NO. 08-608

IN THE
Supreme Court of the United States

ROBERT FLIPPING and ARTHUR SNELLBAKER,

Petitioners,

v.

ROBERT REILLY,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a public employee's truthful trial testimony is citizen speech protected by the First Amendment.

2. Whether the Third Circuit erred in denying qualified immunity on the ground that it is clearly established that retaliation for truthful trial testimony violates the First Amendment.

3. Whether the Third Circuit erred by declining to resolve a fact dispute as to whether petitioners would have treated respondent the same way absent his protected conduct.

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RESPONDENT'S BRIEF IN OPPOSITION

Petitioners seek this Court's review of three questions arising from a Third Circuit decision affirming a district court's denial of summary judgment based on qualified immunity. Petitioners have failed to show any compelling reason to grant the writ.

First, petitioners claim that the Third Circuit's conclusion that truthful trial testimony is citizen speech protected by the First Amendment is contrary to *Garcetti v. Ceballos*, 547 U.S. 410 (2006), and conflicts with the decisions of other courts. Petitioners' premise is flawed because *Garcetti* did not reach the question, and the court below applied the principles of *Garcetti* and numerous other decisions of this Court in finding that, because it is a duty of all citizens, courtroom testimony is protected by the First Amendment even when the speaker is a public employee. Further, the only decision cited by petitioners that even arguably conflicts with the decision below is an unpublished and cursory decision from the Eleventh Circuit that did not consider this Court's precedents holding that the duty to testify truthfully in court is shared by all citizens. Because the only decision that arguably conflicts with the decision below is not binding on any court, it does not establish a circuit split warranting this Court's review.

Petitioners also seek review to correct an alleged error in the Third Circuit's determination that it is clearly established that retaliation for truthful trial testimony violates the First Amendment. This claim does not provide a basis for granting the writ because, as discussed below, numerous cases from well before the event in question had demonstrated that the conduct at issue is unlawful.

Finally, petitioners suggest that the Court grant certiorari to correct the Third Circuit's supposed error in declining to determine whether respondent would have been treated the same way even absent the protected conduct. Because this issue is one of fact that the district court found to be in dispute, it was not subject to resolution on summary judgment or interlocutory appellate review, and thus provides no basis for granting a writ of certiorari.

STATEMENT

Respondent Robert Reilly was an Atlantic City police officer from 1978 until June 1, 2003. Pet. App. 4a. Reilly faced disciplinary charges for conduct alleged to have created a hostile work environment. An independent hearing officer heard testimony from a dozen witnesses and issued a lengthy opinion finding that Reilly had violated departmental rules and regulations but that, due to mitigating circumstances, a reduction in rank or lengthy suspension was inappropriate. The hearing officer

recommended that Reilly be suspended without pay for four days. *Id.* at 6a.

Petitioners Robert Flipping and Arthur Snellbaker were Atlantic City's Public Safety Director and Police Chief, respectively. *Id.* at 4a. Flipping and Snellbaker rejected the hearing officer's recommendation and instead proposed that Reilly be removed from the promotions list and suffer a demotion from sergeant to patrolman and a suspension of ninety days without pay. *Id.* at 7a. Reilly retired by agreement to avoid such punishment and then sued petitioners under 42 U.S.C. § 1983 alleging, in relevant part, that Flipping and Snellbaker violated his First Amendment rights by seeking to impose excessive discipline on him in retaliation for his trial testimony in a police corruption prosecution of Flipping's friend and colleague, Dennis Munoz. *Id.* at 9a.

Petitioners moved for summary judgment on Reilly's First Amendment retaliation claim. The district court, in a decision issued two months before this Court decided *Garcetti*, applied the *Pickering* test and held that Reilly's First Amendment claim could proceed. *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). First, the district court held "[t]hat testifying at a criminal trial is clearly protected speech." Pet. App. 59a (citing *Pro v. Donatucci*, 81 F.3d 1283, 1291 n.4 (3d Cir. 1996)). Second, it found that "the balance of interests favors Reilly" because "'the public's interest in exposing

potential wrongdoing by public employees is especially powerful,'" *id.* (quoting *Baldassare v. New Jersey*, 250 F.3d 188, 198 (3d Cir. 2001)), and easily outweighs the police department's interest in avoiding any workplace disruption that might result from the revelation of criminal wrongdoing within the department. *Id.* at 60a.

Third, the trial court recognized that "it is for the fact-finder to decide: (a) whether Reilly's increased punishment was substantially motivated by his participation in the Munoz case and (b) whether his increased punishment would have occurred in the absence of his participation," and concluded that Reilly had "met his burden of establishing a *prima facie* case." *Id.* Specifically, the district court found that Reilly had put forth sufficient evidence to create a triable issue of fact with regard to whether Flipping and Snellbaker had retaliated against him on account of his testimony in the Munoz case, citing Reilly's own testimony, the corroborating testimony of another police officer, and the severity of the discipline petitioners sought to impose in contrast to the recommendation of the hearing officer. *Id.* at 60a–61a.

Finally, the district court held that petitioners were not entitled to qualified immunity on Reilly's First Amendment claim because the *Baldassare* decision was "factually similar to Reilly's case" such that "a reasonable official in Flipping's or Snellbaker's position in 2003 would have understood

that increasing Reilly's punishment in retaliation for his participation in the Munoz investigation and trial violated Reilly's First Amendment rights." *Id.* at 62a.

Petitioners appealed from the denial of qualified immunity, arguing that the district court erred by holding that Reilly's trial testimony was protected by the First Amendment. Petitioners argued that under *Garcetti*, 547 U.S. at 421 (holding that the First Amendment does not protect employee expression made pursuant to official responsibilities), Reilly's trial testimony was not protected speech because testifying at trial was part of Reilly's duties as a police officer. Pet. App. 19a. Noting that "there was no argument, let alone fact finding, by the District Court as to whether Reilly's speech was made pursuant to his official duties," *id.* at 20a–21a, the Third Circuit concluded that it could resolve the issue as a matter of law based solely on "the fact of Reilly's sworn testimony at the Munoz trial." *Id.* at 28a. The court held that Reilly testified pursuant to his duties as a citizen, and affirmed the district court's denial of petitioners' motion for summary judgment based on qualified immunity. *Id.* at 31a, 35a.

In explaining its decision, the Third Circuit noted that *Garcetti* focused on speech in an internal memorandum and did not reach the question whether an employee's truthful testimony in court is protected by the First Amendment, and that no precedential appellate decision after *Garcetti* had

addressed the question. *Id.* at 28a. The court found, however, that because of the well-established principle that every citizen has a duty to offer truthful testimony in court, and because trial testimony is inherently a matter of public concern and necessary to the integrity of the judicial process, trial testimony is citizen speech, even if it stems from a public employee's job duties. Thus, the court below held that First Amendment retaliation claims based on courtroom testimony are "not foreclosed by the 'official duties' doctrine enunciated in *Garcetti*." *Id.* at 31a.

The court of appeals denied Flipping's petition for rehearing or rehearing en banc, and Justice Souter denied petitioners' application for a stay of the judgment pending disposition of the petition.

REASONS FOR DENYING THE WRIT

I. There Is No Compelling Reason to Review the Lower Court's Determination That Truthful Trial Testimony Is Citizen Speech.

Petitioners seek certiorari on the first question presented based on their assertion that the decision below is contrary to *Garcetti* and conflicts with the decisions of other courts. As explained below, petitioners' arguments are misplaced because *Garcetti* did not reach the first question presented and there is no meaningful circuit split on the issue.

A. The Decision Below Does Not Conflict with *Garcetti*.

Petitioners' claim that the decision below contradicts *Garcetti* is based on their misapprehension of both decisions. First, *Garcetti* never reached the question whether truthful trial testimony is citizen speech protected by the First Amendment even where it may also be a part of the speaker's job. The plaintiff in *Garcetti* claimed that his employer retaliated against him for submitting a disposition memorandum, discussing the matter with two supervisors, testifying truthfully at a hearing, and speaking at a bar association meeting, but the Court's decision addressed only the disposition memorandum. Resolution of the claims involving the other activities, including the plaintiff's testimony in court, was left to be decided on remand. *See* 547 U.S. at 443–44 (Souter, J., dissenting) (noting that "the claim relating to truthful testimony in court must surely be analyzed independently to protect the integrity of the judicial process"). Moreover, the Court in *Garcetti* noted that its decision did not "articulate a comprehensive framework" and that certain types of expression not addressed in *Garcetti* might "implicate[] additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence." 547 U.S. at 424–25.

Second, petitioners misinterpret *Garcetti* as holding that speech arising from the speaker's

official duties can never be citizen speech for First Amendment purposes. In fact, the Court distinguished between expressive activities that are conducted solely because of the speaker's job duties (such as drafting the disposition memo at issue in *Garcetti*), and those that may be conducted in the speaker's capacity as a private citizen (such as drafting a letter to the newspaper). The former lack First Amendment protection because they do not exist outside the employment relationship. Thus, the employer can restrict those activities without infringing "any liberties the employee might have enjoyed as a private citizen." 547 U.S. at 421–22. But the latter are protected because "[t]he First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Id.* at 419.

The court below considered *Garcetti* and concluded that truthful trial testimony is citizen speech entitled to First Amendment protection. The Third Circuit rested its conclusion on the many decisions of this Court upholding the principle that trial testimony is a duty owed by all citizens. Pet. App. 23a–24a (citing *United States v. Mandujano*, 425 U.S. 564, 576 (1976); *United States v. Calandra*, 414 U.S. 338, 345 (1974); *Piemonte v. United States*, 367 U.S. 556, 559 n.2 (1961); *New York v. O'Neill*, 359 U.S. 1, 11 (1959); *Blackmer v. United States*, 284 U.S. 421, 438 (1932); *Blair v. United States*, 250 U.S. 273, 281

(1919)). Finding that "[t]he notion that all citizens owe an independent duty to society to testify in court proceedings is thus well-grounded in Supreme Court precedent," *id.* at 25a, the court below held: "That an employee's official responsibilities provided the initial impetus to appear in court is immaterial to his/her independent obligation as a citizen to testify truthfully." *Id.* at 30a. The court further found that trial testimony is a matter of public concern because uninhibited testimony is essential to the integrity of the judicial process.[1] It concluded that "Reilly's truthful testimony in court constituted citizen speech and [] his claim is not foreclosed by the 'official duties' doctrine enunciated in *Garcetti*." *Id.* at 31a. Thus, the decision below faithfully applied the

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[1]Indeed, this Court has observed that "the fundamental demands of due process of law in the fair administration of criminal justice" require the disclosure of all relevant evidence—it rises to the level of a "constitutional need." *United States v. Nixon*, 418 U.S. 683, 713 (1974). In other words, because the withholding of evidence can impair "the basic function of the courts," *id.* at 712, it is in the interest of due process and the judicial system to have witnesses give complete and truthful testimony. If that testimony is not protected speech, there is a risk that the courts will not receive full and accurate information and justice will not be served. This interest has been held to be strong enough to trump the confidentiality of presidential records, *id.* at 713, and it is sufficient to outweigh the interest of a local police department in protecting itself from testimony about police corruption.

principles of *Garcetti* and did not construct a new or conflicting "forum analysis" as petitioners claim.

B. The Decision Below Does Not Conflict with Precedential Decisions of Any Other Appellate Court.

Petitioners claim that there is a circuit split on the first question presented, but they are unable to cite a single precedential decision holding that truthful trial testimony is not citizen speech. Petitioners rely primarily on the Eleventh Circuit's unpublished decision in *Green v. Barrett*, 254 Fed. App'x 883 (11th Cir. 2007), but, under Eleventh Circuit Rule 36-2, an unpublished decision of that court is not binding circuit precedent. Thus, *Green* cannot establish a circuit split because no court is bound to follow the decision. In any event, the Eleventh Circuit's cursory decision in *Green* failed to consider this Court's precedents holding that the duty to testify truthfully in court is imposed on every citizen, not just on government employees. *See, e.g., Calandra*, 414 U.S. at 345. Because any conflict between the decision below and *Green* is explained by *Green*'s superficial treatment of the issue, the disagreement is too shallow and insignificant to warrant this Court's review.

Petitioners also claim that the decision below conflicts with the Seventh Circuit's decision in *Tamayo v. Blagojevich*, 526 F.3d 1074, 1091–92 (7th Cir. 2008), but they concede that *Tamayo* did not

address the issue of testimony in court. Pet. 13–14. Rather, *Tamayo* involved an agency administrator's testimony before a legislative committee charged with oversight of the agency, and her testimony concerned attempts by other public officials to encroach on the agency's independence. Because the administrator was discharging the duties of her office by reporting allegedly improper political influence over the agency to her supervisors, the Seventh Circuit concluded that she was speaking as an employee and not as a citizen. 526 F.3d at 1091–92. The result in *Tamayo* is consistent with this Court's conclusion in *Garcetti* that the First Amendment does not protect "communications between and among government employees and their superiors in the course of official business." 547 U.S. at 423. Because the legislative testimony in *Tamayo* was, like the memorandum at issue in *Garcetti*, a report made by an employee to her superiors in the course of her job duties, *Tamayo* does not conflict with the Third Circuit's conclusion that trial testimony is citizen speech. Even where trial testimony stems from the speaker's job, such testimony is distinct from an employee's report through the chain of command.

Two other Seventh Circuit decisions cited by petitioners, *Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007), and *Fairly v. Fermaint*, 482 F.3d 897 (7th Cir. 2007), are also consistent with both *Tamayo* and the decision below. In *Morales*, the Seventh Circuit found that a police officer's discussions with an

assistant district attorney about an investigation and arrest were not protected by the First Amendment because such discussions were part of the officer's job duties, but the same speech was protected when the officer testified at a deposition in a civil suit. 494 F.3d at 598. The court in *Morales* explained that under *Garcetti*, the same speech can lack First Amendment protection when it is made as a part of the speaker's job duties, but be entitled to protection when it is made as a result of a duty independent of the employment relationship, such as the duty to testify at a deposition pursuant to subpoena.

Similarly, in *Fairly*, the Seventh Circuit rejected defendants' claim that *Garcetti* precluded all of plaintiffs' First Amendment retaliation claims, noting that plaintiffs had alleged retaliation for "two kinds of speech: not only statements made as part of their duties at work (the kind of speech to which *Garcetti* applies) but also to testimony that plaintiffs gave in inmates' suits." 482 F.3d at 902. The court recognized that *Garcetti* does not preclude a First Amendment retaliation claim premised on testimony in court, because such speech is citizen speech and not a job duty. Because the Seventh Circuit's decisions in *Tamayo*, *Morales*, and *Fairly* are consistent with the decision below, they offer no support for petitioners' claim of conflict.

Petitioners also claim that the decision below "is in tension" with the Third Circuit's decisions in *Hill v. Borough of Kutztown*, 455 F.3d 225 (3d Cir. 2006),

and *Foraker v. Chaffinch*, 501 F.3d 231 (3d Cir. 2007), and that the purported intra-circuit tension is a reason to grant the petition. Pet. 17. To the contrary, an intra-circuit split is not generally a basis for review. *See* Supreme Court Rule 10. Rather, it is the role of the court of appeals to resolve intra-circuit conflicts, but Flipping failed to even raise the issue in his petition for rehearing or rehearing en banc. In any event, the decision below is entirely consistent with *Hill* and *Foraker*.

In *Hill*, the Third Circuit held that the plaintiff Borough Manager's report to his superiors on the Borough Council regarding complaints about the Mayor's treatment of Borough employees was a fulfillment of the Borough Manager's job duties because the Manager was the appointed enforcer of the Borough's personnel policies. Thus, the Manager's report to his superiors on the Council lacked First Amendment protection under *Garcetti*. 455 F.3d at 242. But the Third Circuit further held that the Borough Manager's expression of support for a telecommunications project may have been entitled to protection as citizen speech because, as opposed to the speech regarding employee complaints, there was no indication that the speech was made pursuant to official duties. *Id.*

In *Foraker*, the Third Circuit held that *Garcetti* foreclosed the plaintiffs' First Amendment retaliation claim because the plaintiffs were speaking pursuant to their employment duties when they

reported unsafe workplace conditions through their chain of command. 501 F.3d at 240. Thus, *Hill* and *Foraker* are consistent with the decision below, which turned on the Third Circuit's conclusion that Reilly testified at trial pursuant to a duty owed by all citizens rather than simply in performance of an employment duty.

Finally, petitioners cite numerous cases that have applied *Garcetti* to foreclose First Amendment retaliation claims where the speaker was acting pursuant to official job duties and not pursuant to a duty owed by all citizens. Pet. 18–19. Petitioners concede that none of the cases they cite involve testimony in court, but they claim that the decisions are nevertheless in tension with the decision below because under the Third Circuit's reasoning "each and every one of the cases cited [] would have come out differently if the speech at issue involved courtroom testimony." Pet. 20. Petitioners' observation simply reflects the distinction drawn in *Garcetti* between citizen speech and employee speech; it does not offer any reason for this Court to review the decision below.

II. Petitioners' Assertion That the Third Circuit Erred in Holding That the Protected Status of Reilly's Speech Was Clearly Established at the Time of the Alleged Retaliation Is Unsupported.

Petitioners assert that even if the Third Circuit correctly concluded that *Garcetti* did not foreclose

Reilly's First Amendment claim, certiorari should still be granted because the Third Circuit erred in finding that the protected status of courtroom testimony was clearly established when petitioners allegedly retaliated against Reilly. Pet. 21. Petitioners make two arguments in support of their claim of error. Neither has merit.

First, petitioners claim that the Third Circuit erred in relying on its decision in *Pro* to show that the protected status of courtroom testimony was clearly established because, according to petitioners, *Pro* articulated only a general principle and lacked sufficient specificity to put petitioners on notice that retaliation for truthful trial testimony violates the First Amendment. Pet. 21. But *Pro* held clearly and explicitly that courtroom testimony is protected by the First Amendment; thus, petitioners' conclusory assertion that the decision lacks specificity is without merit. 81 F.3d at 1291–92; *see also* Pet. App. 28a (recognizing "the overwhelming weight of authority concluding that an employee's truthful testimony in court is protected by the First Amendment").

Second, petitioners claim that the holding in *Pro* cannot be considered clearly established because, at the time *Pro* was decided, there was a circuit split on the issue. That argument was rejected when it was raised by the defendant in *Pro*, 81 F.3d at 1292 (holding that a circuit split does not preclude a finding that a right was clearly established), and it has even less merit today, given that the Third

Circuit held that the right to be free from retaliation for courtroom testimony was already clearly established in 1996 when it decided *Pro*. Indeed, the relevant question in this case is whether the right was clearly established when Flipping and Snellbaker acted in 2003.

Petitioners also rest their argument on this Court's conclusion in *Wilson v. Layne*, 526 U.S. 603, 618 (1999), that where judges "disagree on a constitutional question, it is unfair to subject [public officials] to money damages for picking the losing side of the controversy." *See* Pet. at 22. But petitioners have failed to show that judges disagree on the constitutional question presented here. Moreover, *Wilson* involved a situation where there was a lack of case law on the issue at the time of the event, and the disagreement among judges that later developed confirmed that the right had not been clearly established at the earlier time.

In *Wilson*, the Court found that the police violated the Fourth Amendment by bringing members of the media into a home during the execution of a warrant, 526 U.S. at 614, but held that the right had not been clearly established at the time of the search in question. The Court held that a reasonable officer could have believed that the action at issue was lawful because it was not obvious that the conduct violated the Fourth Amendment, the practice was common, there were no cases of controlling authority in the jurisdiction to establish the rule, and

there was no "consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Id.* at 617. The Court further found that, given the undeveloped state of the law at the time, it was reasonable for the officers to rely on their formal policies that allowed the practice. In contrast to *Wilson*, this case involves a right established by numerous cases in the Third Circuit well before the event in question. Thus, petitioners' claim that the Third Circuit erred in finding that the protected status of courtroom testimony was clearly established is without merit and provides no basis for this Court to review the decision below.

III. Genuine Issues of Material Fact Are Properly Considered by a Factfinder and Are Not Subject to Resolution on Summary Judgment or Interlocutory Appellate Review.

Petitioners contend that this Court should grant certiorari because the Third Circuit failed to determine whether Reilly would have been subjected to the same discipline absent the protected conduct. Pet. 23–27. Although petitioners are correct that a disciplined employee may not recover when the employee would have received the same penalty even absent the constitutionally protected conduct, *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285–86 (1977), nothing in the district court's or Third Circuit's opinions challenges *Mt. Healthy*'s

holding or prevents the petitioners from attempting to make such a showing at trial. Rather, the district court in this case found that there was a fact dispute on the issue, thus precluding its resolution on summary judgment or interlocutory appellate review.

A court ruling on a motion for summary judgment made on the basis of qualified immunity must construe the alleged facts in the light most favorable to the party asserting the injury, *Saucier v. Katz*, 533 U.S. 194, 201 (2001), and motivation is a purely factual issue. *Monteiro v. City of Elizabeth*, 436 F.3d 397, 405 (3d Cir. 2006) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 529 (1985)). Here, Reilly alleged that the increased discipline was substantially motivated by his protected trial testimony, and, given that his penalty was significantly more severe than that recommended by the neutral hearing officer, Reilly's allegation is more than a bare assertion. *See Larsen v. Senate of the Commonwealth of Penn.*, 154 F.3d 82, 94–95 (3d Cir. 1998) (holding that a court must accept the injured party's allegations that the movant's actions were retaliatory when evaluating a motion for summary judgment unless it can be concluded from the face of the pleadings that the same action would have been taken absent the protected speech). Thus, in evaluating whether petitioners were entitled to summary judgment on the basis of qualified immunity, the courts below properly took as true Reilly's factual allegation that he faced increased discipline in retaliation for his trial

testimony, and that his penalty would not have been the same absent his trial testimony. Pet. App. 60a–61a. Even in the qualified-immunity context, such questions of disputed fact are for the factfinder to decide. *See Johnson v. Jones*, 515 U.S. 304 (1995) (affirming denial of qualified-immunity summary judgment and remanding for factual determinations); *Monteiro*, 436 F.3d at 405.

Not only did the district court properly decline to grant summary judgment when material facts were in dispute, but the Third Circuit lacked appellate jurisdiction to review the district court's determination that there was a fact dispute. *Johnson*, 515 U.S. at 319–20 ("[W]e hold that a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial."); *Charles v. Grief*, 522 F.3d 508, 512 (5th Cir. 2008) (holding that a district court's determination that there was a genuine issue of material fact as to whether an employee was retaliated against for protected speech, or whether the termination would have occurred absent the protected speech was unreviewable by an appellate court). *Johnson* held that although questions of law related to qualified immunity are immediately appealable, determinations about whether factual disputes are genuine are not final decisions and thus not subject to interlocutory review, even in the qualified-immunity context. 515 U.S. at 317.

Because the Third Circuit did not have appellate jurisdiction over this issue, this Court lacks jurisdiction to review it. *See Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) (holding that the Court lacks jurisdiction to decide the merits of a claim if the court of appeals was without jurisdiction).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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