No. _____

# In The
# Supreme Court of the United States

PENNY NICHOLS CORN; TWYLA JENNINGS,

*Petitioners,*

v.

MISSISSIPPI DEPARTMENT OF PUBLIC SAFETY; ALBERT SANTA CRUZ, Individually and in his official capacity as former Commissioner of the Mississippi Department of Public Safety; MARSHALL FISHER, In his official capacity as Commissioner of the Mississippi Department of Public Safety,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether, after inconsistencies generated by *Garcetti v. Ceballos*, 547 U.S. 410 (2006) and *Lane v. Franks*, 573 U.S. 228 (2014), citizen public employees who were terminated from their employment should have First Amendment protection to make truthful reports, both to their superiors and to state and federal law enforcement, about fraudulent tickets issued by State troopers, when their failure to report would amount to misprision of a felony.

## PARTIES TO THE PROCEEDING

The petitioners are Penny Nichols Corn and Twyla Jennings, who are the plaintiffs-appellants.

The respondents are the Mississippi Department of Public Safety, Albert Santa Cruz, individually and in his official capacity as former Commissioner of the Mississippi Department of Public Safety, and Marshall Fisher, in his official capacity as Commissioner of the Mississippi Department of Public Safety, defendants-appellees. The newly appointed Commissioner who replaces Marshall Fisher is Sean Tindell.

## RULE 29.6 STATEMENT

No parties are or entail either parent companies or nonwholly owned subsidiaries.

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 954 F.3d 268 (5th Cir. 2020) and reproduced at the Appendix 2-14.

The decision denying petition for rehearing is not reported and is reproduced at Appendix 1.

The decision of the United States District Court for the Southern District of Mississippi is unpublished and is reproduced at Appendix 15-42.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The basis for jurisdiction in the United States District Court for the Southern District of Mississippi, the court of first instance, was 28 U.S.C. §§ 1331, 1367, 1343(3)(4), 2201 and 2202. The United States Court of Appeals for the Fifth Circuit denied the petition for rehearing on April 20, 2020. This petition is filed within the time limits set under the special orders of this Court (Order List: 589 U.S.) concerning COVID-19 and is therefore timely under those rules.

## CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States of America: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

## STATEMENT OF THE CASE

This case is about "Ghost Tickets," the fraudulent tickets written to deceased or non-existent people by patrol officers in order to receive bonuses, and the right of Corn and Jennings, employees of the Mississippi Department of Public Safety, to carry out their duty to report the fraud. App. 2 and 16.

Corn and Jennings, while not sworn law enforcement officers, were employees charged by law to report misappropriations of federal funds entrusted to the State Highway Patrol. *Id.* They performed that duty when they called out the Highway Patrol for dispersing federal monies to officers who manufactured these fraudulent "Ghost Tickets." The "Ghost Tickets" are crimes, *e.g.*, §§ 97-23-19, 97-11-25, 97-11-31, and 97-10-83, Miss. Code Ann. and 18 U.S.C. § 666. The Mississippi Highway Patrol had previously been sanctioned for such conduct. Both Corn and Jennings were fired for reporting the "Ghost Tickets" misconduct. *Id.* It was unmistakably their duty to make their required

reports, but they also reported to auditors, the governor's criminal consultant, the FBI, and the federal commission responsible for such programs – the office of Inspector General of the U.S. Department of Transportation. *Id.* The Mississippi Department of Public Safety never seriously contested these facts. The Defendants never offered a reason for firing the Plaintiffs.

Corn wrote succinctly, "I am legally and ethically required to report. . . ." App. 43.

One's ethical responsibilities cannot be hung up at the door when one walks into a governmental post. Such a public employee is still a citizen.

Had the petitioners here, Corn and Jennings, not made their honest reports, they could have been held criminally responsible for conspiracy, or charged as accessories after the fact, or found guilty of misprision of a felony. Misprision of felony means:

> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

18 U.S.C. § 4.

The First Amendment must protect such speech, and not put citizens to such an illegal and unethical

choice. We look to law enforcement as the foundation of order for our society; without any reliable form of accountability, law enforcement itself can create a lawless state. A support system for those who would testify truthfully about police misconduct is a way to solidify accountability.

## REASONS FOR GRANTING THE PETITION

### A. This Court Should Grant Certiorari to Clarify its Own Precedent from *Marbury v. Madison* that Public Duty Lies to the Law, and to the Law Only.

As professor Charles Fried has explained with regard to the firing of the intelligence community inspector general, Michael Atkinson, where a

> statute directs that certain actions be taken, the officer cannot decline to fulfill that statutorily prescribed action. This was established as early as *Marbury v. Madison*, 5 U.S. 158 (1803) (Per Marshall, C.J.): "This is not a proceeding which may be varied if the judgment of the Executive shall suggest one more eligible, but is a precise course accurately marked out by law, and is to be strictly pursued. It is the duty of the Secretary of State to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts, in this respect, as has been very properly stated at the bar, under the authority of law, and not by the instructions of the President.

> It is a ministerial act which the law enjoins on a particular officer for a particular purpose."

Harvard Law Today, April 10, 2020.

The lawful actions taken by the petitioners here, Corn and Jennings, led to their termination by their superiors. To follow *Marbury v. Madison*, no executive, including a presiding officer of a state or federal agency, can superimpose his personal advantage over the boundaries of the law.

This case presents an opportunity for this Court to address what protections, if any, are to be afforded citizens who report misconduct and crimes as part of the duties of their jobs. There is a split in the circuits on this issue. The Fifth Circuit allowed the retaliatory discharge of these two reporting witnesses.

*Garcetti v. Ceballos*, 547 U.S. 410 (2006) upheld the disciplinary actions taken against the public employee Cabellos. The Fifth Circuit's opinion here below relied on *Garcetti* to find the petitioners' reports were made "pursuant to their official duties" and, as such, were not protected citizen speech, *Corn v. Mississippi Department of Public Safety, supra*, at 276, even though the Fifth Circuit has otherwise agreed "that Garcetti's 'official duties' test was far from clear." *Walker v. Smith*, 801 F. App'x 265, 271 n.10 (5th Cir. 2020).

*Lane v. Franks*, 573 U.S. 228 (2014) had tempered the result reached in *Garcetti.* That unanimous decision from this Court held: "Speech by citizens on matters of public concern lies at the heart of the First

Amendment," which "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people," citing *Roth v. United States*, 354 U.S. 476, 484 (1957). The *Lane v. Franks* Court continued, "This remains true when speech concerns information related to or learned through public employment. After all, public employees do not renounce their citizenship when they accept employment, and this Court has cautioned time and again that public employers may not condition employment on the relinquishment of constitutional rights." *Lane v. Franks*, at 235-36. The opinion from the Fifth Circuit here challenged never cited *Lane v. Franks, supra.*

Implicit in the *Lane v. Franks* ruling is that the threat of punitive action, as in contempt for failing to testify truthfully, takes one outside the confines of one's employment under *Garcetti*. Here, not only did the petitioners report outside their chain of command, Corn and Jennings were also under the threat of conviction of misprision if they did not so report. The threat of criminal action against them holds the same force as contempt under *Lane v. Franks* and gives them the protections of the First Amendment. The threat of contempt or misprision of a felony is certainly not a part of their employment's usual evaluation and punishment structure, and unlike *Garcetti*, their reports to the relevant authorities are not part of a normal work product they would be charged with producing.

### B. This Court Should Grant Certiorari to Resolve a Split Among the Circuits as to the Force of *Garcetti v. Cabellos* to Gag Truthful Speech From Public Employees.

As examples of the conflicts based on alternative readings of *Garcetti* and *Lane v. Franks*, compare separate readings of *Garcetti* throughout the federal courts. In *Spiegla v. Hull*, 481 F.3d 961, 969 (7th Cir. 2007), the court held that rules required prison guards to report misconduct, so there was no First Amendment protection for the plaintiff, but the court noted the irony of the fact that the plaintiff was disciplined for following the rules. Compare this Court's addressing the Fifth Circuit to discipline its reading of *Garcetti* in the case *Gibson v. Kilpatrick*, 573 U.S. 942 (2014), where the petition for writ of certiorari was granted, the judgment vacated, and the case was remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Lane v. Franks*. The Fifth Circuit did not respond favorably for the plaintiff in that case. And compare those results with the very recent case of *Mertins v. City of Mount Clemens*, No. 19-1416, 2020 U.S. App. LEXIS 17780, at *9 (6th Cir. June 5, 2020), where that circuit decision held, "As the Supreme Court stated in *Lane*, 573 U.S. at 241, 'allegations of public corruption' are exactly the type of statements that demand strong First Amendment protections."

Splits in the circuits, and even within each circuit, are rampant; they are legion. For collections of such examples, though not exhaustive lists, see the following

law review articles: Stone T. Hendrickson, Note: Salvaging *Garcetti*: How a Procedural Change Could Save Public-Employee Speech, 71 Ala. L. Rev. 291 (2019), where the current confusion is summarized as "*Garcetti's* bright line rule has created more confusion, more fact-intensive inquiries, and less consistency among the federal courts. . . . since *Garcetti*, the federal court have been embroiled in endless and sometimes contradictory rule making. . . . The *Garcetti* rule has caused both confusion and a profound lack of the predictability that is . . . '[t]he core value of rules.' Others have affirmed that *Garcetti* has confused the circuit court to no end." *Id.* at 298.

Further law review criticisms particularly with regard to law enforcement include: Ann C. Hodges and Justin Pugh, Crossing the Thin Blue Line: Protecting Law Enforcement Officers Who Blow the Whistle, 52 U.C. Davis L. Rev. Online 1 (2018); Erwin Chemerinsky, Symposium Issue: The Future of the First Amendment, 46 Willamette L. Rev. 623, 627 (2010), pointing out that "the greatest problem at the [police department] was a culture that created a code of silence. There was tremendous pressure against officers revealing the wrongdoing of other officers." An earlier case in which the Ninth Circuit had held that a police officer's subpoenaed testimony before a grand jury investigating potential corruption within the department was not protected by the First Amendment because this speech was expected of all officers and thus was made pursuant to his duties as a police officer was criticized by Jody L. Rosenberg, Case Note: Freedom of

Speech and the "Catch 22" for Public Employees in the Ninth Circuit – *Huppert v. City of Pittsburg*, 63 SMU L. Rev. 259, 260. The case of *Huppert v. City of Pittsburg*, 574 F.3d 696 (9th Cir. 2009) was later reversed by *Dahlia v. Rodriguez*, 735 F.3d 1060 (9th Cir. 2013).

There are additional law review expressions of concern for other public employees. Erika Schutzman, Article: We Need Professional Help: Advocating for a Consistent Standard of Review When Regulations of Professional Speech Implicate the First Amendment, 56 Boston College L. Rev. (2015); Wett Lesley Black, Jr. and Elizabeth A. Shaver, Article: The First Amendment, Social Media, and the Public Schools: Emergent Themes and Unanswered Questions, 20 Nev. L.J. 1 (2019). Also: "*Garcetti* itself was a controversial ruling, one that led the president of the American Federation of State, County and Municipal Employees to characterize it as having said to public employees, 'your conscience or your job. You can't have both.'" Floyd Abrams, Article: Free Speech and Civil Liberties in the Second Circuit, 85 Fordham L. Rev. 11, 34-35 (2016). There are many more examples.

Within this past year alone, the split on *Garcetti* includes the following cases from each of the circuits:

In *Gilbert v. City of Chicopee*, 915 F.3d 74, 76 (1st Cir. 2019), the dismissal of a 42 U.S.C. § 1983 action was affirmed because an employee's speech was compelled as part of his employment and thus was made within the scope of his official duties rather than as a citizen; the statement the employee uttered concerning

a gun-pointing incident was communicated internally, either in accordance with police department procedure or a directive, and thus was not protected.

In the Second Circuit, the court held that the district court did not err in dismissing a discharged public employee's First Amendment claim because no contested issues of fact existed as to whether appellees, the town and his supervisor, retaliated against him for sending two emails that the employee contended were matters of public concern; the emails were made primarily to address issues relating to his official duties and work-related grievances. *DiCesare v. Town of Stonington*, No. 19-148, 2020 U.S. App. LEXIS 25903, at *1 (2d Cir. 2020).

*Williams v. City of Allentown*, 804 F. App'x 164, 165 (3d Cir. 2020) held for a plaintiff police officer, finding he was speaking as a private citizen on a matter of public concern when he gave a co-worker advice about running for public office because he was not "employed" to give advice to employees about city policies, nor was his speech part of the work he was paid to perform on an ordinary basis.

Other variations within the circuits continue. The Fourth Circuit applied a three-part test to rule that a former state employee's First Amendment retaliation claim based on his termination shortly after he made two blog posts critical of a supervisor failed because neither post involved matters of public concern. *Carey v. Throwe*, 957 F.3d 468, 472 (4th Cir. 2020).

The Sixth Circuit, as mentioned *supra*, has ruled in favor of a plaintiff that her speech to her union, the local prosecutors, the FBI, and the city commissioners clearly are instances of protected, private citizen speech. *Mertins v. City of Mount Clemens*, No. 19-1416, 2020 U.S. App. LEXIS 17780, at *10 (6th Cir. 2020).

*Lett v. City of Chicago*, 946 F.3d 398 (7th Cir. 2020) held that a former public employee, who was terminated after he refused his supervisor's directions regarding the preparation of a work report, failed to establish a First Amendment violation because the employee's refusal did not constitute protected citizen speech; the employee spoke pursuant to his job duties and not as a private citizen when he refused to alter his report, so the First Amendment did not apply to his speech.

Defendants, a city and police chief, were properly granted summary judgment on a police officer's First Amendment retaliation claim because his statements in a media interview made clear that his appearance was within the scope of his duties as a member of the police department and President of the Fraternal Order of Police. *Nagel v. City of Jamestown*, 952 F.3d 923, 926 (8th Cir. 2020).

By comparison, the Ninth Circuit has ruled: "If, however, a public employee takes his job concerns to persons outside the workplace in addition to raising them up the chain of command at his workplace, then those external communications are ordinarily not made as an employee, but as a citizen." *Bustos v. City*

*of Fresno*, No. 1:20-cv-00066-DAD-BAM, 2020 U.S. Dist LEXIS 148144, at *19 (E.D. Cal. 2020) *Id.* (quoting *Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008)); *see also Freitag v. Ayers*, 468 F.3d 528, 545 (9th Cir. 2006) (holding that a correctional officer's communications to a state senator and to the state inspector general's office, both outside of her chain of command, were "protected under the First Amendment"), the result adopted in *Bustos*, *supra*.

The dismissal of this 42 U.S.C. § 1983 action was affirmed because all of the employee's speech was compelled as part of his employment and thus was made within the scope of his official duties rather than as a citizen, as the statement the employee uttered concerning the gun-pointing incident was communicated, either in accordance with police department procedure or because of police department directive, solely internally. *Gilbert v. City of Chicopee*, 915 F.3d 74, 76 (1st Cir. 2019).

Similarly, the district court did not err in dismissing a discharged public employee's First Amendment claim because no contested issues of fact existed as to whether appellees, the town and his supervisor retaliated against him for sending two emails that the employee contended were matters of public concern; the emails were made primarily to address issues relating to his official duties and work-related grievances. *DiCesare v. Town of Stonington*, No. 19-148, 2020 U.S. App. LEXIS 25903, at *1 (2d Cir. Aug. 14, 2020).

*Joritz v. Gray-Little*, No. 19-3078, 2020 U.S. App. LEXIS 24155 (10th Cir. 2020) broke *Garcetti* into five distinct parts. "Because Joritz was a public employee, our analysis of her First Amendment claim requires that we balance her free speech interests as a private citizen against the efficiency interests of the state, as an employer, using the five elements of the *Garcetti/Pickering* test. . . . The five elements require that:

> 1. The protected speech was not made pursuant to an employee's official duties.
>
> 2. The protected speech addressed a matter of public concern.
>
> 3. The government's interests as an employer did not outweigh the employee's free-speech interests.
>
> 4. The protected speech was a motivating factor in the adverse employment action.
>
> 5. The defendant would not have made the same employment decision in the absence of the protected speech.

*Joritz v. Gray-Little*, at *16.

Note that these five factors differ from the elements listed by other circuits.

In our Fifth Circuit opinion here before the Court, Judge Stuart treated as the deciding element the fact that plaintiffs Corn and Jennings had first raised their objections to the "Ghost Tickets" within the internal offices of the defendants at the Department of Public Safety. Apparently, by the Fifth Circuit's ruling, these

petitioners thereby waived any claims they had based on public concern. The court below held that Corn and Jennings' speech to external entities was "simply a continuation of unprotected speech," and therefore disqualified from First Amendment protection. *Corn v. Mississippi Department of Public Safety*, *supra*, at 278. This analysis gives no weight to whether or not the statements were true, whether or not the information revealed state or federal crimes, or whether or not the public interest could in any way be served by burying those critical facts.

The Eleventh Circuit has acknowledged that an employee's speech may deserve First Amendment protection even if it concerns his area of employment, and that *Garcetti* has been limited to "speech that an employee made in accordance with or in furtherance of the ordinary responsibilities of [his] employment, not merely speech that concerns the ordinary responsibilities of [his] employment, yet nevertheless, the circuit ruled against a fire chief who was seeking to implement fire safety codes. And, although the plaintiff never communicated his concerns outside his employment, the Eleventh Circuit held that "this factor is not dispositive." *Batz v. City of Sebring*, 794 F. App'x 889, 899-900 (11th Cir. 2019).

There is a further and more direct split in the circuits on the question of whether an employee can be forced to lie. *Jackler v. Byme*, 658 F.3d 225 (2d Cir. 2011) (reaffirmed in *Montero v. Yonkers*, 890 F.3d 386, 400 (2d Cir. 2018)), held in favor of Plaintiff Jason M. Jackler, a former probationary police officer in

Middletown, New York, that his police department violated his First Amendment right to freedom of speech by causing the termination of his employment in retaliation for his refusals to make false statements in connection with an investigation into a civilian complaint alleging use of excessive force by a department officer. Jackler refused to make false statements, just as petitioners Corn and Jennings refused to lie.

The District of Columbia Circuit disagreed with that result. Soon after the *Jackler* decision, the District of Columbia Circuit – in denying rehearing in *Bowie v. Maddox*, 653 F.3d 45, 48, 397 U.S. App. D.C. 357 (D.C. Cir. 2011), cert. denied, 132 S. Ct. 1636, 182 L. Ed. 2d 234 (2012) – rejected the rationale of *Jackler*, pointing out that under *Garcetti v. Ceballos*, it is "only when public employees 'make public statements outside the course of performing their official duties' do they 'retain some possibility of First Amendment protection.'" *Id*. at 47 (quoting *Garcetti*, 126 S. Ct. at 1961). The D.C. Circuit summarized, "The Second Circuit gets *Garcetti* backwards." *Bowie* at 48. *Bowie* has been addressed within the Fifth Circuit in *Caleb v. Grier*, No. H-12-0675, 2013 U.S. Dist. LEXIS 83139, at *15 n.14 (S.D. Tex. 2013), saying, "*Bowie* held public employees can be fired for refusing orders by superiors to lie."

That *Caleb v. Grier* case therefore anticipated the present Fifth Circuit decision here challenged, holding that at the time of that decision in 2013, the Fifth Circuit "appears not to have written on this point but this Court believes it would follow *Garcetti* and *Bowie.*" *Caleb v. Grier*, *supra*, at *15. Now it is clear, the Fifth

Circuit indeed has adopted the *Bowie* position. That impact is challenged by this petition for certiorari, to overturn the holding that a public employee can be forced to lie, or lose his or her job. Otherwise, the result is clear, the possibility is reinforced that, under *Garcetti*, public corruption can be secreted away from the public view, and shielded behind a fortress of lies to prevent public prosecution and correction.

There is no reason to suppose that a law supporting lies was intended by our founders.

In *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), a thirteen-year-old had protected free expression. In *Cohen v. California*, 403 U.S. 15 (1971), a youth had First Amendment protection for the scrawled letters on his jacket that said "f*** the draft." In *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827 (1969), a Ku Klux Klan leader had First Amendment rights to call for violence to overturn civil rights laws. How can a child, a youth, and one who speaks in favor of fear and violence, all have free speech, but a lawful public servant have no such speech at all?

While the courts below camouflaged their support of lies and coverups by ruling that the petitioners were not protected because they were performing their job, that ruling belies the fact that lying was not part of the job description. It cannot be one's duty both to report and <u>not</u> to report true facts. *Garcetti* creates this contradiction. From a contradiction, anything follows. This contradiction arising from *Garcetti* abandons public employees to the dangers of performing under

contradictory standards. It invites arbitrary enforcement, and fails to provide fair notice. *Sessions v. Dimaya*, 584 U.S. ___, 138 S. Ct. 1204, 1223 (2018). It also invites the arbitrary imposition of power from senior officers to enforce their own subjective, or even selfish and illegal, sense of what is required or forbidden: "leaving the people in the dark about what the law demands and allowing prosecutors and courts" [or superior officers] "to make it up." *Sessions v. Dimaya*, *supra*, 138 S. Ct. 1204, 1224 (2018) (Gorsuch, J., concurring).

Truthful reporting is a necessary part of most government jobs. After all, it would be hard to imagine a job that did not require communication on some level. Truthful reporting must be required for tax collectors, census takers, and public health statisticians, to name a few. But nowhere can truthful reporting be more important than within law enforcement.

## CONCLUSION

The petition for writ of certiorari in this case must be granted.

Respectfully submitted,

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