No. 20-1623

In the Supreme Court of the United States

DAVID BOHLER

Petitioner

v.

CITY OF FAIRVIEW, TENNESSEE

Respondent

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

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

I.

Whether a rational juror could find that the Petitioner, a police officer, had a First Amendment right to speak to a local prosecutor about corruption in his police department

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I. THE COURT BELOW DID *NOT* APPLY THE CORRECT RULE

Respondent City of Fairview has said that the Sixth Circuit applied the right test, and that it ruled against David Bohler on the basis that the speech was his "ordinary" job duty. Brief in Opp. 8 (capitalization removed). In truth, the court never made such a finding. Instead, the Sixth Circuit only held that the speech was part of Bohler's "official duties," a substantially broader term. Pet. App. 11a-12a.

"[O]fficial duties" was the term used in *Garcetti v. Ceballos*, 504 U.S. 410, 413 (2006). In other words, it is the outdated test — later narrowed by *Lane v. Franks*, 573 U.S. 228, 238 (2014). The more narrowed-down test focuses instead on "ordinary" duties. *Id.* But although the words "ordinary" or "ordinarily" appear five times in the *Bohler* opinion, not once is the question ever asked of whether he spoke as part of an *ordinary* duty. (*See* Pet. App. 7a, 10a, 11a, 15a, and 16a).[1] Although the Sixth Circuit did at least reference *Lane* — briefly, (Pet. App. 11a) — in practice it is applying the outdated rule of *Garcetti*.

Worse yet, the Sixth Circuit expressly said that it was ruling against Bohler based on a duty

1 Misleadingly, the City refers to the "lower court" as having applied the *Lane* ordinary duties test. (*See* Brief in Opp. 13a, *citing* Pet.App.35a). But the City's citation is only to the District Court's opinion — not the Sixth Circuit's.

seemingly out-of-the-ordinary — reporting corruption by fellow officers. Invoking an extraordinary duty, based on a hypothetical that it even called "extreme," the court held that all police officers have a duty to speak about corruption:

> Consider an extreme situation where a detective discovered that evidence for the prosecution's case-in-chief was obtained by police torture of a suspect, in violation of 18 U.S.C. § 242, and perhaps state law as well. Even if the detective did not have an express duty to recommend the prosecution of the participating officers, the detective likely still had an obligation to coordinate with the District Attorney to the extent that such illicitly acquired evidence would affect the integrity of her prosecution.

(Pet. App. 12a-13a).

Unless we are supposed to think that police corruption — even torture — is ordinarily encountered on a day-to-day basis, then the Sixth Circuit here has not ruled based on any ordinary duty. It has ruled based on an extraordinary, or "extreme" duty. (*Id.*). It has re-adopted the broader test set forth in *Garcetti*. As such, the City's argument that Rule 10 discourages certiorari — since supposedly the lower court did at least apply the right test — is mistaken. The lower court has applied the wrong test.

II. THE RULING BELOW WAS BROAD, IMPACTING ALL POLICE OFFICERS

The City has said that the Petition "brazenly mischaracterizes" the record, and that really the Sixth Circuit did not rule based on any written job description. (Brief in Opp. 6 and 11). Yet the Sixth Circuit did plainly hold as follows, clearly focusing on the job description:

> According to Bohler's job description, a detective '[c]oordinates activities with the Prosecutor's and District Attorney's office in an effort to avoid mishandling of cases and/or dismissal of charges.' And prosecuting Hamilton based on insufficient evidence or on materials tainted by purported improper motivations of police officers would no doubt be 'mishandling' the prosecution. *See Mishandle*, Merriam-Webster (Online Ed. 2020) (to 'mishandle' a case is to manage it 'wrongly' or 'ignorantly'). By raising concerns about the motivations underlying the Hamilton prosecution, Bohler was thus coordinating with the District Attorney to help prevent the case from being mishandled.

(Pet. App. 12a) (unaltered quote).

Notwithstanding this point, the City has said that the Sixth Circuit relied on something else, too — the Chief's oral instruction. (Brief in Opp. 11). Yet the facts are undisputed that the Chief only gave this instruction *after* Bohler had already spoken out to the prosecutor, unprompted. In fact, the City admits as much:

> Bohler claims that he sent a text message to Helper while he was off duty but followed up with a phone call. There is no evidence that District Attorney Helper took any action at that time. Bohler *then* reported his concerns to the then Chief of Police, Terry Harris.

(Brief in Opp. 4) (emphasis added, internal citations omitted). When Bohler first spoke to the prosecutor, the Chief was already retired. (Pet. App. 63a-64a). Only later did the Chief come back. (Pet. App. 50a). Hence, Bohler was not ordered to speak out — not until after he had already spoken out on his own.

Regardless, the Sixth Circuit did not substantively rely on the Chief's instruction for its ruling. Instead, the court only cited the Chief's instruction as an additional way to distinguish this case from another Sixth Circuit case that Bohler was relying on, *Handy-Clay v. City of Memphis*, 695 F.3d 543 (6th Cir. 2012). Bohler had cited the case because he, too, spoke out unprompted, a factor emphasized in *Handy-Clay*. *See* 695 F.3d, at 542. Apparently, though, the Sixth Circuit did not find the parallel helpful:

> *Handy-Clay* does not suggest otherwise. In complaining about potential corruption, the *Handy-Clay* plaintiff was speaking as a private citizen. 695 F.3d at 543. Making complaints of that ilk were not 'part of her official duties as public records coordinator,' nor was she asked to report on the matter. *Id.* at 542. Here, not only did Bohler act in accordance with his job description when he informed the District Attorney of possible police corruption, but he also conceded that

> he was instructed by the police chief to gather information on the potential corruption to turn over to the District Attorney.

(Pet. App. 12a). In other words, the Sixth Circuit was simply distinguishing Bohler's case from a previous Sixth Circuit authority that Bohler himself cited. Substantively, its decision was based simply on the idea that Bohler carried out "official duties" as laid out in his written job description. Pet. App. 11a-12a.

Worse, though, the Sixth Circuit went beyond even this particular job description, holding simply that *every* police officer has a duty to speak out unprompted. The court said that even without a job description, Bohler would still lose because all officers have a duty to report corruption — such as torture — to local prosecutors. (Pet. App. 12a-13a). The court did not clearly cite any law for the idea. It just alluded to a police officer's unspoken, general duty to seek justice. Perhaps the court had in mind, albeit uncited, a police officer's broad obligations under *Brady v. Maryland*, 373 U.S. 83 (1963).

But whether viewed as a generalized moral duty to do what is right, or as a due-process duty under *Brady*, reporting one's colleagues for crime is still an extraordinary event. And in practical terms, if this Court were to find that the broad duties under *Brady* are ordinary job duties for police officers — such that an officer can be fired for *fulfilling* them — then the Court would be pitting the First Amendment right to free speech against the Fourteenth Amendment right to due process.

Regardless, in *Lane*, this Court left open the question of whether an employee still has a First Amendment right to speak even if the testimony is part of his ordinary duties. 573 U.S., at 238 n. 4. In other words, even if this Court did broadly hold that conveying all exculpatory information to a local prosecutor is an ordinary job duty, still it would not necessarily preclude First Amendment protection. Given that the Court in *Lane* also focused heavily on an employee's independent duty to speak out in response to a subpoena, *Id.*, at 239, it seems doubtful that a police officer here can be punished for complying with the independent duty of due process.

III. THE CITY'S ATTEMPTS TO RESOLVE THE CIRCUIT SPLIT IGNORE THE ACTUAL PURPOSE OF *GARCETTI*

The City has said that *Hunter v. Town of Mockville*, 789 F.3d 389 (4th Cir. 2017) does not show any circuit split because a statewide attorney general is somehow different from a district attorney general. (Brief in Opp. 12). Likewise, the City has said that *Matthews v. City of New York*, 779 F.3d 167 (2nd Cir. 2015) does not show any circuit split because the wrongdoer there had not committed any crime, whereas here the wrongdoers may have. (*Id.*) Both of these rationales to resolve the split are completely arbitrary.

Even more importantly, both purported distinctions ignore the underlying rationale of *Garcetti*. Originally, the purpose of that ruling was to let government employers control the "work

product" that they pay for with tax dollars. 547 U.S., at 422. Namely, *Garcetti* involved a lawyer — specifically one who gave legal analysis. *Id.*, at 413-14. It only made sense that an employer who legitimately felt that the legal advice was unsound should have some remedy to fire the lawyer. But the same work-product rule hardly extends to every instance of whistleblowing. A police officer's freedom to speak about misconduct is, for the most part, inherently different. A police officer is not a legal analyst. Regardless, his freedom to speak to a government lawyer should not hinge on, as the City suggests, whether the police officer is personally familiar with that lawyer. Nor should his freedom to report misconduct hinge on whether the police officer, in theory, might be able to arrest the wrongdoer being discussed. Neither of those rationales has anything to do with the purpose of *Garcetti*.

IV. THE CITY'S RE-WORDING OF THE "QUESTION PRESENTED" HIGHLIGHTS THE LOWER COURT'S ERROR

The City has said that the Petition for Certiorari only raises a red herring by incorporating a standard of review. (Brief in Opp. 8). Consequently, the City has removed the standard from its statement of the issue. (*See* Brief in Opp. i). The City has said that this matter is ripe for resolution simply as a matter of law. The problem with this idea is that the City's re-wording actually highlights the ongoing problem. Despite this Court's precedents, lower courts have wrongly

gotten into the bad habit of resolving these factually intense First Amendment issues on summary judgment. Unless an employee outright admits that something falls within his ordinary duties, summary judgment should be a very uncommon event. In both *Garcetti* and *Lane,* the issue of job duties was effectively stipulated by the parties. *Garcetti*, 547 U.S., at 424 (Stipulation of official duties); *Lane*, 573 U.S., at 238 n. 4 (Stipulation of no ordinary duty). But here the issue is heavily disputed, and yet the government still prevailed.

Namely, Bohler himself testified that the speech was *not part of his duties at all* — ordinary, or otherwise. (Pet. App. 50a, 71a, and 76a-77a). He testified that even going into the file room to get documents in the first place — which serendipitously led to the discovery of the wrongdoing — was not an ordinary duty, either. (*See* Pet. App. 78a-79a). He testified that he had a job duty to report misconduct only within his own chain of command. (Pet. App. 71a). He only spoke to someone outside the department — the prosecutor — after his superiors ignored his report of misconduct. (*Id.*)

Conversely, the *only* evidence that the City can point to for judgment as a matter of law is a written job description. This Court has held that a written job description is *never* "sufficient," by itself, to disqualify a First Amendment claim. *Garcetti*, 547 U.S., at 425. Therefore, the standard of review is quite important here: Given Bohler's testimony, and given that the City's only evidence is a written job description, *could a rational jury find that Bohler spoke as a citizen?* The plain

answer is yes, it could. By trying to hide from that standard of review, the City is only highlighting the error.

CONCLUSION

For the foregoing reasons, the Court should grant the writ of certiorari.

Respectfully submitted,

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