No. _____

IN THE

Supreme Court of the United States

PATRICK FEHLMAN,

Petitioner,

v.

JAMES MANKOWSKI,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is the government free to continue to retaliate against a former public employee for speech made during the employee's employment?

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Patrick Fehlman, respectfully petitions this Court for a writ of certiorari to be granted to review the judgment of the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit affirmed the U.S. District Court for the Western District of Wisconsin's dismissal of Fehlman's claim that his First Amendment rights were violated when his former employer, James Mankowski, continued to retaliate against Fehlman after Fehlman's employment ended.

OPINION BELOW

The decision by the United States Court of Appeals for the Seventh Circuit is reported as *Fehlman v. Mankowski*, 74 F.4th 872, 2023 U.S. App. LEXIS 19044, (7th Cir. 2023), which is attached as Appendix A. The trial court decision by the U.S. District Court for the Western District of Wisconsin is reported as *Fehlman v. Mankowski*, 588 F. Supp. 3d 917, 2022 U.S. Dist. LEXIS 35454, 2022 WL 602920 (W.D. WI March 1, 2022), which is attached as Appendix B.

STATEMENT OF JURISDICTION

Mr. Fehlman invokes this Court's jurisdiction under 28 U.S.C. § 1254(1). The U.S. Court of Appeals for the Seventh Circuit entered its final judgment on July 26, 2023.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> 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.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This is a First Amendment case that raises an issue not previously addressed by the Supreme Court or the courts of appeal. Petitioner Fehlman was a public employee who made speech during his employment, suffered retaliation for that speech, and then continued to endure retaliation by his former employer *after* the employment had terminated because of the speech made during his employment. The decisions by the district court and the court of appeals failed to consider the protection of this speech after the employment terminates. This case presents the question of

whether this Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006) extends beyond the confines of employment.

For decades, this Court has held that public employees are entitled to First Amendment protected speech on matters of public concern, and that the free speech interest outweighs the employer's efficiency interests. *See Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.,* 391 U. S. 563, 570 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983). In 2006, this Court added a requirement that, for the speech to be unprotected, it must be part of the official job duties of the public employee. *Garcetti v. Ceballos*, 547 U.S. 410, 424, 126 S. Ct. 1951 (2006). This Court reasoned that "[u]nderlying our cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to 'constitutionalize the employee grievance.'" *Id.* at 421. This Court has never determined if the public employer retaliation—and discipline for the unprotected speech—ends when the employment terminates.

I. Fehlman's speech while employed by Neillsville Police Department

Patrick Fehlman was employed as a police officer. Appendix A-002.[1] On December 31, 2019, James Mankowski was sworn in as the Chief of Police of Neillsville. *Id.* From approximately March through June 2020, Fehlman approached Mankowski to speak to him about Mankowski's actions as chief. *Id.* Fehlman's motivation was, at least in part, to speak as a citizen, and at least some of the issues Fehlman raised were issues of public concern. A-040-41. Examples of issues Fehlman raised with Mankowski include but are not limited to the following:

[1] Citations hereafter to the appendix shall be referred to as "A" followed by the page number.

- Fehlman noted that two NPD officers (not him) needed new bullet-proof vests.
- Mankowski had ended the practice of writing accident reports for accidents that occurred on private property. Fehlman explained to Mankowski that his decision was in violation of state statute.
- Fehlman explained to Mankowski that Mankowski's policy with respect to issuing citations for Operating Without a License was in violation of state statute.
- Fehlman raised the issue of Mankowski changing radio talk procedures that created officer safety issues.
- Fehlman raised the issue of prioritizing traffic enforcement over a child abuse allegation.

A-041-42.

Mankowski reacted with anger to Fehlman's comments. Mankowski told Fehlman, "I always have my guns loaded," a figurative reference. A-042. Mankowski made this comment as a threat of retaliation against Fehlman should Fehlman continue to exercise his right to speak and complain. Mankowski also said, on more than one occasion, "I could have demoted you," in response to Fehlman's speech. A-042.

In late June 2020, Fehlman and other officers requested a meeting with the Neillsville Police & Fire Commission (PFC). A-002; 042. During the PFC meeting, Fehlman told the PFC that he was addressing Mankowski's professional integrity and ethics. A-002. Fehlman cited his motivation as a sense of duty to the community, and he was making his comments as a citizen as well as a police officer. A-043. Fehlman told the PFC that Mankowski had instilled fear in officers at the NPD, and that the officers feared retaliation. A-003. Amongst other things, Fehlman informed the PFC:

- Fehlman told the PFC about Mankowski's lack of professionalism. He informed the PFC of Mankowski's encounter with a local business owner, while on duty. Fehlman relayed that Mankowski told the business owner that he should consider installing a stripper pole in the bar and have his wife dance on it topless.
- Fehlman also told the PFC about Mankowski ordering officers to turn off their body cameras in violation of department policy and best practices.
- Fehlman informed the PFC that Mankowski was often verbally abusive to suspects, berating them and insulting them gratuitously.
- Fehlman informed the PFC that Mankowski changed radio talk procedures that created officer safety issues. Fehlman expressed his concerns over officer safety, generally.
- Fehlman informed the PFC that Mankowski had prioritized speed limit enforcement over responding to an allegation of child abuse at a school.

A-003.

After the meeting, Mankowski harassed Fehlman. For example, Mankowski demanded that Fehlman turn in his work credit card. A-003. On June 30, 2020, there was a department meeting at a community business. A-045. The purpose of the meeting was, ostensibly, to clear the air between Mankowski and Fehlman and the other concerned officers. A-045.

During the meeting, Mankowski was verbally aggressive and raised his voice several times. A-045. He threatened Fehlman, who was off duty at the time, with charges of insubordination if Fehlman went to higher authorities over issues Mankowski felt they could solve themselves. A-045. Mankowski made it clear that he was prepared to retaliate against Fehlman for his earlier exercise of free speech. A-045-46.

The next day, in the early morning hours of July 1, 2020, Fehlman submitted his resignation, effective immediately. A-046. Fehlman then sought employment at the Clark County Sheriff's Office (CLSO). A-046.

CLSO Patrol Sergeant Wade Hebert was assigned to complete Fehlman's background check, which was necessary for employment. A-046. In July 2020 at Mankowski's behest, CLSO Patrol Captain Charles Ramberg, a friend and ally of Mankowski, spoke to Hebert, telling him that all Hebert needed to do was to interview Mankowski, then terminate the background check, disqualifying Fehlman for the job at the CLSO. A-047.

As a result of Ramberg's interference in the background check process, the background check was instead entrusted to the Eau Claire County Sheriff's Office for completion. A-047. This delayed Fehlman's application process and start date for the CLSO. A-048. It also forced Fehlman to personally explain to the Clark County Sheriff that Mankowski would not be an obstacle to Fehlman doing good work for the CLSO. A-048. As part of the background check into Fehlman as part of CLSO's hiring process, Mankowski made false and negative comments about Fehlman as retaliation for Fehlman speaking on issues of public concern. A-047.

On or about August 13, 2020, Fehlman examined his personnel file with the NPD. A-048. He noted that it had been negatively altered, presumably by Mankowski or at his direction. A-048. The file also contained evidence that Mankowski provided false or misleading information to the unemployment compensation office, leading to a delay in Fehlman's receipt of unemployment compensation to which he was entitled. A-048.

On September 14, 2020, despite Mankowski's efforts to sabotage Fehlman's application with the CLSO, Fehlman started work for the CLSO. A-048.

As a citizen, Fehlman visited the Neillsville Police Department on November 4, 2020. A-048. Soon thereafter, he received a letter from Mankowski, which was copied to CLSO, prohibiting Fehlman from entering the NPD office unless an NPD officer requested that he be on the premises pertaining to a specific law enforcement action. A-048.

II. Procedural posture

On June 1, 2021, Fehlman filed his complaint alleging retaliation by Mankowski in violation of the First Amendment to the United States Constitution. On July 30, 2021, Fehlman filed his First Amended Complaint. On Augst 13, 2021, Mankowski filed a Rule 12(b)(6) motion to dismiss the First Amended Complaint for failure to state a claim.

On March 1, 2022, the United States District Court for the Western District of Wisconsin issued an Opinion and Order dismissing the complaint. *See* A-010-037. The District Court held that the matters raised by Fehlman dealt with an issue of public concern. A-014. However, the District Court also stated that a public employee must do more than prove he spoke on an issue of public concern. A-015. Pursuant to *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the court held that Fehlman was unable to prove that he spoke as a citizen as opposed to speaking pursuant to his official duties. A-017-032.

The District Court never addressed a separate but related issue: Fehlman's allegation that he suffered retaliation from Mankowski *after* Fehlman's employment ended for speech made while Fehlman was employed. *See* A-010-036. The Court did not make a separate ruling with respect to the post-resignation retaliation. *Id.* Instead, the

District Court dismissed the complaint as a whole. A-035-037.

Fehlman appealed the District Court's decision to the U.S. Court of Appeals for the Seventh Circuit on both issues of whether the speech was protected, and whether the post-retaliation from Mankowski was permitted. The Seventh Circuit determined that Fehlman's speech was made in his role as a police officer and, therefore, was not subject to First Amendment protection. A-005. In approximately 100 words, the Seventh Circuit rejected Fehlman's post-retaliation claim and concluded that the post-retaliation claim was legally irrelevant. A-008-009. The court reasoned that there was no case law supporting Fehlman's argument that the *Garcetti* decision did not apply in the post-employment context. A-009. The court held that, because the speech was not protected to begin with, any retaliation was not actionable regardless of whether it occurred during or after employment. A-009.

REASONS FOR GRANTING THE PETITION

Public employees "do not surrender all their First Amendment rights by reason of their employment." *Garcetti v. Ceballos*, 547 U.S. 410, 417, 126 S. Ct. 1951 (2006). This Court has carefully crafted exceptions to the First Amendment limitations placed on public employees. This Court has never considered the effect on a private citizen when the public employment ends, and yet, the employer continues to retaliate against the employee. The Seventh Circuit, here, failed to consider whether retaliation against a public employee can continue post-employment. Despite Fehlman raising this argument and the ongoing limitation on his First Amendment rights post-employment, the Seventh Circuit's decision merely denied the argument in the matter of two brief paragraphs, without considering the arguments put forth by Fehlman. The policies underpinning this Court's holding in *Garcetti* do not apply in situations

where the public employer continues to retaliate against the former employer *after* the employment ends for speech made during the employment. Post-employment, there is no concern related to controlling the speech of the public employee. There must be a reasonable end to when a public employer must stop retaliating against a public employee for that employee's speech that would be protected but for the fact that it was uttered when the citizen was a public employee. The logical end is when that employee leaves the public employment.

I. This Court has carefully limited rules relating to First Amendment speech for public employees, and those interests are not served in a post-employment context.

This Court has issued many decisions carefully tailoring the limitations on free speech when it is uttered by a public employee, and the decision by the Seventh Circuit in this case fails to consider the careful decisions previously issued by this Court. As the Court has phrased the question, "[w]hat is it about the government's role as employer that gives it a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large?" *Waters v. Churchill,* 511 U.S. 661, 671, 114S. Ct. 1878 (1994). The Court has "consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large." *Id.* at 673. This Court succinctly stated:

> The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government

> cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.

Id. at 675. None of these goals are met by the Seventh Circuit's extension of *Garcetti* to the post-employment retaliation faced by Fehlman.

In *Garcetti v. Ceballos,* 547 U.S. 410, 126 S.Ct. 1951 (2006), this Court made it clear that public employees do not surrender all their First Amendment rights by reason of their employment. *Garcetti*, 547 U.S. at 417, 126 S.Ct. at 1957. This Court held that, so long as citizens are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively. *Garcetti*, 547 U.S. at 419, 126 S.Ct. at 1958. This Court further held that a government entity has broader discretion to restrict speech when it acts in its role as employer, and the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations. *Garcetti*, 547 U.S. at 418, 126 S.Ct. at 1958. Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance of the efficient provision of public services. *Garcetti*, 547 U.S. at 418-419, 126 S.Ct. at 1958.

With these principles in mind, this Court held that, when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. *Garcetti*, 547 U.S. at 421, 126 S.Ct. at 1960. "Proper application of our precedents thus leads to the conclusion that the First Amendment does not prohibit managerial discipline based on an employee's expressions made

pursuant to official responsibilities." *Garcetti*, 547 U.S. at 424, 126 S.Ct. at 1961. This Court also emphasized the employer's need to manage its operations and official business and promote its mission by controlling the speech of an employee. *Garcetti*, 547 U.S. at 422-423, 126 S.Ct. at 1960-1961.

The rationale for the ruling in *Garcetti* is that an employer must control the job-related speech *of an employee* if it is to function properly; accordingly, job-related speech is not protected *while the employee-speaker remains employed*. Once the employment ends, the entire justification for the ruling in *Garcetti* disappears. Given the interest in protecting free speech—and this Court's careful analysis and decision in *Garcetti*—it is logical that there is an end to when retaliation by the public employer is permitted.

The post-employment retaliation by Mankowski was unrelated to the functioning of the Neillsville Police Department. Sabotaging Fehlman's applications and unemployment application and forbidding him to enter the police station as a citizen had no impact on how the department was run. Fehlman had left the Neillsville Police Department, so any trouble he could make with the operation of the department vanished with Fehlman's departure. In other words, Mankowski's speech restrictions imposed on Fehlman after Fehlman left his employment were not necessary to operate the department efficiently and effectively, even though Fehlman's speech was uttered before his employment ended. It makes no sense to interpret *Garcetti* as giving public employers the power to discipline employees for otherwise protected speech they made while employed after they leave public employment.

Applying *Garcetti* to Fehlman's case leads to other contradictions as well. The *Garcetti* court held that its ruling would not prevent public employees from participating in public debate. But the Seventh Circuit and District Court's

ruling would do exactly that. Under *Garcetti*, a public employee must already weigh the risk (losing his or her job) of engaging in public debate against the benefits of shining light upon public corruption or safety issues when the disclosure is within the employee's job responsibilities. The District Court's ruling would not only place the employee's job in jeopardy, but it would permit the public employer to harass and retaliate against a *former* employee for speech made during employment. This interpretation would do exactly what the *Garcetti* court stated its decision would *not* do: permit a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. The District Court's interpretation of *Garcetti* would allow a public employer to extend the limits upon a public employee's free speech rights even after the employee resigns.

Another absurd result emerges from applying the *Garcetti* limitation after the public employee quits. Hypothetically, if Fehlman were publicly to criticize Mankowski after Fehlman's departure from the department, and Mankowski began arbitrarily to conduct traffic stops against Fehlman, or refuse to answer his calls for service, Fehlman's First Amendment retaliation claim would be undermined by the Seventh Circuit's ruling. Mankowski could argue that his retaliation was not based on Fehlman's *protected* speech, but the complaints Fehlman made earlier directly to Mankowski. Even the most flagrant post-employment First Amendment retaliation could be hidden behind the *Garcetti* protection, including retaliation for speech indisputably made after employment ended. A public employee at a sanitation department, for example, who complained about public corruption during his employment and pursuant to his job duties could decide to quit his job and go public with his speech. The sanitation department could lawfully refuse to pick up his trash, claiming that it was not the employee's post-employment speech that motivated the

retaliation, but the complaints the employee made during his employment that spawned the retaliation. Under the lower courts' rulings, this would be a viable defense.

The only way to avoid these ridiculous scenarios is to treat speech made during employment and as part of an employee's job duties as private speech once the employment relationship ends. Outside the employment context, the First Amendment forbids retaliation for speech even about private matters: the speech does not even need to be on an issue of public concern. *Zitzka v. Westmont*, 743 F.Supp.2d 887, 915 (N.D. Ill., 2010), *Bridges v. Gilbert*, 557 F.3d 541, 551 (7th Cir. 2009). Because *Garcetti* does not apply to Fehlman's speech after Fehlman quit, and because Fehlman's speech should be treated as private speech after he resigned, the United States Supreme Court should grant the writ of certiorari, hear this case, reverse the lower court decisions, and remand the case to the District Court for further proceedings.

II. The Seventh Circuit decision is at odds with decisions in other circuits that support that *Garcetti* would not extend to ongoing retaliation post-employment.

The Seventh Circuit, in its two-paragraph decision, failed to consider the magnitude of transposing discipline for unprotected speech while employed with discipline for that same speech post-employment. An analysis of the underpinnings of unprotected speech for employees in other circuits shows a split.

In Vickery v. Jones, 100 F.3d 1334 (7th Cir. 1996), the Seventh Circuit held that the public concern test was intended to balance between the competing interests of public employees' free speech rights, on one hand, and the State's interest, as an employer, in promoting the efficiency of the public services it performs through its employees, on

the other hand. *Vickery*, 100 F.3d at 1356, fn 1. Once employment ends, there is nothing to balance.

In *Hyland v. Wonder*, 117 F.3d 405 (9th Cir. 1997), the plaintiff was terminated from his volunteer position after he spoke out about corruption in a youth guidance center, and then faced more retaliation after his position ended. *Hyland*, 117 F.3d at 407-408. The Ninth Circuit held that the plaintiff had First Amendment rights not to be retaliated against for his protected speech. *Hyland*, 117 F.3d at 412.

In *Anderson v. Davilla*, 125 F.3d 148 (3rd Cir. 1997), the plaintiff filed an Equal Employment Opportunities Commission charge and a race discrimination complaint while employed, and his (former) employer (a police department) put him under police surveillance after he resigned. *Anderson*, 125 F.3d at 152-153. The Third Circuit held that the plaintiff's petition for redress of grievances was protected from post-employment retaliation. *Anderson*, 125 F.3d at 162-163.

In *Conard v. Pa. State Police*, 902 F.3d 178 (3rd Cir. 2018), the Third Circuit held the public-employment framework exists to accommodate the competing interests of public employees to speak freely and the government's need to regulate the speech of its own employees. *Conard*, 902 F.3d at 182. Once an employee leaves public employment, the public employer does not have a protectable interest in controlling the former employee's speech. *Conard*, 902 F.3d at 182. *See also Van Deelan v. Johnson*, 497 F.3d 1151, 1156 (10th Cir. 2007) ("The public concern test, then, was meant to form a sphere of protected activity for public employees, not a constraining noose around the speech of private citizens.") and *Campagna v. Massachusetts Dept. of Envtl. Prot.,* 334 F.3d 150, 155 (1st Cir. 2003) ("Since the reason for the test is missing in the present case – maintaining order in the government workplace – the [public concern doctrine]

should not be applied here." Quoting *Gable v. Lewis*, 201 F.3d 769, 771 (6th Cir. 2000)).

Refusing to allow an employer to retaliate against a former employee for conduct that occurred while the employee was employed is consistent with Title VII law, as well. In *Robinson v. Shell Oil*, 519 U.S. 337, 117 S. Ct. 843 (1997), this Court held that Title VII's anti-retaliation provisions protected former as well as current employees. *Robinson*, 519 U.S. at 346, 117 S. Ct. at 848. For the same reason Title VII protects former employees from retaliation for speech made during the employment relationship, this Court should hold that the First Amendment also forbids this type of retaliation.

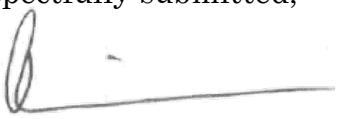
In sum, as reasoned by these other circuit courts, it makes no sense to apply the *Garcetti* limitation on employee speech—even when that speech was made in accordance with an employee's job duties—after the employee quits his or her job. At that point, any adverse action taken against the former employee would not be "discipline," nor would it be related to the efficient and orderly running of the public office. It would just be pure, unadulterated retaliation for speaking on issues that would be protected but for the speaker's former public employment. Extending the *Garcetti* limitation to allow retaliation after employment ends does exactly what this Court promised *Garcetti* would not do: chill employee speech and prevent public employees from engaging in public discourse.

CONCLUSION

For the foregoing reasons, Mr. Fehlman respectfully requests that this Court issue a writ of certiorari to review the judgment from the U.S. Court of Appeals for the Seventh Circuit.

Dated this 24th day of October, 2023.

Respectfully submitted,



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APPENDICES