No. ________

In The
Supreme Court of the United States

DR. SHIMON WARONKER,

Petitioner,

v.

HEMPSTEAD UNIFIED SCHOOL DISTRICT, et al.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Dr. Shimon Waronker was hired as the Superintendent of the Hempstead Unified Free School District to transform its schools and to remedy a history of academic problems, financial mismanagement, and corruption. As Superintendent, he discovered corruption which he reported to law enforcement officials as he was required to do by law. After he informed the Board of Education and the community of his actions, he was suspended and then fired. He lost his job for speech that was required by law, that was public, and that reported and exposed corruption. This case thus poses the important questions:

1. Whether the First Amendment protects the speech by a public official that is required by law and that reports and exposes corruption.

2. Whether speech by a public official reporting misconduct to external government officials, outside the chain of command, is protected by the First Amendment, as held by the Fifth, Ninth, and Tenth Circuits, or whether such speech is unprotected under *Garcetti v. Ceballos* as held by the Second Circuit in this case and by the Sixth and District of Columbia Circuits.

PARTIES TO THE PROCEEDING

Petitioner is Dr. Shimon Waronker, who is the plaintiff in these proceedings.

Respondents are Hempstead Union Free School District, the Board of Education of the Hempstead School District, David B. Gates, in his individual and official capacity, Randy Stith, in his individual and official capacity, Lamont E. Jackson, in his individual and official capacity, and Patricia Wright, as a necessary party in her capacity as Clerk of the Hempstead School District, who are the defendants in these proceedings.

RELATED CASES

Shimon Waronker v. Hempstead Unified Free School Dist., et al., United States District Court for the Eastern District of New York, 2:18-cv-393 (DRH)(SIL), January 16, 2019.

Shimon Waronker v. Hempstead Unified Free School Dist., et al., United States Court of Appeals for the Second Circuit, 19-407, October 17, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Dr. Shimon Waronker petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is unreported and is reproduced at the Appendix 1-16. The decision of the United States District Court for the Eastern District of New York is unpublished and is reproduced at App. 17-40.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The United States Court of Appeals for the Second Circuit entered judgment on October 17, 2019, affirming the judgment of the District Court. App. 1. This petition is filed within 90 days of the Second Circuit's ruling and is therefore timely under Rule 13.1 and 29.2 of this Court.

CONSTITUTIONAL PROVISION

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. First Amendment to the United States Constitution.

STATEMENT OF THE CASE

A. Factual Background

The Hempstead Unified Free School District

Hempstead Unified Free School District has been historically plagued by violence, low graduation rates and academic failures, crumbling facilities, and corruption. (A 11-44, ECF 1, 21, 23, 24). Students and staff are jeopardized by in-school violence, gang activity and racial animosity. (*Id.*, 25-40). Its schools suffer from long-standing abysmal graduation rates, alarming drop-out rates, and social promotion of students. (*Id.*, 41-62). The facilities are and have been deplorable. Its buildings are crumbling, infested with mold and vermin, contaminated by asbestos, and its systems continually fail. (*Id.*, 64-72, 124).

Corruption long has been the norm, characterized by patronage and nepotism. (*Id.*, 73). For example, there were 295 payroll distributions to 129 individuals who were not active employees of the District, and 500 employees who were paid as vendors. (*Id.*, 75-77). Financial waste and mismanagement is and has been widespread. (*Id.*, 96-97, 99-101, 104-05, 106-08).

The Hiring of Dr. Shimon Waronker

Following the involuntary removal of Defendant-Appellee Lamont E. Johnson from the Board, the extant majority of the Board authorized a nationwide search for a new Superintendent. (*Id*., 94, 131). Dr. Shimon Waronker interviewed and was hired for this position. He had successfully transformed schools with academic, funding, and leadership challenges in the South Bronx, Brownsville, and East Flatbush. (*Id*., 14).

The term of the contract between the Board and Waronker (A 300-13) "commenc[ed] July 1, 2017 through and including June 30, 2021." (A 300). Further, Plaintiff's duties and responsibilities were specifically identified in the contract. (A 301). Under the contract, the Board is empowered to terminate the contract "for material breach of this Agreement as described in Paragraph 10, titled 'Hearing Procedures.'" (A 306). The "Hearing Procedures" prohibit suspension, discipline, or termination "without just cause and only for alleged acts of material breach of this Agreement, neglect of duty, gross misconduct, or disability . . . and only following a fair hearing before an impartial hearing officer." (A 307) (emphasis added). The contract provides for extensive hearing procedures including, but not limited to written notice of charges, right to counsel, discovery of testimonial and documentary evidence, and the selection of a neutral arbiter. (A 307-09).

Dr. Waronker's Initiatives

Soon after being hired, Waronker brought another proven school reformer to the District as Deputy Superintendent. (A 16, 120). Plaintiff also caused the District to engage special investigators and a forensic accounting firm to help identify and eradicate corruption and mismanagement. (A 11-44, 121, 137, 140). "Soon after his appointment, Dr. Waronker began evaluating the administrative personnel. Among other things, he fired high ranking Administrators." (*Id*., 127-28).

There was strenuous resistance to Waronker's efforts (*Id*. 129-30), as evidenced by the burning of many financial records just before the forensic accountants began their work (*Id*. 122), and the vocal hostility of individual Defendants Randy Stith and David B. Gates to Waronker's actions. (*Id*. 126, 135).

Dr. Waronker's Communications

On December 6, 2017, Waronker sent an email to the Board members, setting forth, among other things, communications he had "with several law enforcement agencies on the local, state and federal level about disturbing facts which have become apparent to me [that] endanger the public health, welfare, and safety of our district and appear to be both unlawful and unethical." Plaintiff further wrote that these matters "required disclosure to, and an evaluation by, governmental offices outside the confines of the Hempstead School District." (*Id*. 145, 182).

Having received no response to his December 6, 2017 correspondence to the Board members, on January 5, 2018, Waronker sent an open letter to the Hempstead community, simultaneously posted on the District's website, in which Plaintiff warned that "Politics, self-interests, patronage, vendettas, threats, and cover-ups cannot rule the day." (*Id*. 151).

Dr. Waronker Is Placed on Administrative Leave and then Fired

Waronker was placed on administrative leave of absence with pay and excluded from entering District property by the Board during its public meeting on January 9, 2018 pending an investigation by the District's "Special Council." (*Id*. 152-53; *see also* A 93).

The suspension was without notice, an opportunity to be heard, charges, a hearing, or any other protections afforded to him by his contract with the Board. He was then fired.

Waronker alleges he was retaliated against for his communications with law enforcement regarding "actions which he reasonably and in good faith, believes violates the law, rules and regulations governing said actions and behavior which presents a substantial and specific danger to the public health or safety." (*Id*. 182). Further, Plaintiff alleges that Defendants intended to punish him for his communications regarding, among other things, "wrongful and improper actions being taken by the SCHOOL DISTRICT, and by THE BOARD and more specifically in use of Federal monies,

improper hiring practices and violation of Federal laws, State Laws and Civil Service Rules and Regulations." (*Id*. 185). Plaintiff alleges that his suspension by Defendants was intended to "silence him, eliminate his voice, and thereby block, limit and deter the Plaintiff and other persons from exposing wrong doing, public abuses, violations of law and exercising their civil, statutory and constitutional rights." (*Id*. 186).

B. Procedural history

Dr. Waronker asserts five causes of action in his Complaint: (1) the First Claim under 42 U.S.C. § 1983 was for municipal liability for violations of his Fourteenth Amendment rights; (2) the Second Claim was for violations of his procedural due process rights under the Fourteenth Amendment and 42 U.S.C. § 1983; (3) the Third Claim was for violations of Plaintiff's First Amendment rights and 42 U.S.C. § 1983; (4) the Fourth Claim was for violations of New York State whistleblower statutes; and (5) the Fifth Claim was for breach of his employment contract. (A 32-42).

The defendants moved to dismiss for failure to state a claim. The District Court granted the motion to dismiss. App. 17. As for the issue that is the basis of this Petition, the court concluded that Waronker's speech was not protected by the First Amendment because under *Garcetti v. Ceballos*, 547 U.S. 410 (2006), it was the speech of a government employee on the job on the scope of his duties. App. at 32. The United States Court of Appeals for the Second Circuit affirmed on the

same basis and concluded: "we affirm the District Court's dismissal of Waronker's First Amendment claim on the grounds that he failed to plausibly allege that he spoke as a private citizen on a matter of public concern." App. at 5-9.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT BETWEEN THE SECOND CIRCUIT'S DECISION AND THIS COURT'S DECISION IN *LANE V. FRANKS* AS TO WHETHER THE FIRST AMENDMENT PROTECTS THE SPEECH OF A PUBLIC OFFICIAL THAT REPORTS CORRUPTION AND IS REQUIRED BY LAW.

In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), this Court held that the First Amendment does not protect the speech of government employees on the job in the scope of their duties. Richard Ceballos, a supervising district attorney in Los Angeles County, concluded that a witness in one of his cases, a deputy sheriff, was not telling the truth. He wrote a memo to this effect and felt that he was required by the Constitution to inform the defense of this. Ceballos alleged that his employers retaliated against him because of this speech, including transferring him to a less desirable position and denying him a promotion.

The issue before the Court was whether Ceballos's speech was protected by the First Amendment. Although this Court long has held that there is constitutional protection for the speech of government employees, *see*, *e.g.*, *Pickering v. Board of Education*, 391 U.S. 563 (1968), it ruled against Ceballos. The Court drew a distinction between speech "as a citizen" as opposed to "as a public employee"; only the former is protected by the First Amendment. The Court stated: "[W]hen 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." 547 U.S. at 421.

The Court acknowledged that it was leaving open many questions, including, for example, when should speech be regarded as "on the job" and in "the scope of duties." The Court wrote: "We thus have no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate. We reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions. The proper inquiry is a practical one." *Id*. at 424.

Only once in the more than decade since *Garcetti v. Ceballos* was decided has this Court clarified the line between speech as a "citizen" and speech as a "government employee." In *Lane v. Franks*, 573 U.S. 228 (2014), the Court unanimously held that a government employee's First Amendment rights were violated when he was fired for truthful testimony he gave in court

pursuant to a subpoena. Edward Lane was fired from his state job after he testified at a criminal trial, even though he appeared after being subpoenaed and testified truthfully. The Court said that under *Garcetti v. Ceballos* his speech was protected because it was speech as a "citizen" and not as a "government employee": "Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment." *Id.* at 238.

The Court stressed that government employees are speaking as citizens even when they express information learned on the job and emphasized the importance of such expression:

> Speech by citizens on matters of public concern lies at the heart of the First Amendment, which was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. This remains true when speech concerns information related to or learned through public employment. After all, public employees do not renounce their citizenship when they accept employment, and this Court has cautioned time and again that public employers may not condition employment on the relinquishment of constitutional rights. There is considerable value, moreover, in encouraging, rather than inhibiting, speech by public employees. For '[g]overnment employees are

> often in the best position to know what ails the agencies for which they work.' 'The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it.' *Id.* at 235-36 (citations omitted).

Crucial to the Court's decision was that Lane had no choice: he could not ignore the subpoena and he could not go to court and commit perjury. To punish him under these circumstances was deemed to violate the First Amendment.

The fact that the speech was in public, and not private within the job, also was important in deeming the expression to be that of a citizen. The Court observed: "The sworn testimony in this case is far removed from the speech at issue in *Garcetti*—an internal memorandum prepared by a deputy district attorney for his supervisors recommending dismissal of a particular prosecution." *Id.* at 239.

Finally, and quite significantly, in concluding that Lane spoke as a citizen, the Court emphasized that his speech exposed public corruption: "The importance of public employee speech is especially evident in the context of this case: a public corruption scandal. . . . It would be antithetical to our jurisprudence to conclude that the very kind of speech necessary to prosecute corruption by public officials—speech by public employees regarding information learned through their employment—may never form the basis for a First Amendment retaliation claim. Such a rule would place public employees who witness corruption in an impossible

position, torn between the obligation to testify truthfully and the desire to avoid retaliation and keep their jobs." *Id.* at 240-41.

Thus, three factors were especially important in determining that Lane's speech was as a citizen and protected by the First Amendment even though it was based on information learned on the job and took place during work hours: his speech was required by law; it was public and not private; and it concerned exposing corruption.

All of these factors are present in this case. First, Waronker was obligated by law to expose the corruption he saw in his school district. As he declared in his Complaint, he was "compelled" to contact law enforcement "by his professional, moral, and legal obligations to serve the District." If a Superintendent of Schools sees illegal corruption and does not report it to law enforcement, he has breached his fiduciary duty and may well be an accessory after the fact. Like Edward Lane, Shimon Waronker had a legal duty to speak. Like in *Lane v. Franks*, to deny First Amendment protection is to force a public official to choose between violating the law, including potential liability for breach of fiduciary duty, and facing retaliation.

Second, Waronker, like Lane, spoke publicly, including in his community letter. As the Court noted in *Lane v. Franks*, this is very different from the internal memorandum by a deputy district attorney recommending dismissing a particular criminal case in *Garcetti v. Ceballos*.

Finally, exactly like in *Lane v. Franks*, Waronker was speaking to combat corruption. This is not disputed in this litigation. Indeed, the defendants in the lower courts did not deny that this was speech of public concern precisely because it was about corruption within the district. The great public interest in having government officials expose corruption was present in this case just as in *Lane v. Franks.*

There is thus an inescapable conflict between the Second Circuit's decision in this case and this Court's decision in *Lane v. Franks.* When a public official has the legal duty to report and expose corruption, there should be First Amendment protection. This Court should grant review to resolve this conflict and to clarify this very important principle of freedom of speech.

II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A SPLIT AMONG THE CIRCUITS AS TO WHETHER IT IS SPEECH AS A "CITIZEN" WHEN A PUBLIC OFFICIAL REPORTS MISCONDUCT OUTSIDE THE CHAIN OF COMMAND TO GOVERNMENT OFFICIALS RESPONSIBLE FOR HANDLING MATTERS OF CORRUPTION.

The central issue presented in this case—when is speech by a public official deemed speech as a "citizen" that is protected by the First Amendment—constantly arises in litigation in courts throughout the country. Yet, courts struggle and reach inconsistent results because there has been little clarification from this

Court. This case presents an ideal vehicle for providing much needed clarity in this important area of law.

Specifically, there is a split among the Circuits as to whether *Garcetti v. Ceballos* applies when it is speech outside the "chain of command" and is taken to outside officials, as occurred here when Waronker spoke to law enforcement officials. Several Circuits have explicitly ruled that *Garcetti* involved speech *within* the workplace, but does not apply and the speech is protected by the First Amendment when the speech is to outside officials. *See Thomas v. City of Clanchard*, 548 F.3d 1317 (10th Cir. 2008) (finding that a building inspector's threat to report illegal behavior to the Oklahoma State Bureau of Investigation fell outside of *Garcetti* because he "went beyond complaining to his supervisors and instead threatened to report to the [Bureau], an agency outside his chain of command, his speech ceased to be merely 'pursuant to his official duties' and became the speech of a concerned citizen."); *Charles v. Grief*, 522 F.3d 508, 514 (5th Cir. 2008) (deciding that *Garcetti* did not apply to an employee of a state commission who sent allegations of racial discrimination to the Texas Legislature because "[h]is decision to ignore the normal chain of command in identifying problems with Commission operations [was] a significant distinction [from *Garcetti v. Ceballos*.]"); *Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008) (stating that if "a public employee takes his job concerns to persons outside the work place in addition to raising them up that chain of command at this workplace, then those external communications are ordinarily not made as an employee, but as a citizen.");

Frietag v. Ayers, 468 F.3d 528, 532 (9th Cir. 2006) (finding that a correctional officer's complaints regarding the inability of officials to control the sexual impropriety of inmates to the state senator and the California Inspector General constituted protected speech).

But the Second Circuit in this case deemed irrelevant that Waronker's speech was to law enforcement and concerned his communications with law enforcement. Other Circuits, too, have said that it does not matter whether the speech is to external authorities. *See Weisbarth v. Gauga Park Dist.*, 499 F.3d 538, 545 (6th Cir. 2007) ("the determinative factor . . . [is] not where the person to whom the employee communicated fit within the employer's chain of command, but rather whether the employee communicated pursuant to his or her official duties."); *Winder v. Erste*, 566 F.3d 209, 215 (D.C. Cir. 2009) (maintaining that a "public employee speaks without First Amendment protection when he reports conduct that interferes with his job responsibilities, even if the report is made outside his chain of command.").

Indeed, the Second Circuit's ruling here directly conflicts with a decision of the Tenth Circuit in a case that also involved a fired school superintendent. In *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323 (10th Cir. 2007), the Court of Appeals allowed a First Amendment suit by a fired superintendent to go forward for statements that she made to the state Attorney General. The plaintiff superintendent conceded that her reports about non-standard hiring practices and improper handling of misconduct claims fell within the "scope of her duties as Superintendent

because they were aimed 'solely to the School Board' to which she reported and her job admittedly included 'advis[ing] [the School Board] about the lawful and proper way to conduct school business.'" *Id*. at 1329. The Tenth Circuit thus found that claims of retaliation for this speech were precluded by *Garcetti v. Ceballos.*

However, the Court of Appeals allowed her First Amendment claim to go forward for retaliation based on statements she made to the New Mexico Attorney General about the Board's Open Meetings Act violations. In fact, the Court of Appeals allowed the First Amendment claim to proceed even though "she had no apparent duty to cure or report and [the violations] were not subject to her control." *Id*. at 1334. The Court of Appeals, in an opinion by then-Judge Gorsuch stressed: "The statements made to the New Mexico Attorney General, however, are another kettle of fish. In the first place, Ms. Casey was not seeking to fulfill her responsibility of advising the Board when she went to the Attorney General's office. *Just the opposite: she had lost faith that the Board would listen to her advice so she took her grievance elsewhere.*" *Id.* at 1332 (emphasis added).

Both cases involve a school superintendent who suffered retaliation for reporting misconduct to law enforcement authorities. Both cases involve a superintendent who took grievances of illegal conduct elsewhere. The First Amendment interests for Waronker are even greater because he had a legal duty to report corruption. Yet, the Tenth Circuit said that case could go forward without such a legal duty. This leaves little

doubt that this case would have come out differently had it been litigated in the Tenth Circuit.

The confusion over how to determine what is speech as a "citizen" as opposed to as a government employee has produced many splits among the Circuits. This case provides an ideal vehicle for clarifying the law in this important and much litigated area. Shimon Waronker was placed on involuntary leave, which amounted to a suspension as superintendent of schools, and ultimately fired solely because he reported corruption to law enforcement authorities and spoke about doing so. The case thus presents the opportunity for this Court to give much needed guidance to lower courts, as well as to government employers and government employees, about the First Amendment's protection of freedom of speech.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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