No. _____

In The
Supreme Court of the United States

LONNIE TOFSRUD,

Petitioner,

v.

SPOKANE POLICE DEPARTMENT, a municipal corporation of the City of Spokane; CRAIG MEIDL, in his personal and official capacity; JUSTIN LUNDGREN, in his personal and official capacity; and DAVE STABEN, in his personal and official capacity,

Respondents.

On Petition For Writ Of Certiorari To The Ninth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

JEFFRY K. FINER
Counsel of Record
KSB LITIGATION
510 West Riverside Drive
Spokane, Washington 99201
(509) 981-8960
jfiner@ksblit.legal

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Petitioner, City of Spokane Detective Lonnie Tofsrud, learned that a police officer fabricated material facts in an arrest report of one of his informants. In accordance with his duty Petitioner told his own supervisor of the fabrications. The supervisor refused to forward the matter along the chain of command stating that based on past frustrations he would "not bang his head against that wall." In consequence Petitioner stated to the supervisor he intended to bring the matter to the county prosecutor. His supervisor endorsed this decision. Petitioner was later sanctioned for recklessly and knowingly making statements outside his chain of command.

The Ninth Circuit reasoned that Petitioner's practical duties included his complaint to the prosecutor because Tofsrud (1) exploited his employment-based access, and (2) his speech to the prosecutor did not disclose systemic abuse. App. 2-3. Following the circuit's mandate this Court decided *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022).

The question presented is:

Following a supervisor's refusal to act on a credible report of officer misconduct, does a city police detective's complaint to a county attorney, given his access to and past collaboration with the prosecutor, meet the test for private speech?

RELATED CASES

United States Court of Appeals for the Ninth Circuit, *Tofsrud v. City of Spokane, et al*., No.: 21-35450 (May 9, 2022)

United States District Court for the Eastern District of Washington, *Tofsrud v. Spokane Police Department, et al.*, No.: 2:19-cv-00371 (June 2, 2021)

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Lonnie Tofsrud, plaintiff below, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's unpublished decision affirming the trial court's dismissal of Petitioner's First Amendment Free Speech claim is found at *Tofsrud v. City of Spokane, et al.*, 2022 WL 1451394. Both the Ninth Circuit and trial court decisions are reproduced in the Appendix. App. 1, 4.

JURISDICTION

The Ninth Circuit unpublished opinion was filed on May 9, 2022. App. 1. This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution reads as follows:

> Congress shall make no law . . . abridging the freedom of speech. . . .
>
> United States Constitution, Amend. I

STATEMENT OF THE CASE

This petition challenges the unpublished decision by the Ninth Circuit affirming the decision by the district court for the Eastern District of Washington dismissing Petitioner's claim of retaliation under the First Amendment's Free Speech Clause and seeks return of the case to the Circuit for consideration under *Kennedy v. Bremerton*, 147 S. Ct. 2407 (2022), decided after the Circuit's mandate.

A. Facts

1. Petitioner discovered a falsified arrest report relating to the arrest of his own confidential informant.

Petitioner Tofsrud, a 27-year police detective with the City of Spokane, was reprimanded for disclosing to a Spokane County prosecutor that a colleague had prepared and filed a false arrest report. The report involved one of Petitioner's confidential informants.

Upon learning of the arrest, Petitioner worked for several weeks with his supervisor Sgt. Prueninger, his cooperating task force officer from the Bureau of Alcohol Tobacco and Firearms, and his prosecutor to resolve pending cases that required the informant's testimony. Excerpt of the Record ("ER") 149.

Before all the cooperator's cases were dismissed or resolved, Petitioner examined the arresting officer's arrest report in comparison with other records. Per policy, he reported to his supervisor that he noticed

obvious discrepancies between the official arrest report and the objective computer-aided dispatch ("CAD") records. ER 140 (final ¶). The arresting officer had failed to disclose: that the arrestee had been identified by an unnamed informant and was targeted for arrest; that the arrest did not arise from a random check of license plate numbers as set forth in the report; nor that the arrest was the result of a planned stake-out by the officer's unit, the Patrol Anti-Crime Team ("PACT").

The arresting officer admitted to Tofsrud that the CAD was authoritative, as opposed to his arrest report. Petitioner urged the arresting officer to let the prosecutor know about the discrepancies. ER 67:1-2, ER 151. Petitioner returned to his direct supervisor Sgt. Prueninger and reported the conversation he had with the arresting officer. ER 67:6-14, ER 91. Prueninger agreed the discrepancies were troubling, "a huge issue." ER 65 ¶ d. Prueninger viewed Tofsrud's concern not as a "gotcha" but as "a legitimate issue." ER 155, ER 65:14-19.

Sgt. Prueninger and Tofsrud worked with his ATF contact over the next weeks to "get together and sort out any repercussions to [the Spokane Police Department] and ATF cases." ER 149.

On December 27, 2017, seven weeks following the informant's arrest, Tofsrud asked Sgt. Prueninger to take the fact of the falsified report up the chain of command. Sgt. Prueninger refused. He later explained in the internal affairs investigation that he was "unwilling to bash his head against the wall," based on his

past experience of "frustrating and unsuccessful" complaints about members of the PACT unit. ER 142.

Prueninger and Petitioner were aware of longstanding friction with the arresting officer's unit and its supervising lieutenant, Respondent Staben, who had made known that "[i]f anyone fucks with the PACT, I'm going to bring them down." ER 193:10-12. Staben's attitude was attributed by a senior lieutenant to "the deluge of comments people had made to him about the PACT Team." ER 193:18-19. This history was known to the Chief of Police, Respondent Meidl. ER 209:2-6.

Petitioner was also aware that a recent suppression motion had been granted in federal district court based on the district court's conclusion that a PACT officer had given false testimony in violation of the rule in *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978). ER 183-85.

Tofsrud believed that the arresting officer was duty bound to go to the prosecutor to clarify the discrepancies. ER 149. In the absence of this, Petitioner Tofsrud stated to Prueninger that, while the informant's arrest was not their unit's case, he could not ignore the discrepancies. Prueninger declined to bring the matter forward as required by Department rules. In response "Tofsrud stated he felt he should speak with the prosecutor, I agreed." ER 150. Prueninger did not indicate whether Tofsrud was asking for permission or merely stating his intention. Prueninger did not elaborate whether his response was other than

a personal endorsement. ER 150. No party claimed that Prueninger ordered Petition to go outside the chain of command. Prueninger's refusal to handle the matter internally was contrary to his duty to bring Respondent's allegation to a supervisor.

2. Petitioner used his access to the prosecutor to inform Spokane County of the misconduct.

Tofsrud had a long employment-related connection with the prosecutor. He and the prosecutor had been in contact over the past seven weeks to handle the fallout on pending cases that required the informant's involvement. In late December, 2017, however, he went to the prosecutor's office without an appointment to disclose a different issue. The prosecutor noted that "Tofsrud is of the opinion that [the arresting officer] was not being truthful." ER 68. The prosecutor disclosed that the arresting officer had provided him only a report of the arrest but not a copy of the CAD. ER 146. According to later statements by the arresting officer, however, the report's falsifications were at the direction of the prosecutor himself. ER 77:19-23. The Chief of Police considered the officer's explanation was "a pivotal piece of this incident." ER 79:6-8. This explanation was never corroborated.

Supervisors in the county prosecutor's office reviewed Tofsrud's claim and moved to dismiss the charges as a pretextual stop under state law. ER 68:21 to 69:2. The county dismissed the case against the

informant. The senior prosecutor recommended that the City of Spokane Police Department open an investigation of the arresting officer. ER 172.

3. PACT supervisors and Department officials retaliated.

PACT supervisor Lt. Staben opened an Internal Affairs investigation of Petitioner Tofsrud, ER 151, 260, 282. The Department then opened an internal affairs investigation of the arresting officer. ER 72.

Lt. Staben lobbied the county prosecutors stating that the PACT officer's conduct was authorized and that this officer had "every right to submit an arrest report at odds with its CAD." ER 71.

The Spokane Police Department reprimanded Tofsrud for "circumventing the chain of command and the internal affairs process," making "reckless" accusations in violation of Policy 340.3.5 (App. 41-44) and for "knowingly making false, misleading, or malicious statements." (App. 7). The Chief concluded that Tofsrud acted recklessly—not knowingly (App. 45), and he clarified in testimony that Tofsrud acted without knowing "all the information." The only information unknown to Tofsrud was the arresting officer's claim that he was ordered by the prosecutor to file his report in the manner he did. Chief Meidl concluded that Tofsrud's complaint was "unfounded." ER 32.

> Your meeting with the prosecutor as a peer to Cpl. McCollough and with no direct

> involvement in the criminal case was unsolicited, reckless, and inappropriate.

ER 161. Asked about the mental state required by the policy, Chief Meidl testified that the dishonesty prong of the Department's Policy (App. 41) was met by Tofsrud bringing "incomplete" information forward, and for "not having all the information." ER 76:7-23. The Chief's formal reprimand cited multiple additional factors (App. 42-43), and concluded stressing that a future discovery of misconduct must be reported in detail to Tofsrud's supervisor. App. 44. That supervisor was Sgt. Prueninger.

Defendants gave multiple explanations to justify finding the requisite mental state under the City policy. ER 200, 202:11-25 (Tofsrud's violation of a nonexistent "reckless" element). The Assistant Chief stated that Tofsrud acted knowingly insofar as "he knew" that he made the statements at issue. ER 82:6-7. A lieutenant testified that Tofsrud was found to have given false and misleading information based on the fact he had changed his story. ER 80:18-20, ER 216:5-13. According to Captain Overhoff, "We came to the conclusion that none of it was true." ER 216:10-11

As a result of the Chief's reprimand, Petitioner Tofsrud was reassigned from his investigation assignments and detailed to a reception area of a remote precinct. ER 76-77.

B. Summary Judgment

At summary judgment the trial court held that "[a]lthough Tofsrud's job duties may not include disclosing concerns to the prosecutor[], Tofsrud's job duties, including working with this specific confidential informant, compelled the disclosure at issue." App. 18. Accordingly his speech was his employer's and his actions were not protected by the First Amendment's Speech Clause. The court granted summary judgment in favor of all defendants and dismissed the claim. Other supplemental state claims not pertinent to this Petition were dismissed as well.

C. Ninth Circuit

On appeal the panel held that Tofsrud failed to meet his burden to show that "he spoke as a private citizen when he approached the prosecuting attorney about the arrest of his confidential informant." App. 2. The panel engaged in a practical inquiry of Tofsrud's duties and the circumstances of his speech. The panel properly found that Tofsrud's "role as a detective involved collaboration with the prosecution."

Of particular significance, the panel noted that Tofsrud had job-related access to the prosecutor so that "[b]y virtue of their working relationship Tofsrud was able to enter the prosecutor's office casually and without advance notice." App. 2. "Further, Tofsrud *asked for* and received his supervisor's endorsement before approaching the prosecutor." App. 2 (emphasis added).

The panel's characterization that Tofsrud "asked" for Prueninger's permission or endorsement is not found in the record. It appears to be in conflict with the rule reinforced in *Tolan v. Cotton*, 572 U.S. 650 at 656-57 (2014) (judge's function at summary judgment is not to weigh evidence or make inferences in favor of the moving party). The record on this point indicates only that Sgt. Prueninger heard Tofsrud state that because the informant was still in jail, Tofsrud felt he "should speak" with the prosecutor. 2-ER 150.

The panel noted that Tofsrud's speech "touched only his CI arrest rather than any broader concerns related to the [PACT]," and concluded:

> Thus, neither Tofsrud's privately held systemic concerns nor any failure to follow the chain of command can "transform" his speech into that of a private citizen versus a public employee. See *Barone [v. City of Springfield]*, 902 F.3d [1091,] at 1100 [(9th Cir. 2018.)]

This timely Petition for Certiorari follows.

REASONS FOR GRANTING THE PETITION

I. *PICKERING & GARCETTI* FRAMEWORK LEFT OPEN THE EXTENT TO WHICH ACCESS TO A VENUE DETERMINES THE PROTECTION AFFORDED THE SPEAKER.

The Court's framework for analyzing First Amendment claims by public employees in *Garcetti v. Ceballos*, 547 U.S. 410 (2006) and *Pickering v. Bd. of*

Ed. of Twp. High Sch. Dist. 205, Will Cnty., Ill., 391 U.S. 563 (1968), leave open the framework to analyze a key issue arising from a non-supervisory employee's report of misconduct made to a prosecutor outside his chain of command.

Respondent Tofsrud's issue squarely lies within the open question. Neither Washington State nor the City of Spokane have a rule requiring an officer to report misconduct beyond his or her direct supervisor.

Tofsrud's speech, though confined to a single episode of officer-misconduct, holds special value in the management of public offices inasmuch as government misconduct is well understood to involve quintessential matters of public concern. *Lane v. Franks*, 573 U.S. 228 at 240-41 (2014).

"*Garcetti* said nothing about speech that relates to public employment or concerns information learned in the course of employment." *Lane v. Franks*, 573 U.S. at 239. The critical question from *Garcetti* is whether the speech was itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties. Speech by public employees on subject matter related to their employment holds special value precisely because these employees have knowledge of matters of public concern by virtue of their employment. *Lane v. Franks*, 573 U.S. at 239 (2014).

Here the lower courts determined that Tofsrud was acting consistent with his practical and historic duties and was therefore his employer's speech.

According to the Ninth Circuit, Detective Tofsrud's speech to the county prosecutor was among his practical normal duties because: (1) he had access to the prosecutor's office without prior appointment, and (2) his ongoing and past collaboration with the prosecutor establish his duty to report on misconduct committed by other police units.

The *Pickering/Garcetti* framework does not address either access or past collaboration. The role of the reviewing court in defining an employee's scope of duty in cases of serious debate was left open.

> First, as indicated above, the parties in this case do not dispute that Ceballos wrote his disposition memo pursuant to his employment duties. We thus have no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate.

Garcetti v. Ceballos, 547 U.S. 410, 424 (2006). This Court did, however, note that formal job descriptions alone were neither necessary nor sufficient to guide the decision.

> We reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions. [Internal citation omitted]. The proper inquiry is a practical one.

Id.

Neither *Garcetti* nor cases decided prior to the Ninth Circuit's resolution of the instant case on May 3,

2022, have addressed the degree to which the analysis can turn upon on a factor such as access. The question remained open until July of this past Term.

II. *KENNEDY v. BREMERTON* ERODES THE NINTH CIRCUIT'S RELIANCE ON "ACCESS" AS A DETERMINING FACTOR UNDER THE *PICKERING-GARCETTI* FRAMEWORK.

In *Kennedy v. Bremerton School District*, 147 S. Ct. 2407 (2022) this Court noted the complexity arising from the interplay between free speech rights and government employment. The Court's framework set forth in *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 and related cases suggest two steps. The first is a threshold inquiry examining "nature of the speech" and determines whether the party spoke "as a citizen addressing a matter of public concern." If so, the analysis proceeds to a second, balancing, test. *Kennedy*, at 2423 (referring to the *Pickering-Garcetti* framework). As in *Kennedy*, the parties here have no disagreement that the matter Tofsrud raised was of serious public concern. The dispute at this first stage is entirely over whether Tofsrud was speaking on behalf of the Spokane Police Department.

Access to a prosecutor based on collaborative duties does not immutably make a whistleblower's disclosures speech by the employer. The Court reiterated that an employee may speak in a location associated with the employment, even one restricted to the public, yet nevertheless not lose the right to free speech.

Kennedy v. Bremerton, at 2424, *citing Lane v. Franks*, 573 U.S. 228 at 240 (2014). In view of the Ninth Circuit's reliance on a now-weakened factor, Petitioner has a strong claim for granting his petition, vacating the Ninth Circuit's judgment, and remanding in light of this Court's decision in *Kennedy v. Bremerton.*

III. THE NINTH CIRCUIT'S VIEW THAT SPEECH BY A PUBLIC EMPLOYEE IS LESS LIKELY TO WARRANT PROTECTION UNLESS ITS RAISES BROAD-BASED OR SYSTEMIC ISSUES IS UNSUPPORTED BY THIS COURT'S CASES.

The Ninth Circuit's secondary rationale addresses the scope of the employee's speech. To qualify as private speech, the Circuit favors broad-based or systemic issues over narrowly focused topics. This is an established standard within the Ninth Circuit. See *Ohlson v. Brady*, 9th F.4th 1156, 1165 (2021); and see *Brandon v. Maricopa County*, 849 F.3d 837, 844 (9th Cir. 2017). Neither this Court—nor any other circuit—appears to have placed a similar categorical burden on speech rights under the *Pickering*/*Garcetti* analysis. Systemic or not, broad or narrow, a public employee's speech has been protected when it is exercised outside of the employee's duties. The breadth or scope of the speech has not been a factor in this Court's analysis.

The Circuit's favoring of systemic complaints is an unwarranted dilution of a citizen's right to reveal public misconduct. This is especially true here, given the history of frustration and the inference of organized

protection given the PACT unit. As a citizen, Tofsrud would have a right to bring even one instance of misconduct to the attention of the authorities.

CONCLUSION

The lower courts' reliance upon Tofsrud's access to and past collaboration with a public prosecutor is untenable following this Court's decision in *Kennedy v. Bremerton*. On this basis Tofsrud's suit should be granted certiorari, the judgment vacated, and the matter remanded with instruction to the Ninth Circuit.

Dated: August 8, 2022

Respectfully submitted,

JEFFRY K. FINER
Counsel of Record
KSB LITIGATION
510 West Riverside Drive
Spokane, Washington 99201
(509) 981-8960
jfiner@ksblit.legal

Counsel for Petitioner