No. 19-893

In the Supreme Court of the United States

SHIMON WARONKER, PETITIONER

v.

HEMPSTEAD UNION FREE SCHOOL DISTRICT, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

AUSTIN REIS GRAFF
Counsel of Record
JONATHAN L. SCHER
The Scher Law Firm, LLP
One Old Country Road
Suite 385
Carle Place, NY 11514
(516) 746-5040
agraff@scherlawfirm.com
jscher@scherlawfirm.com

Counsel for Respondents

QUESTIONS PRESENTED

In *Garcetti* v. *Ceballos*, 547 U.S. 410 (2006), this Court held that the First Amendment does not shield public employees from employer discipline for speech made "pursuant to their official duties." *Id.* at 421. The petition presents the following questions:

1. Whether the court of appeals correctly held that the First Amendment did not protect speech by a superintendent of schools reporting perceived corruption, where the superintendent was hired to combat corruption and viewed the reports at issue as "mandated by" his "professional, moral and legal obligation to serve the [School] District," Compl. ¶ 145.

2. Whether speech by a public employee reporting alleged misconduct to external government officials, outside of the employee's chain of command, always enjoys First Amendment protection, even if the speech was made pursuant to the public employee's official duties.

PARTIES TO THE PROCEEDING

The parties to the proceeding are set forth in the petition, except that the petition repeatedly misidentifies respondent Hempstead Union Free School District as "Hempstead Unified School District," and misidentifies respondent Lamont E. Johnson as "Lamont E. Jackson." Cf. Compl. ¶ 11 (identifying defendant "Lamont E. Johnson," who was sued "individually and in his official capacity").

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Cases—Continued: **Page(s)**

OPINIONS BELOW

The summary order of the court of appeals (Pet. App. 1-16) is not published in the *Federal Reporter* but is reprinted in 788 Fed. Appx. 788. The district court's memorandum and order (Pet. App. 17-40) is unreported but is available at 2019 WL 235646.

JURISDICTION

The court of appeals' judgment was entered on October 17, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

In *Garcetti* v. *Ceballos*, 547 U.S. 410 (2006), this Court held that the First Amendment does not shield public employees from employer discipline for speech made "pursuant to their official duties." *Id.* at 421. The court of appeals correctly applied that settled rule to the facts of this case, which involves speech by a high-ranking public employee pursuant to his assigned duty of "root[ing] out * * * corruption." Compl. ¶ 133. The decision below does not warrant this Court's review.

Petitioner, Dr. Shimon Waronker, alleges that the Hempstead Union Free School District hired him as its Superintendent of Schools in part to "remedy * * * corruption" within the District. Pet. i. Petitioner further claims that he was placed on paid administrative leave after disclosing to the School Board that he had reported alleged instances of such corruption to law enforcement. By his own assertion, petitioner made these reports pursuant to his "professional, moral, and legal obligations" to the District. Pet. 11; accord Compl. ¶ 145. Petitioner then sued, alleging (as relevant here) that the District

retaliated against him for speech protected under the First Amendment. In affirming the dismissal of that claim, the court of appeals explained that petitioner "all but concedes" that the law-enforcement communications in question were made pursuant to his official duties. Pet. App. 8. In accordance with *Garcetti*, the court of appeals thus held, in an unpublished, non-precedential order, that those communications lacked First Amendment protection.

Recasting the positions he advocated differently below, petitioner in this Court offers two theories for escaping the holding of *Garcetti*, but each rests on a misunderstanding of relevant law.

First, petitioner mistakenly asserts that this Court's decision in *Lane* v. *Franks*, 573 U.S. 228 (2014), established a three-factor test protecting any speech that is (i) public, (ii) legally required, and (iii) concerned with exposing corruption. Pet. 11. Even putting aside petitioner's failure to mention such a three-prong test below, *Lane* involved "a straightforward application of *Garcetti*," *Lane*, 573 U.S. at 247 (Thomas, J., concurring), addressing only the narrow issue of subpoenaed testimony given outside the scope of a public employee's ordinary job duties.

Second, petitioner incorrectly claims that a split of authority exists between three circuits that supposedly hold that the First Amendment categorically protects public-employee speech outside an employee's "chain of command," and three which supposedly reject that purported rule. Pet. 13-14. The purported split, however, evaporates under even casual scrutiny. No circuit has endorsed a bright-line

rule that all external reports by public employees enjoy First Amendment protection. Nor does any circuit treat the fact that speech was made to outside officials as categorically irrelevant to the First Amendment analysis. Instead, the circuits consistently examine such reports under the *Garcetti* standard—just as the court of appeals did below.

Applying the *Garcetti* standard, the Second Circuit correctly held that the high-ranking public official who made the reports of alleged corruption here was acting pursuant to his professional responsibilities. The petition should be denied.

STATEMENT

A. Legal Background

The First Amendment protects public-employee speech when an employee speaks "as a citizen on a matter of public concern." *Garcetti* v. *Ceballos*, 547 U.S. 410, 418 (2006). But "when 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." *Lane* v. *Franks*, 573 U.S. 228, 237 (2014) (quoting *Garcetti*, 547 U.S. at 421).

This Court's decisions in *Garcetti* and *Lane* illustrate how that rule applies in particular factual circumstances. *Garcetti* involved a prosecutor disciplined for recommending to dismiss a case after evidence surfaced that a critical government affidavit contained serious misrepresentations. 547 U.S. at 413-415. Even though exposing governmental corruption was "a matter of considerable significance,"

id. at 425, and even though the prosecutor felt he had a constitutional obligation to report the misconduct, *id.* at 442 (Souter, J., dissenting), he ultimately recommended dismissal as "part of what he * * * was employed to do," *id.* at 421 (majority opinion). The "controlling factor" that his speech was "made pursuant to [official] duties" rendered the speech unprotected by the First Amendment, for "[t]o hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers." *Id.* at 421, 423. The Court declined to "constitutionalize [every] employee grievance," *id.* at 420 (quoting *Connick* v. *Myers*, 461 U.S. 138, 154 (1983)), while noting that "those who seek to expose wrongdoing" on the job would still have recourse to "the powerful network of legislative enactments," including whistle-blower protection laws and labor codes. *Id.* at 425.

Lane applied these principles in resolving a split of authority as to whether public employers may discipline employees "for providing truthful subpoenaed testimony outside the course of their ordinary job responsibilities." 573 U.S. at 235. The plaintiff in *Lane* had discovered a co-worker's misconduct during an audit, and was fired after testifying, under subpoena, in the co-worker's subsequent criminal prosecution. *Id.* at 232-233. The Eleventh Circuit had held that because the plaintiff's testimony "owe[d] its existence" and was "relate[d] to" his professional responsibilities, the speech was pursuant to his official duties and therefore

unprotected by the First Amendment. *Id.* at 235, 238-239.

In a straightforward application of *Garcetti*, this Court concluded that "the obligation borne by all witnesses testifying under oath" to "speak the truth" was "distinct and independent" from any obligation the plaintiff owed to his employer, even if the subject of his testimony related to facts that he had discovered on the job. *Lane*, 573 U.S. at 238-239. The "critical question under *Garcetti*," the Court emphasized, is not whether an employee's speech "merely concerns" her official duties, but rather "whether the speech at issue is itself ordinarily within the scope of [those] duties." *Id.* at 240. Applying that test, the "undisputed [fact] that [the plaintiff's] ordinary job responsibilities did not include testifying in court proceedings" meant that he spoke as a citizen. *Id.* at 238 n.4.

B. Factual And Procedural History

1. Petitioner Shimon Waronker is a former superintendent of the Hempstead Union Free School District. Petitioner asserts that he was hired to "transform [the District's] schools and to remedy a history of * * * financial mismanagement[] and corruption." Pet. i. Petitioner sued the District, its Board of Education, and three Board members for alleged violations of the First and Fourteenth Amendments, state whistle-blower statutes, and breach of contract. Compl. ¶ 1. The district court dismissed all counts for failure to state a claim, Pet. App. 39, and the Second Circuit affirmed, *id.* at 16. Accepting its allegations as true for purposes of this appeal arising from the grant of a motion to dismiss, the complaint alleges as follows:

Hempstead schools have struggled over the years with low graduation rates, Compl. ¶ 24, fiscal and administrative problems, *id.* ¶ 102, past financial scandals, see *id.* ¶¶ 67-68, 76-77, 98, 104, and "corruption and mismanagement," *id.* ¶ 121. Seeking to reverse those trends, the Board undertook a "national search for an educational leader that would change the [District's] course and culture," *id.* ¶ 91, ultimately hiring petitioner as the District's superintendent, *id.* ¶¶ 15, 94.

Petitioner was hired to "transform[]" the District and "root out * * * corruption." Compl. ¶¶ 14, 133. Recognizing that his official "function" included "mak[ing] known [any] serious and unlawful activities [that] were occurring," *id.* ¶ 210, petitioner promptly hired a team of special investigators and a forensic auditing firm, *id.* ¶ 121.

Approximately six months after taking office, petitioner's "ability to * * * root out the corruption * * * changed" following a shift in the composition of the Board's voting majority. Compl. ¶¶ 132-133. Seeking to "speak reason and truth as a concerned * * * employee," *id.* ¶ 184, petitioner emailed the Board ("Board Email"). *Id.* ¶ 145. Petitioner's email began with a summary of his vision for the District and the efforts he had taken to date as superintendent to "return [it] to being [a] top notched educational system." *Ibid.* It continued:

> I am advising the Board that after raising questions about suspected illegal financial activity to members of the District, no corrective action has taken place. As a fiduciary and as a guardian of the public trust I have been compelled to consult

> with several law enforcement agencies on the local, state and federal level about disturbing facts which have become apparent to me, which I felt could not and should not be occurring. These matters are of a nature that endanger the public health, welfare, and safety of our district and appear to be both unlawful and unethical, and required disclosure to, and an evaluation by, governmental offices outside the confines of the Hempstead School District.
>
> The need to provide this information was mandated by two factors: first, the fact that instead of corrective action, I am seeing the opposite; and second, my professional, moral and legal obligation to serve the District and those who are truly the consumers—our children—, and the community at large.

Ibid. Petitioner signed the email in his capacity as "Superintendent of Schools." *Ibid.*

Approximately a month later, as part of his professional "pledge to be transparent and to keep the Community involved," petitioner posted an open letter to the entire Hempstead community ("Community Letter") on the District's website. Compl. ¶ 150. The letter summarized "the work [petitioner had] done during [his] first six (6) months" as superintendent, explained what he believed "it would take for the District to stay on the positive track," and invited community members to "[c]ollaborate with me to make Hempstead Schools thrive again." *Id.* ¶ 151.

The Board subsequently voted to place petitioner on paid administrative leave, Compl. ¶ 152, and days later, petitioner filed suit, *id.* ¶ 1.

2. Petitioner initially sought a temporary restraining order restoring him to his position. Pet. App. 24. In denying the TRO on the basis that the complaint failed to state a viable claim for relief, the district court explained that petitioner's job responsibilities as "Chief Executive Officer of the school district" included "root[ing] out corruption." C.A. App. 1419. The court found that the Board Email and Community Letter "sp[oke] for themselves" and that "the statements [petitioner] made were part and parcel of his duties." *Id.* at 1420.

3. In a later order, by which all of petitioner's claims were dismissed under Rule 12(b)(6), the district court explained that petitioner "was hired to transform the District into an appropriately functioning educational institution" and that the communications were made "[i]n an effort to accomplish that core mission." Pet. App. 34. The Board Email, for example, contained petitioner's official signature, "explicitly discussed his role and duties" as superintendent, and "provid[ed] counsel based on [his] experience and position." *Id.* at 33. The Community Letter, "posted on the District website by Plaintiff in his capacity as superintendent," did much of the same. *Ibid.*[1]

---

[1] Having concluded that the First Amendment did not protect petitioner's statements, the district court did not have occasion to address the other elements of a First Amendment retaliation claim. See *Cox* v. *Warwick Valley Cent. Sch. Dist.*, 654 F.3d 267, 272 (2d Cir. 2011) (plaintiff must show that "(1) his speech or conduct was protected by the First Amendment; (2) the defendant took an adverse action against him; and (3) there was a causal

4. In a non-precedential summary order, the Second Circuit affirmed, holding that petitioner "failed to plausibly allege that he spoke as a private citizen on a matter of public concern." Pet. App. 1, 9. In so holding, the unanimous panel concluded that "rooting out corruption and mismanagement was part-and-parcel * * * of [petitioner's] daily responsibilities as superintendent." *Id.* at 7. Petitioner wrote the Board Email and Community Letter as part of his official efforts to inform the community and the Board about his corruption-fighting, and—as the complaint explicitly alleges—petitioner contacted law enforcement out of his perceived "professional, moral and legal obligation to serve the District." *Ibid.* In fact, petitioner "all but concede[d]" that he spoke as an employee when he informed the Board that he had acted "as a fiduciary and as a guardian of the public trust." *Id.* at 8.

The panel rejected petitioner's reliance on *Lane* v. *Franks*, emphasizing that *Lane* turned on a citizen's unique "obligation to tell the truth—an obligation that stands 'distinct and independent' from any obligation that a public employee might owe to his employer." Pet. App. 8 (quoting *Lane*, 573 U.S. at 239).[2] Petitioner, by contrast, bore no "obligation as a private

---

connection between this adverse action and the protected speech").

[2] In the Second Circuit, petitioner described the "critical question" in *Lane* as "whether the speech at issue is itself ordinarily within the scope of an employee's duties." Pet. C.A. Br. 25 (quoting *Lane*, 573 U.S. at 240). He asserted that reporting corruption was not "within the scope of [his] duties" in part because it was not required by law. See *id.* at 22-23; but cf. Pet. i (predicating question presented on speech having been "required by law").

citizen to communicate with law enforcement about the School District's corruption and mismanagement." *Ibid.* A straightforward application of both *Garcetti* and *Lane* thus barred petitioner's claim for relief.

REASONS FOR DENYING THE PETITION

I. This Case Implicates No Split Of Authority

Petitioner urges review based upon two purported conflicts of authority. First, petitioner asserts that the decision below conflicts with *Lane* v. *Franks*, 573 U.S. 228 (2014). See Pet. 12. But as explained below, see pp. 22-25, *infra*, petitioner misreads *Lane*, and the decision by the Second Circuit below is consistent with *Lane*. Petitioner does not allege a split among the courts of appeals regarding the proper interpretation of *Lane*. Indeed, other than the decision below, the most recent court of appeals opinion that petitioner cites to is *Winder* v. *Erste*, 566 F.3d 209 (D.C. Cir. 2009), decided five years before *Lane*. Petitioner's failure to cite any relevant post-*Lane* case law underscores the absence of any issue warranting this Court's review.

Second, petitioner alleges a split between the Fifth, Ninth, and Tenth Circuits, which he claims have "explicitly ruled that *Garcetti* * * * does not apply" to speech directed to government officials "outside [an employee's] 'chain of command,'"[3] and the Second,

[3] At points, the petition further qualifies this alleged carve-out from *Garcetti*, limiting it to "speech * * * reporting misconduct to external government officials," Pet. i, or, more narrowly, to reports of misconduct to "officials responsible for handling matters of corruption," *id.* at 12. As discussed below, however,

Sixth, and D.C. Circuits, which purportedly have rejected that rule. Pet. 13-14.

The alleged split, however, does not exist. No circuit court has endorsed a bright-line rule that all public-employee speech outside of the employee's "chain of command" is protected by the First Amendment, as alleged by petitioner. Pet. i. Conversely, no circuit court treats the fact that speech was made to outside officials as categorically irrelevant in determining whether the speech enjoys First Amendment protection. Rather, the circuit courts consistently examine such external reports under the standard articulated in *Garcetti*—asking whether, under the totality of the circumstances, the employee spoke "pursuant to [his] professional duties." *Garcetti*, 547 U.S. at 426.

1. *Fifth, Ninth, and Tenth Circuits.* Petitioner focuses heavily on the Tenth Circuit's decision in *Casey* v. *West Las Vegas Independent School District*, 473 F.3d 1323 (2007), which, like this case, addressed First Amendment claims by a superintendent of schools. Pet. 14-16. Petitioner contends that *Casey* "directly conflicts" with the decision below (*id.* at 14) because the Tenth Circuit allowed a claim to proceed where a superintendent complained to the State Attorney General's office regarding violations of an open-meetings law by the school board. Petitioner suggests that *Casey* grounded that holding in the fact that the plaintiff had reported misconduct to an

---

none of petitioner's formulations accurately characterizes the relevant circuit precedents.

outside entity, thus "*t[aking] her grievance elsewhere*." *Id.* at 15 (quoting *Casey*, 473 F.3d at 1332).

Petitioner's argument, however, omits a key detail that defeats his claim that a split exists between the circuit courts based on the Tenth Circuit's decision in *Casey*. The court in *Casey* addressed *two* separate communications between the superintendent and "outside authorities"—only one of which the court held to be protected. *Casey*, 473 F.3d at 1332. In addition to the Open Meetings Act complaint, the superintendent in *Casey* had reported to federal authorities falsified enrollment figures for her school district's federally funded Head Start program. *Id.* at 1326. The Tenth Circuit concluded that the superintendent made the Head Start report "pursuant to her official position," because she had a legal responsibility as the program's director to report the district's noncompliance with federal regulations. *Id.* at 1330-1331. Therefore, the court held that this report to "outside authorities" was unprotected under *Garcetti*. *Id.* at 1330-1332. In contrast, the superintendent's report regarding violations of the Open Meetings Act was protected speech—*not* because she directed it to an outside agency (just as she had the Head Start program violations), but instead because she had no legal or professional "responsibility for the Board's meeting practices." *Id.* at 1332.

Far from demonstrating that "this case would have come out differently * * * in the Tenth Circuit," Pet. 15-16, petitioner's citation to *Casey* actually proves the opposite precisely because the Tenth Circuit differentiated its analysis of the *two* separate communications between the superintendent and

"outside authorities." One report of irregularities, or corruption, was not protected because it was made within the superintendent's job duties, while the other was protected, because the reporting to those "outside authorities" was beyond the scope of her job duties. Thus, *Casey* would have required the same result that the Second Circuit reached below. Petitioner's speech to law enforcement is analogous to the *Casey* superintendent's reporting to federal authorities about her district's Head Start program, not her Open Meetings Act complaint.

By petitioner's own account, he was "compelled to consult" with law-enforcement agencies as "a fiduciary and as a guardian of the public trust," and because he had a "professional, moral and legal obligation" to engage in the relevant communications. Compl. ¶ 145. *Casey* recognizes that external reports of malfeasance are not protected by the First Amendment when made pursuant to such a professional obligation. See *Casey*, 473 F.3d at 1332. Read in full, the case directly undermines, rather than supports, the existence of a split, and, further, directly undermines petitioner's claim that he engaged in reporting that was protected under the First Amendment.

The other Tenth Circuit case that petitioner cites, *Thomas* v. *City of Blanchard*, 548 F.3d 1317 (2008), reaffirmed *Casey*'s distinction between external speech made pursuant to official duties and speech outside the scope of those duties. See *id.* at 1324-1326. *Thomas* held that a building inspector's reports of fraud to law enforcement were protected—but only after concluding that he lacked any "'primary

responsibility' for ensuring" that the fraud was "subject to criminal investigation." *Id.* at 1326.

In a published decision that petitioner ignores, the Tenth Circuit squarely rejected the very reading of its precedents that petitioner now advances, explaining that "[n]either *Casey* nor *Thomas* establish[es] a per se rule that speaking outside the chain of command is protected." *Chavez-Rodriguez* v. *City of Santa Fe*, 596 F.3d 708, 716 (10th Cir. 2010). Thus, in the Tenth Circuit, "an employee's decision to go outside of their ordinary chain of command does not necessarily insulate their speech" under *Garcetti*. *Rohrbough* v. *Univ. of Colo. Hosp. Auth.*, 596 F.3d 741, 747 (10th Cir. 2010).

Petitioner fares no better in attempting to portray a split with the Fifth or Ninth Circuit. The cited cases from those circuits again simply fail to support the bright-line rule on which petitioner's purported split rests. Indeed, petitioner tacitly concedes the point by citing the Fifth Circuit's statement that if "a public employee takes his job concerns to persons outside the work place * * * , then those external communications are *ordinarily* not made as an employee." *Davis* v. *McKinney*, 518 F.3d 304, 313 (5th Cir. 2008) (emphasis added); Pet. 13. The Ninth Circuit has taken the same position, quoting the language from *Davis* verbatim. See *Dahlia* v. *Rodriguez*, 735 F.3d 1060, 1074 (9th Cir. 2013) (en banc) (quoting *Davis*, 518 F.3d at 313).

Neither *Davis* nor the Ninth Circuit's similar case law establishes a bright-line rule protecting external reporting. To the contrary, *Davis* stated only that, in the "ordinar[y]" case, a public employee's job duties do not include making reports outside the chain of

command. 518 F.3d at 313. The Fifth Circuit has subsequently clarified that this "is only *ordinarily* the case" and that "no single fact or factor is dispositive" under *Garcetti*. *Gibson* v. *Kilpatrick*, 773 F.3d 661, 670 (5th Cir. 2014). The Ninth Circuit agrees, explaining that "because of the fact-intensive nature of the inquiry, no single formulation * * * can encompass the full set of inquiries relevant to determining the scope of a plaintiff's job duties." *Dahlia*, 735 F.3d at 1074. *Davis* merely recognized that a typical public employee is not ordinarily hired to report misconduct to outside officials. By contrast, as the Fifth Circuit explains, "when an employee's official duties [do] include communicating with outside agencies * * * , it would be in dissonance with *Garcetti* to conclude that * * * he enjoys First Amendment protection" for such speech. *Gibson*, 773 F.3d at 670.

Every Fifth and Ninth Circuit case petitioner cites is consistent with this fact-bound approach. In each instance, the court held an employee's speech to be protected based not on a per se rule protecting external reports, but instead on an analysis of the individual plaintiff's particular job duties. See *Charles* v. *Grief*, 522 F.3d 508, 514 (5th Cir. 2008) (systems analyst's reports of racial discrimination and other misconduct "concerned topics * * * unrelated to * * * any [of his] conceivable job duties"); *Davis*, 518 F.3d at 316 (computer auditor's "communicat[ions] with outside * * * authorities" concerning discrimination and pornography were "not within [her] job function"); *Freitag* v. *Ayers*, 468 F.3d 528, 545 (9th Cir. 2006) (correctional officer's reports of sexual harassment to

state legislator and Inspector General were "not part of her official tasks").

Applying the same analysis to this case, it is clear that petitioner's professional duties did "include communicating with outside agencies." *Gibson*, 773 F.3d at 670. As superintendent, petitioner was no ordinary employee. He was the School District's "chief executive officer." N.Y. Education Law § 1711.2(a). Petitioner admitted that he felt "compelled to consult" with law enforcement as "a fiduciary and as a guardian of the public trust," and because of his "professional, moral and legal obligation to serve the District." Compl. ¶ 145; accord Pet. 11. The Second Circuit held that petitioner's communications were unprotected specifically because petitioner spoke pursuant to his job responsibilities. Pet. App. 7-9. Petitioner cites no decision from any court that conflicts with the decision below.

2. *Second, Sixth, and D.C. Circuits.* Petitioner further errs in suggesting that the Second, Sixth, and D.C. Circuits have held that it is categorically "irrelevant" under *Garcetti* whether public-employee speech is directed to outside officials. Pet. 14. In fact, each court assesses the protected status of such external reports based on the individual speaker's job duties—same as the Fifth, Ninth, and Tenth Circuits.

The Sixth Circuit, for example, treats "whether the [speech was] made to individuals 'up the chain of command'" and "whether the speech was made inside or outside of the workplace" as "relevant" factors under *Garcetti*. *Handy-Clay* v. *City of Memphis*, 695 F.3d 531, 540-541 (6th Cir. 2012) (quoting *Fox* v. *Traverse City Area Pub. Sch. Bd. of Educ.*, 605 F.3d 345, 350

(6th Cir. 2010)). Similar to the Fifth, Ninth, and Tenth Circuits, the Sixth Circuit recognizes that those factors are not "determinative," *Weisbarth* v. *Geauga Park Dist.*, 499 F.3d 538, 545 (6th Cir. 2007), but may provide evidence about the scope of the employee's official duties, see, *e.g.*, *Handy-Clay*, 695 F.3d at 542-543 (public-records coordinator's report of misuse of funds to "individuals outside her department" was protected, where she was not "asked to investigate the alleged misconduct").

Petitioner notes that in 2009, the D.C. Circuit treated as unprotected certain public-employee speech that "reports conduct that interferes with [the speaker's] job responsibilities, even if the report is made outside his chain of command." *Winder*, 566 F.3d at 215. It is unclear, however, whether *Winder* remains good law in the D.C. Circuit. See *Mpoy* v. *Rhee*, 758 F.3d 285, 294 (D.C. Cir. 2014) (suggesting that *Winder* "could be in tension with *Lane*[]"). Regardless, *Winder* does not sweep as broadly as petitioner suggests. It applies only to a limited set of reports—ones concerning interference with the speaker's job duties. See *Winder*, 566 F.3d at 215-216 (school transportation manager spoke as employee in reporting obstruction of court order, where he was tasked with ensuring district's compliance with that order). *Winder* says nothing about the relevance of the chain of command in other circumstances not involving such interference.

In any event, the decision below did not purport to rely on D.C. Circuit case law regarding external reports of conduct interfering with an employee's job responsibilities. Instead, the Second Circuit held that

petitioner's reports to law enforcement were unprotected because petitioner's own "complaint makes clear that 'root[ing] out [] corruption and mismanagement' was 'part-and-parcel' * * * of [petitioner's] daily responsibilities as superintendent." Pet. App. 7 (first quoting Compl. ¶ 121, and then quoting *Montero* v. *City of Yonkers*, 890 F.3d 386, 398 (2d Cir. 2018)).

The Second Circuit's holding does not conflict with the decisions of any other court of appeals. It merely reflects a fact-bound—and legally correct, see pp. 18-25, *infra*—application of *Garcetti*'s holding that the First Amendment does not protect employees' speech made "pursuant to their professional duties." *Garcetti*, 547 U.S. at 426. Consistent with the approach taken by other courts of appeals, the decision below noted that *Garcetti*'s "official duties" analysis "is not susceptible to a brightline rule." Pet. App. 6 (quoting *Ross* v. *Breslin*, 693 F.3d 300, 306 (2d Cir. 2012)). The Second Circuit's summary order—which lacks precedential effect even within the circuit—does not implicate any circuit split.

II. The Decision Below Is Correct

1. *Garcetti* held that "when 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." 547 U.S. at 421. The court of appeals correctly applied that rule to the particular communications at issue here—"(1) the Board Email, (2) the Community Letter, and (3) the [underlying law-

enforcement] communications * * * referenced in the Board Email." Pet. App. 5-6.

According to petitioner, respondents violated his First Amendment rights by retaliating against him for "publicly accus[ing] the School District of corruption" in those communications. Pet. App. 7. At the district court level, petitioner's disputed allegations were deemed true for purposes of respondents' motion to dismiss, and petitioner's First Amendment claim was dismissed because his own pleading conceded the point that he was acting within the scope of his job duties, and thus that, "[i]n each instance, he spoke as an employee [and not as a private citizen] for First Amendment purposes." *Id.* at 34. As the court of appeals observed, petitioner's "complaint makes clear that 'root[ing] out [] corruption and mismanagement' was 'part-and-parcel' * * * of [petitioner's] daily responsibilities as superintendent." *Id.* at 7 (first quoting Compl. ¶ 121, and then quoting *Montero*, 890 F.3d at 398); see also Compl. ¶ 133 (as superintendent, petitioner sought to "root out * * * corruption"). Indeed, even in this Court, petitioner explains he "was hired * * * to remedy a history of * * * financial mismanagement[] and corruption," and highlights the initiatives he undertook as superintendent "to help identify and eradicate corruption and mismanagement." Pet. i, 4. Therefore, the court of appeals correctly concluded that communications addressing perceived corruption within the School District were made "pursuant to [petitioner's] professional duties," so the First Amendment does not "shield[] [him] from discipline" based on those communications. *Garcetti*, 547 U.S. at 426.

It is particularly clear that petitioner "sent the Board Email and Community Letter pursuant to his official employment responsibilities": "Not only do both of these communications focus on [petitioner's] efforts as superintendent to reform the School District, but [petitioner] signed the Board Email using his official job title, 'Superintendent of Schools,' and he posted the Community Letter on the School District's website." Pet. App. 7.

As for petitioner's communications with law-enforcement agencies, the court of appeals rightly observed that petitioner "all but concedes" that he made those communications pursuant to his professional duties. Pet. App. 8. In the Board Email, petitioner explained that he was "compelled" to report "suspected illegal financial activity" to law enforcement because he believed that he had a "*professional*, moral and legal obligation" to do so, given his position as "a fiduciary and as a guardian of the public trust." Compl. ¶ 145 (emphasis added). *Garcetti* makes clear that such communications "mandated by * * * professional * * * obligation," *ibid.*, are "not insulate[d] * * * from employer discipline" by the First Amendment, *Garcetti*, 547 U.S. at 421.

Petitioner contends that to the extent his reports to law enforcement occurred outside of his "chain of command," they were not made pursuant to his professional duties and thus enjoyed First Amendment protection. Pet. 14. *Garcetti*, however, never suggests that reports made outside of a public employee's chain of command are categorically eligible for First Amendment protection. To the contrary, *Garcetti* eschewed "articulat[ing] a comprehensive

framework for defining the scope of an employee's duties," recognizing instead that the "proper inquiry is a practical one" that must account for "the enormous variety of fact situations" in which speech-related discipline may arise. 547 U.S. at 418, 424 (citation omitted). Under *Garcetti*, the dispositive factor here is not whether the law-enforcement reports occurred outside of petitioner's chain of command, but is instead petitioner's own acknowledgment that he made the reports pursuant to his "professional * * * obligation to serve the District." Compl. ¶ 145.

Finally, petitioner attempts to distinguish his case from *Garcetti* by claiming that he had a "legal duty" to report corruption.[4] Pet. 12. In *Garcetti*, however, this Court considered and rejected a similar argument. There, a prosecuting attorney allegedly faced adverse employment actions for preparing a memorandum to his supervisors that recommended dismissal of a case based on inaccuracies in a government affidavit. *Garcetti*, 547 U.S. at 413-415. The employee in *Garcetti* believed that constitutional law "obliged him to give the defense his internal memorandum as exculpatory evidence." *Id.* at 442 (Souter, J., dissenting) (citing *Brady* v. *Maryland*, 373 U.S. 83 (1963)). Nevertheless, the Court held that the employee's memorandum did not enjoy First

[4] Petitioner merely asserts that he "was obligated by law to expose the corruption he saw," without citing any statutes, regulations, or case law to support that assertion. Pet. 11. At minimum, petitioner's failure to cite any authority in support of that critical component of his argument makes this case a poor vehicle for deciding any issues related to "[w]hether the First Amendment protects * * * speech by a public official that is required by law." *Id.* at i.

Amendment protection. See *id.* at 420-424 (majority opinion). While constitutional requirements such as the *Brady* rule may "provide checks on supervisors who would order unlawful or otherwise inappropriate actions," the Court rejected "the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties." *Id.* at 425-426.

2. Petitioner contends (Pet. 12) that the decision below conflicts with *Lane* v. *Franks*, 573 U.S. 228 (2014). *Lane*, however, involved "a straightforward application of *Garcetti*," *id.* at 247 (Thomas, J., concurring), to a narrow issue that is irrelevant here—i.e., "whether the First Amendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, *outside the scope of his ordinary job responsibilities*," *id.* at 238 (majority opinion) (emphasis added). Applying the standard set forth in *Garcetti*, *Lane* held that the employee's testimony enjoyed First Amendment protection because it was not "within the scope of [the] employee's duties." *Id.* at 240.[5] In doing so, the Court emphasized that it was "not address[ing]" a case in which the testimony was "given as part of a public employee's ordinary job duties." *Id.* at 238 n.4; accord *id.* at 247 (Thomas, J., concurring).

In contrast to *Lane*, petitioner does not claim to have suffered retaliation because of "truthful sworn testimony[] compelled by subpoena." *Lane*, 573 U.S.

---

[5] The Court nonetheless held that the employee's claims against the defendant in his individual capacity should be dismissed based on qualified immunity. See *Lane*, 573 U.S. at 243-246.

at 238. And while in *Lane* it was "undisputed that [the employee's] ordinary job responsibilities did not include testifying in court proceedings," *id.* at 238 n.4, petitioner here himself stated that his communications were "mandated by * * * [his] professional * * * obligation to serve the District." Compl. ¶ 145.

Attempting to substantially broaden *Lane*'s narrow holding, petitioner suggests that *Lane* identified "three factors [as] especially important in determining" whether a public employee's speech enjoys First Amendment protection—whether the "speech was required by law," "was [made] public[ly]," and "concerned exposing corruption." Pet. 11. *Lane*, however, nowhere purports to establish such a three-factor standard. And such a three-prong test should be rejected because it would conflict with *Garcetti*'s recognition that legally required speech is not necessarily protected by the First Amendment, see pp. 21-22, *supra*, would strangely elevate and create a preference for speech exposing corruption over speech addressing other matters of public concern, and would risk giving inadequate protection to speech that is not made publicly, cf. *Garcetti*, 547 U.S. at 420 ("That [the prosecutor] expressed his views inside his office, rather than publicly, is not dispositive."). Petitioner cites no case from any court interpreting *Lane* as establishing such a three-prong standard, which is contrary to *Garcetti*. Indeed, petitioner's novel interpretation of *Lane* appears to reflect nothing more than an ad hoc effort to manufacture a standard tailored to the particular circumstances of his own case.

Petitioner's misreading of *Lane* ignores the particular lower-court error that the Court corrected in *Lane*—an error that is irrelevant here. In *Lane*, the Eleventh Circuit had erroneously "reasoned that, because Lane learned of the subject matter of his testimony in the course of his employment * * * , *Garcetti* require[d] that his testimony be treated as the speech of an employee rather than that of a citizen." *Lane*, 573 U.S. at 239. *Lane* clarified that "the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech." *Id.* at 240. Instead, "[t]he critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Ibid.*

In petitioner's case, the Second Circuit faithfully followed *Lane*'s guidance. It did not repeat the error corrected in *Lane* of focusing on whether the plaintiff's speech merely "concern[ed] information acquired by virtue of his public employment." *Lane*, 573 U.S. at 240. Instead, the court of appeals here focused on what *Lane* described as "[t]he critical question under *Garcetti*"—"whether the speech at issue is itself ordinarily within the scope of [the] employee's duties." *Ibid.* Applying that standard to the particular facts of this case, the court of appeals below correctly held that petitioner's communications with law-enforcement agencies lacked First Amendment protection because petitioner himself stated that he "felt 'compelled' to contact law enforcement by '[his] *professional*, moral

and legal obligation to serve the District.'" Pet. App. 8 (emphasis added) (quoting Compl. ¶ 145).

Petitioner's suggestion that the decision below conflicts with *Lane* is thus meritless.

III. This Case Is An Exceedingly Poor Vehicle To Address Either Question Presented

This Court has repeatedly and recently denied certiorari on questions similar to those raised here.[6] Even if the Court were inclined, in the absence of a split of authority, to give additional guidance on when employees speak pursuant to their official duties for purposes of *Garcetti*, the non-precedential summary order below is not a suitable vehicle for doing so.

1. Petitioner's first question presented is predicated on the existence of communications "required by law." Pet. i. But in briefing to the Second Circuit, petitioner took the opposite position, arguing that his communications were *not* required by law. See, *e.g.*, Pet. C.A. Br. 27-28 ("Nothing in the record here establishes that a superintendent * * * has a duty to report criminal misconduct and corruption to law enforcement officials or outside governmental agencies."). Now, before this Court, petitioner

[6] See, *e.g.*, *Bradley* v. *West Chester Univ.*, No. 17-1677 (seeking review on whether speech allegedly reporting corrupt accounting practices was protected), cert. denied, 139 S. Ct. 167 (2018); *Holub* v. *Gdowski*, No. 15-839 (seeking review of whether a school auditor who reports fraud to board members outside of the auditor's chain of command acts within her ordinary job duties), cert. denied, 136 S. Ct. 1209 (2016); *Williams* v. *County of Nassau*, No. 14-1197 (seeking review of whether "truthful speech given in a legislative hearing" is protected), cert. denied, 135 S. Ct. 2806 (2015).

reverses himself and abandons the then-newly crafted argument that he advanced to the Second Circuit that he had no duty to speak. See, *e.g.*, Pet. 11 ("Waronker was obligated by law to expose the corruption * * * in his school district."). Even putting aside petitioner's failure to cite to any legal authority under which he was legally obligated to speak, see note 4, *supra*, the Court should not reward petitioner's vacillating litigation positions by granting review of a question the circuit court below did not have a fair opportunity to address.

To similar effect, petitioner now reads this Court's decision in *Lane* as establishing a three-prong test to determine when speech is protected. Pet. 10-12 (reading *Lane* to turn on whether speech was "required by law," is "public and not private," and "concerned exposing corruption"). But petitioner proposed no such standard in briefing his First Amendment claim below, and thus neither the district court nor the Second Circuit had occasion to address his novel reading of *Lane*.

2. Petitioner's second question presented is predicated on the existence of speech "reporting misconduct" that occurred "outside the chain of command." Pet i. But even in the context of a case decided on a motion to dismiss, the record before this Court is strikingly sparse regarding the nature—and even recipients—of communications central to his First Amendment claim. In particular, petitioner's complaint provides almost no detail on the nature of his communications to law enforcement, which are merely referenced in passing in the Board Email. The record contains no detail, for instance, about the

precise nature of the supposed misconduct being reported, the timing of the communications, or the identity of the law-enforcement personnel.

The sparse factual record makes this a poor case for the Court to attempt to give generally applicable guidance on when a public employee's external communications "outside the chain of command" and relating to "corruption" may be protected by the First Amendment.

3. To the extent the Court is interested in clarifying more generally when "speech by a public official [is] deemed speech as a 'citizen'" under *Garcetti* and *Lane*, see Pet. 12, this case does not provide a suitable opportunity.

As superintendent, petitioner served as the highest policy-making, policy-interpreting, and policy-enforcing official in the District. Unlike a lower-level employee tasked with overseeing "computer-related audits," *Davis*, 518 F.3d at 307, or "network operations," *Charles*, 522 F.3d at 514, petitioner acted as the District's "chief executive officer," N.Y. Education Law § 1711.2(a). See, *e.g.*, *Gibson*, 773 F.3d at 671 (emphasizing the plaintiff's role as "chief law enforcement officer" in holding that "communicating with outside law enforcement agencies was part of his job responsibilities"). Thus, this case arises on an unusual and narrow set of facts, as petitioner's executive-level oversight responsibilities are not representative of the duties of rank-and-file public employees.

Even putting aside petitioner's status as a senior official, his claim differs from the mine run of cases

because, by his own account, petitioner was specifically hired "to remedy a history of * * * corruption," see Pet. i, in the District. The petition itself highlights how petitioner undertook various initiatives to achieve this goal. See p. 19, *supra*. That his role involved a particular focus on identifying and addressing corruption is yet another feature that distinguishes this from a typical case. As the Second Circuit explained, petitioner "all but concede[d]" that his law-enforcement communications were made pursuant to his official duties. Pet. App. 8; accord Compl. ¶ 145. Therefore, this case is a poor vehicle to provide more general guidance on the question of when speech that "exposes corruption" may be protected by the First Amendment. Pet. i.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

AUSTIN REIS GRAFF
Counsel of Record
JONATHAN L. SCHER
The Scher Law Firm, LLP
One Old Country Road
Suite 385
Carle Place, NY 11514
(516) 746-5040
agraff@scherlawfirm.com
jscher@scherlawfirm.com

Counsel for Respondents

MARCH 2020