No. 12-607

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

REPLY BRIEF FOR PETITIONER

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Respondents strive mightily to divert the Court's attention from the actual question presented in the petition and the actual basis for the court of appeals' decision, but the school of red herrings that they release cannot obscure the realities that necessitate review by this Court:

First, petitioner does not seek the overruling of this Court's decision in *Garcetti*, but rather relies on this Court's express recognition that some forms of expression might require special tailoring of the general standard set forth in that case.

Second, the lower courts have adopted starkly different approaches in applying *Garcetti*'s "speaking as a citizen on a matter of public concern" threshold inquiry to sworn truthful testimony in an adjudicative proceeding. Respondents' attempt to deconstruct the court of appeals' decisions on the basis of factual distinctions not relied on by those courts simply confirms that clear disagreement.

Finally, the court below took the view that petitioner was discharged because of the content of her truthful sworn testimony and concluded that *Garcetti*'s threshold standard barred any First Amendment challenge to that government action. Whether other facts, not relied on by the court of appeals, could possibly justify petitioner's discharge is irrelevant in determining whether the reasoning that the court of appeals *actually did employ* warrants this Court's review. In any event, there is no basis to respondents' claim that the discharge could be justified on other grounds.

Review by this Court is warranted.

A. *Garcetti* itself anticipated that this Court would tailor "citizen" and "public concern" standards to particular factual contexts.

Respondents' first attempt at obfuscation comes on the very first page of their brief—the contention that the petition asks this Court to "overrule *Garcetti*" (Opp. i). Of course, the petition does no such thing; it asks the Court to address the conflict among the lower courts over how *Garcetti*'s standard applies in the context of sworn testimony in connection with an adjudicatory proceeding, because of the special considerations applicable in that context. See *Garcetti* v. *Ceballos*, 547 U.S. 410, 444 (2006) (Souter, J., dissenting) ("[C]laim[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.").

Respondents also caricature the petition as a request for First Amendment protection not just for the content of petitioner's truthful sworn testimony but for "all public employee activity *related* to testimony." Opp. 11 (emphasis added). See also *id.* at 6.

But petitioner does not seek protection for all activity "relating" to her sworn testimony. For example, she does not claim that an individual fired for violating a rule requiring her to inform her superiors of any request for sworn testimony could assert a First Amendment claim. The sole focus is the standard applicable to adverse government action based on the content of an employee's sworn testimony. Pet. 6-7.

B. The courts of appeals are divided over the proper application of *Garcetti*'s threshold requirement to truthful sworn testimony.

Garcetti holds speech by public employees categorically ineligible for First Amendment protection when the employee speaks "pursuant to [her] official duties" rather than "as a citizen addressing a matter of public concern." 547 U.S. at 421, 423. As the petition explains (at 7-12), the Third and Seventh Circuits hold that a claim resting on truthful sworn testimony satisfies *Garcetti* even when the subject of the testimony relates to the employee's duties, and therefore would not meet the *Garcetti* test outside the adjudicatory context. The Second, Ninth, and Eleventh Circuits, by contrast, have declined to treat sworn testimony differently than other statements; as a result, they regularly have held that *Garcetti*'s threshold test is not satisfied when an employee is fired or sanctioned because of truthful sworn testimony.

Respondents label the conflict "illusory" (Opp. 6), but that conclusion rests on claimed factual distinctions neither relied upon by these courts nor justified, or justifiable, on any rational basis by respondents.

For example, in *Reilly* v. *City of Atlantic City*, the Third Circuit held that "[w]hen a government employee testifies truthfully, s/he is not 'simply performing his or her job duties,' rather, the employee is acting as a citizen." 532 F.3d 216, 231 (3d Cir. 2008) (citation omitted) (quoting *Garcetti*, 547 U.S. at 423). Had petitioner's case arisen in the Third Circuit, this binding precedent would have produced a holding that her claim satisfied *Garcetti*.

Respondents assert that *Reilly* is distinguishable because the plaintiff in that case testified "under subpoena" and because "[p]etitioner is not a law enforcement officer." Opp. 10. It also is true that the plaintiff in *Reilly* was male and that petitioner is female. All three of these distinctions are equally irrelevant to the applicability of the holding in *Reilly*.

The Third Circuit's rationale rested entirely on *different* considerations categorically applicable in the context of sworn testimony:

> 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. That an employee's official responsibilities provided the initial impetus to appear in court is immaterial to his/her independent obligation as a citizen to testify truthfully.

Reilly, 532 F.3d at 231. *Reilly* therefore establishes a bright-line rule that "truthful testimony in court constitute[s] citizen speech," and claims based on such testimony are "not foreclosed by the 'official duties' doctrine enunciated in *Garcetti*." *Ibid*.

Indeed, the Third Circuit expressly rejected a distinction between voluntary and compelled sworn testimony. *Reilly*, 532 F.3d at 229-230. Although respondents cite *Reilly* for the proposition that the plaintiff testified "under subpoena" (Opp. 10), the opinion says no such thing, either at the particular page cited by respondents or anywhere else. See *Reilly,* 532 F.3d at 219-220.

Respondents' reliance (Opp. 10) on the Third Circuit's unpublished opinion in *Beckinger* v. *Township*

of Elizabeth, 434 F. App'x 164, 168-169 (3d Cir. 2011), is also misplaced. *Beckinger* expressly stated that *Reilly* was "distinguishable on the ground that it involved discipline for the content of the employee's testimony," while *Beckinger* did not involve any testimony but rather employees' challenge to a directive not to attend a hearing because the government had decided not to pursue parking violation charges. *Id.* at 169.[1]

Respondents' reference to a phrase in *Brown* v. *Montgomery County*, 470 F. App'x 87, 89 (3d Cir. 2012)—another unpublished decision that did not involve sworn testimony—is even more far-fetched. The passage cited by respondents merely quotes *Reilly*'s quotation of *Garcetti*; it does not even purport to address the question at issue in *Reilly* or in this case.

Respondents' description of the Seventh Circuit's decisions is similarly flawed. To say that the Seventh Circuit "consistently applies *Garcetti*'s official duties analysis to public employee testimony" (Opp. 12) misses the central point about *how* it conducts that analysis. Like the Third Circuit, the Seventh Circuit holds that retaliation claims for truthful sworn testimony satisfy *Garcetti* even when the employee's testimony is intimately related to his job.

In *Matrisciano* v. *Randle*, 569 F.3d 723 (7th Cir. 2009), for instance, the critical fact is not that the court *asked* the question whether the plaintiff spoke "pursuant to his official duties," *id.* at 731, but that it

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[1] Although *Beckinger* characterized *Reilly* as involving a subpoena (see 434 Fed. App'x. at 167) it did not cite support for this conclusion and quoted with approval *Reilly*'s broader conclusion. *Id.* at 168.

answered this question in the negative—and therefore held that the First Amendment claim was *not* precluded by *Garcetti*'s "official duties" test—despite the fact that he testified to his "professional opinion" and signed his statement with his senior-level job title. *Id.* at 728.[2]

Indeed, in *Fairley* v. *Andrews*, the Seventh Circuit explained more directly that a plaintiff's First Amendment retaliation claim based on prospective testimony simply "falls outside *Garcetti*" altogether. 578 F.3d 518, 524 (7th Cir. 2009). Respondents invert the analytic structure of Judge Easterbrook's opinion in *Fairley*, contending that his decision rested simply on the fact that "testifying *against* the Jail was not part of the plaintiffs' job responsibilities." Opp. 13 (quotation omitted). In fact, the court declined to resolve whether such testimony represented a job responsibility precisely because "that doesn't matter," as "courts rather than employers are entitled to supervise the [testimonial] process" regardless. *Fairley*, 578 F.3d at 525.

Respondents acknowledge that the Ninth Circuit applies a different, more restrictive test to cases involving public employees' sworn testimony. Indeed, they recognize the "arguable disagreement in the courts of appeals" over *Garcetti*'s application to public employees who testify under subpoena. Opp. 7. Given that the Ninth Circuit has denied First Amendment protection even to public employees who

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[2] That is precisely the opposite of the approach taken by the Eleventh Circuit. See *Green* v. *Barrett*, 226 F. App'x 883, 886 (11th Cir. 2007) (per curiam) (public employee spoke "pursuant to her official duties" within the meaning of *Garcetti* because "she testified at the hearing because she was the Chief Jailer").

do testify under subpoena (see *Huppert* v. *City of Pittsburg*, 574 F.3d 696, 708 (9th Cir. 2009)), however, there is little question that petitioner—who, as respondents emphasize, did *not* testify pursuant to a subpoena—would be denied First Amendment protection there as well. To be sure, the Ninth Circuit has granted rehearing en banc in *Dahlia* v. *Rodriguez*, 689 F.3d 1094 (9th Cir. 2012)—but whatever that court decides in *Dahlia*, it cannot resolve the conflict on its own: the Third and Seventh Circuits still would apply a rule different from that of the court below and the Eleventh Circuit.

Thus, while the courts of appeals have adhered to *Garcetti*'s formal categories—distinguishing between speech "as a citizen addressing a matter of public concern" and "expressions made pursuant to official responsibilities" (547 U.S. at 423-424)—they have taken fundamentally different approaches to applying those standards in the particular context of truthful testimony under oath. This stark division among the courts of appeals warrants this Court's review.

C. The issue arises with considerable frequency.

Respondents attempt to explain away the more than thirty post-*Garcetti* cases involving claims of alleged retaliation for sworn testimony by asserting that none "involve[] a similar fact-pattern." Opp. 15. This contention is based on the same tactic that respondents use to try to disguise the conflict among the courts of appeals—asserting that facts irrelevant to the courts' analysis provide the basis for declaring cases inapposite. Is there really any rational basis for concluding that cases involving sworn testimony on "the operation of government policies" or "poten-

tial misconduct of fellow government employees" can be distinguished from this case? Certainly respondents do not even attempt to explain why their distinctions make sense.

If claims involving truthful sworn testimony categorically satisfy *Garcetti*, then all of these cases would be affected by the Court's resolution of this case. If testimony relating to facts learned by an employee as a result of his or her job cannot satisfy *Garcetti*, then virtually all of these claims will fail. Either way, it is clear that the question presented is substantial because its resolution will affect claims that arise with considerable frequency.

D. Petitioner was fired because of the content of her sworn testimony.

Respondents conceded below that petitioner was fired because of their disagreement with the content of her court testimony. See Pet. 5.[3] And the court of appeals characterized petitioner's claim as one "for retaliatory termination in violation of her First Amendment rights" because she was discharged "after testifying [before the] New York State Family Court" (Pet. App. 2a); focused its analysis entirely on petitioner's sworn testimony (*id.* at 2a-3a); and concluded that because petitioner "testified as a gov-

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[3] Defs.' Br. at 11, *Kiehle* v. *Cnty. of Cortland,* 486 F. App'x 222 (2d Cir. 2012) (No. 11-3097), 2011 WL 5909664 (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 ("the content of [petitioner's] speech itself warranted her dismissal when considered in conjunction with her other errors in judgment and job performance").

ernment employee," *Garcetti*'s standard was not satisfied (*id.* at 3a).

Despite respondents' concession below and the ample record evidence supporting it (see Pet. 4-5),[4] as well as the court of appeals' express focus on petitioner's testimony as the grounds for her discharge, respondents devote much of their opposition to claiming that petitioner was fired for reasons other than the content of her court testimony, or at least could have been fired on those grounds. Opp. 1-2, 4, 8-9.

Even if that claim were true, it would not provide a basis for denying review here, given the court of appeals' clear holding that petitioner could not satisfy *Garcetti* by showing that she was fired in retaliation for truthful sworn testimony. The question whether that legal determination is correct is squarely presented in this case.

Moreover, respondents' claim that petitioner was (or could have been) fired for reasons unrelated to the content of her testimony is wrong for several reasons. Because only respondents moved for summary judgment, and judgment was granted in their favor, the facts must be viewed in the light most favorable to petitioner. See, *e.g.*, *Scott* v. *Harris*, 550 U.S. 372, 378 (2007).

First, respondents argue that petitioner was discharged for violating a supposed policy restricting caseworkers from testifying on behalf of families except when subpoenaed. Opp. 1, 17-18. But petitioner

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[4] The County had no plans to terminate petitioner's employment before she testified, but she was fired within hours of her testimony. Pet. 4. Her immediate supervisor expressly criticized her for the content of her testimony. See *id.* at 4-5.

did inform her supervisor that she had been called to testify; the only response she received was "oh." Ct. App. J.A. 98. Neither the supervisor nor the County's attorney at the hearing—who plainly knew that petitioner was a witness—objected to petitioner's testimony. Pet. 3.[5]

Second, respondents assert that claimed "performance failures" justified the decision to discharge petitioner. Opp. 2, 19-20. But *no court* has endorsed that contention, and it is difficult to credit in light of the fact that they had no plans to terminate her employment before her testimony, but that she was fired only hours after she testified. See note 4, *supra*.

To establish a *prima facie* First Amendment retaliation claim, a plaintiff need show only that the content of protected speech was at least a substantial or motivating factor (among others) for an adverse employment decision. See, *e.g.*, *Burkybile* v. *Bd. of Educ. of Hastings-On-Hudson Union Free Sch. Dist.*, 411 F.3d 306, 313-314 (2d Cir. 2005) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 287 (1977)). Respondents—the summary judgment movants—have not established that the content of petitioner's testimony was not a substantial factor in their decision. Indeed, the record strongly supports the conclusion that the content of the testimony was the sole or principal reason for the discharge. Certainly neither of the courts below disputed that fact; to the contrary, they based their de-

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[5] Contrary to respondents' assertion (Opp. 1), petitioner was told that caseworkers might have to render an opinion on the stand and instructed "that their testimony is generally factual and that they testify as lay witnesses." Ct. App. J.A. 169.

cisions on the assumption that petitioner *was* fired because of the content of her testimony.

Third, respondents contend that petitioner would not prevail under the *Pickering* balancing test. Opp. 19-20. But there is no basis for that speculation. If the Court determines that it is appropriate here, the case can be remanded for the lower courts to conduct that inquiry on the basis of a factual record compiled to address that question, something that has not yet occurred.

E. Truthful sworn testimony implicates First Amendment interests that must be balanced against competing concerns.

The remainder of respondents' arguments relate to the merits of the question presented. Opp. 20-25. The dispute regarding the merits is a reason for this Court to grant review, not a reason to let the conflict among the lower courts continue to fester.

Two aspects of respondents' argument are worth noting, however. *First*, respondents repeatedly describe petitioner's testimony as speech "on behalf of the agency." Opp. 20. See also *id*. at 15 ("on behalf of an agency"). That misunderstands the nature of sworn testimony in an adjudicatory proceeding.

Employees may testify in a representative capacity at a legislative hearing on an agency budget. But in an adjudicatory proceeding they testify regarding their personal knowledge. Here, for example, petitioner testified regarding her observations of the interaction between the mother and child and expressed her opinion regarding the future safety of the child. Pet. 3-4. Her speech did not constitute "official communications" (*Garcetti*, 547 U.S. at 422-423) of an agency but rather "a basic obligation that

every citizen owes his Government" (*United States* v. *Calandra*, 414 U.S. 338, 345 (1974)).[6]

Second, respondents ignore completely the harm to the truth-seeking process that would result if government employers could fire employees because their truthful sworn testimony conflicted with the employer's view of the relevant facts. Pet. 17-18. That was a basis for the Third Circuit's decision in *Reilly*, and it is another reason why clarification by this Court of *Garcetti* in this context is urgently needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[6] Respondents' reliance (Opp. 19) on *Borough of Duryea* v. *Guarnieri*, 131 S. Ct. 2488 (2011) is misplaced. That case involved adverse action for the filing of a claim by a government employee, a context entirely different from retaliation for truthful sworn testimony, which implicates concerns regarding protection of the truth-seeking process. Indeed, the Court observed that "[a] petition filed with [a government] employer using an internal grievance procedure in many cases will not seek to communicate to the public or to advance a political or social point of view beyond the employment context." *Id.* at 2501.

Respectfully submitted.

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