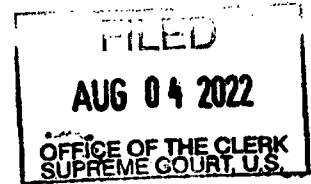


ORIGINAL

22-144
No.



In The
Supreme Court of the United States

MAHESH KHATRI,

Petitioner,

v.

OHIO STATE UNIVERSITY ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Sixth
Circuit

PETITION FOR A WRIT OF CERTIORARI

MAHESH KHATRI, DVM, PHD
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QUESTIONS PRESENTED

As of August 1, 2022, due to the ongoing COVID-19 pandemic which is caused by a coronavirus called SARS-CoV-2, a select infectious agent, more than 6.4 million people have lost their lives. Although not confirmed yet, the World Health Organization is investigating if the virus leaked from a laboratory and caused the current pandemic. To prevent infections to humans and animals due to intentional misuse of select infectious agents (dangerous viruses) by untrained lab personnel in lower biosafety lab and animal facilities, petitioner reported the misuse to law enforcement agencies and The Ohio State University's administration and faced retaliation.

In *Lane v. Franks*, 573 U.S. 228, 240 (2014), this Court ruled that in order to show that the speech is employee-speech outside the protection of the First Amendment, the public employer must show that the speech is related to the employee's "ordinary job responsibilities." *Id.* at 240. The Sixth Circuit below included campus police in petitioner's chain of command, falsified petitioner's job description and actual speech, reporting of misuse of "select infectious agents" (highly pathogenic H5N1 avian influenza virus and the GB Texas strain of New Castle disease virus) which are included in the "Federal Select Agent Program", in lower biosafety level, BSL-2 lab to reporting of "infectious agents" (H5N1 avian influenza virus, not a select infectious agent) to make petitioner's speech related to his ordinary job duties and wrongly affirmed the district court's ruling. Petitioner had appealed the district court's incorrect ruling that reporting of

QUESTIONS PRESENTED – Continued

federally regulated infectious agents related to petitioner's official duties. In appeal, petitioner reasserted that it was not part of petitioner's ordinary job duties to illegally work with select infectious agents in BSL-2 lab which according to Federal Law should be handled in higher biosafety lab, BSL-3 lab. When petitioner made the report of misuse of select infectious agents, department had no BSL-3 lab and petitioner had not received advanced special training necessary to work with select infectious agents in BSL-3 lab, thus working illegally with select infectious agents in BSL-2 lab or training others or reporting their misuse cannot be petitioner's ordinary job duties.

Additionally, *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006), holds that government-employee speech made pursuant to official duties is not protected. However, in *Garcetti*, this Court also explicitly stated that it was not ruling on speech related to scholarship or teaching. *Id.* at 425. Currently, four Circuits, including the Sixth Circuit have recognized academic freedom exception to *Garcetti* for speech by Public University Professors. Petitioner, worked as Research Scientist (non-tenure track faculty) in the Ohio State University (OSU) whose research in the Virology and Cell Biology fields directly contributed to the education mission of the university. Petitioner, as an expert in Virology recognized that misuse of select infectious agents in BSL-2 lab by untrained lab personnel can cause deadly infections to humans and animals (violation of Bioterrorism Act, 2002). To protect the public and animal health, petitioner reported the misuse of select agents to law

QUESTIONS PRESENTED – Continued

enforcement agencies and the university administration. Even though petitioner's speech is not related to his ordinary job duties, the Sixth Circuit and the district court wrongly applied *Garcetti* to petitioner's speech. As a research faculty member in a public university, Petitioner's speech on research procedure should also qualify for an academic exception to *Garcetti*.

The Sixth Circuit also ignored all the facts and wrongly affirmed the district court's decision that petitioner did not suffer and adverse employment action due to his perceived disability and due to his son's medical condition.

The questions presented are

Is petitioner's reporting of misuse of "select infectious agents" in BSL-2 lab which according to Federal regulations should be handled in BSL-3 lab by personnel who have received advanced training (BSL-3 lab was not available and petitioner was not trained to work with select infectious agents), is an employee speech related to his ordinary official duties?

Does petitioner's speech as a research faculty member in a public university qualify for an academic exception to *Garcetti*?

If the Sixth Circuit properly dismissed petitioner's disability discrimination claims due to his son's medical condition?

PARTIES TO THE PROCEEDING

Petitioner Mahesh Khatri, DVM, Ph.D., was Plaintiff and Appellant below.

Respondents Ohio State University, Dr. David Benfield, PhD, Dr. Yehia Mohamed “Mo” Saif, DVM, PhD, Chang-Won Lee, DVM, PhD, Gireesh Rajashekara, DVM, PhD, and Ms. Elayne Siegfried in their individual and official capacities were Defendants and Appellees below.

RULE 29.6 DISCLOSURE STATEMENT

No parties are corporate entities.

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PETITION FOR A WRIT OF CERTIORARI

Mahesh Khatri (Khatri) respectfully submits this petition for a writ of certiorari.

OPINIONS BELOW

The order of the Court of Appeals for the Sixth Circuit ("Sixth Circuit"), affirming the District Court for the Northern District of Ohio ("District Court") and rendering judgment of dismissal is not reported (App. 27). The order of the Sixth Circuit denying Khatri-Appellee's Petition for Rehearing is not reported (App. 72). The opinion of the District Court granting Defendant-Appellant's Motion to Dismiss is not reported (App. 39).

JURISDICTION

The Sixth Circuit entered judgment on January 25, 2022. The Sixth Circuit denied the Motion for Rehearing filed by Khatri, Khatri-Appellee below, on April 5, 2022. On June 28, 2022, Justice Kavanaugh granted Khatri's application for extension of time to file Writ of Certiorari on or by August 4, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

“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.”

U.S. Const. Amend. I.

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law ”

42 U.S.C. § 1983.

STATEMENT OF THE CASE

This Petition arises from the Sixth Circuit’s judgment of dismissal, under Federal Rule of Civil Procedure 12(b)(6), of Khatri’s First Amendment retaliation claim and disability discrimination due to his son’s medical condition.

A. Khatri’s reporting of misuse of select infectious agents to law enforcement agencies and to the OSU’s administration:

In Oct. 2011, for the first time, Khatri raised

the intentional misuse of select infectious agents (dangerous viruses) regulated under Agricultural Bioterrorism Protection Act of 2002 and 9 CFR 121 (highly pathogenic H5N1 avian influenza virus and the GB Texas strain of Newcastle disease virus (NDV) in Dr. Chang-Won Lee's lab (BSL-2) in the department. Dkt. 16, PageID # 233 and Exhibit 8. Both GB Texas NDV strain and highly pathogenic H5N1 avian influenza virus are included in the Federal Select Agent Program based on their potential to pose a severe threat to both human and animal health, and National Economy. Federal select Agent Program suggests misuse of select agents should be reported to the FBI (Dkt. 39, PageID # 559-560). Khatri first observed the misuse of the GB Texas NDV strain in the lab when Dr. Lee gave this virus to his graduate student, Smitha Pillai to work in the BSL-2 lab. She spoke with Khatri to confirm if the GB Texas NDV strain is a select agent. Khatri told her that the GB Texas NDV is a select agent and should not be used in a BSL-2 lab. In the evening on the same day Khatri mentioned this select infectious agent misuse to Dr. Y.M. (Mo) Saif's (Then Head FAHRP) student, Hadi Yassine and wanted to know if Dr. Saif would be in town on the next day. Hadi told Khatri "[i]t's not a big deal; for company work even they infect animals with this virus."

During 2010-11, Dr. Lee had 7-8 visiting scholars/students from Egypt in his lab and they were working on highly pathogenic H5N1 avian influenza viruses isolated from Egypt. They were receiving supposedly inactivated H5N1 virus from Egypt here at Wooster, sometimes shipments were leaky, and Khatri was told by one of the students that they inactivate the virus here. As Khatri and others observed, these personnel were not trained and used to struggle doing common laboratory techniques.

Dr. Lee's graduate students also complained to outside researchers that experiments in his lab were not done correctly. As the situation was very serious, Khatri as a concerned citizen decided to report this misuse of select infectious agents to prevent any major disaster that may have resulted in loss of human lives and livestock. Khatri on October 5, 2011, after office hours, from his home, called the FBI but could not talk to the FBI. Khatri then went to Highway Patrol office (law enforcement agency) just next to his apartment to ask how Khatri can approach the FBI to report illegal use of select agents at his workplace. After getting information that Khatri works at OSU Wooster Campus, Highway Patrol Agent called Wooster Campus Police Officer and asked Khatri to tell Police officer about the misuse of select agents. The Officer advised Khatri that Police Chief will call him for a meeting and will help in reporting the select agent misuse to FBI. Dkt.39, PageID # 560. However, the next morning Police chief instead of helping Khatri report select agents misuse to FBI/law enforcement agencies, informed Dr. Benfield and Lieutenant and Public Safety Manager, Wooster Campus Seth Walker. Dkt.16 at Exhibit 8. In turn Dr. Benfield informed Dr. Mo Saif, then department head. Dr. Mo Saif called Khatri to his office and threatened him saying reporting to the Police is highly unacceptable. Khatri had clearly indicated to the Police Officer that he did not want to report this issue to the department head. Dkt.16 at Exhibit 8. After Dr. Saif's retirement in Jan. 2013 (he now works as Professor Emeritus), Khatri in Feb 2013 reported misuse of select agents to Dr. LeJeune who was promoted as a new department head. He responded, "you should not have raised this issue, we will be in trouble" and Khatri was continuously subjected to retaliation. Dkt. 16, PageID # 236. Between Dec. 2014

and Aug. 2016, Khatri requested several Wooster Campus and College Administration (Wooster Campus Director, College HR Director, HR Generalist, Senior Associate Deans) for help to stop retaliation and offered his help to investigate the misuse of select agents. In August 2016 Elayne Siegfried (College HR Director) asked Khatri to file 'dispute form'. In dispute form Khatri indicated that he is facing retaliation for raising misuse of dangerous viruses, exploitation and discrimination due to his son's medical condition. App. 94. On October 20, 2016, Dr. Benfield communicated to Khatri that there was no misuse of select agents. Khatri contacted Lt. Walker and asserted that Khatri has evidence of misuse of select agents and sent the evidence and names of witnesses by email on Oct 25, 2016 as suggested by him. Dkt.16 at Exhibit 18. On Dec. 3, 2016 Lt. Walker informed Khatri that there was no misuse of select agents in the department. Dkt. 39 at Exhibit 9. Khatri conveyed his disagreement with Lt. Walker's investigation and its conclusion. When retaliation continued by department head and Wooster Campus Administration, Khatri in Nov. 2017 requested college Dean and in Dec. 2017 requested several university administrators including University provost and President for help to stop retaliation. Dkt.16, PageID # 246 and Dkt.16 at Exhibit 22. Instead of any help, Khatri's employment was terminated in March 2018.

B. First Amendment Retaliation

Immediately after reporting the misuse of infectious agents in October 2011, Khatri was subjected to severe retaliation. He was kept hostage so that department heads could continue to misuse Khatri's research grants money. Khatri's grants paid more than \$250,000 to the department. Dkt.16,

PageID # 237. He was blacklisted, then Department head, Dr. Mo Saif threatened Khatri that reporting misuse of select agents to police is highly unacceptable. Dr. Benfield, Wooster Campus Director and Dr. Mo Saif sent Khatri for psychiatric counseling (five sessions) and ordered Khatri to give his Mahesh Khatri (MK)1-OSU cell line (technology) to Dr. Lee. Dkt.16, PageID # 235 and Dkt.16 at Exhibit 9. Another Faculty member in the department, Dr. Gourapura tried to use Khatri's research grant to pay salary of his student. Dr. Gourapura also wanted Khatri's cell line to send to other researchers under his name. Dkt.16 at Exhibit 12. Khatri's faculty job applications to outside schools were blocked. Dr. Mo Saif was using Khatri's grant money to hire people from Egypt, Lebanon and Pakistan, Dr. Saif wrote negative reviews in annual review (March 2012 specifically saying difficulty in working with people), threatened to end Khatri's employment, denied lab facilities, moved lab equipment required for Khatri's research to Dr. Lee's lab. The retaliation continued when Dr. LeJeune was promoted as department head in Feb 2013, he told Khatri that "you should not have raised misuse of select agents", he blocked Khatri's job application to the University of Georgia in Feb. 2013 saying that no university will let go of research grants to other schools, Khatri was denied lab facilities to work on his grants. In March 2014 when Khatri was notified by NIH that he will get a new grant of approx. \$420000 and 54% of this grant will go to the University and Department, Dr. LeJeune didn't let Khatri move to Animal Sciences department so that he can continue to use Khatri grant money and promised Khatri a faculty position in the department, Khatri was forced to continue to pay his modest salary from his own grants, no other research scientist in the department had their research grants and were paid

by University resources. Dkt.16, PageID # 237. In July 2014 Dr. LeJeune blocked Khatri's faculty position in main Campus in Columbus that would have paid Khatri \$120000/annum salary, startup package, own lab and other benefits. Department continued to block applications to other schools and used Khatri for departmental politics. Dr. LeJeune told Khatri if he wants lab facilities and faculty job in the department then he has to complain against Dr. Mo Saif and his wife, Dr. Linda Saif, also professor in the department, to the University Administration that Khatri was forced to write Dr. Mo Saif's student, Abdul Rauf's thesis and that student did Dr. Saif's personal work. App. 90. Khatri was repeatedly told that he has no option but to stay in his current status as he needs a job and insurance to keep his son alive. In May 2015, to show that he is providing lab space to Khatri, Dr. LeJeune asked Khatri to move to a space in Edgington hall that used to be a storage room and not a research lab required for Khatri's research. In May 2015 when Khatri went to ask for help to HR Director, Elayne Siegfried and Dr. Benfield that Khatri lacks lab space to work on his grants and Khatri is kept hostage in the department, facing retaliation for raising misuse of infectious agents in the department and his grant money is being misused, instead of any help, Khatri was threatened that there was no misuse of infectious agents and Khatri will be provided only a storage room as a lab. Dr. LeJeune threatened Khatri that he will destroy his career and give him so much stress that like his son, Khatri's Adrenal glands will also stop working and wrote false negative comments in his annual review in May/June 2015. Dkt.16, PageID # 239. In June 2015-June 2016 (search period), Khatri was passed over for two faculty positions in the department despite his higher credentials than the selected candidates, having more than a million

dollars in research grants while selected candidates had either no or insignificant grants. In April/May 2016, Dr. LeJeune and Dr. Benfield blocked Khatri's faculty job application to University of Wisconsin. When Khatri was asked to file Dispute Form in August 2016, Khatri wrote in Dispute Form that he is facing retaliation for raising the misuse of dangerous infectious agents in the department. Dkt.16, PageID # 241 and Exhibit 15. The Campus Director, Dr. Benfield in his response in October, 2016 communicated that no misuse of select infectious agents occurred. However, when Khatri provided the evidence and names of the witnesses to Lt. Seth Walker, Wooster Campus Biosafety Officer, he was forced to undergo 'Fitness for Duty Examination' in Dec. 2016. Dkt.16, PageID # 242 and Dkt. 39 at Exhibit 10. After passing the fitness exam, Khatri was allowed to return to work in January 2017 and was forced to meet with Department Acting Head and College Interim Associate Dean for Research at 2-week intervals, not allowed to work on his grants, his job applications were blocked, acting Department Head wrote negative comments in Khatri's annual review conducted in May, 2017 (Dkt.16, PageID # 244), Wooster Campus Director and Department Head were misusing money from Khatri Research Grants for their benefits. When Khatri refused to include Acting Department Head name in his patent and Research grant which Khatri was preparing to submit for funding to NIH in October-November, 2017 (Dkt.16, PageID # 245-246), Khatri was placed on Performance Improvement Plan (PIP) and his employment was wrongfully terminated in March 2018.

C. Khatri faced continuous discrimination due to his son's medical condition

Khatri was held hostage and continuously faced discrimination and exploitation due to medical condition of his son that started soon after Khatri started his employment with OSU in September 2008 and is still ongoing as stated in the First Amended complaint (Dkt. 16 and Dkt. 39, PageID # 563). Khatri's son suffers from a chronic medical condition, 'Adrenal Insufficiency'. Within a month of joining, Dr. Chang Won Lee took Khatri's novel grant idea and submitted it under his name. Dr. Lee was also threatening Khatri to give him cell line (technology) developed by Khatri which he wanted to send to other researchers outside the OSU without following university rules. When Khatri insisted on following the University rules, Dr. Lee threatened Khatri that he will not let Khatri get Permanent Resident status and job outside and Khatri needs a job and medical insurance for his son. Khatri wrote grants for Dr. Lee as he told Khatri that he had problem in writing. Khatri was kept hostage and Dr. Lee took advantage of Khatri's situation and took Khatri's work and got promotions at the expense of Khatri's career.

Dr. Saif forced Khatri to write Dr. Saif's student, Abdul Rauf's PhD thesis so that Abdul can graduate and obtain a Green Card. Khatri's job application were blocked and Khatri's grant money was used to pay salary of personnel hired by Dr. Saif from Egypt, Pakistan, and Lebanon.

In October 2011, Khatri reported the misuse of dangerous infectious agents in Dr. Lee's lab to the Wooster Campus Police. Dr. Saif threatened Khatri for reporting infectious agent misuse violation. Dr. David Benfield, then Associate Director of Wooster Campus and now Director, Wooster Campus, ordered Khatri to attend counseling through Employee Assistance Program. Khatri had no option but to comply as he needed a job and medical insurance for

his son's medical condition.

Dr. Saif retired in Jan 2013 and Dr. Jeffrey LeJeune was promoted as new Head of the Department. Dr. LeJeune continued with the departmental policy of discrimination against Khatri, and Khatri's job applications were continued to be blocked within OSU and to outside schools and misuse of Khatri's grant money continued.

Khatri was passed over for 2 faculty positions in the department which became open in June, 2015. At that time Khatri was had a nationally recognized Research Program and Federally funded research grants. The search for these positions was concluded in June/July 2016. The selected candidates had either no or insignificant grants yet were provided with university paid salary of \$131,000.00/annum, startup package of \$500,000.00 and salary and benefits for one Research Associate and one graduate student and lab facilities. Khatri was not even provided with lab facilities and was forced to pay his salary \$56,000 from his own grants. Department and Campus Director blocked Khatri's job applications outside and used Khatri's grants money to support research of others. Dkt.16, PageID # 240.

In August 2016, after sending requests for help to stop discrimination and exploitation which Khatri was facing to several Administrators of the University, Khatri was asked to file a dispute form and Khatri in December 2016 was informed that OARDC has conducted investigation into Khatri's report of misuse of dangerous infectious agents in the Department and no violation was found. (Dkt. 39 at Exhibit 9). However, when Khatri provided the proof and name of witnesses, Khatri was forced to undergo 'Fitness for Duty' examination and was threatened that his employment will be terminated if he refused. Dkt.16, PageID # 242 and Dkt. 39 at Exhibit 10.

Khatri had no option but to comply as he needed a job and medical insurance for his son's medical condition.

Dr. Rajashekara, Acting Department Head, blocked Khatri's faculty jobs to outside schools and even transfer to different department so that he can continue using Khatri's research grant money, he refused to provide Khatri facilities and resources to work on his grants. Dr. Rajashekara told Khatri 'he has no option, he has to stay like this'. Dr. Rajashekara in the past had tried to take Khatri's grant and submit it under his name and Khatri's wife had refused to work in Dr. Rajashekara lab. Dr. Rajashekara told Khatri we have "past issues" and wrote negative reviews in his annual review in May 2017.

In October and November 2017, Dr. Rajashekara demanded his name be put in Khatri's NIH grant and Patent; Khatri refused to include his name. He threatened Khatri that he controls Khatri's employment and Khatri needs a job to keep his son alive. In Nov 2017, Khatri complained to the College Dean and OSU's Senior Vice President of Research that Dr. Rajashekara is taking advantage of Khatri's situation. Dkt.16, PageID # 246 and Dkt.16 at Exhibit 21. Dr. Rajashekara told Khatri that Administration is against him because he reported the misuse of infectious agents in the department and will not receive any help from the Administration and he has no option as Khatri needs a job to get medical insurance for his son. Khatri did not receive any response to his complaint. Instead, Dr. Rajashekara and OSU placed Khatri on PIP in Dec. 2017. Despite a very productive research record, Khatri was wrongly placed on PIP and wrongfully terminated on March 5, 2018. Dkt.16, PageID # 246.

C. Procedural History

Khatri filed Complaint against the OSU in the Northern District of Ohio in December, 2018 and on June 24, 2019, Khatri filed an Amended Complaint against OSU and added new party Defendants. In his Amended Complaint, Khatri listed the following Federal claims: (1) First Amendment retaliation under 42 U.S.C. § 1983 against all Defendants and against the individually-named defendants in their official and personal capacities; (2) Conspiracy to interfere with Civil Rights under 42 U.S.C. § 1983 against all Defendants and against the individually-named defendants in their official and personal capacities; (3) Disability Discrimination under the ADA, 42 U.S.C. § 12112 and Rehabilitation Act against all Defendants and against the individually-named defendants in their official and personal capacities; and (4) Discrimination based on religion and national origin under Title VII against all Defendants and against the individually-named defendants in their official and personal capacities, except for Dr. Rajashekara and several state law claims against all defendants. Dkt.16.

On July 10, 2019, Khatri filed motion for permission for electronic filing of case documents. Motion was not entered in the Case docket and Khatri was forced to file documents related to this case either by mail or in person. The motion was finally entered on November 12, 2020 (Dkt. 65, Dkt. 65 is missing in PacerMonitor) when Khatri called the Court Clerk's office who first denied that Khatri ever filed the motion. Khatri then sent the copy of the motion which he had received from the Court Clerk's office with filing date stamp in July 2019.

Defendants moved to dismiss. Dkt.25, PageID # 390-412.

In January 2020, the magistrate judge recommended dismissing all federal claims and declined supplemental jurisdiction over the state claims. Dkt. 49, PageID # 638-667. For First Amendment claim, the magistrate judge correctly determined that reporting of misuse of select agents was a matter of public concern. However, Magistrate Judge recommended that Khatri did not speak as a private citizen, but rather pursuant to his duties as an employee in the course of performing his job, rendering his speech outside the limits of First Amendment protection. Magistrate also recommended OSU and individually-named defendants, in their official capacities, are entitled to qualified immunity for Khatri's First Amendment claims under § 1983.

For Khatri's ADA/Rehabilitation claims, the Magistrate recommended dismissal of ADA and Rehabilitation Act claims against all Defendants. The Magistrate judge declined to consider discrimination based on Family member's disability claim under ADA/Rehabilitation Act.

Magistrate Judge issued the R. & R. on January 17, 2020 and indicated that the R. & R. was mailed to Khatri on the same day. In fact, the R. & R. was mailed to Khatri by regular mail on January 21, 2020 which Khatri received on January 25, 2020. Dkt. 52 at Exhibit 1.

On February 3, 2020 "Upon due consideration", the district court ignored clear errors in the R. & R., adopted the R. & R., and dismissed the case. Dkt. 50, PageID # 668-669. Khatri received Judge Adams' judgment by mail on February 5, 2020. On February 4, 2020, Khatri timely filed his objections to the R. & R. Dkt. 52, PageID # 671-701. Khatri on March 17, 2020 and May 11, 2020 filed motions (Dkt. 58 and 60) to request the court to consider his objections to the R.

& R. and court's ruling on Defendants' motion to dismiss Khatri's first Amended complaint. In the motions Khatri also indicated that based on his research and invention, OSU had filed a provisional patent (Methods Of Treating Respiratory Infections Using Extracellular Vesicles) in July 2017 and Khatri's invention is being tested in clinical trials as treatment option for coronavirus (respiratory infections) in China and other places and Khatri's other research 'Mesenchymal stem cell-based therapies for lung diseases' is also being tested in clinical trials as therapy for COVID-19 and timely ruling on Khatri's motions will allow Khatri to continue his novel research and Khatri will be able to take care of his family (id at PageID # 867-868).

Khatri on October 26, 2020 filed another motion to request the district court to convene a virtual status conference to discuss the pending motions (Dkt. 63, PageID # 882-884). On November 12, 2020 Judge Adams denied the motion (Dkt. 66, PageID # 895). In late Jan. 2021, Khatri filed Judicial misconduct complaint against Judge Adams. Khatri has not received any response from the Judicial Council of The Sixth Circuit yet. On Feb. 5, 2021, Khatri filed yet another motion to request ruling on the pending motions so that Khatri can work on his research on developing vaccines and therapeutics for viruses including COVID-19 and take care of his family. Dkt. 67. On February 12, 2021, the district court for the first time since Khatri filed his objections to the R. & R. on Feb. 4, 2020, ruled that Khatri's objections to the R. & R. were untimely and upon due consideration, overruled Khatri's objections to the R. & R. and dismissed the case. App. 39.

Khatri appealed, arguing that the district Court erred by not considering Khatri's First Amendment Retaliation claim under continuing

violation and hostile work environment; the district court erred by not recognizing Khatri's reporting of misuse of federally regulated viruses as protected speech under First Amendment; the District Court erred by rejecting First Amendment Retaliation claim against individually-Named Defendants and the district court wrongly concluded that Khatri was sent for Fitness for duty exam due to performance issues and Khatri did not suffer any adverse employment action due to his perceived disability or his son's medical condition.

The Sixth Circuit affirmed dismissal of First Amendment Retaliation claims by incorrectly considering Khatri's reporting of misuse of "infectious agents" (H5N1 avian influenza virus) instead of Khatri's actual reporting of misuse of "select infectious agents", the GB Texas NDV and Highly pathogenic H5N1 avian influenza virus, both included in the Federal Select agent program and regulated under Agricultural Bioterrorism Act of 2002, in lower safety level lab as public employee speech. App. 32.

The Sixth Circuit also affirmed dismissal of Khatri's ADA and RA claims of perceived as disabled and discrimination due to his son's medical condition and court incorrectly determined that Khatri did not suffer any adverse employment action due to his perceived disability or due to his son's medical condition. App. 34-35.

REASONS FOR GRANTING THE PETITION

1. The Sixth Circuit incorrectly held that Khatri's reporting of misuse of select infectious agents (dangerous viruses) was a public employee speech and Sixth Circuit's decision conflicts with this Court and

Sixth Circuit's own past opinions:

Khatri's First Amendment retaliation claims are based on his reporting of intentional misuse of select infectious agents (dangerous viruses) (the GB Texas strain of Newcastle disease virus (NDV) and highly pathogenic H5N1 avian influenza virus), regulated under Agricultural Bioterrorism Protection Act of 2002, in Dr. Chang-Won Lee's lower safety lab (BSL-2 lab) in Food Animal Health Research Program (FAHRP), OSU Wooster Campus, OH. App. 85.

The district court agreed that the reporting of misuse of select agents by Khatri is a matter of Public Concern but incorrectly determined that reporting of misuse of federally regulated select agents was part of his job duties. App. 57-58.

Khatri appealed the district court decision reasserting that at the time of his reporting of misuse of select infectious agents included in Federal select agent program, FAHRP had no higher biosafety level laboratory facilities (BSL-3) required to work on dangerous viruses and Khatri had not received special training required to work on dangerous virus, therefore, it was not part of Khatri's ordinary job duties to illegally work on select infectious agents or training others in lower safety, BSL-2 lab and reporting their misuse, a violation of Bioterrorism Act of 2002.

The Sixth Circuit made fundamental error when the panel, without considering the Khatri's actual reporting, determined Khatri's speech as public employee speech by incorrectly considering Khatri's reporting as misuse of "infectious agents" rather than Khatri's actual reporting of misuse of "select infectious agents" which require higher safety lab facilities and special training for people working with select agents. App. 32-33 and App. 74-75. The Sixth

Circuit excluded Khatri's actual reporting of misuse of GB Texas NDV strain and "highly pathogenic" H5N1 avian influenza virus "select infectious agents" and instead included H5N1 avian influenza virus (which is not a select agent, therefore, can be handled in BSL-2 lab) and ruled that Khatri spoke as a public employee. Both GB Texas NDV strain and highly pathogenic H5N1 avian influenza virus are included in the Federal Select Agent program because of these viruses' potential to pose a severe threat to human and animal health, and National economy. App. 74-75; Dkt. 39, PageID # 559 and Dkt. 39 at Exhibit 3.

In an EEOC position statement, OSU explained that select agents are heavily regulated by federal laws and agencies due to their potential harm. OSU also stated that at the time of Khatri's 2011 report, OSU was not registered to obtain select agents. Dkt. 16, PageID # 264.

The Sixth Circuit also incorrectly asserted that Khatri taught lab techniques to visitors from Egypt and it was Khatri's job to train others in the proper handling of infectious agents. App. 33. Lab supervisor, Dr. Lee did not assign Khatri to work with these visitors from Egypt. *See* Publication of Dr. Lee's group, Khatri was not assigned to work with visiting scholars <https://tinyurl.com/33s8mcfh>. Also, as per the CDC guidelines, lab supervisor is responsible for safety of the lab. App. 74-75 and also *See* CDC guidelines- Biosafety in Microbiological and Biomedical Laboratories- 6th Edition, <https://tinyurl.com/bdfufjjz>. Most importantly, as there were no higher safety lab facilities to work on select agents and Khatri himself had not received special safety training required to work on select agents in BSL-3 lab (App. 75), it was not Khatri's ordinary job duty to illegally work on select agents in lower safety lab or training others on proper handling

of select infectious agents or reporting misuse of select agents (violation of Bioterrorism Act) to law enforcement agencies/University administrators. *See Lane*, 573 U.S. at 240 (“The critical question . . . is whether the speech at issue is itself *ordinarily* within the scope of an employee’s duties, not whether it merely *concerns* those duties.” (emphasis added)); *see, e.g., Mayhew*, 856 F.3d at 464–65 (Plaintiff, a lab supervisor, spoke as a public employee when he reported violations of water-testing regulations because his “entire function at the plant was to ensure water-testing standards were in compliance with federal and state regulatory mandates”).

2. The Sixth Circuit is setting a wrong precedent by including University Police in Research Scientist’s chain of command and Sixth Circuit ignored Khatri’s reporting of misuse of select infectious agents to outside law enforcement agencies:

The court should not allow below judgement of Sixth Circuit to include University Police in Khatri’s (Research Scientist) chain of command. App. 33. This will set a very wrong precedent in the Circuits and lower courts. The Sixth Circuit was wrong in determining Khatri’s speech as employee speech because he reported to his employer through campus police. App. 33. The Sixth Circuit ignored Khatri’s attempt to call FBI and speaking to Ohio Highway Patrol agent regarding his reporting of misuse of select infectious agents. *See supra* at p.4. The Wooster Campus instead of helping Khatri report of misuse of select infectious agents the FBI informed campus administration, Dr. Benfield and Lt. Seth Walker. (Dkt.16, PageID # 287). In turn Dr. Benfield informed Dr. Mo Saif, then department head. Khatri had clearly indicated to the Police Officer that he did not want to

report this issue to his department head (Dkt.16, PageID # 287). Dr. Mo Saif called Khatri to his office and threatened him saying reporting misuse of select infectious agents to the Police is “highly unacceptable”, implying that reporting misuse of select agents was not part of Khatri’s ordinary job duties. After Dr. Saif’s retirement in Jan. 2013, Khatri reported misuse of select agents to Dr. LeJeune, new department head, who responded “[y]ou should not have raised this issue, we will be in trouble”-suggesting reporting of misuse of select agents was not part of Khatri’s ordinary job duties. In Nov 2017, Plaintiff complained to the College Dean and University Senior Vice President of Research that Dr. Rajashekara, Acting Department head, is taking advantage of Khatri’s situation. Dr. Rajashekara told Khatri that OSU Administration is against him because of his reporting of misuse of select infectious agents in the department and he will not receive any help from the Administration-again confirming reporting misuse of select infectious agents was not part of his ordinary job duties.

The Sixth Circuit decision in determining Khatri’s speech as employee speech because when an employee “raises complaints or concerns up the chain of command at his workplace about his job duties” even if he bypasses his immediate supervisors, he still speaks as a public employee, is also wrong. App. 33. This conflicts with the Sixth Circuit’s other authorities. In cases when the Sixth Circuit made determination that employee’s speech made “up the chain of command” was unprotected employee-speech, in those cases, the speech at issue involved typical “employee beef[s]” pertaining to his or her employment. *See, e.g., Mayhew*, 856 F.3d at 466 (“When a public employee raises complaints or concerns up the chain of command at his workplace

about his job duties, that speech is undertaken in the course of his job.”) (emphasis added); *Keeling v. Coffee Cty.*, 541 F. App’x 522, 527 (6th Cir. 2013) (holding the speech was not protected because “[m]ost importantly, her speech *pertained to her employment* ... and was made up the chain of command.”) (emphasis added); *Fox*, 605 F.3d at 350 (holding a teacher’s complaints made directly to her supervisor *about class size* were not protected). Khatri’s case is totally different. Here Khatri was not making typical employee complaints (i.e., about his job responsibilities) up the chain of command, but Khatri was trying to raise serious Public Health, Animal Health and National Economy concerns, and violation of Bioterrorism Act to University Administrators who Khatri believed were able to address these concerns. Because Khatri’s speech falls outside the context of “employee beefs,” the cases holding that “up the chain” communication generally constitute employee-speech were not dispositive on Khatri’s claim.

3. The Court should analyze Khatri’s speech under an academic freedom exception to *Garcetti*:

As discussed above, illegally working or reporting of misuse of select infectious agents in BSL-2 lab was not part of Khatri’s ordinary job duties. See *supra*....

In *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006), this Court explicitly reserved the question of whether *Garcetti*’s limitation even applies to cases arising from an academic setting: “We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.” *Id.* at 425. Several Circuits, including the Sixth Circuit have applied academic freedom exception to *Garcetti* for Public University Professors’

speech related to their official duties. *Adams v. Trustees of the Univ. of N.C.-Wilmington*, 640 F.3d 550 (4th Cir. 2011); *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014); *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021). *Buchanan v. Alexander*, 919 F.3d 847 (5th Cir. 2019).

Recently, in *Meriwether* the Sixth Circuit held that “[t]he academic-freedom exception to *Garcetti* covers all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not.” Although in this case, the Sixth Circuit’s ruling applied to classroom speech (only issue in the case) but the Court clarified that lack of germaneness to what is being taught cannot disqualify speech on matters of public concern from First Amendment protection under the academic freedom exception, suggesting that the setting in which professors’ speech occurs is not the determining factor whether the *Garcetti* academic freedom exception applies or not. If professor is speaking on a matter of public concern, the venue does not make the speech unrelated to scholarship or teaching. *See e.g. Bradley v. W. Chester Univ. of Penn. State Sys. of Higher Educ.*, 880 F.3d 643, 653 (3^d Cir. 2018) (indicating that speech at a public university committee meeting that was closed to the public could receive First Amendment protection). Similarly, Khatri worked as Research Scientist (non-tenure track research faculty) in OSU and spoke on matter of public concern. The Sixth Circuit and district court correctly recognized that Khatri spoke on matter of public concern. App. 32. His research in Virology and Cell Biology directly contributed to the education mission of the university. As an expert in Virology, when Khatri observed the misuse of select infectious agents by untrained personnel in lower biosafety, BSL-2 lab, to prevent any infections to humans and

animals, Khatri reported the misuse of dangerous viruses to the law enforcement agencies and the University administration.

4. The Sixth Circuit incorrectly rejected Khatri's claim that he was perceived disabled and subjected to several adverse employment actions:

The Sixth Circuit ignored all the facts detailed in Khatri's Brief that clearly stated that in retaliation for raising the misuse of select infectious agents, Khatri was perceived as disabled and he suffered several adverse employment actions. Khatri was ordered to attend Psychiatric counseling, defendants blocked Khatri's faculty job applications within OSU and outside schools, ordered for Fitness for duty exam, forced to meet with acting department head and Interim college associate dean every two weeks and wrongfully placed on PIP and his employment was terminated.

Following Khatri's reporting of misuse of select agents for the first time in Oct. 2011, Khatri was ordered by defendants to attend Psychiatric counseling sessions through Employee Assistance Program. Dkt.16, PageID # 235 and Dkt.16 at Exhibit 9. The panel completely ignored Psychiatric counseling. Before reporting of select agents misuse, Khatri received excellent annual reviews. After reporting of misuse, Khatri faced several adverse employment actions: Defendants provided false negative reviews, blocked Khatri's faculty job applications and denied promotions. To damage Khatri's research career, Khatri was denied lab facilities and Khatri research grant money was misused by the defendants. *See supra*

The Sixth Circuit incorrectly applied ADA provision in this case the ADA permits employers to

require examinations that are “job-related and consistent with business necessity 42 U.S.C. § 12112(d)(4)(A); and cited cases unrelated to this case. *See Babb v. Maryville Anesthesiologists, P.C.*, 942 F.3d 308, 321 (6th Cir. 2019); *Pena v. City of Flushing*, 651 F. App’x 415, 420–21 (6th Cir. 2016); *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 808–12 (6th Cir. 1999). App. 34. In each of these cases employees were ordered for fitness for duty exam and employers knew about employee’s medical condition which was affecting their job performance. This case is different, Khatri had no medical condition and even though defendants created unworkable conditions for Khatri, Khatri worked hard day or night depending upon the availability of the lab and Khatri was successful in obtaining competitive research grants and published papers and made several innovations, significantly higher than the other research scientists in the department. Dkt.16, PageID # 247.

On Oct 20, 2016, Dr. Benfield, Wooster Campus Director, in his response to Khatri’s dispute form commented on Khatri’s accomplishments and described him as a “Productive Research Scientist.” Dkt. 52, PageID # 685 and Dkt. 52 at Exhibit 2. Dr. Benfield in his response also indicated that their investigation has not found (without contacting Khatri) misuse of select agents in the department. Khatri disagreed with Dr. Benfield’s response and contacted Lt. Walker, Public Safety Officer, Wooster Campus, and as suggested by Lt. Walker sent his statement and evidence of misuse of select agents and names of witnesses by email to him on Oct 25, 2016. Khatri sent his comments to Dr. Benfield’s response to Khatri’s dispute form on Nov 20, 2016. On Nov 27, Dr. Benfield responded that Khatri will be contacted by the HR. On Dec 2, 2016, Lt Walker informed Khatri that he has concluded his investigation and there was

no misuse of select agents in the department. Khatri told Lt Walker that he disagrees with his investigation. On Dec 13, 2016, College HR Director, Elayne Sigfried called Khatri to her office on pretext of discussing an administrative matter and ordered Khatri to undergo Fitness for duty exam without providing any reasons for ordering the exam. *See supra* p 8. There is clear pretext between Khatri's maintaining his misuse of select agents claim in the department and Respondents ordering Khatri to undergo retaliatory Fitness for duty exam.

The Sixth Circuit incorrectly determined that Khatri did not suffer any discrimination due to his perceived disability after passing the Fitness for duty exam. App. 34-35. Khatri continued to face discrimination due to his perceived disability. Khatri was required to meet with acting department head and Interim college associate dean every two weeks and give them information about his grants and intellectual work. No other Research Scientists or faculty were subjected to this treatment even though none of Research Scientists and even some faculty members could bring any research grants whereas Khatri had secured several grants and department used his grant money to promote others' research. Khatri was the only research scientist who was forced to pay his modest salary from his grants. Defendants continued to block Khatri's job applications to outside schools, Khatri's request to transfer to Animal Science department was again denied in July, 2017, Defendants conspired to end Khatri's employment in June, 2017 and in Dec., 2017, despite having successful research program Khatri was wrongfully placed on PIP and his employment was terminated in March 2018 when Khatri's NIH-funded grant that paid Khatri's salary was ending.

5. **The Sixth Circuit incorrectly determined that Khatri did not face discrimination due to his son's medical condition and did not suffer any adverse employment actions:**

The Sixth Circuit incorrectly determined that Khatri did not suffer any adverse employment action due to his son's medical condition. App. 35. Khatri suffered discrimination, exploitation, and harassment because of his son's medical condition, and he suffered several adverse employment actions. *See supra* p 9-11. The district court acknowledged that department heads blocked Khatri's faculty jobs to outside schools and within OSU as "[d]epartment heads sought to retain Khatri's research grants money". Dkt. 49, PageID # 665. Khatri was repeatedly told that "he has no option, he needs a job and medical insurance for his son's medical condition." Dkt. 39, PageID # 563-565.

6. **The Court should grant the petition or, in the alternative, summarily reverse the judgment below.**

The Court should not allow the erroneous judgment below to stand. Khatri's speech involved a very serious matter of public concern. Ongoing COVID-19 pandemic has shown how dangerous viruses can affect human lives and damage the economy. Even one incidence of careless handling of dangerous viruses can cause a pandemic. The Court should grant the petition to provide guidance to lower courts so that other scientists who see the violations of biosecurity regulations are not discouraged to report fearing losing their career. Khatri should not lose his research career and livelihood for raising serious violation of mishandling of dangerous viruses that according to federal guidelines are capable of

causing serious harm to humans and animals. By granting this petition, the Court will also provide guidance on considering university professor's research-related speech consideration under academic exception to *Garcetti*.

Summary reversal would be appropriate. The Court does not hesitate to summarily correct "a lower court's demonstrably erroneous application of federal law." *Maryland v. Dyson*, 527 U.S. 465, 467 n.1 (1999); *see, e.g., Hunter v. Bryant*, 536, 502 U.S. 224, 227-28 (1991) (explaining that the decision below reflected "confusion" over the "import" of the relevant Supreme Court precedent).

CONCLUSION

The Court should grant the petition for certiorari or, alternatively, summarily reverse the judgment below.

Respectfully submitted,



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