No. 13-620

IN THE

Supreme Court of the United States

CITY OF BURBANK,

Petitioner,

v.

ANGELO DAHLIA,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL A. MORGUESS, *Counsel of Record*
LAW OFFICE OF MICHAEL A. MORGUESS
1440 North Harbor Boulevard, Suite 900
Fullerton, CA 92835
(714) 680-9115
mmorguess@gmail.com

SCOTT MICHELMAN
SCOTT L. NELSON
ANDREW D. SELBST
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Respondent

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QUESTIONS PRESENTED

1. Was the court of appeals correct to apply the "practical inquiry" that this Court prescribed in *Garcetti v. Ceballos* to determine whether a public employee's speech was pursuant to his job duties?
2. Was the court of appeals correct to determine that an employee's placement on administrative leave may constitute adverse action for the purpose of a retaliation claim, where as a result of being placed on leave the employee lost an opportunity for promotion and forfeited on-call and holiday pay?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

INTRODUCTION

Burbank police officer Angelo Dahlia told an outside agency and his union president that his fellow officers abused suspects and subsequently threatened Dahlia himself to keep him quiet. As a result of his speech, Dahlia was placed on administrative leave, with the consequence that he forfeited holiday and on-call pay and lost the opportunity to take an examination for a promotion. Dahlia then sued the officers who threatened him, the police chief, and the City of Burbank for (among other things) retaliation based on his speech.

The district court ruled that Dahlia's speech was unprotected by the First Amendment. Applying a 1939 state court case generally defining the duties of a California police officer, the court held that any time a California police officer reports evidence of a crime to anyone, he is acting within the scope of his job and his speech is therefore unprotected under *Garcetti v. Ceballos*, 547 U.S. 410 (2006). Sitting en banc, the court of appeals reversed, applying this Court's instruction in *Garcetti* that, in determining whether speech falls within an employee's job duties, the "proper inquiry is a practical one." *Id.* at 424. The court of appeals thus rejected the notion that California police officers are unique for the purpose of a First Amendment retaliation claim and correctly held that a generic, judicially-created job description cannot substitute for the practical and fact-specific inquiry that this Court prescribed in *Garcetti*.

The City of Burbank's arguments for certiorari are unpersuasive. In the main, Burbank contends that the court of appeals misapplied California law, but that contention does not implicate a federal

question. Next, Burbank claims that the circuits are divided as to whether the job-duties inquiry is a question of law or fact, but a review of Burbank's authorities reveals that the application of *Garcetti* is consistent across circuits, with the only difference being one of terminology and not substance (as the court of appeals itself correctly noted in the decision below). Finally, Burbank suggests that the fact that a police officer is involved justifies this Court's review, but a special First Amendment rule that treats police officers differently from other public employees would be unworkable and is not justified by any consideration of law or policy.

Burbank also attacks the appeals court's holding that Dahlia's placement on administrative leave, which entailed denial of a promotion opportunity and a loss of pay, may constitute an adverse employment action. But that holding is entirely consistent with this Court's definition of adverse action in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). Burbank's argument that there is a circuit split on this question is incorrect, as it relies almost entirely on decisions prior to this Court's clarification of the law in *Burlington Northern*. Burbank's one post-*Burlington Northern* case is distinguishable.

The Court should deny the petition.

STATEMENT OF THE CASE

During a robbery investigation in December 2007, Detective Angelo Dahlia of the Burbank Police Department witnessed fellow officers engaging in unlawful and abusive conduct against suspects, including grasping a suspect around the throat and placing a gun directly under a suspect's eye. Pet. App. 70. Dahlia also heard the sound of someone

being slapped inside a room in which another officer was interviewing a suspect. *Id.*

Troubled by what he had seen and heard, Dahlia reported the conduct to the lieutenant in charge of the robbery investigation, who told Dahlia to "stop his sniveling." *Id.* at 71. Dahlia heard the Chief of Police endorse violence against suspects, exhorting his officers to "beat another [suspect] until they are all in custody." *Id.* Although Dahlia again urged the lieutenant to intervene, he did not do so, and the abusive tactics continued. *Id.*

In April 2008, the department's Internal Affairs unit began to investigate the abuse of suspects and interviewed Dahlia several times. *Id.* at 71-72. Several of Dahlia's fellow officers harassed, followed, and threatened Dahlia to keep him from revealing what he knew. *Id.* at 71-73. After Dahlia's second interview with Internal Affairs, Officer Omar Rodriguez, one of the officers whom Dahlia had seen abusing suspects, ordered Dahlia to go to a city park, where Rodriguez and another officer berated him about the investigation. *Id.* at 72. Dahlia's working experience was "fully consumed" by the persistent intimidation. *Id.*

Pressure on Dahlia from other officers intensified in late 2008 when the department learned of a pending federal investigation. *Id.* at 73. In April 2009, Rodriguez called Dahlia into his office, brandished a gun, and stated, "Fuck with me and I will put a case on you, and put you in jail." *Id.*

Outside the bounds of any official investigation, Dahlia reported the incident in Rodriguez's office to the president of the Burbank Police Officers Association. *Id.* On May 11, 2009, Dahlia was

interviewed by another law enforcement agency, the Los Angeles Sheriff's Department, about the December 2007 robbery investigation; at that meeting, Dahlia disclosed the abuses he had witnessed and the threats made against him. *Id.*

Four days later, Dahlia was placed on administrative leave pending discipline, with the consequence that he lost holiday pay, on-call pay, and the opportunity to take an examination for a promotion. *Id.* at 73, 102. This lawsuit followed, asserting among other claims retaliation in violation of the First Amendment. *Id.* at 74.

The district court dismissed the case for failure to state a claim, holding that Dahlia's speech was not constitutionally protected because he spoke pursuant to his job duties and that Dahlia did not suffer adverse employment action when he was placed on paid administrative leave. *Id.* at 34-51.

Reluctantly applying an earlier circuit precedent, *Huppert v. City of Pittsburg*, 574 F.3d 696 (9th Cir. 2009), a panel of the court of appeals affirmed on the ground that Dahlia's speech was unprotected because it was encompassed within his official duties as a matter of law. *See* Pet. App. 75 (summarizing panel opinion). *Huppert* had held that, under a 1939 intermediate state appellate decision generally describing the duties of a California police officer, reporting potential criminal activity is always within the scope of a police officer's job duties and therefore his speech about criminal activity is unprotected as a matter of law. 574 F.3d at 707. The *Huppert* majority had acknowledged that it was creating a circuit split. *See id.* at 708 ("We decline to follow the Third

Circuit's decision in *Reilly v. Atlantic City*, 532 F.3d 216 (3d Cir. 2008).").

The court of appeals granted rehearing en banc, reversed the district court, and overruled *Huppert*. Pet. App. 76, 104. The court concluded that *Huppert* had "improperly relied on a generic job description and failed to conduct the 'practical,' fact-specific inquiry required by *Garcetti*." *Id.* at 85. The court declined to perpetuate a special First Amendment rule for California police officers either based on a state court's generic job description or the argument that police officers are unique for First Amendment purposes. *Id.* Applying *Garcetti*'s "practical" inquiry, the court carefully parsed which of Dahlia's allegations plausibly stated a claim for relief. The court held that Dahlia's claims arising out of his reporting misconduct up the chain of command did not state a First Amendment claim because, even considering the facts in the light most favorable to Dahlia, he did not state a plausible claim that such reporting would fall outside his job duties as a police officer. *Id.* at 97. However, because there was a possibility that each of the other alleged instances of whistleblowing speech — including speech to the Los Angeles Sheriff's Department and speech to Dahlia's union president — were not part of Dahlia's job, his speech in these instances might be protected under the First Amendment and therefore his claim could not be dismissed. *Id.* at 98-100. The court did not conclusively determine whether these acts were part of his job, only that dismissal was inappropriate "at this [i.e., motion-to-dismiss] stage," *id.* at 99, and that the ultimate resolution of these questions would turn on facts learned in discovery, *see id.* at 100.

The court additionally held that Dahlia's placement on administrative leave, with attendant losses of advancement potential and pay, would if proved constitute adverse action for the purpose of Dahlia's retaliation claim. *Id.* at 100-03. The court noted that the threatening and harassing conduct of Dahlia's fellow officers might also be adverse action if these allegations were fleshed out, and the court instructed the district court to permit Dahlia to amend his complaint. *Id.* at 100-03 & n.23.

REASONS FOR DENYING THE WRIT

I. The Question Whether Dahlia Engaged In Official-Duty Speech Does Not Merit Review.

A. Burbank's Primary Argument That The Court Of Appeals Misapplied State Law Does Not Present A Federal Question.

Burbank argues principally that the Ninth Circuit misapplied California law regarding the duties of a police officer, *see* Pet. 12-17, and that under California law, "Dahlia had a duty to disclose misconduct by fellow officers, including criminal conduct." Pet. 13 (citing *Alhambra Police Officers Ass'n v. City of Alhambra Police Dep't*, 7 Cal. Rptr. 3d 432 (Cal. Ct. App. 2003), and *Titus v. Civil Service Comm'n*, 181 Cal. Rptr. 699 (Cal. Ct. App. 1982)). But an alleged misapplication of state law is not a reason to grant certiorari. *See, e.g., Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944) ("[O]rdinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts."). Further, in arguing that the Ninth Circuit's application of California law "draws a

distinction without a difference," Pet. 15, and relies on "inapposite" federal cases, *id.* at 17, Burbank is asking this court to engage in error-correction, also not generally a function of this Court's certiorari jurisdiction. S. Ct. Rule 10.

Most fundamentally, the First Amendment question whether Dahlia was speaking as a citizen or pursuant to his official duties does not turn on the application of the general principles of California law that Burbank discusses. Rather, as this Court has emphasized, resolving that question requires a "practical inquiry" in which a formal job description "is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." *Garcetti*, 547 U.S. at 424-25. In accord with *Garcetti*, the court of appeals simply held that the inquiry cannot be confined to abstract principles.

B. The Circuits Are Not Divided Regarding The Proper Application Of *Garcetti*.

Burbank's contention that the courts of appeals are divided in their application of *Garcetti* relies on a difference of terminology rather than one of substance or effect. As the decision below noted, the Third, Fourth, Seventh, Eighth, and Ninth Circuits describe the scope of job duties as a question of fact or a mixed question of law and fact, whereas the Fifth, Tenth, and D.C. Circuits describe the inquiry as a question of law. *See* Pet. App. 90 n.12. But this distinction has no practical effect. *See id.* ("[E]ven several of the circuits that classify the inquiry as a 'question of law' nevertheless undertake a tailored, fact-specific assessment of a plaintiff's professional circumstances.").

For instance, although *Burbank* is correct that *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192 (10th Cir. 2007), characterized the scope-of-job-duties inquiry as one "to be resolved by the district court," *id.* at 1203, the court went on to caution that "we must take a practical view of all the facts and circumstances surrounding the speech and the employment relationship." *Id.* at 1204. More recently, the Tenth Circuit clarified that the question whether an employee is speaking pursuant to his official duties "may turn on resolution of a factual dispute by the jury," *Deutsch v. Jordan*, 618 F.3d 1093, 1098 (10th Cir. 2010), and as with any other factual inquiry, the Tenth Circuit "view[s] disputed facts relevant to step one of the *Garcetti/Pickering* analysis [i.e., the scope of job duties] in the light most favorable to the non-moving party at the summary judgment stage." *Rohrbough v. Univ. of Colo. Hosp. Auth.*, 596 F.3d 741, 746 (10th Cir. 2010).

The D.C. and Fifth Circuit cases that Burbank cites reflect the same approach. *See Wilburn v. Robinson*, 480 F.3d 1140, 1149-51 (D.C. Cir. 2007) (describing question as one of law but then resolving the issue by analyzing facts, including the "Position Description" and plaintiff's own allegations concerning her job, followed by a "see also" citation to sections of the D.C. Code); *Charles v. Grief*, 522 F.3d 508, 512-14 (5th Cir. 2008) (stating that "[w]hether [the plaintiff] engaged in protected speech is a purely legal question," but analyzing the factual circumstances — including that the employee spoke via his private email address, listed his home address and phone number for his contact information, and spoke to elected representatives

rather than his supervisor — to determine whether he spoke pursuant to his job duties).

Burbank relies heavily on *Gibson v. Kilpatrick*, 734 F.3d 395 (5th Cir. 2013), but that decision confirms that the Fifth Circuit, like the other courts of appeals and the decision below, engages in a fact-based inquiry that does not focus on an abstract legal conception of an employee's job. As *Gibson* noted, *Garcetti* "proscrib[es] our exclusive reliance on an employer's written description of duties." *Id.* at 403. Therefore, the Fifth Circuit explained, the proper course when the record is not clear on the scope of an employee's duties is to remand for further factual development rather than presume what the duties are. *See id.* The court went on to determine that Gibson's speech fell within his job duties based primarily on the circumstances of the speech, including how Gibson came to learn of the information about which he spoke and what his actions revealed about the scope of his job. *See id.* at 404-05. *Gibson* also cited state law, but only to "reinforce[] what the facts . . . show." *Id.* at 405.

These cases demonstrate that even in circuits that describe the scope-of-job-duties inquiry as a question of law, courts consistently answer that question by looking to the facts. What is resolved as a matter of law is the *ultimate* question whether the speech is protected under the First Amendment, not the subordinate question of what an employee's job duties are. The approach of the Fifth, Tenth, and D.C. Circuits is thus consistent with the analysis employed by the Ninth Circuit here: all faithfully

apply *Garcetti*'s teaching that the inquiry into the scope of an employee's job duties is a "practical" one.[1]

Burbank's complaint that the decision below and several other courts of appeals "make a factual determination in all cases of public employee speech, no matter what the objective circumstances of the job," Pet. 19, is a curious criticism: "mak[ing] a factual determination" does not mean *ignoring* "the objective circumstances of the job," but rather *determining* what the objective circumstances are. Likewise, Burbank's rhetorical question, "Can one imagine a police department that made it discretionary for an officer to choose not to report a serious crime committed before his eyes?" *id.* at 16-17, caricatures the decision below. The court of appeals held only that *some* reporting of crime to individuals not in an officer's chain of command *might* not, depending on the facts, be part of an officer's job. Notably, the court determined that some of Dahlia's reporting in this case *was* part of his job because, even viewing the facts in Dahlia's favor, he had not plausibly alleged that reporting misconduct within the chain of command was not part of his job. Pet. App. 97.

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[1] *Accord Ross v. Breslin*, 693 F.3d 300, 306 (2d Cir. 2012) ("The inquiry into whether a public employee is speaking pursuant to her official duties is not susceptible to a brightline rule. Courts must examine the nature of the plaintiff's job responsibilities, the nature of the speech, and the relationship between the two. Other contextual factors, such as whether the complaint was also conveyed to the public, may properly influence a court's decision." (citations omitted)); *Pucci v. Nineteenth Dist. Court*, 628 F.3d 752, 768 (6th Cir. 2010) ("Whether Pucci's [speech] was within her workplace duties is a question of fact[.]").

Burbank's citation to *Bowie v. Maddox*, 653 F.3d 45 (D.C. Cir. 2011), *see* Pet. 19, as evidence of a broad circuit split on the meaning of *Garcetti* is misplaced. *Bowie* criticized the Second Circuit's application of *Garcetti* to a specific factual scenario — where a public employee flouts a direct order about the contents of an official report — not the Second Circuit's view about whether an employee's duties are a question of law or fact. *Compare Bowie*, 653 F.3d at 45 (employee's refusal to sign affidavit that his employer drafted for him was part of employee's duties), *with Jackler v. Byrne*, 658 F.3d 225, 241-42 (2d Cir. 2011) (employee's disobedience of order to withdraw a truthful report and submit a false one was not part of employee's duties). Although the court here discussed the disobeying-orders issue briefly, *see* Pet. App. 94 (opining generally that "when a public employee speaks in direct contravention to his supervisor's orders, that speech *may* often fall outside of the speaker's professional duties" (emphasis added)), it would be premature, absent additional facts, to conclude that the issue is presented in this case. Dahlia is not claiming (as were the plaintiffs in *Bowie* and *Jackler*) retaliation for disobeying a specific order regarding an official report, but for blowing the whistle on misconduct that he witnessed.

Similarly, the circuit split alleged by the petitions in *Lane v. Franks*, No. 13-483 (pet. filed Oct. 15, 2013, cert. granted Jan. 17, 2014) and *Bianchi v. Chrzanowski*, No. 13-498 (pet. filed Oct. 18, 2013) — both about whether a public employee was speaking as part of his job duties when testifying under oath — concerns a factual context not implicated by this case, which does not concern sworn testimony. In a

footnote (though not in the Questions Presented), the *Lane* petition also makes the same circuit-split claim that Burbank does regarding the nature of the scope-of-job-duties inquiry. *See* Pet. for Cert., *Lane v. Franks*, No. 13-483, at 11 n.2. But as explained above, the courts of appeals differ on this point only in their terminology, not in substance or practical effect.

Finally, to the extent Burbank suggests that the circuits are split over the question whether every report of wrongdoing by every police officer anywhere in the nation is part of the officer's duty, *see* Pet. ii, 18-19, Burbank's argument is misconceived under *Garcetti* and in any event also incorrect. Under *Garcetti*'s practical approach to the discernment of job duties, it would be impossible for the courts to give a single answer, as a matter of federal law for the entire country, to the question of what every police officer's duties are. Such an approach to the question flies in the face of *Garcetti*'s admonition not to rely on generic job descriptions, and would also disrespect the sovereign States by imposing a one-size-fits-all job description on all state and local officers notwithstanding each State's law and practice. Moreover, *Gibson*, the one case Burbank cites to demonstrate the supposed split, is fully consistent with the decision below. The Fifth Circuit in *Gibson*, like the Ninth Circuit below, "decline[d] to rely exclusively on a statutory description of a generic law enforcement officer to determine the scope of a specific police officer's official duties." 734 F.3d at 403.

C. A Special Rule Treating Police Officers Differently From Other Public Employees Is Unjustified.

Burbank asks this Court to grant review in order to establish a special rule for police officers as distinct from other public employees. This Court has not previously carved out such an exception, and Burbank's suggested justification — that officers "constitute a special class of public employees with unique duties" including the reporting of crime, Pet. 20 — is unpersuasive. A special rule for law enforcement would be difficult to administer, giving rise to line-drawing questions such as whether the rule would cover the many other officials who, like police officers, are charged with the duty to report crime in certain circumstances. *See* Cal. Penal Code §§ 11165.7-11165.9 (requiring teachers, clergy, social workers and others to report child abuse to particular law enforcement agencies).

Moreover, a rule specially restricting law enforcement officers' speech would place additional burdens on officers: instead of making officers' jobs easier, it would demand of individuals who take on some of the most difficult and dangerous tasks of any public employees that they sacrifice their First Amendment rights to a greater degree than other public employees. This Court has already rejected that path. *See generally Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) ("We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights."). Burbank's suggestion that a special rule is necessary to maintain the public's confidence in law enforcement, *see* Pet. 7, and to avoid perpetuating a "code of silence," *id.* at i, is particularly ironic given

that Burbank's desired result would *permit* retaliation against an officer for bringing misconduct to light.

Moreover, because *Garcetti*'s practical inquiry is context-specific, it fully accounts for the particular circumstances of law enforcement officers, so a special rule just for law enforcement is unnecessary. Unsurprisingly, Burbank fails to cite a single court of appeals case in which such a rule was adopted (save for the case that the Ninth Circuit overruled in the decision below to bring its law into line with that of other circuits). *See* Pet. App. 85 (overruling *Huppert v. City of Pittsburg*, 574 F.3d 696 (9th Cir. 2009)).

II. No Circuit Split Exists Over Whether Paid Administrative Leave May Constitute Adverse Action, And This Case Would Be A Poor Vehicle For Addressing That Issue.

Burbank's contention that the circuits are split regarding whether administrative leave could constitute an adverse employment action is undermined by Burbank's failure to account for this Court's leading case on adverse employment actions in the retaliation context, *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). Of the cases Burbank cites as supposedly conflicting with the decision below, all but one predate and were abrogated by *Burlington Northern*, and the other one is distinguishable from the decision below. Additionally, this case would be a poor vehicle to consider whether paid administrative leave can be an adverse action, because deciding that issue would not affect the outcome of the case: Dahlia alleged, and the court of appeals agreed, that he suffered several other adverse actions in retaliation for his speech.

In *Burlington Northern*, the Court clarified the standard for determining, in the context of a Title VII retaliation claim, whether an employer has taken an adverse employment action. 548 U.S. at 67-70.[2] Under *Burlington Northern*, an adverse employment action, for purposes of a retaliation claim, is an action "likely to dissuade employees from complaining or assisting in complaints" about violations of a protected right. *Id.* at 70. The Court rejected a narrower standard, in use at the time in some circuits, requiring that the action be a "materially adverse change in the terms and conditions of employment." *Id.* at 60 (citation and internal quotation marks omitted). The Court also noted that the definition of "adverse employment action" for the purposes of a retaliation claim is broader than for the purposes of a substantive claim. *Id.* at 67.

Because Burbank ignores *Burlington Northern*, its petition relies mostly on cases applying the more restrictive standard that *Burlington Northern* abrogated. *See Singletary v. Mo. Dep't of Corr.*, 423 F.3d 886, 891-92 (8th Cir. 2005) (applying "material employment disadvantage" standard); *Peltier v. United States*, 388 F.3d 984, 988 (6th Cir. 2004) (relying on the decision that the Supreme Court reversed in *Burlington Northern*); *Haddon v. Executive Residence at the White House*, 313 F.3d 1352, 1363 (Fed. Cir. 2002) ("material employment

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[2] *Burlington Northern* was a Title VII retaliation case, but its rationale applies equally well to a First Amendment retaliation claim. The court of appeals noted that the standard it applied is derived from the Title VII context. Pet. App. 103. Burbank's petition likewise relies on Title VII cases.

disadvantage"); *Breaux v. City of Garland*, 205 F.3d 150, 157 (5th Cir. 2000) ("Adverse employment actions are discharges, demotions, refusals to hire, refusals to promote, and reprimands." (citation and internal quotation marks omitted)). Indeed, the Fifth Circuit has explicitly recognized that its pre-*Burlington Northern* case law is no longer current. *See McCoy v. City of Shreveport*, 492 F.3d 551, 559 (5th Cir. 2007) (noting that, in *Burlington Northern*, "the Supreme Court abrogated our approach in the *retaliation* context").

One of Burbank's pre-*Burlington Northern* cases, *Peltier*, is inapposite for the additional reason that it concerned discrimination, not retaliation. *See Michael v. Caterpillar Fin. Servs. Corp.*, 496 F.3d 584, 595-96 (6th Cir. 2007) ("[T]he Supreme Court recently held that a plaintiff's burden of establishing a materially adverse employment action is less onerous in the retaliation context than in the anti-discrimination context." (citing *Burlington Northern*)).

The lone post-*Burlington Northern* case Burbank cites to support its assertion that there is a circuit split is *Joseph v. Leavitt*, 465 F.3d 87 (2d Cir. 2006). But the court in *Joseph* considered only a substantive discrimination claim, as Joseph did not appeal the dismissal of his retaliation claim. *Id.* at 89. Moreover, the court explicitly limited its holding to the facts of that case, rather than holding that administrative leave can *never* be adverse. *Id.* at 92 ("We need not hold that suspensions during investigations will never rise to the level of an adverse employment action."). This treatment comports with *Burlington Northern*, which "phrase[d] the standard in general terms because the significance of any given act of

retaliation will often depend upon the particular circumstances. Context matters." 548 U.S. at 69. Therefore *Joseph*'s conclusion that administrative leave was not adverse action on the facts of that case does not conflict with the decision below, which held only that placement on administrative leave could constitute adverse action "under some circumstances," Pet. App. 100 — not *always*, as Burbank implies, *see* Pet. 23.

As other cases also illustrate, each case depends on the specific consequences faced by the employee rather than on the label "administrative leave." *Compare, e.g., Nichols v. S. Ill. Univ.-Edwardsville*, 510 F.3d 772, 786 (7th Cir. 2007) (administrative leave not adverse action because plaintiff's position, salary, and benefits were not affected), *and Stewart v. Miss. Transp. Comm'n*, 586 F.3d 321, 332 (5th Cir. 2009) (administrative leave not adverse action where plaintiff "suffered no adverse impact as a result of being placed on leave"), *with* Pet. App. 102 (administrative leave was adverse action because Dahlia forfeited pay and was prevented from taking a promotional exam). In light of the context-specific standard of *Burlington Northern*, Burbank's attempt to show a circuit split fails.

Additionally, this case is a poor vehicle for the Court to make any determination about paid administrative leave because such a ruling would not affect the outcome of the case. As the court of appeals noted, Dahlia alleged several adverse actions in addition to his placement on administrative leave: specifically, Officer Rodriguez's threat to "put a case on you, and put you in jail," the confrontation in the park, and the other "ongoing harassment and threats" to which Dahlia's fellow officers subjected

him. Pet. App. 102. The court instructed that Dahlia be allowed to amend his complaint and opined that the harassment and threats might constitute adverse action independent of the placement on administrative leave. *See id.* at 100-03 & n.23. The petition does not challenge this aspect of the decision below. Therefore, remand to the district court will be required regardless of whether the placement on administrative leave was an adverse action.

Finally, Burbank's policy argument that the decision below creates a "lose-lose" situation for municipalities using administrative leave to deal with allegations of misconduct, Pet. 23-24, is incorrect. First, Burbank conflates the question of what is an adverse employment action, which is only one element of a retaliation claim, with the ultimate question of liability. If an officer is placed on administrative leave for permissible reasons rather than (as here) in retaliation for protected speech, no liability will attach, even if the employment action is adverse. Second, as noted, the *Burlington Northern* standard is fact-specific, and so is the decision below, which did not hold, as Burbank implies, that placement on administrative leave will always be an adverse action. *See* Pet. App. 100.

III. Review Is Inappropriate Because Of The Preliminary Posture Of The Case.

Because the case came to the court of appeals following the grant of a motion to dismiss, and because the court of appeals specifically contemplated amendment of the complaint to enable Dahlia to flesh out his allegations, Pet. App. 101 n.23, review at this time would be premature. Even the two judges below who disagreed with the

majority's analysis agreed that Dahlia should have an opportunity to amend his complaint. *Id.* at 129-30 (O'Scannlain, J., concurring in the judgment). Additionally, to the extent that Burbank poses the question of the proper allocation of responsibilities between judge and jury, *see* Pet. ii, that question is clearly not raised at the motion-to-dismiss stage.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL A. MORGUESS, *Counsel of Record*
LAW OFFICE OF MICHAEL A. MORGUESS
1440 North Harbor Boulevard, Suite 900
Fullerton, CA 92835
(714) 680-9115
mmorguess@gmail.com

SCOTT MICHELMAN
SCOTT L. NELSON
ANDREW D. SELBST
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Respondent

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