); *Cindrich* v. *Fisher*, 512 F. Supp. 2d 396 (W.D. Pa. 2007), aff'd, 341 F. App'x 780 (3d Cir. 2009); *Novak* v. *Bd. of Educ. of Fayetteville-Manlius Cent. Sch. Dist.*, 2007 WL 804679 (N.D.N.Y. 2007); *Johnson* v. *LaPeer Cnty.*, 2006 WL 2925292 (E.D. Mich. 2006).

Amendment claim challenging adverse action based on sworn testimony affects a significant number of cases.

Clarifying the proper application of *Garcetti* to truthful testimony is especially pressing because of "the key role of the testimony of witnesses in the judicial process." *United States* v. *Nixon*, 418 U.S. 683, 710 n.18 (1974).

There is a significant risk that the legal uncertainty about the scope of *Garcetti* is chilling the actions of government employees. In the Second, Ninth, and Eleventh Circuits, a conscientious public servant who testifies before a court must now seriously weigh the impact of candor and truthfulness on his or her future job security. By contrast, public employees testifying before courts in the Third and Seventh Circuits need not tailor their testimony in the same manner to protect their careers. As Justice Souter noted in *Garcetti*, "claim[s] relating to truthful testimony in court must surely be analyzed independently [from other kinds of public employee speech claims] to protect the integrity of the judicial process." 547 U.S. at 444 (Souter, J., dissenting).

Moreover, the pressures now facing public employees are not resolved by state and federal whistleblower laws, which amount to a patchwork of inconsistent and limited protections that fall well short of protecting testifying employees from content-based retaliation by their government employers. State laws vary both in the depth of their protection and in the scope of their reach. See *Garcetti*, 547 U.S. at 440-441 (Souter, J., dissenting) (cataloging state statutes).

Under New York law, for example, public employees are protected from retaliation only if they disclose information "regarding a violation of a law, rule or regulation" that "presents a substantial and specific danger to the public health or safety," or if the employee reasonably believes that a public agent has, in the performance of his official duties, broken the law. N.Y. Civ. Serv. Law § 75-b(2)(a). Petitioner's testimony in this case concerning a mother's suitability to be reunited with her son would thus not have been protected.[5] The public interest in ensuring judicial access to truthful testimony requires broader protections than whistleblower statutes provide.

In sum, clarifying *Garcetti*'s relationship to truthful testimony offered in connection with adjudicative proceedings would settle questions that are both practically pressing and of vital concern to the First Amendment. It would provide essential guidance to lower courts, employers, and employees concerning the rights of federal, state, and municipal workers, who number more than twenty million strong.[6]

---

[5] Federal law is even more restrictive. Under the Whistleblower Protection Act, an employee is protected only if she can show that "a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee [could] reasonably conclude that the actions of the government evidence gross mismanagement." *White* v. *Dep't of the Air Force*, 391 F.3d 1377, 1381 (Fed. Cir. 2004) (citation omitted) (internal quotation marks omitted). See Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified in scattered sections of 5 U.S.C.A.).

[6] See *Federal Government Civilian Employment by Function: March 2010*, U.S. Census Bureau, http://tiny.cc/s4qrnw; *2010 Public Employment and Payroll Data, State Governments*, U.S.

C. Sworn testimony satisfies *Garcetti*'s threshold requirement.

This Court in *Garcetti* recognized that some forms of expression "implicate[] additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence," and would therefore require specially tailored analysis in future cases. *Garcetti*, 547 U.S. at 425.

Testimony under oath plainly qualifies as a category of expression in which the "interests at stake" extend "beyond the individual speaker" to encompass broader "societal interests." *Id.* at 419-420. For that reason, adverse action against a public employee for the content of her truthful sworn testimony must be assessed on the basis of a "balancing of the competing interests surrounding the speech and its consequences." *Id.* at 423.

The Court has long recognized that "'the dictates of public policy * * * require[] that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible.'" *Briscoe* v. *LaHue*, 460 U.S. 325, 333 (1983) (citations omitted) (quoting *Calkins* v. *Sumner*, 13 Wis. 193, 197 (1860)); see also *United States* v. *Havens*, 446 U.S. 620, 626 (1980) ("There is no gainsaying that arriving at the truth is a fundamental goal of our legal system.").

Last Term, this Court invoked this principle in unanimously holding that complaining witnesses are absolutely immune from suit for their testimony before grand juries. *Rehberg* v. *Paulk*, 132 S. Ct. 1497 (2012). Absent such immunity, the Court explained,

---

Census Bureau, http://tiny.cc/n7qrnw; *2010 Public Employment and Payroll Data, Local Governments*, U.S. Census Bureau, http://tiny.cc/qfrrnw.

"[w]itnesses might be reluctant to come forward to testify, and even if a witness took the stand, the witness might be inclined to shade his testimony * * * for fear of subsequent liability." *Id.* at 1505 (citation and quotation marks omitted).

Similar dangers of self-censorship and distortion attend the prospect of discipline by a government employer. As this Court has explained, "the threat of dismissal from public employment," like the threat of "damage awards," is "a potent means of inhibiting speech." *Pickering* v. *Board of Ed.*, 391 U.S. 563, 574 (1968). And government employees' testimony can be especially valuable, carrying significant costs to the truth-seeking process if it is "repressed" by the threat of retaliation by a government employer seeking to prevent truthful testimony. *Garcetti*, 547 U.S. at 420 (citation and quotation marks omitted).

Petitioner's case provides an apt example. With a mother's custody of her child in the balance, it was critically important that the testimony offered by the state employees familiar with the case be objective and truthful, unencumbered by fear of reprisal.

Moreover, when a public employee testifies truthfully under oath in connection with an adjudicative proceeding, she necessarily speaks as a citizen, not as a public employee.

This Court has long characterized giving truthful sworn testimony as an obligation one bears *as a citizen*. See, *e.g.*, *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"); *Piemonte* v. *United States*, 367 U.S. 556, 559 n.2 (1961) ("Every citizen of course owes to his society the duty of giving testimony to aid

in the enforcement of the law."). "The notion that all citizens owe an independent duty to society to testify in court proceedings is thus well-grounded in Supreme Court precedent." *Reilly*, 532 F.3d at 229.

This principle is reflected in the process of testifying itself. When petitioner swore to tell "the truth, the whole truth, [and] nothing but the truth," she plainly made this vow on her own behalf, not on behalf of her employer. Ct. App. J.A. 418. Had petitioner violated her oath, she, not her employer, would have been subject to criminal prosecution for perjury. See N.Y. Penal Law § 210 (criminalizing perjury); see also *Briscoe*, 460 U.S. at 342 ("A police officer on the witness stand performs the same functions as any other witness; he is subject to compulsory process, takes an oath, responds to questions on direct examination and cross-examination, and may be prosecuted subsequently for perjury.").

As such, petitioner's speech in this unique setting—speech for which she alone bears ultimate responsibility in the eyes of the law—in no way resembles the mere "work product" employee memorandum that this Court held unprotected in *Garcetti*. 547 U.S. at 422. The court of appeals thus erred in concluding that petitioner merely spoke pursuant to her employment duties in giving her truthful testimony.

To the contrary, when a public employee speaks in sworn testimony, she speaks subject to "an independent obligation as a citizen to testify truthfully," and consequently she "is bound by the dictates of the court and the rules of evidence," not the will of her government employer. *Reilly*, 532 F.3d at 231. Ultimately, as Judge Easterbrook has noted, "courts rather than employers are entitled to supervise the

[testimonial] process," and "[a] government cannot tell its employees what to say in court." *Fairley*, 578 F.3d at 525.

Similarly, sworn testimony in an adjudicative proceeding necessarily involves a matter of public concern. The fact that a government proceeding has been convened to resolve the dispute—and that the dispute's resolution will involve the exercise of government power by the tribunal involved—demonstrates that the proper resolution is a matter of public concern.

Finally, in recognizing that sworn testimony satisfies *Garcetti*'s requirements, the Court would not "empower [public employees] to 'constitutionalize the employee grievance.'" *Garcetti*, 547 U.S. at 420 (quoting *Connick* v. *Myers*, 461 U.S. 138, 154 (1983)). This case concerns only sworn testimony offered as part of an adjudicative process. Such speech has objective and readily discernible indicia—most obviously, the taking of an official oath—that would ensure easy identification of the narrow class of cases eligible for the clarifying rule that petitioner urges here.

Moreover, the question presented in this case is limited to *Garcetti*'s threshold inquiry into whether the First Amendment is *relevant* to the permissibility of an adverse employment action, and hence whether "the possibility of a First Amendment claim arises." *Id.* at 418. At that point, the First Amendment is not absolute, and the merits of the claim rest on a "balancing of the competing interests surrounding the speech and its consequences," with due regard for the

government's legitimate prerogatives in its role as employer. *Id*. at 423.[7]

* * *

The *Garcetti* Court anticipated that its holding would require further elaboration as the courts confront a variety of "cases where there is room for serious debate." 547 U.S. at 424. That prediction is borne out by this case. Because *Garcetti* recognized that it could not "articulate a comprehensive framework" for applying its threshold test to all forms of speech (*ibid*.), the courts of appeals are now divided on its proper application to sworn testimony in an adjudicative context. This case plainly warrants the Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

---

[7] The proposed clarification also would not disturb the settled rule that a plaintiff must show retaliatory motive and causation to prevail. See *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle,* 429 U.S. 274, 285-287 (1977).

Respectfully submitted.

JEFFREY A. MEYER
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

STEPHEN BERGSTEIN
Bergstein & Ullrich, LLP
15 Railroad Ave.
Chester, NY 10918

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioner

NOVEMBER 2012

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PRESENT: RALPH K. WINTER,
CHESTER J. STRAUB,
DENNY CHIN

SUMMARY ORDER

KRISTINA KIEHLE,
Plaintiff-Appellant,

v.

COUNTY OF CORTLAND, KRISTEN MONROE, sued in her individual capacity, MAUREEN SPANN, sued in her individual capacity, TIFFANY PARKER, sued in her individual capacity,
Defendants-Appellees.

No. 11-3097-CV
July 3, 2012

Appeal from a judgment of the United States District Court for the Northern District of New York (McAvoy, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Plaintiff-appellant Kristina Kiehle appeals from the district court's judgment entered on July 8, 2011, pursuant to its decision and order dated July 8, 2011, granting summary judgment to defendants-

appellees, the County of Cortland and three employees of the Cortland County Department of Social Services ("DSS"). We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review.

Kiehle sued defendants for retaliatory termination in violation of her First Amendment rights when she was discharged as a probationary DSS caseworker after testifying at a New York State Family Court ("Family Court") hearing. "A public employee claiming First Amendment retaliation must demonstrate that: (1) [her] speech addressed a matter of public concern, (2) [s]he suffered an adverse employment action, and (3) a causal connection existed between the speech and the adverse employment action" such that "speech was a motivating factor in the determination." *Feingold v. New York*, 366 F.3d 138, 160 (2d Cir. 2004) (internal quotation marks omitted).

Upon *de novo* review, we conclude that the district court did not err in granting summary judgment to defendants. *See Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir. 2003).

On August 18, 2008, at the Family Court hearing, Kiehle testified that the Family Court petitioner—a mother seeking to re-obtain custody of her daughter—was able to adequately supervise, and was not neglectful of, her children. Kiehle recommended that the child be returned to the mother. Kiehle's testimony was offered voluntarily, for the petitioner, without a subpoena. When she took the stand, Kiehle introduced herself as a DSS caseworker, and her conclusions were based on information she obtained during the course of her public employment. Further, while taking a position in her testimony that was contrary to DSS's position in the

proceeding, Kiehle did not distinguish her personal views from those of DSS.

Hence, as the district court concluded based on the indisputable facts, Kiehle did not testify as a private citizen on a matter of public concern at the Family Court hearing; rather, she testified as a government employee—as a DSS caseworker. "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). Thus, the district court did not err in granting summary judgment to defendants.

We have considered plaintiff's remaining arguments and find them to be without merit. Accordingly, we hereby **AFFIRM** the judgment of the district court.

FOR THE COURT:
CATHERINE O' HAGAN WOLFE, CLERK

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

KRISTINA KIEHLE,

Plaintiff,

v.

COUNTY OF CORTLAND; KRISTEN MONROE, in her individual capacity; MAUREEN SPANN, in her individual capacity; and TIFFANIE PARKER, in her individual capacity,

Defendants.

THOMAS J. McAVOY,
Senior United States District Judge

3:09-cv-1259

DECISION & ORDER

I. INTRODUCTION

Plaintiff commenced this action asserting claims of First Amendment retaliation following Plaintiff's discharge from her position as a probationary caseworker for the County of Cortland Department of Social Services. Compl., dkt. # 1. Defendants move for summary judgment seeking to dismiss the case in its entirety. Dkt. # 21. Plaintiff has opposed the motion. Dkt. # 22. For the reasons that follow, the motion is granted.

II. STANDARD OF REVIEW

On a motion for summary judgment the Court must construe the properly disputed facts in the light most favorable to the non-moving party, *see Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007), and may grant summary judgment only where "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). An issue is genuine if the relevant evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). A party seeking summary judgment bears the burden of informing the Court of the basis for the motion and of identifying those portions of the record that the moving party believes demonstrate the absence of a genuine issue of material fact as to a dispositive issue. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); Fed. R. Civ. P. 56(c)(1). If the movant is able to establish a *prima facie* basis for summary judgment, the burden of production shifts to the party opposing summary judgment who must produce evidence establishing the existence of a factual dispute that a reasonable jury could resolve in his favor. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). While the Court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in his favor, *Abramson v. Pataki*, 278 F.3d 93, 101 (2d Cir. 2002), a party opposing a properly supported motion for summary judgment may not rest upon "mere allegations or denials" asserted in his pleadings. *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 525-26 (2d Cir. 1994); Fed. R. Civ. P. 56(c). Summary judgment will be granted when it is apparent on the facts presented that no rational trier of fact could find in favor of the non-

moving party because evidence supporting the essential elements of the non-movant's claim is lacking. FED. R. CIV. P. 56(c); *Celotex Corp.*, 477 U.S. at 322.

III. BACKGROUND[1]

Plaintiff Kristina Kiehle was employed as a caseworker by the County of Cortland Department of Social Services ("DSS") from April 7, 2008 until August 18, 2008. During this time she was considered a probationary employee. This case arises from Plaintiff's testimony on August 18, 2008 at a New York State Family Court hearing to determine whether a child, removed from the home on a neglect petition, could be returned to her home.

Plaintiff worked as a caseworker in DSS's foster and preventive care unit. In this capacity, Plaintiff worked with families who had children removed from their homes, or who were in danger of being removed. Plaintiff had a caseload of approximately ten (10) families. The instant case concerns a family that was part of Plaintiff's caseload.

When Plaintiff was assigned as a caseworker for a family, she was required to meet with her supervisor to learn about the case, to review the existing case file, and to speak with the supervisor about the progress of the case. Plaintiff's direct supervisor was Defendant Maureen Spann. A caseworker was required to maintain in each file caseworker progress notes documenting the caseworker's work with a family, and up-to-date Family Assessment Service Plans (FASP). Plaintiff admits, however, that she was unable to keep up on her progress notes al-

---

[1] The Background facts are taken from the Plaintiff's Response to Defendants' Statement of Material Facts, dkt. # 22-6.

though Plaintiff testified at her deposition that she kept her progress notes up to date "as best I could . . . as time permitted, as best I could." Plaintiff did not recall at her deposition if her progress notes were put in the files within a month of the events that were to be recorded, or whether her FASPs were up to date.

As a new caseworker, Plaintiff was required to attend the Child Protective Services Core Training program. Prior to attending the Core Training Program, and prior to Plaintiff's Family Court testimony which is the focus of this case, it was Spann's opinion that there was a "50/50 chance" that Plaintiff would be terminated because of poor work performance. Spann asserts that there had been talk of terminating Plaintiff but Spann advocated to give Plaintiff a chance after the completion of Core Training to see if Plaintiff could "pull it together."

With regard to the particular family in issue in this case, Plaintiff visited the family, met with a mental health counselor and the mother in June of 2008, and transmitted to Spann the mother's request to temporarily place the daughter into DSS custody and leave the son at home. Spann denied the request. Plaintiff also met with the family several more times in June and July 2008 while the son was in DSS custody on a Person In Need of Supervision ("PINS") placement, and the daughter was still at home. Plaintiff was aware that the son was behaving much better while in the foster home while the daughter remained a problem living at home with the mother.

On the Friday before the August 18, 2008 hearing, Plaintiff returned from Core Training and talked to Spann. Spann advised Plaintiff that the subject family's daughter had been removed from the home

through a neglect petition filed by Spann while Plaintiff was at Core Training. Plaintiff was also advised that a Family Court hearing would be held at 9:30 on the following Monday (August 18) on the mother's petition to return the daughter to her home. Spann told Plaintiff to attend the hearing, that Spann would be testifying for the Department, and that Plaintiff's job would be to take notes at the hearing. Plaintiff acknowledges that, before the hearing, she did not review the progress notes from the time that she was at the Core Training program during which the daughter was removed from the home.

At the hearing, Plaintiff was identified by the mother's attorney as a witness for the mother, and Plaintiff was excluded from the courtroom until she was called to testify. When she was called to the stand, Plaintiff testified that she began as a caseworker in the DSS's foster and preventive care unit on April 7, 2008. She further testified that, despite the family being part of her active caseload, she: (a) had not read all of the prior caseworker's progress notes and could not recall how many times the prior caseworker had recorded that the son was in the household alone when his behavior was out of control; (b) acknowledged that it was the mother's idea to have the daughter placed in DSS care; (c) was unaware how long Liberty Resources, a parenting skills program, had been working with the mother on parenting skills; (d) did not know whether there had been any psychological or medical diagnosis made for either of the children; and (f) had not seen the DSS neglect petition that prompted the daughter's removal. Nevertheless, Plaintiff gave the opinion that the mother was not neglectful of her children, and that the mother was able to provide adequate supervision of the children. Despite Plaintiff's testimony,

the Family Court denied the mother's petition to return the daughter to the home.

After the hearing, Spann advised her supervisor, Defendant Tiffany Parker, of what occurred in Family Court. Spann was of the belief that, except in "really extraordinary circumstances," a caseworker should not testify for anyone other than the DSS without first being subpoenaed, and that anytime a caseworker was called to testify in a Family Court proceeding about the substance of the caseworker's employment duties, the caseworker was to first discuss the testimony with a supervisor to ensure that improper confidences would not be divulged and so that the Department would know the substance of the caseworker's testimony. Spann further believed that Plaintiff's testimony, without first discussing the matter with a supervisor or fully reviewing the file and the circumstances of the family, were examples of Plaintiff's poor judgment.

Parker then met with DSS Commissioner Kristen Monroe, DSS Attorney Ingrid Olsen-Tjensvold, and Spann. Olsen-Tjensvold discussed the court proceedings that morning, indicating that Plaintiff had testified without reviewing the petition, without being subpoenaed, and without discussing her testimony with a supervisor. Olsen-Tjensvold felt that Plaintiff had testified to matters that were beyond her scope of knowledge.

There was great concern among the individuals in the meeting about Plaintiff's work performance. Parker had to leave the meeting early and, at the point that she left, no conclusions had been reached as to the continuation of Plaintiff's employment. Before leaving, Parker expressed her opinion that,

based upon the totality of circumstances, Plaintiff "should not pass probation."

Monroe was of the opinion that Plaintiff's conduct that day represented poor judgment because she did not consult with her supervisor or the DSS attorney prior to testifying. After the meeting, Monroe consulted with Annette Barber, the Personnel Officer, and Scott Schrader, the County Administrator, to clarify the procedures and acceptable bases for discharging a probationary employee.

Later that day, Monroe met with Kiehle and told her she was not passing her probation as a caseworker. Monroe stated to Plaintiff that the DSS relies on caseworkers to assess case safety and risk, and to manage families with those concerns "first and foremost." She further stated that if the DSS files a neglect petition it is indicating that the DSS has significant concerns about the well being of a child and that, for a caseworker to not understand those issues and be willing to testify for opposing counsel without having spoken to anyone at the DSS, constituted negligence. Monroe told Plaintiff that she would be paid through August 25, and that she had an opportunity to contact Annette Barber if she needed any further explanation. The instant action followed.

IV. DISCUSSION

Defendants argue that Plaintiff has failed to demonstrate that she engaged in speech protected by the First Amendment. The Court agrees.

A public employee's speech may be constitutionally protected only if she has spoken out as a citizen, not as an employee, on matters of public concern, rather than on matters of personal interest, and the

state lacks an adequate justification for treating the employee differently from any other member of the general public. *See Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968); *Ruotolo v. City of New York*, 514 F.3d 184, 188 (2d Cir. 2008); *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir.1999). "If the court determines that the plaintiff either did not speak as a citizen or did not speak on a matter of public concern, 'the employee has no First Amendment cause of action based on his or her employer's reaction to the speech' . . . ." *Sousa v. Roque*, 578 F.3d 164, 170 (2d Cir. 2009) (quoting *Garcetti*, 547 U.S. at 418).

a. Speech as a Citizen or Public Employee?

Garcetti constituted a refinement of First Amendment jurisprudence in the context of actions, like the instant one, that involved First Amendment workplace retaliation claims by public employees, holding that the First Amendment does not protect statements by public employees, even on matters of public concern, if those statements were made pursuant to the public employee's official duties. *Garcetti*, 547 U.S. at 420.[2] The inquiry into whether a public employee spoke "pursuant to" her official duties is an objective and practical one, and the employee's official job duties must neither be defined too narrowly nor limited to a formal job description. *See Garcetti*, 547 U.S. at 424-25; *Weintraub v. Board of Educ. of City School Dist. of City of New York*, 593

[2] ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.")

F.3d 196, 202 (2d Cir. 2010).[3] "The *Garcetti* Court defined speech made 'pursuant to' a public employee's job duties as 'speech that owes its existence to a public employee's professional responsibilities.'" *Weintraub*, 593 F.3d at 201 (quoting *Garcetti*, 547 U.S. at 421).

In interpreting *Garcetti*, the Second Circuit has concluded that "under the First Amendment, speech can be 'pursuant to' a public employee's official job duties even though it is not required by, or included in, the employee's job description, or in response to a request by the employer." *Weintraub*, 593 F.3d at 203. Rather, speech is "pursuant to" a public employees official duties if it was "part-and-parcel of [her] concerns about [her] ability to properly execute [her] duties." *Id.* (citation and interior quotation marks omitted). That is, if the speech was a "means to fulfill, and undertaken in the course of, performing [the public employee's] primary employment responsibility," then it was pursuant to the public employee's official duties. *Id.*

Plaintiff's primary employment responsibility as a caseworker in DSS's foster and preventive care unit was to assess and report on the safety and well being of the children in the families making up her caseload. Plaintiff's testimony at the Family Court hearing concerned her observations of, and opinions

---

[3] (explaining that "[f]ormal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes" (quoting *Garcetti*, 547 U.S. at 424–25))

about, the circumstances of a family that was part of her caseload. Thus, Plaintiff testified to the subject matter that formed the core responsibility of her public employment position. Plaintiff's testimony at the Family Court hearing concerning the safety and well-being of the subject-child in the family home "owe[d] its existence to [Plaintiff's] professional responsibilities." *Garcetti*, 547 U.S. at 421. The testimony "was part-and-parcel of [Plaintiff's] concerns about [her] ability to properly execute her duties." *Weintraub*, 593 F.3d at 203. That is, the speech was a "means to fulfill, and undertaken in the course of, performing [Plaintiff's] primary employment responsibility" as a DSS foster and preventive care unit caseworker even though her testimony was not required by, or sought from, the employer. *Id.*

In determining whether a plaintiff spoke as an employee or a citizen, the Court may also consider whether the form of the speech had a "relevant citizen analogue," or "channel of discourse available to non-employee citizens." *Id*. at 203, 204. Although not a dispositive factor, *id*. at 204, the existence of a citizen analogue may serve as a proxy "for the controlling question of what role the speaker occupied when [she] spoke." *Williams v. County of Nassau*, --- F. Supp.2d ----, 2011 WL 1240699, at *4 (E.D.N.Y. March 30, 2011)(interior quotation marks and citation omitted). This inquiry focuses on whether a non-employee citizen would have the same opportunity to convey the speech through the channel utilized. *See Williams*, 2011 WL 1240699, at *7.[4]

---

[4] (finding that the plaintiff was not speaking as a citizen based, in part, on that fact that "[w]hile citizens may write letters to, or request meetings with, the Deputy County Executive,

While any person may give testimony at a Family Court hearing, Plaintiff's testimony was relevant *only* because of the access she gained through her position as a caseworker. Were it not for this access, it is unlikely that her testimony would have been sought. Thus, the channel of discourse utilized by Plaintiff - the offering of an opinion about the suitability of a parent in a Family Court return of child hearing - would not be available to non-employee citizens.

Based upon these reasons, the Court concludes that Plaintiff's testimony at the August 18, 2008 Family Court hearing was speech made pursuant to her official duties and was not made as a citizen. Thus, there is no First Amendment protection for Plaintiff's speech.

b. Speech on a Matter of Public Concern?

Moreover, Plaintiff's speech was not on a matter of public concern, but rather was on an issue of isolated significance to the family that was the subject

---

none would have the kind of access to [the Deputy County Executive] that Williams had as Executive Director of the [Nassau County Civil Service Commission]")(citing *D'Olimpio v. Crisafi*, 718 F. Supp.2d 340, 354 (S.D.N.Y.2010) (noting that plaintiffs' statements were "made in a manner that would not be available to a non-public employee citizen"); *Medina v. Dep't of Educ. of N.Y.*, 2011 U.S. Dist. LEXIS 5194, at *8–9 (S.D.N.Y. Jan. 14, 2011)(plaintiff guidance counselor who complained to principal, union representative, and students' parents "was only in a position to raise these concerns to these specific people as a direct result of his position as a guidance counselor"); *Heffernan v. Straub*, 612 F. Supp.2d 313, 326 (S.D.N.Y. 2009) (holding plaintiff made speech pursuant to his official duties when "an ordinary citizen not employed by the Fire Bureau would not ... have the opportunity to convey [his opinion] through the channels that he utilized."))

of the Family Court proceeding in which Plaintiff testified. The speech lacked the "broader public purpose" necessary to afford it protection under the First Amendment. *See Ruotolo v. City of New York*, 514 F.3d 184, 189 (2d Cir. 2008); *Lewis v. Cowen*, 165 F.3d 154, 63-64 (2d Cir. 1999)). Accordingly, the claims can be dismissed on this basis alone. *Garcetti*, 547 U.S. at 418; *Sousa*, 578 F.3d at 170.

c. Pinkering & Mt. Healthy

Finding that Plaintiff's speech is not protected by the First Amendment, there is no basis to determine whether Defendants have asserted a viable defense under *Pickering v. Bd. of Educ.*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed.2d 811 (1968), or under *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 50 L. Ed.2d 471 (1977).

V. CONCLUSION

For the reasons discussed above, Defendants' motion for summary judgment [dkt. # 21] is **GRANTED**, and all claims in this matter are **DISMISSED.**

IT IS SO ORDERED

DATED: July 8, 2011

(signature)

Thomas J. McAvoy
Senior, U.S. District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 16th day of August, two thousand twelve,

ORDER
Docket Number: 11-3097

Kristina Kiehle,
Plaintiff-Appellant,

v.

County of Cortland, Kristen Monroe,
sued inher individual capacity, Maureen Spann, sued
in her individual capacity, Tiffany Parker,
sued in her individual capacity,
Defendants-Appellees.

Appellant Kristina Kiehle filed a petition for rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk