No. 19-893

In The
Supreme Court of the United States

DR. SHIMON WARONKER,

Petitioner,

v.

HEMPSTEAD UNION FREE SCHOOL DISTRICT, et al.,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Fourteen years ago, 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. There are hundreds, if not thousands, of lower court decisions applying this decision and the lower courts have struggled with many aspects of it. Only once since 2006 has the Court returned to this issue and applied *Garcetti v. Ceballos*: in *Lane v. Franks*, 573 U.S. 228 (2014). Many issues remain unresolved and would benefit from clarification by this Court.

This case poses two such issues. Throughout its Opposition to the Petition for the Writ of Certiorari, Respondents mischaracterize Shimon Waronker's position and then responds to the straw person rather than the arguments actually made.

First, does the First Amendment protect speech by a public official that is required by law and that reports and exposes corruption? As argued in the Petition for the Writ of Certiorari, three factors were crucial in *Lane v. Franks* in this Court's holding that Edward Lane's speech was protected by the First Amendment: his speech was required by law, it was public, and it exposed corruption. All three of these factors are present here.

Respondents answer by repeatedly saying that *Lane v. Franks* did not create a "three-prong standard." Brief for the Respondent's in Opposition [Opp. Br.] at 23; *see also id.* at 2, 23, 26. Never does Waronker in his

Petition for Certiorari say that the Court created a three-part test. But there is no dispute that this Court pointed to each of these three factors as important in ruling in favor of Lane's free speech rights. The question presented is whether they should be sufficient to provide First Amendment protection for a government official's speech.

Second, whether and to what extent is speech by a public official protected by the First Amendment because the individual reported misconduct to external government officials, outside the chain of command? The Circuits are split on this question. Respondents reply that "[n]o circuit court has endorsed a bright-line rule that all public-employee speech outside the employee's 'chain of command' is protected by the First Amendment." Br. Opp. at 11.

Again, Respondents create a straw person and then knock it down. Waronker's position is that some Circuits have given great weight to whether the speech is outside the chain of command in deciding that it is entitled to First Amendment protection, while other Circuits consider this factor unimportant. Respondents never deny *this* split among the lower courts and it is the one that this case squarely presents: under *Garcetti v. Ceballos* is there greater First Amendment protection when a public official speaks outside the chain of command, especially in reporting corruption?

Finally, this case presents an excellent vehicle for resolving these issues. The Complaint clearly and unambiguously alleges that Shimon Waronker was

suspended from his position as Superintendent of the Hempstead Union Free School District entirely because of his speech reporting corruption. Nothing in Respondents' brief suggests any other reason.

Respondents repeatedly point to particular arguments in the Petition for Certiorari and says that those arguments were not made below. *See, e.g.*, Opp. Br. at 26 (claiming that Petitioner, in the lower courts, did not present *Lane v. Franks* as creating a three-part test). Respondents, though, make a fundamental error. What is required is that the issues be raised in the lower courts, even though new arguments obviously can be developed and presented in this Court. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534 (1992); *see also Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

Waronker's claim, from the outset of the litigation and throughout the proceedings below, is that his suspension violated the First Amendment in light of *Lane v. Frank* and that *Garcetti v. Ceballos* is distinguishable. That, of course, is exactly the claim in this Court and the central issue is the same as in the lower courts: was Waronker's speech constitutionally protected?

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 *Lane v. Franks*, this Court held that notwithstanding *Garcetti v. Ceballos*, there was a First Amendment violation when Edward Lane was fired for his testimony before a grand jury and at two trials. The Court distinguished *Garcetti v. Ceballos*. The Court pointed to Lane's speech being public, as opposed to the private communications in *Garcetti*. 573 U.S. at 239. Also, the Court stressed that Lane had no choice: he could not ignore the subpoena and he could not go to court and commit perjury. *Id.* at 240-41. And the Court stressed that the speech was of great public concern because it exposed corruption. *Id.*

Each of these factors is present in this case. First, as Respondents observe, the speech which led to Waronker losing his job was public, including to the School Board and an open letter to the community. Opp. Br. at 6-7.

Second, the speech was required by law and by Waronker's fiduciary duty as superintendent of schools. Respondents say: "Petitioner merely asserts that he 'was obligated by law to expose the corruption he saw,' without citing any statutes, regulations, or case law to support that assertion." Opp. Br. at 21 n.4. This is a

strange argument because Respondents contended throughout the lower court proceedings that Waronker's job required him to expose and report corruption. In the Court of Appeals, Respondents' brief stated: "As chief executive officer, if he sees, learns, or suspects corruption, malfeasance, misconduct, or fraud, the Plaintiff has a duty and is expected to report what he sees, learns, or suspects to the proper authorities."

Brief for Defendant-Appellees at 19. In light of this contention, Waronker hardly needed to cite to authority for such a duty, but it is found, among other places, in New York Education Law § 1711(2), which says that the "superintendent shall . . . *report to such board violations of regulations and cases of insubordination*." (emphasis added).

Respondents always contended that Waronker's speech was required by law because otherwise it would not be covered by *Garcetti v. Ceballos*. Precisely because the speech was required by law, this case is like *Lane v. Franks*. What is a government official like Edward Lane or Shimon Waronker to do when the law requires speech: violate the law or speak? *Lane v. Franks* should be understood to hold that speech in this situation is protected by the First Amendment.

Third, the speech exposed corruption. Respondents say that this should not be a factor because it "would strangely elevate and create a preference for speech exposing corruption over speech addressing other matters of public concern." Opp. Br. at 23. But this Court in *Lane v. Franks* did stress that Lane's

speech was protected, in part, because it exposed corruption: "The importance of public employee speech is especially evident in the context of this case: a public corruption scandal." 573 U.S. at 240. Speech on other subjects, too, might be of great public importance. But this Court in *Lane v. Franks* emphasized that denying First Amendment protection to speech revealing corruption means that "public employees who witness corruption [would be] in an impossible position, torn between the obligation to testify truthfully and the desire to avoid retaliation and keep their jobs." *Id.* at 241.

This was exactly Waronker's situation. He witnessed corruption and without First Amendment protection he was "torn between the obligation to [speak] and the desire to avoid retaliation and keep [his job.]" This Court should grant review to clarify the existence of First Amendment protection in such situations.

Respondents' primary argument, made repeatedly throughout their brief, is that Waronker is wrong in reading *Lane v. Franks* to create a three-prong test. *See, e.g.*, Br. Opp. at 2, 23, 26. But Respondents attribute to Waronker an argument he did not make. Waronker argues that *Lane v. Franks* emphasized three considerations in finding that Lane's speech was protected by the First Amendment – it was public, it was required by law, and it exposed corruption – and that all three are present here. Waronker asks the Court to grant review to decide whether there is First Amendment protection in a case like this where all three factors are present.

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.

There is a split among the Circuits as to whether and how much it matters that a government employee has gone outside the chain of command and spoken to government officials responsible for handling matters of corruption.

Some Circuits have considered this is very important in deciding that the speech is protected by the First Amendment. The Ninth Circuit, in an *en banc* decision, stated: "particularly in a highly hierarchical employment setting such as law enforcement, whether or not the employee confined his communications to his chain of command is a relevant, if not necessarily dispositive, factor in determining whether he spoke pursuant to his official duties. When a public employee communicates with individuals or entities outside of his chain of command, it is unlikely that he is speaking pursuant to his duties." *Dahlia v. Rodriguez*, 735 F.3d 1060, 1074-75 (9th Cir. 2013) (*en banc*); *Frietag v. Ayers*, 468 F.3d 528, 532 (9th Cir. 2006) (holding that a correctional officer's communications with a state senator and inspector general were protected speech, but her internal reports were not).

Other Circuits, too, have given great weight to whether the speech is outside the chain of command. *See, e.g.*, *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.").

But in sharp contrast, some Circuits give this factor little weight in determining whether a government employee's speech is protected by the First Amendment. For example, the District of Columbia Circuit declared 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*." *Winder v. Erste*, 566 F.3d 209, 215 (D.C. Cir. 2009) (emphasis added). Similarly, the Sixth Circuit has stated: "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." *Weisbarth v. Gauga Park Dist.*, 499 F.3d 538, 545 (6th Cir. 2007).

Respondents again create a straw person argument and then refute it. Respondents say that Waronker claims that speech by government employees is always protected if made outside the chain of command. Respondents rephrase the second question presented as, "Whether speech by a public employee reporting alleged misconduct to external government officials, outside the of the employees chain of command *always* enjoys First Amendment protection, even if the speech was made pursuant to the public employee's official duties." Opp. Br. at I (emphasis added). Respondents say that there is no Circuit split because "No circuit court has endorsed a bright-line rule that all public-employee speech outside of the employees 'chain of command' is protected by the First Amendment, as alleged by petitioner." Opp. Br. at 11.

But Waronker's claim is not that there is always First Amendment protection, or that any Circuit says that speech outside the chain of command is always protected by the First Amendment. That would be an absurd assertion; there obviously could be instances where speech outside the chain of command could be punished, such as if it were false and harmful. Rather, it is that some Circuits give this factor should be given great weight, while others dismiss it as relatively unimportant. For example, the Ninth Circuit in *Dahlia v. Rodriguez* set forth a three-factor test for determining whether speech was made in an individual's public or private capacity, but said that the first factor – whether the speech was outside the chain of command – is the

most important and often dispositive factor. *Id.* But other Circuits, as quoted above, disagree.

Respondents discuss the law in various Circuits by repeatedly saying that "none establishes a bright line rule," Opp. Br. at 14, or deem this factor "categorically irrelevant." Opp. Br. at 16. Yet a careful reading of the cases shows that the Circuits do split over the relevance and importance of speech being outside the chain of command in deciding whether it is made as a public employee or as a citizen.

The opinions of the Tenth Circuit, which Respondents focus on (Opp. Br. at 12-14), show that Circuit, unlike the Second Circuit in this case, gives great weight to whether the speech was outside the chain of command. Respondents say that Waronker "omits a key detail" about *Casey v. West Las Vegas Independent School District*, 473 F.3d 1323 (10th Cir. 2007). Opp. Br. at 12. Respondents observe that there were two separate communications to outside authorities, but the court found that only one was protected by the First Amendment: where there was a legal duty to report the information about misconduct. Opp. Br. at 12. But that is exactly this situation. As Respondents repeatedly argued in the courts below, Waronker, as Superintendent of Schools, had the duty to report the corruption he observed. His speech is exactly like the speech which the Tenth Circuit in *Casey* found to be protected by the First Amendment and it is why this case would have been decided differently in the Tenth Circuit.

Moreover, the Tenth Circuit's decision in *Thomas v. City of Clanchard*, 548 F.3d 1317 (10th Cir. 2008), shows the importance that court gives to speech made outside the chain of command. There the court found that a building inspector's threat to report illegal behavior to the Oklahoma State Bureau of Investigation fell outside of *Garcetti* because when 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." Respondents say that the court came to this conclusion "only after concluding that he lacked any 'primary responsibility for ensuring that the fraud was subject to criminal investigation.'" Opp. Br. at 13-4. But that does not deny Waronker's point that the Tenth Circuit emphasized that the speech was outside the chain of command in deeming it to be protected by the First Amendment.

Respondents say that *Chavez-Rodriguez v. City of Santa Fe*, 596 F.3d 708 (10th Cir. 2010), shows that the Tenth Circuit does not give great weight to the chain of command in applying *Garetii v. Ceballos*. But all the Tenth Circuit said was that an "employee's decision to go outside of their chain of command does not necessarily insulate their speech" under *Garcetti*. *Id*. at 14.

The Courts of Appeals clearly disagree on whether and how much it matters for analysis under *Garcetti* that a public official's speech is outside the chain of command. This Court has never addressed this issue, one that arises with great frequency.

III. THIS CASE IS AN EXCELLENT VEHICLE FOR THIS COURT TO DECIDE THE ISSUES PRESENTED.

The Complaint alleges that Shimon Waronker was suspended for his speech reporting corruption. The district court dismissed the case based on *Garctti v. Ceballos* and the Second Circuit affirmed. Thus, the First Amendment issue, and the meaning of *Garcetti v. Ceballos* and *Lane v. Franks*, is clearly posed.

Respondents argue that this is an improper vehicle because there was a dispute below as to whether Waronker's job required him to report corruption. Opp. Br. at 25. But as explained above, Respondents repeatedly argued that Waronker was legally required to report the corruption. Waronker concedes this and argues that is why under *Lane v. Franks* it was speech protected by the First Amendment.

Respondents also say that the "record before this Court is strikingly sparse regarding the nature – and even recipients – of communications." Opp. Br. at 26. But Respondents, earlier in their brief, describe the communications which occurred, Opp. Br. at 5-7, as did Waronker in his Petition. And the Complaint has even more details describing the communications and the identity of the recipients. No other facts are needed for the Court to decide this issue.

Finally, Respondents claim that this case does not provide as a suitable occasion for construing *Garcetti* because Waronker served as "the highest policy-making, policy-interpreting, and policy-enforcing official

in the district." Opp. Br. 27. But that does not deprive him of First Amendment protection or make this case atypical. Quite the contrary, it makes this a particularly important vehicle for this Court to consider the issues because it poses a situation where the employee does not have any of the whistleblower or civil service protections that the Court referred to in *Garcetti v. Ceballos*, 547 U.S. at 425.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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