No. 13-498

IN THE

Supreme Court of the United States

LOUIS A. BIANCHI, *et al.*,

Petitioners,

v.

KIRK CHRZANOWSKI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether the Seventh Circuit misapplied *Garcetti v. Ceballos* in determining that Respondent's public employee sworn testimony was not offered pursuant to his official duties.

Whether there is a division among the Circuit Courts of Appeals regarding First Amendment protection of public employee sworn speech.

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STATEMENT OF THE CASE

The Respondent agrees with the statement of the case as presented by the Petitioners, and therefore will not separately outline a recitation of the facts here.

REASONS FOR DENYING THE WRIT

I. REVIEW IS UNNECESSARY AND UNWARRANTED AS THE SEVENTH CIRCUIT DID NOT MISAPPLY *GARCETTI* IN HOLDING THAT RESPONDENT'S SPEECH WAS NOT MADE PURSUANT TO HIS OFFICIAL DUTIES

The Seventh Circuit did not misapply *Garcetti*, but properly, pursuant to that case, undertook an analysis of whether Respondent's testimony was made pursuant to his official duties. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). The Seventh Circuit, quoting extensively from the *Garcetti* opinion, described the critical examination necessary to determine whether a public employee's speech was a "government employees' work product" that was "commissioned or created" by his employer such that same is not afforded First Amendment protection. Pet. App. 7.

This Court could not have been clearer in *Garcetti* that the rule that most public employees may no longer claim First Amendment protection for statements they make pursuant to their official duties is quite "limited in scope." See *Id.* at 410, 424. A public employee speaks pursuant to his official duties only when he is "fulfilling a responsibility" to his employer, or when the "employer itself has commissioned or created" the speech, or when

the speech is part of "the tasks [the employee is] paid to perform." *Id.* at 424, 421-22.

Moreover, Petitioner ignores the most pivotal distinction between the instant case and *Garcetti*, one which was not overlooked by the Seventh Circuit Court: "The [*Garcetti*] Court highlighted the fact that 'the parties … [did] not dispute that Ceballos wrote his disposition memo pursuant to his employment duties.'" Pet. App. 6 quoting *Garcetti*, 547 U.S. at 424.

The Seventh Circuit rejected the District Court's overly broad job description for an Assistant State's Attorney, exactly as *Garcetti* instructs a Court to do. Pet. App. 10. "[E]mployers can[not] restrict employees' rights by creating excessively broad job descriptions. . . The proper inquiry is a practical one. Formal 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." *Id.* at 424-5.

When undertaking the practical inquiry directed by *Garcetti*, the Seventh Circuit found, "[t]he McHenry County State's Attorney's Office does not pay Chrzanowski to witness crimes and then testify about them; it pays him to prosecute crimes." Pet. App. 11. The Court properly held that, though Chrzanowski's testimony was about the subject matter of his employment, it did not mean that his speech "'owe[d] its existence' to his official responsibilities." Pet. App. 12, quoting *Garcetti* at 421.

The Seventh Circuit Court did not misapply *Garcetti*; instead, using a *Garcetti* analysis, that Court rejected the District Court's finding that Respondent's subpoenaed, sworn testimony against his employer was made in the course of his official duties. As no misapplication of this Court's prior holdings was made, review is unnecessary.

II. THE CIRCUIT COURTS OF APPEALS ARE NOT DIVIDED AS TO WHETHER PUBLIC EMPLOYEE SWORN TESTIMONY AUTOMATICALLY TRIGGERS FIRST AMENDMENT PROTECTION

Petitioner misstates a division in the Circuit Courts of Appeals alleging that the Third and Seventh Circuits protect all public employee sworn speech while the Eleventh and Second Circuits have held that public employee sworn speech given pursuant to an employee's official duties is speech unprotected by the First Amendment. *See* Pet. 14. In fact, there is no division among the Circuits that public employee speech, whether offered during sworn testimony or not, when given pursuant to that employee's official duties is speech which is unprotected by the First Amendment. Each of the decisions cited in Petitioner's brief rested on the particular facts of the case and, specifically, each Court analyzed whether the public employee at issue was speaking pursuant to his official duties.

In *Reilly v. City of Atl. City*, 532 F.3d 216 (3d Cir. 2008), the Third Circuit addressed the case of a former police officer who, when employed, had assisted a state investigation of another officer and testified for the prosecution in the resulting trial. Reilly alleged that he was forced to resign in retaliation for his testimony.

Ultimately, the Third Circuit Court found that Reilly was not performing his official duties when he testified for the prosecution. *Id.* at 231.

The Seventh Circuit addressed public employee sworn testimony in *Tamayo v. Blagojevich*, 526 F.3d 1074 (7th Cir. 2008) wherein the Court affirmed the District Court's denial of First Amendment protection to certain sworn public employee speech. In that case, the Interim Administrator of the Illinois Gaming Board claimed retaliation for certain sworn testimony she gave before the Illinois House Gaming Committee regarding misconduct by the Governor and another state official. *Id.* at 1078-80. Finding that Tamayo's speech was made pursuant to her official duties, the Seventh Circuit affirmed the dismissal of Tamayo's First Amendment claim. *Id.* at 1091-2.

Contrary to the Petitioners' assertion, the Seventh Circuit has not adopted a blanket rule that all public employee sworn speech is protected speech. In both *Tamayo,* and in the case presently before the Court, the Seventh Circuit followed this Court's instructions in *Garcetti* by analyzing the facts to determine whether the speech was made pursuant to the public employee's official duties.

The Eleventh Circuit declined to extend First Amendment protection to a public employee Plaintiff's sworn testimony. *Green v. Barrett*, 226 F.App'x 883 (11th Cir. 2007). However, again in that case, the Court's decision rested on a review of the specific facts of the case, and an affirmative answer to the inquiry whether the public employee was speaking pursuant to her official duties. *Id.* at 886. Green, the former Chief Jailer at the Fulton County Jail, alleged that she was fired in retaliation

for her sworn testimony at a special hearing about the incarceration of a certain inmate. The Eleventh Circuit undertook a *Garcetti* analysis and found that, "Green's testimony was given pursuant to her official duties as Chief Jailer." *Id.* Further, the Court found that Green was not speaking on a matter of public concern. *Id.*

The Second Circuit addressed a public employee's sworn testimony in *Kiehle v. County of Cortland*, 486 F.App'x 222 (2d Cir. 2012). That Court, too, undertook an analysis of the context of Kiehle's speech in determining whether same should be afforded First Amendment protection. Kiehle was a Department of Social Services ("DSS") caseworker who voluntarily appeared to testify at a family court hearing on behalf of a mother seeking to re-obtain custody of her daughter. *Id.* at 223. The Second Circuit Court found that Kiehle "testified as a government employee — as a DSS caseworker." Accordingly, the Court found that Kiehle's statements were made pursuant to her official duties.

These Circuit Court holdings are not that "First Amendment protections are *automatically triggered* when a public employee provides truthful testimony under oath." Pet. 14 (emphasis added). The inquiry in each of these cases was one of whether the respective employee was speaking pursuant to his official duties. Pursuant to *Garcetti*, only after answering that inquiry in the negative did any Court allow such speech First Amendment Protection. Such holdings are neither in conflict with *Garcetti* nor with each other. Accordingly, review is unwarranted.

Further, only four of the Circuits have addressed the issue of First Amendment protection of sworn public employee speech. Moreover, the alleged division on this issue is only approximately six years old. Taken together, these statistics weigh against this Court granting certiorari at this time.

CONCLUSION

Petitioners have not established compelling reasons for this Court to grant the Petition. Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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