NO. 23-441

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Under *Garcetti v. Ceballos*, 547 U.S. 410 (2006) this Court held that the threshold inquiry for analyzing whether public employees' speech is protected by the First Amendment is whether the speech was made as a private citizen on an issue of public concern. Where the speech was made by the public employee pursuant to his or her official duties, that speech is accorded no protection under the First Amendment.

The question presented is:

Where it is undisputed that a public employee's speech was made pursuant to his official duties and therefore not protected under the First Amendment, may a former employee nonetheless pursue a First Amendment retaliation claim against his former employer based on the employer's reaction to that unprotected prior speech after the employment ended.

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INTRODUCTION

In *Garcetti v. Ceballos*, 547 U.S. 410 (2006) this Court held that speech made by public employees even on issues of public concern, is not entitled to First Amendment protection if that speech was made "pursuant to their official duties." *Id.* at 421; U.S. Const. amend. I. In such circumstances, public employees "are not speaking as citizens for First Amendment purposes" and the Constitution does not provide sanctuary from a public employer's response to that speech. *Garcetti*, 547 U.S. at 421. In the years since *Garcetti*, neither this Court nor the courts of appeal have wavered from this threshold test for analyzing when speech made by a public employee is entitled to First Amendment protection. It is the nature and circumstances surrounding the speech itself that is initially determinative of its protection, not the employer's response to that speech.

Here, both the district court and the Seventh Circuit concluded that *all* the speech at issue was made by the petitioner, Patrick Fehlman, as part of his official duties as a police officer with the City of Neillsville, Wisconsin, and therefore was not protected under *Garcetti*. Pet. App. 8a, 28a, 33a, 36a. Before this Court, the petitioner has abandoned any challenge to this threshold determination by the courts below on this controlling issue—thus, at the time Officer Fehlman spoke it is undisputed that he was speaking, not as a private citizen, but as part of his official duties as a police officer with the City. Pet. 8-9. Accordingly, the petitioner further now concedes, as he must, that his speech when it was made was not protected by the First Amendment. Pet. 2-3, 8-9. Under *Garcetti*, that is where the inquiry ends.

The petitioner argues, however, that same unprotected speech should be transmuted into protected speech under the First Amendment the moment he left his employment with the Neillsville Police Department. Pet. 3, 8-9, 13. This feat of legal alchemy is not based on anything to do with his speech itself because, of course, neither the content, the context, nor the recipients of his speech changed whatsoever since he spoke as part of his official duties with the Neillsville Police Department.

Instead, the petitioner asserts this Court should limit the holding of *Garcetti* to only those cases involving alleged retaliation against public employees who remain at their job. Pet. 9. The petitioner contends that this Court should accept review and create a bright-line rule that *Garcetti* and its threshold test should not apply to post-employment retaliation claims made by a former public employee, whatever the protected status of that same speech was while an employee. Pet. 9. In the petitioner's words, the Constitution should "treat speech made during employment and as part of an employee's job duties as private speech once the employment relationship ends." Pet. 13.

The Seventh Circuit summarily rejected this argument below, concluding "there is no caselaw supporting this reading of *Garcetti*." Pet App. 8a. In doing so, the court properly applied this Court's precedent and noted—"If the speech is not protected to begin with, any retaliation for that speech is not actionable under a First Amendment framework, so the question of whether that retaliation happened during or after employment is legally irrelevant." Pet. App. 9a. The Seventh Circuit was correct.

While the petitioner seeks an unsupported sea change in the fundamental holding of *Garcetti*, the present case is a poor vehicle for the Court to consider such a doctrinal shift. Not only is the record in this case extremely sparse because it was decided on a motion to dismiss, but the petitioner never fully developed the argument in the district court that he is now asking this Court to review.

Additionally, although the petitioner initially acknowledges that the courts of appeal have not previously addressed his issue of first impression, Pet. 2, he later contradictorily claims the Seventh Circuit decision is somehow at odds with decisions from other circuits. Pet.13-15. A review of the cases cited shows there is no circuit conflict on this issue as he claims; no circuit has limited *Garcetti* in the manner he seeks, or even presented a rationale for doing so.

Finally, contrary to the petitioner's contention, this Court did not leave this question unanswered in *Garcetti*. Pet. 2. Rather, it conclusively established a threshold test to determine whether public employees' speech is protected in the first instance, and that initial test is not dependent on *when* the employer is alleged to have reacted to that speech. *Garcetti*, 547 U.S. at 421. When it is undisputed that public employees were speaking, not as private citizens, but as part their official duties, the constitutional inquiry ends. *Id.* at 424.

Subsequently this Court has confirmed that the "first step" in the *Garcetti* inquiry is for a court to distinguish "between employee speech and citizen speech." *Lane v. Franks*, 573 U.S. 228, 237 (2014); *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. ___, 142 S.Ct. 2407, 2423 (2022)(holding "first step involves a

threshold inquiry into the nature of the speech at issue;" where employee spoke pursuant to official duties, "that kind of speech is—for constitutional purposes at least—the government's own speech").

That is exactly what both courts below did in this case. After properly applying the threshold test and answering conclusively that Officer Fehlman was speaking as a public employee as part of his official duties, there was no reason to go any further under *Garcetti*. There is also no reason for this Court to grant the petition for further review the question presented.

STATEMENT OF THE CASE

This case only involves speech by the petitioner Patrick Fehlman when he was a law enforcement officer under the supervision of the respondent Chief of Police James Mankowski. It does not involve speech made by a private citizen outside of Officer Fehlman's official duties—which this Court has characterized as the threshold test for determining whether public employee speech is entitled to First Amendment protection. Nor does it involve speech made after Officer Fehlman left his employment and could no longer be considered speaking pursuant to his official duties. The petitioner contends that conclusive determination should not end any constitutional inquiry and seeks the ability to sue Chief Mankowski nonetheless.

In 2021, Fehlman commenced a First Amendment retaliation claim against Chief Mankowski in the United States District Court for the Western District of Wisconsin. Pet. App. 38a-50a. He alleged that he suffered retaliation from Chief Mankowski both while he was a police officer and in the months after he left

his employment—all because of critical comments he made to and about Chief Mankowski back when he was employed with the police department. Pet. App. 40a-49a. The district court determined none of the speech was protected under the First Amendment based on this Court's decision in *Garcetti*, because Officer Fehlman was speaking pursuant to his official duties. Pet. App. 12a-13a. That decision was unanimously affirmed by the Seventh Circuit. Pet. App. 9a.

1. The petitioner's amended complaint provides the sole "factual" basis in the court record for his lawsuit against Chief Mankowski.[1] In 2019, Officer Fehlman was employed as a police officer with the City of Neillsville, a small, central Wisconsin municipality. Pet. App. 40a. For a brief time, Officer Fehlman was appointed as the Neillsville Police Department's interim chief of police, Pet. App. 40a., and he served in that capacity until December 31, 2019, when the City hired James Mankowski as its permanent chief of police. Pet. App. 40a. Officer Fehlman remained as a police officer with the Department until he voluntarily resigned on July 1, 2020. Pet. App. 46a.

Fehlman concedes his lawsuit did not involve *any* speech made outside of his employment with the Neillsville Police Department, and it did not involve any speech *after* Fehlman resigned from the Department. Pet. 3-5. Instead, Fehlman alleged his

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[1] Because Fehlman's lawsuit was dismissed for failing to state a claim under Fed. R. Civ. P. 12(b)(6), the record in this appeal consists of Fehlman's allegations in his First Amended Complaint and the public minutes of the Neillsville PFC meeting posted online by the City, which Fehlman referenced in his complaint. Pet. App. 7a n.1, 38a-50a.

former chief retaliated against him in various ways for the things he said critical of Chief Mankowski in the first six months of 2020, while Officer Fehlman was a police officer under Chief Mankowski's command. Pet. App. 40a-46a, 49a.

Fehlman claimed that from March to June 2020, he directly approached Chief Mankowski at various times and spoke to him about what Fehlman claimed were his concerns with Mankowski's alleged actions, decisions, and policies as chief of police. Pet. App. 40a-42a. Among other things, he claimed Chief Mankowski reacted angrily to these comments. Pet. App. 42a.

Fehlman also alleged that he and two other officers spoke to the Neillsville Police & Fire Commission (PFC) on June 25, 2020, in a closed session meeting. Pet. App. 7a. According to Fehlman, they complained about Chief Mankowski and his handling of the Department, including, among other things, asserting the new Chief instilled fear in the officers, lacked professionalism, was verbally abusive to suspects, and that his changed policies and priorities were allegedly creating safety issues. Pet. App. 43a-44a. Fehlman alleged that after the closed session, Chief Mankowski, who had not been in the closed session, was very upset and that he later harassed Officer Fehlman by demanding Fehlman turn in his Department credit card. Pet. App. 44a-45a.

Finally, Fehlman alleged that at a June 30, 2020, all-Department meeting to "clear the air", Chief Mankowski was verbally aggressive and threatening—but Fehlman did not speak at that meeting. Pet. App. 45a-46a. He alleged the Chief told the assembled officers about policy violations the Chief observed committed by the officers and that he

could have "written them up." Pet. App. 46a. Officer Fehlman resigned from the Department on July 1, 2020. Pet. App. 46a. Fehlman never alleged he was forced out of the Department by the Chief, simply that he resigned. Pet. App. 46a.

Fehlman alleged that after he resigned, he immediately sought employment as a deputy with the local Clark County Sheriff's Department, Pet. App. 46a, and that Chief Mankowski allegedly attempted to delay or torpedo Fehlman's hiring as a deputy—all supposedly solely because of what Fehlman had said while he was employed as a Neillsville police officer. Pet. App. 46a-48a. For instance, he claimed that Chief Mankowski attempted to interfere with a background check, which delayed his hiring. Pet. App. 46a-47a. Further, Fehlman claimed "on information and belief" that Chief Mankowski made false and negative comments about Fehlman, that his personnel file at the Neillsville Police Department had been altered, and that his unemployment compensation was delayed because information he believed was false or misleading had been provided by Chief Mankowski. Pet. App. 47a-48a. Nonetheless, Fehlman was hired as a deputy on September 14, 2020, only two months after he resigned from the Neillsville Police Department. Pet. App. 48a.

2. In the district court, Chief Mankowski immediately moved to dismiss Fehlman's lawsuit against him for failing to state a claim because all of Fehlman's alleged speech was made pursuant to his official duties as a police officer with the Neillsville Police Department and therefore not protected under *Garcetti*. Pet. App. 11a-12a. In a thorough decision, which examined not only *Garcetti*, but also Seventh Circuit decisions applying *Garcetti*, Pet. App. 10a-

37a, the district court agreed, concluding that the controlling issue was whether Fehlman was "speaking as a police officer or citizen" because "a public employee's speech made pursuant to his official duties isn't protected by the First Amendment, no matter how important that speech may be or how it could affect the public interest." Pet. App. 12a.

Significantly, the parties' arguments in the district court were: (1) whether Officer Fehlman's critical comments that he made directly to his supervisor, Chief Mankowski, were made pursuant to his official duties as a law enforcement officer with the Department, Pet. App. 13a, 17a-27a, and (2) whether his criticism of Chief Mankowski to the Neillsville PFC in closed session was offered pursuant to his official duties as a law enforcement officer with the Department. Pet. App. 14a, 28a-32a.

As to the first question, the court analyzed the Seventh Circuit precedent applying *Garcetti*, and concluded that Fehlman's direct comments to Chief Mankowski, his supervisor, even if viewed as complaints of perceived workplace misconduct or wrongdoing, were made pursuant to his official duties and responsibilities as a law enforcement officer with the Department and therefore, under circuit precedent, were made not as a citizen, but as a police officer pursuant to his official duties. Pet. App. 22a-28a.

On the second question, the district court analyzed the specific context of Officer Fehlman's comments to the Neillsville PFC, which were not public, but in closed session, not to an outside agency, and not required sworn testimony, but made at Fehlman's request to complain about the chief's "effectiveness as a supervisor and chief of police." Pet. App. 29a-30a,

32a. The court concluded that under Wisconsin law, the Neillsville PFC was not a separate outside agency from the Department, but instead a statutory commission that has "jurisdiction over the hiring, promotion, and discipline of members of police … departments, including the chief of police" Pet. App. 31a. *See City of Madison v. Wisconsin Emp. Rels. Comm'n*, 2003 WI 52, ¶ 13, 261 Wis. 2d 423, 662 N.W.2d 318; Wis. Stat. § 62.13(3) and (5)(j).

Accordingly, the court concluded that under Wisconsin law the PFC served as "a personnel board for the chief," not a completely separate agency, and that Officer Fehlman "was not simply acting in a manner that any concerned citizen could" but was taking employment-related concerns to the body that "had disciplinary authority over Mankowski" for the Department. Pet. App. 31a-32a. Based on these threshold determinations, the court concluded that all of Officer Fehlman's speech fell outside the protection of the First Amendment because he was not speaking as a citizen but as a police officer pursuant to his official duties. Pet. App. 12a.

Fehlman contends to this Court that the district court failed to analyze the issue Fehlman now asks this Court to consider—whether *Garcetti* applies to an employer's alleged post-employment reactions to a former employee's unprotected speech. Pet. 7-8. That is true, but squarely the result of Fehlman failing to develop or argue the issue and offering a one-paragraph, conclusory argument to the district court. R16:20-21.[2]

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[2] The petitoner's cursory argument in the district court briefing is contained in the Seventh Circuit record on appeal. R16:20-21 (Dkt. 16).

3. Fehlman appealed the dismissal to the Seventh Circuit, which unanimously affirmed. Pet. App. 1a-9a. On appeal Fehlman abandoned his claim that his critical comments made directly to Chief Mankowski were protected under the First Amendment. Pet. App. 2a. He still challenged the district court's decision concerning his complaints to the Neillsville PFC and argued that, regardless, *Garcetti* should not apply to his allegations of post-employment retaliation. Pet. App. 2a, 8a.

The Seventh Circuit agreed with the district court that Fehlman's complaints to the Neillsville PFC were not protected under the First Amendment because they were made in his "role as a police officer." Pet. App. 5a. Analyzing the circumstances surrounding the Neillsville PFC meeting and applying the same Wisconsin law relied on by the district court, the Seventh Circuit concluded that the PFC was part of the Police Department's "chain of command," making Fehlman's complaints a form of "internal grievance," which under *Garcetti's* formulation, owed its existence to the public employee's professional responsibilities, and therefore did not implicate the speech liberties that an employee enjoys as a private citizen. Pet. App. 6a-8a. The court also concluded that the form of the Neillsville PFC meeting further supported the conclusion that Officer Fehlman was speaking as a public employee not as a private citizen—it was closed to the public, made at Officer Fehlman's request, and the PFC itself described it as a "meeting to address governance issues involving" the Department. Pet. App. 7a. In sum, the Seventh Circuit concluded that the Neillsville PFC was an extension of the Department's management and operational structure

and Officer Fehlman used what was "effectively a supervisory agency of the [Department] to raise a complaint about his manager." Pet. App. 8a.

Finally, the court also summarily rejected Fehlman's argument that any alleged post-employment actions by his former chief should be considered to fall outside the *Garcetti* analysis—which required "an initial showing that the speech the employee was engaged in was constitutionally protected." Pet. App. 9a. The court succinctly held: "If the speech is not protected to begin with, any retaliation for that speech is not actionable under a First Amendment framework, so the question of whether that retaliation happened during or after employment is legally irrelevant." Pet. App. 9a.

The petitioner is seeking review of only this last issue. He has abandoned any arguments over whether his speech was protected under *Garcetti* while he was an employee.

REASONS FOR DENYING THE PETITION

The petition should be denied because the Seventh Circuit succinctly and correctly concluded that based on the record and this Court's precedent, Officer Fehlman had no First Amendment protection for speech he made pursuant to his official duties with the Neillsville Police Department. The petitioner asks this Court to ignore this straightforward application of this Court's *Garcetti* precedent and instead urges the Court to first focus on what he alleges was post-employment retaliation, to retroactively convert prior unprotected speech into constitutionally protected speech—even where it is undisputed the employee was speaking only as a public employee in furtherance of official duties at the time the speech

was made. The petitioner's position would turn longstanding First Amendment analysis on its head and there is no support in *Garcetti* or this Court's precedent for such a fundamental shift in the constitutional analysis governing public employee speech.

As this Court instructed: "Our precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job." *Garcetti*, 547 U.S. at 426. Fundamentally, under the Constitution, "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have exercised as a private citizen." *Id*. at 421-22. In other words, it is the nature of the speech itself, *when it is uttered*, that determines whether it is protected by the First Amendment—not how an employer is alleged to have later responded to that speech. This "threshold inquiry" focuses on "the *nature of the speech* at issue." *Kennedy*, 142 S.Ct. at 2423 (emphasis added). Why? Because when public employees speak pursuant to their official duties, that speech is not the speech of private citizens, but, as far as the Constitution is concerned, it is "the government's own speech." *Id.* In sum, this case presents no compelling basis for this Court to break from its consistent line of precedent for determining whether public employees' speech is protected by the First Amendment. Moreover, the petition certainly does not satisfy any of this Court's traditional standards for the exercise of certiorari jurisdiction.

I. The Seventh Circuit correctly applied *Garcetti* based on the record below.

The petitioner's entire rationale for asking this Court to break with its precedent is the notion that none of the employer or management rationales or goals for limiting the speech rights of public employees under the First Amendment have any justification once employees leave their employment. Pet. 9-11. The petitioner is correct that this Court has broadly discussed the balancing of priorities between a government entity when acting as an employer and the government when acting with regard to the general public. *Garcetti*, 547 U.S. at 418. Further, most of the cases addressing the First Amendment confines of public employees' speech have generally been raised in ongoing employment disputes or terminations. *See e.g., Waters v. Churchill*, 511 U.S. 661, 664 (1994) (wrongful discharge); *Connick v. Myers*, 461 U.S. 138, 141 (1983)(wrongful termination). But nothing in *Garcetti* or subsequent decisions by this Court carved out or limited the applicability of the threshold inquiry established by *Garcetti* to only cases involving alleged retaliation occurring while a plaintiff was still employed.

1. That is because like in nearly all cases involving the First Amendment, the first question is always whether the conduct or expression at issue is protected in the first instance; if it isn't, the Constitution is no longer involved. *See e.g., Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790-91 (2011) (holding video games qualify for First Amendment protection before analyzing whether regulation was justified by a compelling state interest); *Pleasant Grove City v. Summum*, 555 U.S. 460, 467

(2009)("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."); *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004)(per curiam)("W]hen government employees speak or write on their own time on topics unrelated to their employment, the speech can have First Amendment protection…"); *Ward v. Rock Against Racism*, 491 U.S. 781, 790-91 (1989)(holding music entitled to First Amendment protection before considering whether government regulation was content neutral); *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 284 (1977)(analyzing whether communication was protected by First Amendment before analyzing motive for government reaction to that communication).

This Court has not deviated from this premise in cases involving the intersection of the First Amendment and public employee speech. The starting point is always "a threshold inquiry into the nature of the speech at issue"—if the public employee "speaks 'pursuant to [his or her] official duties" the inquiry ends because that speech is not protected. *See Kennedy*, 142 S.Ct. at 2423-24 (applying *Garcetti*). In *Lane* this Court confirmed the two-step inquiry into whether a public employee's speech is entitled to protection: if the answer to the first step is that the employee was *not* speaking as a private citizen on an issue of public concern, the constitutional inquiry ends because "the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." *Lane*, 573 U.S. at 237 (citation omitted).

Thus, as presented by *Garcetti*, then *Lane*, and now *Kennedy*, this Court has been constant that the threshold inquiry moves in one direction—first

determine whether the speech was made as an employee pursuant to his or her official duties or as a private citizen, and *only if* the court concludes it was the latter, should a court consider the remaining steps including balancing any employment or management rationales for the government's response to that speech. *Kennedy*, 142 S.Ct. at 2423-25 (analyzing *Garcetti* and *Lane*'s application of the threshold inquiry).

2. The petitioner's argument turns this linear analysis on its head, by arguing a court should first consider when the alleged retaliatory conduct occurred, irrespective of whether the speech was protected when it was made. This argument ignores this Court's repeated directive that it is "the nature of the speech" itself that controls whether it is protected by the First Amendment. *Id.* at 2423. Nothing in this Court's previous application of this threshold inquiry suggests that unprotected speech can be converted into protected speech simply because the employee is no longer an employee. How could it when this Court recently acknowledged that speech made pursuant to a public employee's official duties is "for constitutional purposes … the government's own speech"? *Id.* at 2423. When the government's own speech is at issue "it is exempt from First Amendment scrutiny." *See Johanns v. Livestock Mktg. Assn.*, 544 U.S. 550, 553 (2005).

3. The petitioner raises several hypotheticals to claim that the application of *Garcetti* to post-employment retaliation makes no sense when the employee is no longer employed by the government; but it equally makes no sense for a court to consider unprotected speech suddenly protected—where nothing about the content or context of the speech

itself has changed. *See Lane*, 573 U.S. at 240 (holding critical question is whether the speech itself was made within scope of an employee's duties). The petitioner never explains *why* this alchemy should occur other than judicial fiat.

Again, this is not a case about speech made by a public employee on an issue of public concern *after* his employment ended—it is about government speech made by a public employee pursuant to his official duties *while* he was employed. Officer Fehlman did not allege he made any speech about Chief Mankowski after he left the Department. He nonetheless hypothetically contends that had he done so, that subsequent speech would not be protected under *Garcetti*. But neither *Garcetti, Lane,* nor *Kennedy* involved cases of subsequent speech by employees and that issue is not before the Court in this case.

He also asserts that applying *Garcetti* to post-employment retaliation claims seemingly allows any government employer free reign to retaliate against former employees once they leave employment. Pet. 11-12. But all his hypotheticals are premised on a situation in which the former employee criticized or spoke after employment had ended and then the alleged retaliation occurred. Whether *Garcetti* would have any applicability in such situations is not the question presented in this case. Accordingly, this case is not the proper vehicle to consider such hypothetical applications of *Garcetti.*

4. In sum, the petitioner urges this Court to first consider when the government's alleged reaction to the speech occurred and ignore whether the speech itself was protected. But the *Garcetti* test has already prioritized any competing concerns by directing a

court to first consider whether the speech itself was protected at the time it was made. *See Garcetti*, 547 U.S. at 421. Only if this threshold is overcome should a court enter into the complex and "'delicate balancing of the competing interests'" between the public employee and the government employer. *Kennedy*, 142 S.Ct. at 2423(citation omitted).

5. Here the Seventh Circuit succinctly applied this Court's precedent to conclude: "If the speech is not protected to begin with … the question of whether that retaliation happened during or after employment is legally irrelevant." Pet. App. 9a. The Seventh Circuit was correct and nothing is presented in the petition that provides a basis for this Court to deviate from its precedent.

II. This case is an exceedingly poor vehicle for further review to consider a break with *Garcetti*.

1. This case does not come to this Court on a fully-developed factual record—it was decided on a motion to dismiss. Pet. 11. Accordingly, it presents a very poor vehicle for this Court to consider any deviation from its past precedent. In each recent previous case in which this Court has considered the contours and balancing of the competing interests surrounding a public employee's speech under the First Amendment, the cases were generally presented to the Court after summary judgment, where a full evidentiary record could be considered. *See Kennedy,* 142 S.Ct. at 2420; *Lane*, 573 U.S. at 234; *Garcetti*, 547 U.S. at 415. That makes sense because a full consideration and balancing of the competing interests implicated by the *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty.*, 391 U.S. 563

(1968) framework can be fact intensive. Here the district court concluded that dismissal was appropriate as a matter of law under Fed. R. Civ. P. 12(b)(6). Pet. App. 36a. In other words, the allegations presented by the petitioner in his complaint were so conclusive as to the nature of the speech at issue that both the district court and the Seventh Circuit could rule as a matter of law that the petitioner failed to overcome the threshold test from *Garcetti*.

The district court also declined to allow the petitioner an opportunity to amend his complaint "to fix any defects" because he had already amended his complaint once and "the problem isn't that Fehlman failed to plead enough facts; the problem is that the facts he did plead show that he isn't entitled to relief." Pet. App. 36a. As a result, neither court needed to address any other step of the *Pickering* framework—including whether the government employer had "an adequate justification" for his response to the employee's speech which outweighs any protection for the speech. *See Lane*, 573 U.S. at 242; *Kennedy*, 142 S.Ct. at 2425. Given the procedural posture and limited record here, this case is not appropriate for review by the Court on the question the petitioner is presenting.

2. Moreover, because the lawsuit against him was dismissed on a motion to dismiss, Chief Mankowski did not file an answer and therefore was not able to deny the allegations made against him; nor was he able to present evidence refuting the allegations or present a full explanation or rationale for any actions he may have taken after Fehlman resigned from the Department. This absence is significant because the petitioner's overarching argument in his petition is his assertion that *Garcetti* should not apply to

allegations of post-employment retaliation under the First Amendment because this Court's policy statements concerning a government employer's countervailing interest "in controlling the operation of its workplaces" have no applicability once an employee leaves the workplace. Pet. 9, 11. But here there is no evidentiary record showing what occurred after Fehlman resigned from the Department—only his allegations. Even those allegations of alleged post-employment actions by Chief Mankowski, however, are not so divorced from or unrelated to either employment or department concerns as suggested by the petitioner. Pet. 11. Without a full evidentiary record, which very well could winnow out any claimed retaliatory acts, or more importantly explain any management or operational rationale for Chief Mankowski's purported actions, this Court is being asked to fundamentally change its precedent based on one-sided allegations and hypotheticals.

3. Additionally, even if the Court were to consider the petitioner's proposed change in the law, which he asserts has never been addressed by this Court and the courts of appeal, Pet. 2, the petitioner would be hard-pressed to dispute that qualified immunity bars any First Amendment retaliation claim against Chief Mankowski under these circumstances. While qualified immunity was not argued below because Chief Mankowski had not filed an answer yet, this Court indicated in *Lane* that qualified immunity is fully available in First Amendment retaliation claims where the constitutional right at issue was not "clearly established" at the time of the challenged conduct. *Lane*, 573 U.S. at 243. Given this reality, and the petitioner's acknowledgement that he is seeking a sea change in the law, the present case is a poor

vehicle for this Court to consider any substantive change in *Garcetti* where it is likely qualified immunity would ultimately bar the claim. *See Pearson v. Callahan*, 555 U.S. 223, 236-37 (2009) (deciding constitutional right was violated before deciding right was clearly established "results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case").

4. Finally, the petitioner criticizes the district court and Seventh Circuit for never specifically addressing his arguments concerning the alleged post-employment retaliation. Pet. 7-8. But the record below shows that he failed to meaningfully develop any argument fully and adequately in the district court on the very issue he now asks this Court to review. R16:20-21. Accordingly, the Seventh Circuit gave this issue the appropriate and succinct review for such a poorly preserved issue in the district court. Pet. App. 8a-9a. This Court should not contemplate deviation from its prior precedent in a case in which the petitioner failed to fully develop his arguments first in the lower courts.

III. There is no conflict in the circuits on the application of *Garcetti* to cases of alleged post-employment retaliation.

Curiously, the petitioner argues that the Seventh Circuit's decision is at odds with conclusions from other circuits, Pet. 13-15, yet he also contends that *none* of the courts of appeal nor this Court have ever addressed the question he is presenting in his petition. Pet. 2. The petitioner cannot have it both ways and he is incorrect. The simple fact is that none of the cases cited in his petition demonstrate any real

conflict among the circuits on the issue he is seeking review. Nor is there is any confusion evinced in the circuits concerning the application of *Garcetti*. There is no reason for this Court to intercede where there is no conflict.

1. As argued above, the Seventh Circuit's decision was a scrupulous application of this Court's precedent applying the threshold *Garcetti* test. The petitioner argues that a pre-*Garcetti* decision from the Seventh Circuit discussed the purpose of the "public concern test" as previously outlined by this Court in *Connick*. *See Vickery v. Jones*, 100 F.3d 1334, 1346 n. 1 (7th Cir. 1996). However, the plaintiff in *Vickery* was a *private citizen* who alleged that a government agency unlawfully considered political affiliation in hiring decisions and the Seventh Circuit summarily concluded in a footnote that *Connick* did not apply to the facts of the case. *See id*. As indicated above, this Court's post-*Garcetti* analysis is first predicated on addressing whether the speech is as a public employee or a private citizen; only after resolving that should a court consider the competing interests of the "public concern test." Accordingly, *Vickery* does not show any doctrinal confusion in the Seventh Circuit.

2. The petitioner claims that decisions from other circuits show that the supposed rationale for not protecting public employees' speech conflicts with the Seventh Circuit's decision in this case, but this purported circuit split conflict is entirely contrived.

The First Circuit decision in *Campagna v. Massachusetts Dept. of Env't Prot.*, 334 F.3d 150, 154-55 (1st Cir. 2003), pre-dates *Garcetti* and involved a plaintiff who alleged retaliation against him for actions he took in his capacity as a *private* contractor, not as a public employee. *See Campagna*, 334 F.3d at

154-55. So, the threshold question of whether the plaintiff spoke as a public employee or private citizen was not before the court. *See id.*

That threshold question was also not at issue in *Conard v. Pa. State Police*, 902 F.3d 178, 182 (3rd Cir. 2018). The Third Circuit in *Conard* specifically noted that the speech at issue was made *after* the public employee had left employment. *See id.* at 181-82. In other words, the case did not involve speech made while the employee was speaking pursuant to his official duties. Therefore, *Conard* does not conflict with the Seventh Circuit whatsoever.

Likewise, in the pre-*Garcetti* Ninth Circuit decision, *Hyland v. Wonder*, 117 F.3d 405 (9th Cir. 1997), the court simply assumed the speech at issue would be protected when it was made for purposes of qualified immunity analysis and therefore permitted a claim for post-dismissal retaliation to go forward. The question of whether the speech was protected in the first instance was not before the Ninth Circuit in *Hyland*. *See id.* Here, under *Garcetti* the petitioner's speech was never protected in this first instance.

3. Finally, the remaining cases cited by the petitioner do not involve First Amendment retaliation claims, but instead concern anti-retaliation provisions under various federal statutes that have no applicability here. *See Robinson v. Shell Oil*, 519 U.S. 337 (1997) (extending Title VII's anti-retaliation provisions to former employees); *Anderson v. Davila*, 125 F.3d 148 (3rd Cir. 1997) (employee alleged retaliation for filing a discrimination complaint with the EEOC). As this Court noted in *Garcetti*, while the First Amendment does not provide sanctuary from an employer's responses to a public employee's speech made pursuant to his or her official duties, there may

be other whistleblower protections available legislatively. *Garcetti*, 547 U.S. at 425. But this case only alleges First Amendment retaliation, and nothing cited by the petitioner establishes a circuit-split requiring this Court to accept review to resolve a conflict. The precedent from this Court and from the circuit courts demonstrates that the first issue for a court to decide is whether the employee was speaking as an employee or as a private citizen. The Seventh Circuit correctly applied this analysis and there is no circuit split.

Absent any conflict either among the circuits or any conflict with this Court's precedent, the petition fails to establish any basis for this Court to grant review.

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

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