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

REPLY BRIEF IN SUPPORT OF WRIT OF CERTIORARI

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REASONS FOR GRANTING THE PETITION

Respondent James Mankowski is missing the forest for the trees. Petitioner Patrick Fehlman is not seeking this Court's review of a "straightforward" application of *Garcetti*. Fehlman does not seek this Court to review whether speech he made was protected at the time he made it while a public employee. Fehlman is not seeking a review of Mankowski's retaliation against Fehlman for that unprotected speech while Fehlman was employed. Fehlman does not dispute that, had he remained employed with the Neillsville Police Department, his speech would have remained unprotected and Mankowski could have continued his retaliation.

The issue in this case is specific, novel, and not previously considered by this Court: whether retaliation for unprotected speech may continue against a former public employee after that employer-employee relationship ends. Mankowski continued to retaliate against Fehlman for his speech while Fehlman sought new employment. Mankowski:

- Intervened with the Clark County Sheriff's Sergeant assigned to complete Mr. Fehlman's background check;
- Made false and negative comments about Fehlman;
- Altered Fehlman's personnel file;
- Interfered with Fehlman's receipt of unemployment compensation; and
- Banned Fehlman from entering the Neillsville Police Department.

Notably absent in Mankowski's brief is a response to Fehlman's argument regarding the Seventh Circuit's application of *Garcetti* in the post-employment context. This lack of a response is—quite simply—because there is no basis in prior case law for the Seventh Circuit's decision. The Seventh Circuit, in merely a few paragraphs, applies

Garcetti far beyond its holding and beyond prior case law limiting speech for public employees.

Speech made by a public employee is closely scrutinized to determine whether it meets the exception for the limitation on free speech. The first analysis is whether the public employee speaks pursuant to official duties, as that is the government's own speech. *Garcetti v. Ceballos*, 547 U.S. 410, 421, 126 S. Ct. 1951 (2006). The second step is consideration of whether the topic the employee speaks on as a citizen addresses an issue of public concern. *Id.* at 423. In arriving at this second step, the *Garcetti* court stated that there is "a delicate balancing of the competing interests surrounding the speech and its consequences." *Id.* This Court advised that the interest of the government employer must be weighed, and a key consideration is "promoting the efficiency of the public services it performs through its employees." *Id.*; *see also Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2423, 213 L.Ed.2d 755, 773 (2022).

In creating this narrowly tailored exception to free speech, this Court carefully considered the impact of a public employee's speech on the workplace and the ability of a public office to function efficiently and properly. This Court reasoned "[a] government entity has broader discretion to restrict speech when it acts in its role as employer, but 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. This Court reasoned that "[t]he question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Id.; see also Pickering*, 391 U.S., at 568. This Court clearly stated:

> This consideration reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict

> speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.

Id.

Based on this Court's reasoning for this exception for free speech, when public employment is removed from the equation, the speech restriction and retaliation must end. Permitting post-employment retaliation to continue fails to comport with this Court's rationale in *Garcetti.* Implicit in the *Garcetti* holding is that the exception to protecting free speech is meant exclusively to enable the government to operate efficiently. It is meant so that employers can ensure that their employees and their workplace continue to work without disruptions by employee speech. There is no policy reason to protect post-employment retaliation. There is no reason to permit a former public employer to continue to retaliate against a former public employee when that employment relationship terminates.

To illustrate the risks associated with the Seventh Circuit's decision in this matter, Fehlman set forth hypotheticals in his petition. (Pet. 12-13.) Contrary to Mankowski's argument (Br. in Opp. 16), these hypotheticals demonstrate the risk for employees when their employment ends and a public employer has free reign to retaliate in the future for speech made during the employment. For example, a former public employee sanitation worker who complained about government corruption as a public employee might find his trash not picked up once he leaves his public employment. If Fehlman he were to criticize Mankowski now as a citizen and if the police department were to ignore Fehlman's calls for service, Mankowski can claim that it was retaliation due to the unprotected speech made during Fehlman's employment and not retaliation for the protected speech made post-employment. There must be

a clearly delineated end point for when a public employer can retaliate against a public employee for unprotected speech. The logical end point is when the public employment terminates.

The Seventh Circuit rejected Mankowski's argument that Fehlman did not develop this issue sufficiently at the trial court level. The Seventh Circuit considered and ruled on the argument, which is the basis for Fehlman's appeal to this Court. This Court should likewise reject Mankowski's argument and accept this writ. Moreover, the record and arguments were well-developed at the Seventh Circuit. The Seventh Circuit failed to consider Fehlman's argument on this issue and merely ruled against him in approximately 100 words.

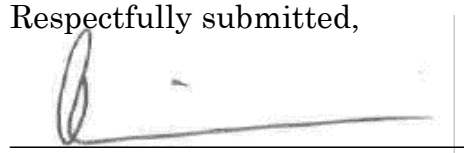
Mankowski's argument that this is the wrong case for this issue must be ignored. An issue such as this can only make its way to the Supreme Court through an appeal of a decision granting a motion to dismiss, particularly if this decision by the Seventh Circuit is left to stand. If Mankowski sought to develop a more robust argument and address the issue of qualified immunity, he had the option to file an answer, enter into discovery, and then move for summary judgment. Instead, this matter was decided on a motion to dismiss, which extended the *Garcetti* holding in a novel way. In the future, defendants will rely on this case and move to dismiss a claim for failure to state a claim, and further facts will never be developed. Mankowski fails to state any facts that would be relevant to the Court's decision in this matter. A more robust factual record is immaterial to the question before this court: how far does *Garcetti* extend? Does it make lawful post-employment retaliation against a public employee brave enough to risk his or her job for speaking out? The facts of this case are more than sufficiently developed to answer this question.

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 11th day of December 2023.

Respectfully submitted,



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