No. __-____

IN THE
Supreme Court of the United States

ELIZABETH AGUILERA, PHILLIP ARELLANO,
BENJAMIN BARDON, AND HECTOR RAMIREZ,
Petitioners,
v.

LEROY BACA, INDIVIDUALLY AND AS SHERIFF OF THE
COUNTY OF LOS ANGELES, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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June 11, 2008

QUESTION PRESENTED

This Court has established that a public employer may compel employees to testify in internal investigations and may discipline those who refuse to cooperate only if it "offer[s] to [the employees] whatever immunity is required" to protect their Fifth Amendment rights against self-incrimination. *Lefkowitz v. Turley*, 414 U.S. 70, 85 (1973).

Lower courts are divided three ways on what a public employer must do to offer employees that required immunity: (1) Three federal circuits and five state supreme courts hold that to compel potentially incriminating testimony a public employer must give employees a "*Garrity* notice," i.e., must notify employees of their immunity rights under *Garrity v. New Jersey*, 385 U.S. 493 (1967), and explain the consequences of their decision whether to testify; (2) one federal circuit holds that a public employer can compel potentially incriminating testimony if the employees are deemed to have notice of their *Garrity* rights under an objective standard; and (3) three federal circuits (including the Ninth Circuit below) and three state high courts hold that a *Garrity* notice is entirely unnecessary and that a public employer can compel potentially incriminating testimony so long as it does not also compel employees to waive their *Garrity* immunity.

The question presented is:

Does a public employer violate its employees' Fifth Amendment rights by punishing them for their refusal to provide potentially incriminating testimony in an internal investigation when it did not provide notice that the testimony could not be used against them in criminal proceedings and that they would therefore be subject to administrative discipline if they did not testify?

PARTIES TO THE PROCEEDINGS

Petitioners Elizabeth Aguilera, Phillip Arellano, Benjamin Bardon, and Hector Ramirez were plaintiffs in the district court and appellants in the court of appeals.

Respondents Leroy Baca, individually and as Sheriff of the County of Los Angeles; William Stonich, individually and as Under Sheriff of the Los Angeles County Sheriff's Department; Larry Waldie, individually and as Assistant Sheriff of the Los Angeles County Sheriff's Department; William McSweeney, individually and as Commander of the Los Angeles County Sheriff's Department; Neil Tyler, individually and as Commander of the Los Angeles County Sheriff's Department; Thomas Angel, individually and as Commander of the Los Angeles County Sheriff's Department; Arthur Ng, individually and as Captain of the Los Angeles County Sheriff's Department; Alan Smith, individually and as Lieutenant of the Los Angeles County Sheriff's Department; Margaret Wagner, individually and as Lieutenant of the Los Angeles County Sheriff's Department; Russell Kagy, individually and as Sergeant of the Los Angeles County Sheriff's Department; Brian Proctor, individually and as Sergeant of the Los Angeles County Sheriff's Department; the Los Angeles County Sheriff's Department; and the County of Los Angeles, a municipal corporation, were the defendants in the district court and the appellees in the court of appeals.

Respondent Gustavo Carrillo was a plaintiff in the district court and an appellant in the court of appeals, but is not participating in the petition. Pursuant to Supreme Court Rule 12.6, Mr. Carrillo is considered a respondent in this Court.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES vii

INTRODUCTION 1

OPINIONS BELOW 2

JURISDICTION..... 2

CONSTITUTIONAL PROVISION INVOLVED..... 3

STATEMENT..... 3

A. Facts 3

B. Legal Background 6

C. Proceedings Below 9

REASONS FOR GRANTING THE PETITION..... 10

I. THE DECISION BELOW DEEPENS AN ENTRENCHED CONFLICT ON A FIFTH AMENDMENT ISSUE OF FUNDAMENTAL IMPORTANCE..... 10

A. The Second, Seventh, And Federal Circuits And At Least Five State Supreme Courts Require A "*Garrity* Notice" Before A Public Employer May Compel An Employee's Testimony Or Punish An Employee For Refusing To Testify..... 11

B. The Fifth, Eighth, And Ninth Circuits Reject The *Garrity* Notice Rule And Hold That No Constitutional Violation Occurs Unless The Employee Is Forced To Waive Immunity 16

C. The First Circuit Rejects The *Garrity* Notice Rule In Favor Of A Fact-Based Standard For Determining When Public Employees Can Reasonably Be Said To Have Notice Of Their *Garrity* Rights 18

D. Further Confusion Is Evidenced By Those Courts That Have Faced The Issue Without Adopting A Clear Rule 18

E. The Conflict Is Irreconcilable, Acknowledged By Lower Courts, And Deeply Entrenched 19

II. THE COURT BELOW ERRED IN FINDING THAT RESPONDENTS DID NOT VIOLATE PETITIONERS' FIFTH AMENDMENT RIGHTS 21

A. By Not Either Expressly Compelling Petitioners To Speak Or Granting Them Immunity, Respondents Deprived Petitioners Of Their Fifth Amendment Rights 21

B. Petitioners' Reassignment From Street Patrol Duty To Station Duty Was An Unconstitutional Consequence Of Their Invocation Of Their Fifth Amendment Rights..... 24

C. Petitioners' Fifth Amendment Rights Were Violated Even Though They Were Never Charged With A Crime 27

III. WHETHER *GARRITY* NOTICE IS REQUIRED IS AN ISSUE OF EXCEPTIONAL IMPORTANCE 27

A. Resolving The *Garrity* Notice Issue Is Important To Public Employees 28

B. Resolving The *Garrity* Notice Issue Is Important To Public Employers..... 30

C. Resolving The *Garrity* Notice Issue Is Important To The General Public..... 31

IV. THIS CASE PROVIDES AN IDEAL VEHICLE FOR RESOLVING THE ENTRENCHED CONFLICT AMONG THE LOWER COURTS 33

CONCLUSION..... 34

APPENDIX:

Opinion of the United States Court of Appeals for the Ninth Circuit, *Aguilera, et al. v. Baca, et al.*, No. 05-56617 (Dec. 27, 2007)..... 1a

Order of the United States District Court for the Central District of California Granting Defendants' Motion for Summary Judgment, *Aguilera, et al. v. Baca, et al.*, No. CV 03-6328 SVW(CWX) (Sept. 15, 2005)..... 36a

Order of the United States Court of Appeals for the Ninth Circuit Denying Rehearing, *Aguilera, et al. v. Baca, et al.*, No. 05-56617 (Feb. 12, 2008)..... 86a

Judgment of the United States District Court for the Central District of California, *Aguilera, et al. v. Baca, et al.*, No. CV 03-6328 SVW (CWX) (Sept. 26, 2005) 87a

Letter from Supreme Court Clerk regarding grant of extension of time for filing a petition for a writ of certiorari (May 7, 2008)..... 89a

TABLE OF AUTHORITIES

Page

CASES

Arrington v. County of Dallas, 970 F.2d 1441 (5th Cir. 1992).....16, 19, 21

Atwell v. Lisle Park Dist., 286 F.3d 987 (7th Cir. 2002).....12, 20, 21, 23, 28, 29

Benjamin v. City of Montgomery, 785 F.2d 959 (11th Cir. 1986)..... 18

Carney v. City of Springfield, 403 Mass. 604, 532 N.E.2d 631 (1988).....15, 20, 28

Chavez v. Martinez, 538 U.S. 760 (2003)..... 27

City of Warrensville Heights v. Jennings, 58 Ohio St.3d 206, 569 N.E.2d 489 (1991)..... 15

Click v. Copeland, 970 F.2d 106 (5th Cir. 1992)..... 26

Confederation of Police v. Conlisk, 489 F.2d 891 (7th Cir. 1973).....13, 14, 20

Debnam v. North Carolina Dep't of Correction, 334 N.C. 380, 432 S.E.2d 324 (1993)..... 17

Franklin v. City of Evanston, 384 F.3d 838 (7th Cir. 2004)..... 13-14, 20, 21

Fraternal Order of Police v. City of Philadelphia, 859 F.2d 276 (3d Cir. 1988).....19, 20

Gandy v. State ex rel. Division of Investigation & Narcotics, 96 Nev. 281, 607 P.2d 581 (1980).....15, 20, 28

Gardner v. Broderick, 392 U.S. 273 (1968)..... 6

Garrity v. New Jersey, 385 U.S. 493 (1967)...1, 2, 6, 8, 21, 23, 28, 29, 32, 33

Gulden v. McCorkle, 680 F.2d 1070 (5th Cir. 1982).....16, 17, 20, 21

Harrison v. Wille, 132 F.3d 679 (11th Cir. 1998)..... 19

Hill v. Johnson, 160 F.3d 469 (8th Cir. 1998).....9, 16, 17, 20, 29

Kalkines v. United States, 473 F.2d 1391 (Ct. Cl. 1973).....14, 15, 20, 28

Kastigar v. United States, 406 U.S. 441 (1972) ... 6, 22

Lefkowitz v. Cunningham, 431 U.S. 801 (1977) 25, 26

Lefkowitz v. Turley, 414 U.S. 70 (1973) 6, 7, 22, 24, 26

Maness v. Meyers, 419 U.S. 449 (1976) 22

Matt, *In re*, 71 N.Y.2d 154, 518 N.E.2d 1172 (1987) 17, 28

McKinley v. Mansfield, 404 F.3d 418 (6th Cir. 2005)..... 25

Minnesota v. Murphy, 465 U.S. 420 (1984)..... 22

Miranda v. Arizona, 384 U.S. 436 (1966) 23, 29

Modrowski v. Dep't of Veterans Affairs, 252 F.3d 1344 (Fed. Cir. 2001).....14, 20

Oddsen v. Board of Fire & Police Comm'rs, 108 Wis.2d 143, 321 N.W.2d 161 (1982).....14, 20

Perry v. Sindermann, 408 U.S. 593 (1972) 25

Seattle Police Officers' Guild v. City of Seattle, 80 Wash.2d 307, 494 P.2d 485 (1972).....15, 28

Sher v. U.S. Dep't of Veterans Affairs, 488 F.3d 489 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 1924 (2008) 14, 18, 20, 28, 29, 33, 34

Spevack v. Klein, 385 U.S. 511 (1967)..... 26

State Dep't of Correctional Servs. v. Gallagher, 214 Neb. 487, 334 N.W.2d 458 (1983)..... 17

Stover v. United States, 40 F.3d 1096 (10th Cir. 1994) 19

Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation:

392 U.S. 280 (1968) 6, 12, 34

426 F.2d 619 (2d Cir. 1970).....8, 12, 13, 15, 28

United States v. Friedrick, 842 F.2d 382 (D.C. Cir. 1988).....23, 24

United States v. Vangates, 287 F.3d 1315 (11th Cir. 2002).....18, 19

Waterman, *In re*, 910 A.2d 1175 (N.H. 2006) 14

Weston v. U.S. Dep't of Housing & Urban Dev., 724 F.2d 943 (Fed. Cir. 1983)..... 14

Wiley v. Mayor & City Council of Baltimore, 48 F.3d 773 (4th Cir. 1995) 19

CONSTITUTION AND STATUTES

U.S. CONST.:

Amend. IV 9

Amend. V (Self-Incrimination Clause) 1, 2, 3, 5, 6, 7, 9, 11, 21, 22, 23, 24, 25, 26, 27, 28, 30

Amend. XIV 6, 9

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1983..... 26

OTHER MATERIALS

Application for County of Los Angeles for Leave to File Amicus Curiae Brief, *Spielbauer v. County of Santa Clara*, No. S150402 (Cal. filed Sept. 14, 2007)..... 30

Michael E. Brooks, *Statements Compelled from Law Enforcement Employees*, 71 FBI L. ENFORCEMENT BULL. 26 (2002), av*ailable at* http://www.fbi.gov/publications/leb/2002/june02leb.pdf 29

Civil Rights Division, U.S. Dep't of Justice:

http://www.usdoj.gov/crt/split/documents/cleveland_uof.pdf..... 30

http://www.usdoj.gov/crt/split/documents/split_alabaster_talet_11_09_04.pdf..... 30

http://www.usdoj.gov/crt/split/documents/wpd_talet_3-2-06.pdf..... 30

Consent Decree, *United States v. City of Los Angeles*, No. 00-11769 GAF (C.D. Cal. June 15, 2001), *available at* http://www.usdoj.gov/crt/split/documents/laconsent.htm 32

MATTHEW J. HICKMAN, U.S. DEP'T OF JUSTICE, CITIZEN COMPLAINTS ABOUT POLICE USE OF FORCE (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ccpuf.pdf 28, 30

1 L.A. POLICE DEP'T, MANUAL (2007)..... 29

Letter from Civil Rights Division, U.S. Dep't of Justice, to Ruth Carter, City of Detroit Corporation Counsel, Re: Investigation of the Detroit Police Department (Mar. 6, 2002), *available at* http://www.usdoj.gov/crt/split/documents/dpd/detroit_3_6.htm..... 30

Letter from Civil Rights Division, U.S. Dep't of Justice, to Stu Gallaher, Chief of Staff Office of the Mayor, Re: Department of Justice Investigation of the Easton Police Department (Nov. 26, 2007), *available at* http://www.usdoj.gov/crt/split/documents/easton_talet_11-26-07.pdf 32

Michael Merkow, Commanding Officer Prof'l Standards Bureau, L.A. Police Dep't, Keynote Address at the National Summit on Police Use of Force (Jan. 23, 2006), *in* REPORT: NATIONAL SUMMIT POLICE USE OF FORCE 16 (Inst. for Law Enforcement Admin. 2006), *available at* http://www.cailaw.org/ilea/publications/National_Summit_Police_Use_Of_Force_Report06.pdf..... 31

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S.F., CAL., CHARTER (2006), *available at* http://www.municode.com/Resources/gateway.asp?pid=14130&sid=5 32

San Francisco Gov't: Office of Citizen Complaints, http://www.sfgov.org/site/occ_index.asp 32

Byron L. Warnken, *The Law Enforcement Officers' Privilege Against Compelled Self-Incrimination*, 16 U. BALT. L. REV. 452 (1987) 7

Elizabeth Aguilera, Phillip Arellano, Benjamin Bardon, and Hector Ramirez respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

This case presents a question of recurring significance affecting public employers and employees nationwide. The lower federal and state courts are hopelessly divided regarding when public employees who assert their Fifth Amendment right not to testify in internal investigations may suffer employment-related discipline for their silence. More specifically, the federal circuits are divided 3-3-1 (and state courts are divided 5-3) on whether public employers, before punishing employees who refuse to answer potentially incriminating questions, must inform them that the use immunity recognized by this Court in *Garrity v. New Jersey*, 385 U.S. 493 (1967), overrides the Fifth Amendment right to remain silent, and thus that their testimony may be compelled.

Petitioners, four Los Angeles County sheriff's deputies under investigation for alleged use of excessive force, suffered significant job-related penalties because they refused to make statements in an internal criminal investigation. Because petitioners were neither explicitly ordered to testify nor informed of how *Garrity* immunity would apply in their situations, they reasonably believed that any testimony would constitute voluntary waivers of their Fifth Amendment rights. In ruling against them, a divided panel of the Ninth Circuit (over Chief Judge Kozinski's vigorous dissent) widened a deep and entrenched conflict involving at least seven circuits (and the highest courts of at least eight states).

The lower courts have had several decades and numerous opportunities to consider the proper application of *Garrity* and its progeny. The conflict is clear, irreconcilable, and deeply entrenched, and nothing would be gained by further percolation. The importance of the issue is underlined by the number of cases in which it has arisen and is likely to arise in the future.

This case offers an appropriate vehicle for reaching the crucial question whether notice of *Garrity* immunity is required. Because petitioners received no notice of their *Garrity* rights, there is no fact-sensitive dispute whether notice was sufficient. Petitioners' claim of a Fifth Amendment violation stands or falls entirely on whether they were entitled to some sort of notice of their *Garrity* rights. If this Court were to find that they had no such entitlement, their claim would fail. But if notice was required, then they could not constitutionally be punished for refusing to cooperate with their public employer's internal investigation.

Because this case squarely presents a recurring issue of fundamental importance, in a manner fit for resolution by this Court, certiorari should be granted.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a–35a) is reported at 510 F.3d 1161. The opinion of the district court (App. 36a–85a) is reported at 394 F. Supp. 2d 1203.

JURISDICTION

The court of appeals entered its judgment on December 27, 2007, and denied a timely petition for rehearing on February 12, 2008. App. 86a. On May 7, Justice Kennedy extended the time to file a

petition for certiorari until June 11, 2008. App. 89a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution provides that "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

STATEMENT

A. Facts

In the early morning hours of September 5, 2002, petitioners, four deputies of the Los Angles County Sheriff's Department (the "Department"), participated in a narcotics investigation during their patrol shift. 1 E.R. 11.[1] At the scene, Martin Flores, a visibly intoxicated bystander, interfered with the investigation. 4 E.R. 1070–71. When requested to leave the scene, Flores asked petitioners to arrest him so he would have somewhere to sleep. *Id.* at 1067. Shortly thereafter, Flores called the Los Angeles Police Department ("LAPD") and claimed that a male deputy, possibly Hispanic, had struck him with a flashlight in the back and head. App. 39a.

The Department's Internal Affairs Bureau ("IAB") promptly initiated an investigation. App. 40a. The Department has two separate investigation units: The IAB investigates only administrative allegations, and the Internal Criminal Investigations Bureau ("ICIB") investigates only criminal allegations. App. 41a. At the end of their shift, petitioners were told to return to the East Los Angeles Station and remain until interviewed and released by the IAB investiga-

[1] "E.R." citations are to the appellants' Excerpts of Record in the court of appeals.

tors. *Id.* After interviewing Flores at the hospital, IAB investigators decided that the ICIB should become involved. *Id.* Petitioners were advised that the matter had been turned over to the ICIB to investigate criminal allegations against them. App. 3a.

Petitioners were called to the office of Captain Thomas Angel, the Station's Commanding Officer. App. 43a. He announced in a harsh, accusatory manner that he believed that one of the deputies had used excessive force on Flores, that the others were covering up, and that one or more of them could be criminally prosecuted or fired. App. 43a–44a. Captain Angel told petitioners that the only way to avoid criminal charges was to "come forward now," which they understood to mean to give an immediate and voluntary statement to the ICIB investigators without any protection against later use of such statements against them. *Id.* Captain Angel ordered petitioners not to leave the station until after they were interviewed by the ICIB. *Id.*

The lead ICIB investigator on the case, Sergeant Russell Kagy, interviewed each petitioner individually. App. 45a. He advised petitioners that, although they were not yet formally considered suspects, they could not be eliminated as suspects either. App. 5a. Sergeant Kagy asked petitioners to provide statements. Asserting their rights under the Fifth Amendment, they declined to testify. *Id.*

Upon returning to work the next day, petitioners were reassigned from street patrol duties to station duties.[2] App. 6a. Petitioners were told that Captain

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[2] Petitioners were asked to waive the five-day notice requirement for a schedule change, but they declined. Their schedules were nevertheless changed immediately. 3 E.R. 749–56. Sergeant Burke and Deputy Joseph Carrillo, who were also under

Angel ordered the reassignments because they had refused to provide statements to the ICIB. 1 E.R. 14–15. As a result of the reassignments, they suffered personal financial hardship through decreased opportunities for earning overtime and lost valuable field experience. *E.g.*, 1 E.R. 15. In addition, Deputy Aguilera was denied two promotions,[3] each with a corresponding 5% increase in pay, because she was not permitted to work in the field. *Id.* at 15–16. As a result of being removed from patrol duty, Deputy Arellano, who was in his last month of patrol training, was unable to complete his training and receive a corresponding salary increase. 2 E.R. 546.

While petitioners remained on station duty, Sergeant Kagy and the ICIB coordinated with prosecutors to continue the investigation. App. 6a–7a. In August 2003, the ICIB submitted the case investigation report to the District Attorney's Office to consider filing criminal charges. App. 7a. In September 2003, the District Attorney's Office requested compelled statements from Deputies Aguilera, Ramirez, and Arellano. *Id.* Within days of providing compelled statements, the three were cleared by their supervisors and restored to their pre-investigation street patrol assignments. *Id.* Deputy Bardon was

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ICIB investigation, were similarly reassigned, but they returned to patrol duties immediately after waiving their Fifth Amendment rights and providing voluntary statements. 1 E.R. 16–17.

[3] Deputy Aguilera was told that, although she was highest on the list of available candidates for a promotion to Narcotics Investigator, she was not chosen because of Captain Angel's intervention. She was also advised that she had been chosen for a position in the Major Crimes Bureau, but again could not take the position as a result of her superiors' intervention. 1 E.R. 16; 2 E.R. 539.

never interviewed or reassigned to patrol duties before his retirement from the Department in December 2004. 3 E.R. 778.

B. Legal Background

The Fifth Amendment, applicable to the States under the Fourteenth Amendment, privileges a witness from answering questions in any "proceeding, civil or criminal, formal or informal," when the answers might tend to incriminate the witness in future criminal proceedings. *E.g.*, *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). Despite this privilege, a witness may be compelled to testify when granted "use immunity," i.e., immunity from the testimony's subsequent use and derivative use in a future criminal proceeding. *E.g.*, *Kastigar v. United States*, 406 U.S. 441, 453 (1972).

This Court clarified the application of these principles in the public employment context in a line of cases beginning with *Garrity v. New Jersey*, 385 U.S. 493 (1967), which established that public employees' compelled statements cannot be used against them in criminal proceedings. But public employers may still compel employees to cooperate in employment-related investigations so long as their Fifth Amendment rights are protected. In *Gardner v. Broderick*, 392 U.S. 273 (1968), this Court held that a public employee could not be punished for asserting his Fifth Amendment rights but declared in dicta that with use immunity he could have been punished if he "had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties." *Id.* at 278; *see also Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation*, 392 U.S. 280, 284 (1968).

In *Lefkowitz v. Turley*, this Court elaborated somewhat on the immunity that is required before a public employer may compel testimony:

> [T]he accommodation between the interest of the State and the Fifth Amendment requires that the State have means at its disposal to secure testimony if immunity is supplied and testimony is still refused. This is recognized by the power of the courts to compel testimony, after a grant of immunity . . . . [G]iven adequate immunity, the State may plainly insist that employees either answer questions under oath about the performance of their job or suffer the loss of employment. . . . [I]f answers are to be required . . . States must offer to the witness whatever immunity is required to supplant the privilege and may not insist that the employee . . . waive such immunity.

414 U.S. at 84–85.

This Court, however, has never explained how "States must offer to the witness whatever immunity is required." *Id.* at 85. Under this Court's decisions, at least four[4] possible avenues to immunity might protect employees' Fifth Amendment rights sufficiently to permit a public employer to compel testimony (or punish employees who refuse to testify). The opinions leave open the possibility that a public employer's ability to compel testimony (or punish silence) could be limited to one of the following circumstances:

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[4] Prof. Warnken identified three of these possibilities in his article on the subject. *See* Byron L. Warnken, *The Law Enforcement Officers' Privilege Against Compelled Self-Incrimination*, 16 U. BALT. L. REV. 452, 482 (1987). The fourth has been recognized in subsequent cases.

(1) only if the government has expressly granted immunity to the employee;

(2) only if the employer explicitly notifies the employee that (a) the testimony is being compelled, (b) under *Garrity*, the compelled testimony cannot be used in a subsequent criminal proceeding, and (c) it may administratively punish the employee if he or she fails to testify;

(3) whenever the totality of the circumstances indicate that the employee objectively should have known of his or her "*Garrity* immunity" rights, even in the absence of an express grant or explicit notice; or

(4) in any circumstance—because *Garrity* immunity attaches automatically upon the compulsion to answer—so long as the employer does not demand that the employee waive his or her *Garrity* immunity.

Judge Friendly adopted alternative (2)—requiring explicit *Garrity* notice—in a detailed opinion for the Second Circuit on remand from this Court's *Uniformed Sanitation Men* decision. *See Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation*, 426 F.2d 619, 627 (2d Cir. 1970). Two other circuits and several state supreme courts agree with that analysis. The First Circuit follows alternative (3)—holding employees to an objective standard under the totality of the circumstances. And the Ninth Circuit has now joined two other circuits and several state supreme courts in adopting alternative (4)—rejecting the notice requirement and finding a constitutional violation only upon compelled testimony coupled with compelled waiver.

C. Proceedings Below

Petitioners brought this action in the Central District of California, alleging that respondents violated their Fifth Amendment rights by punishing them (through adverse employment actions) for failing to provide statements in the criminal investigation of the alleged assault.[5] In granting respondents' motion for summary judgment, the district court held that an employer violates the Fifth Amendment "'only by the *combined* risks of *both* compelling the employee to answer incriminating questions *and* compelling the employee to waive immunity from the use of those answers.'" App. 68a (quoting *Hill v. Johnson*, 160 F.3d 469, 471 (8th Cir. 1998)) (emphasis added by district court).

On appeal, a divided panel of the Ninth Circuit affirmed. The majority—following the Eighth Circuit's decision in *Hill*—held that petitioners' Fifth Amendment rights were not violated, despite the adverse employment actions, because they were not forced to waive immunity from prosecution on the basis of their responses. App. 18a–19a, 20a n.6. The majority reasoned that "*Gardner* does not require . . . that a public employer must expressly inform an employee that his statements regarding actions within the course and scope of his employment cannot be used against him in a criminal proceeding before taking administrative action against that employee." App. 20a n.6. In reaching this conclusion, the majority expressly rejected the "bright-line rule" that had been "adopted by the Second, Seventh, and Federal Circuits." *Id.*

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[5] Petitioners also alleged violations of their Fourth and Fourteenth Amendment rights. They do not pursue those claims here.

Chief Judge Kozinski, dissenting on this issue, criticized the majority for "adopt[ing] the harsh and unfair rule of the Fifth and Eighth Circuits." App. 30a. He rejected the majority's analysis because "[w]e can't expect public employees who are pressured to give a statement to know that they have immunity." App. 32a. He argued that "the only constitutionally permissible rule" is that of the Second, Seventh, and Federal Circuits: "if the government doesn't expressly inform public employees that any statements they give can't be used against them in criminal proceedings, it may not punish them for refusing to speak." App. 30a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW DEEPENS AN ENTRENCHED CONFLICT ON A FIFTH AMENDMENT ISSUE OF FUNDAMENTAL IMPORTANCE

This Court has never fully explained the mechanism by which public employers offer the immunity required to compel employees to make potentially incriminating statements, or how public employees' constitutional rights must be protected in the complicated interaction between the public employers' need to elicit information related to employment and public employees' constitutional right not to incriminate themselves. In the absence of any guidance, the courts of appeals are irreconcilably split among three divergent positions: The Second, Seventh, and Federal Circuits hold that public employers must affirmatively notify employees of their *Garrity* rights so that the employees can make informed decisions. In sharp contrast, the Fifth and Eighth Circuits, now joined by the Ninth Circuit, hold that any compelled statement automatically attracts *Garrity* immunity

and that employers therefore need do nothing further to supply immunity or counsel employees regarding the consequences of their choices. These circuits hold that the Fifth Amendment is violated only when employers compel testimony and require employees to waive their immunity. Rejecting both bright-line rules, the First Circuit has adopted a case-by-case analysis to determine whether employees can be charged with notice of their *Garrity* immunity.

These alternative legal standards do not co-exist harmoniously. Rather, public employees face different consequences for the same choices and public employers face different legal obligations. The existence of these radically different alternatives creates an untenable patchwork in the legal landscape that defines a fundamental constitutional right.

The conflict is well-recognized in the lower courts. Indeed, it is explicitly acknowledged and discussed in both majority and dissenting opinions in multiple circuits. Moreover, the conflicting positions are so entrenched that further percolation would not resolve the conflict. This Court should grant review now and provide guidance on this fundamental issue.

A. The Second, Seventh, And Federal Circuits And At Least Five State Supreme Courts Require A "*Garrity* Notice" Before A Public Employer May Compel An Employee's Testimony Or Punish An Employee For Refusing To Testify

The "*Garrity* notice" approach to interrogation of public employees recognizes that coercion will often be implicit and that in the absence of notice employees will be confused about their rights. As Judge Posner explained:

> Our rule is perhaps best understood as an anti-mousetrapping rule. Uncounselled persons are much more likely to know about their "Fifth Amendment" right than they are to know about an immunity that qualifies the right. Asked to give answers to questions put to them in the course of an investigation of their arguably criminal conduct, they may instinctively "take the Fifth" and by doing so unknowingly set themselves up to be fired without recourse.

Atwell v. Lisle Park Dist., 286 F.3d 987, 990 (7th Cir. 2002). The Second, Seventh, and Federal Circuits, along with at least five state supreme courts, therefore require a public employer to inform employees of their rights—giving what might be called a *Garrity* notice—before it may compel an employee's testimony or punish an employee for refusing to testify. No single formula is necessary to satisfy the requirement, but the rules in all of these jurisdictions are substantially the same.

The origin of the *Garrity* notice requirement can be traced to the final sentence of this Court's opinion in *Uniformed Sanitation Men*, which declared that "petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, *after proper proceedings*, which do not involve an attempt to coerce them to relinquish their constitutional rights." 392 U.S. at 285 (emphasis added).

On remand in *Uniformed Sanitation Men*, in an opinion by Judge Friendly, the Second Circuit held that "'[a]fter proper proceedings' means proceedings, such as those held here, in which the employee is asked only pertinent questions about the perform-

ance of his duties and is duly advised of his options and the consequences of his choice." 426 F.2d at 627. Thus, the *Garrity* notice requirement was satisfied because the employer notified the employees that they "may be subject to disciplinary action . . . for the failure to answer material and relevant questions relating to the performance of [their] duties" and that their answers "may not be used against [them] in a criminal proceeding." *Id*. at 621.[6]

A year later, the Seventh Circuit—citing Judge Friendly's analysis—adopted substantially the same rule:

> [A] public employer may discharge an employee for refusal to answer where the employer both asks specific questions relating to the employee's official duties and advises the employee of the consequences of his choice, *i.e.*, that failure to answer will result in dismissal but that answers he gives and fruits thereof cannot be used against him in criminal proceedings.

Confederation of Police v. Conlisk, 489 F.2d 891, 894 (7th Cir. 1973). The Seventh Circuit has reaffirmed the rule several times, most recently in *Franklin v. City of Evanston*, 384 F.3d 838, 844–45 (7th Cir.

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[6] On a hyper-technical level, this statement could be viewed as dictum because the court held that the employees had been properly discharged. Under the circumstances, however, Judge Friendly's explanation clearly states the rule in the Second Circuit. This Court had just held that these same employees could not be discharged when no *Garrity* notice had been given. The one factual change and Judge Friendly's sole rationale for the different result was that a *Garrity* notice had been given in the meantime.

2004) (reversing the dismissal of public employee who had received no *Garrity* notice).

The Federal Circuit[7] traces its rule to *Kalkines v. United States*, 473 F.2d 1391, 1393–94 (Ct. Cl. 1973), a Court of Claims decision that quoted Judge Friendly's language and adopted his analysis to reverse the discharge of a federal employee who had received no *Garrity* notice. Since its creation in 1982, the Federal Circuit has consistently reaffirmed the rule initially adopted by its predecessor court. *See, e.g.*, *Modrowski v. Dep't of Veterans Affairs*, 252 F.3d 1344, 1350–53 (Fed. Cir. 2001); *Weston v. U.S. Dep't of Housing & Urban Dev.*, 724 F.2d 943, 948 (Fed. Cir. 1983).

In addition to these three federal circuits, the highest courts of at least five states have adopted substantially the same rule.[8] The Wisconsin Supreme Court, for example, reversing the dismissal of two police officers who had not received a *Garrity* notice, adopted the Seventh Circuit's rule as announced in *Conlisk*, 489 F.2d at 894. *See Oddsen v. Board of Fire & Police Comm'rs*, 108 Wis.2d 143, 163–65, 321 N.W.2d 161, 172–73 (1982).

Similarly, the Massachusetts Supreme Judicial Court, reversing punishments imposed on an officer

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[7] "Because . . . most petitions for review of a final order of the Merit Systems Protection Board are filed in the Federal Circuit . . . , close consideration of that court's approach in *Garrity* cases is instructive." *Sher v. U.S. Dep't of Veterans Affairs*, 488 F.3d 489, 510 n.24 (1st Cir. 2007) (Stahl, J., dissenting), *cert. denied*, 128 S. Ct. 1924 (2008).

[8] In addition, some state supreme courts have upheld disciplinary actions against public employees and noted that *Garrity* notices had been given but have not clarified whether a *Garrity* notice is a necessary precondition for punishment. *See, e.g.*, *In re Waterman*, 910 A.2d 1175, 1179–80 (N.H. 2006).

who had received no *Garrity* notice, explained that "public employers . . . must specify to the employee the precise repercussions (i.e., suspension, discharge, or the exact form of discipline) that will result if the employee fails to respond." *Carney v. City of Springfield*, 403 Mass. 604, 609, 532 N.E.2d 631, 635 (1988) (citing *Kalkines*, 473 F.2d at 1393).

In *Gandy v. State ex rel. Division of Investigation & Narcotics*, 96 Nev. 281, 284, 607 P.2d 581, 583–84 (1980), the Nevada Supreme Court reversed the dismissal of an officer, following *Kalkines* and Judge Friendly's interpretation of "proper proceedings" in *Uniformed Sanitation Men*, 426 F.2d at 627. *Gandy* adopted a rule requiring *Garrity* notice.

In a detailed opinion considering exactly what is required in a *Garrity* notice, the Ohio Supreme Court announced substantially the same rule:

> [A] police officer may be dismissed for just cause . . . when he or she refuses to obey a superior's reasonable order to take a polygraph test, so long as the officer has been informed as part of such order (1) of the subject of the intended inquiry, which is specifically and narrowly related to the performance of the officer's official duties, (2) that the officer's answers cannot be used against him or her in any subsequent criminal prosecution, and (3) that the penalty for such is dismissal.

City of Warrensville Heights v. Jennings, 58 Ohio St.3d 206, 210, 569 N.E.2d 489, 494 (1991). *See also Seattle Police Officers' Guild v. City of Seattle*, 80 Wash.2d 307, 316, 494 P.2d 485, 490–91 (1972) (permitting testimony to be compelled because officers would receive *Garrity* notice).

B. The Fifth, Eighth, And Ninth Circuits Reject The *Garrity* Notice Rule And Hold That No Constitutional Violation Occurs Unless The Employee Is Forced To Waive Immunity

The Fifth, Eighth, and Ninth Circuits hold that—because *Garrity* immunity attaches whenever public employees are compelled to answer questions in a job-related investigation regardless whether they were informed of their rights—employees may be administratively punished for remaining silent in the face of compulsion, despite a mistaken belief that answers may be used in subsequent criminal proceedings. A constitutional violation occurs in these circuits only if the employer requires the employee to waive immunity.

The Fifth Circuit clearly states this position:

> [I]t is the compelled answer in combination with the compelled waiver of immunity that creates the Hobson's choice for the employee. It is a discharge predicated on the employee's refusal to waive immunity which is forbidden . . . , not a discharge based on refusal to answer where there is no demand by the employer of the relinquishment of the constitutional right.

Gulden v. McCorkle, 680 F.2d 1070, 1074 (5th Cir. 1982); *see also Arrington v. County of Dallas*, 970 F.2d 1441, 1446 (5th Cir. 1992) (reaffirming and applying *Gulden* rule).

The Eighth Circuit applies the same standard. *See Hill*, 160 F.3d at 471–72 (following *Gulden*). According to the *Hill* court, "the mere failure affirmatively to offer immunity" is not impermissible. *Id.* at 471. "The Fifth Amendment is violated only by the

combined risks of both compelling the employee to answer incriminating questions and compelling the employee to waive immunity from the use of those answers." *Id.*

The court below adopted the same approach for the Ninth Circuit: "[T]he Constitution is offended not when an officer is compelled to answer job-related questions, but only when the officer is required to waive his privilege against self incrimination while answering legitimate job-related questions." App. 18a n.5. Even if the officer remains silent because he believes that any statements made can be used against him criminally, he may be punished as long as the government has not actively created that belief. *See id.* ("Indeed, the deputies were not *asked* to waive their immunity.") (emphasis added).

At least three state high courts also reject the *Garrity* notice rule and hold that a constitutional violation occurs only when public employees are asked to waive their *Garrity* immunity. *See Debnam v. North Carolina Dep't of Correction*, 334 N.C. 380, 388–89, 432 S.E.2d 324, 330 (1993) (adopting Fifth Circuit rule; rejecting decisions of Second, Seventh, and Federal Circuits); *In re Matt*, 71 N.Y.2d 154, 162, 518 N.E.2d 1172, 1176 (1987) (because "immunity . . . flows directly from the Constitution, . . . the State was not obligated to inform [its employee] that immunity attached before ordering him to answer questions"); *State Dep't of Correctional Servs. v. Gallagher*, 214 Neb. 487, 494, 334 N.W.2d 458, 462–63 (1983) (following *Gulden*).

C. The First Circuit Rejects The *Garrity* Notice Rule In Favor Of A Fact-Based Standard For Determining When Public Employees Can Reasonably Be Said To Have Notice Of Their *Garrity* Rights

The First Circuit rejects both the bright-line rule followed in the *Garrity* notice circuits and the harsh bright-line rule (adopted by the majority below) that no notice is necessary. It instead makes a case-by-case determination whether, under the totality of the circumstances, employees have adequate notice of their *Garrity* rights.

In *Sher v. U.S. Department of Veterans Affairs*, the First Circuit considered the circuit split regarding when, if ever, *Garrity* notice must be given. 488 F.3d at 502–05. Although the employee had received no explicit *Garrity* notice, the court concluded that on the totality of the circumstances—particularly the presence of counsel at the employee's questioning, *id.* at 505—he could be charged with adequate notice of his *Garrity* rights. The government was accordingly justified in disciplining him.

D. Further Confusion Is Evidenced By Those Courts That Have Faced The Issue Without Adopting A Clear Rule

The Eleventh Circuit has decided several cases implicating the issues raised here, but it has not adopted a clear rule. In *Benjamin v. City of Montgomery*, 785 F.2d 959 (11th Cir. 1986), for example, it declared that "we cannot require public employees to speculate whether their statements will later be excluded under *Garrity*," *id.* at 962, thus suggesting that a *Garrity* notice might be required. *See also*, *e.g.*, *United States v. Vangates*, 287 F.3d 1315, 1322 (11th Cir. 2002) (explaining that the court examines

the employee's subjective belief "and, more importantly, the objective circumstances surrounding it"); *id*. ("we examine (as we must) the totality of the circumstances"). But in other cases the court has appeared to base its analysis on Fifth Circuit decisions rejecting a *Garrity* notice requirement. *See*, *e.g.*, *Harrison v. Wille*, 132 F.3d 679, 682–83 (11th Cir. 1998) (per curiam) (following *Arrington* analysis).

Several other courts of appeals have also touched on the issue but for one reason or another failed to announce a definitive rule. *See*, *e.g.*, *Fraternal Order of Police v. City of Philadelphia*, 859 F.2d 276, 282 (3d Cir. 1988) ("Although we recognize the importance of the issue, we find it unnecessary to decide whether a public employer must inform employees [of their *Garrity* rights] when the employee is required, on pain of dismissal, to answer the questions."); *Wiley v. Mayor & City Council of Baltimore*, 48 F.3d 773, 777 n.7 (4th Cir. 1995) ("In an appropriate case, it might be necessary to inform an employee about [*Garrity*'s] nature and scope.") (citing Seventh Circuit's rule); *Stover v. United States*, 40 F.3d 1096, 1102 n.5 (10th Cir. 1994) ("this case does not require us to decide whether the government must affirmatively advise [an employee of *Garrity* rights]").

Although these circuits are not part of the direct conflict, they nevertheless help demonstrate the confusion that exists in the lower courts and illustrate why this Court's guidance is essential.

E. The Conflict Is Irreconcilable, Acknowledged By Lower Courts, And Deeply Entrenched

The conflict among the respective approaches is clear and irreconcilable. If petitioners' case had

arisen in the Second, Seventh, or Federal Circuits or in five other states, their punishments would not have withstood constitutional scrutiny. They would have prevailed on this issue, just as similarly situated public employees succeeded in those circuits and state supreme courts. *See*, *e.g.*, *Franklin*, 384 F.3d at 844–45; *Modrowski*, 252 F.3d at 1350–53; *Conlisk*, 489 F.2d at 894; *Kalkines*, 473 F.2d at 1393–94; *Oddsen*, 108 Wis.2d at 163–65, 321 N.W.2d at 172–73; *Carney*, 403 Mass. at 609, 532 N.E.2d at 635; *Gandy*, 96 Nev. at 284, 607 P.2d at 583–84.

Even if petitioners' case had arisen in the First Circuit, they would have prevailed, for there is no evidence that petitioners had adequate notice of their *Garrity* rights. Indeed, all of the evidence suggests that the Department sought to obtain petitioners' voluntary (non-immunized) statements until the time that it finally compelled testimony from three of them.

The lower courts have widely acknowledged the present conflict. In the court below, both the majority (App. 19a–20a n.6) and the dissent (App. 30a & n.10) noted the conflict. Seven months earlier, both the *Sher* majority and the dissent discussed the conflict. *See* 488 F.3d at 503–04 ("[t]he circuits have taken different approaches"); *id.* at 509–11 (dissent) (identifying 3-3 circuit split). Judge Posner acknowledged that the Seventh Circuit's rule "has been rejected in two circuits." *Atwell*, 286 F.3d at 990 (citing *Hill* and *Gulden*). Indeed, even courts that have not yet adopted a position recognize this conflict. *See Fraternal Order of Police*, 859 F.2d at 282 (noting Second, Fifth, Seventh, and Eleventh Circuits' different positions).

The conflict is so deeply entrenched that nothing would be gained by further percolation. The lower

courts have had several decades and numerous opportunities to consider the proper application of *Garrity* and its progeny, but on both sides of the conflict they have simply reaffirmed their earlier positions. *See*, *e.g.*, *Franklin*, 384 F.3d at 844–45 (reaffirming *Atwell*); *Atwell*, 286 F.3d at 990 (reaffirming three earlier Seventh Circuit decisions); *Arrington*, 970 F.2d at 1446 (reaffirming *Gulden*). The First and Ninth Circuits addressed the issue most recently and adopted differing positions (both over vigorous dissents) after full consideration of the conflicting views. There is no reason to believe that any of the lower courts are likely to change their position without this Court's intervention, and there is no evidence that the lower courts are moving closer together. To the contrary, they are demonstrably moving further apart and deepening the conflict.

II. THE COURT BELOW ERRED IN FINDING THAT RESPONDENTS DID NOT VIOLATE PETITIONERS' FIFTH AMENDMENT RIGHTS

This Court should also grant review because the Ninth Circuit's decision is inconsistent with this Court's Fifth Amendment jurisprudence. As Chief Judge Kozinski explained in his dissent, "the only constitutionally permissible rule" is to require the government to clarify the consequences of testifying before it can punish an employee for failing to do so. App. 30a.

A. By Not Either Expressly Compelling Petitioners To Speak Or Granting Them Immunity, Respondents Deprived Petitioners Of Their Fifth Amendment Rights

The Ninth Circuit's decision is premised on the view that respondents did not violate petitioners'

Fifth Amendment rights because they "were not compelled to answer the investigator's questions or to waive their immunity." App. 18a. The notion that there is no constitutional violation when public employees threatened with administrative and criminal action are penalized for exercising their Fifth Amendment right against self-incrimination is contrary to this Court's cases.

The Court's cases make clear that public employees must be assured of immunity before losing the right to remain silent. *See Minnesota v. Murphy*, 465 U.S. 420, 429 (1984) (one who asserts the privilege "'may not be required to answer a question if there is some rational basis for believing that it will incriminate him, at least without *at that time* being assured that neither it nor its fruits may be used against him' in a subsequent criminal proceeding.") (quoting *Maness v. Meyers*, 419 U.S. 449, 473 (1976) (White, J., concurring in result)) (emphasis added in *Maness*); *see also Turley*, 414 U.S. at 78 ("a witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers") (citing *Kastigar*).

Here, ICIB investigators in a criminal investigation sought voluntary, non-immunized statements for a full year. By not expressly compelling petitioners to give statements, they hoped to obtain incriminating information without triggering *Garrity* immunity. At the very least, petitioners reasonably feared that any statements might be used against them in a criminal prosecution, and thus they had a rational basis for remaining silent. If petitioners' fears had been unreasonable, respondents could easily have dispelled the ambiguity (as they ultimately did after a year when three petitioners were expressly

compelled to testify). In the meantime, respondents deliberately forced petitioners into a Hobson's choice—and then penalized them for invoking their Fifth Amendment rights.

A rule requiring *Garrity* notice would remedy the constitutional violation by preventing employees from mistakenly asserting their Fifth Amendment rights against self-incrimination and facing adverse employment consequences as a result. The Ninth Circuit relied on petitioners' law enforcement experience and "familiarity with . . . the Department's procedures for placing suspects under arrest" to suggest that they should have understood the benefit of *Garrity* immunity. App. 20a n.6. But that argument assumes they knew their testimony was compelled, when every indication was to the contrary. Moreover, even experienced law enforcement officers—even the experienced chief judge of the nation's largest federal circuit, *see* App. 32a—"are much more likely to know about their 'Fifth Amendment' right than they are to know about an immunity that qualifies the right." *Atwell*, 286 F.3d at 990. The logic of *Garrity* immunity is quite different and likely will not be intuitive even to law enforcement officers familiar with placing criminal suspects under arrest, advising them that they have the right to remain silent, and warning them that "anything said can and will be used" against them, *Miranda v. Arizona*, 384 U.S. 436, 469 (1966). Under *Garrity*, public employees do *not* have the right to remain silent because anything they say *cannot* be used against them.

The ease of providing notice is demonstrated by FBI procedures. *See United States v. Friedrick*, 842 F.2d 382, 385 (D.C. Cir. 1988). FBI regulations pro-

vide that FBI employees are to be presented with either of two forms when they are interviewed. One is captioned "Warning and Assurance To Employee Requested To Provide Information On a Voluntary Basis." *Id.* It "indicates to the prospective interviewee that his statement is voluntary and that his refusal to answer questions *cannot* result in adverse employment action." *Id.* It continues, "the Government is free to use any statements by the employee against him in any subsequent criminal prosecution or agency disciplinary proceeding." *Id.* The other form is captioned "Warning and Assurance To Employee Required To Provide Information." *Id.* Under this form, "the FBI may require an employee to provide information, and it may visit sanctions upon an employee, including dismissal if he refuses to submit to questioning. Since [the form] procedures are *compulsory*, the Government may not use an employee's statements against him in any subsequent criminal prosecution." *Id.*

B. Petitioners' Reassignment From Street Patrol Duty To Station Duty Was An Unconstitutional Consequence Of Their Invocation Of Their Fifth Amendment Rights

The majority below suggested that petitioners had not been subject to unconstitutional retaliation because it did "not consider re-assignment from field to desk duty as equivalent to losing one's job under *Gardner*." App. 20a. But this Court and several federal circuits have recognized that improper sanctions less severe than employment termination are still unconstitutional. In *Turley*, for example, architects were disqualified from bidding on state contracts, thus losing a possibility for future profits, 414 U.S.

at 77—much as petitioners' future prospects were damaged here. In *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977), the penalty (loss of an unpaid position) did not involve an economic impact, but this Court held that "direct economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination which the Amendment forbids." *Id.* at 806. *See also*, *e.g.*, *id.* at 805 ("[A] State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right."); *McKinley v. Mansfield*, 404 F.3d 418, 436 n.20 (6th Cir. 2005) ("although job termination is surely a 'substantial penalty,'" for purposes of proving compulsion, "so, too, are other employer actions, such as ordering a demotion or suspension").

The government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Department polices allow for reassignment of deputies to less desirable duties (with notice that was not given here, *see supra* note 2). But they may not impose reassignment as a penalty for exercising constitutional rights. Petitioners were reassigned to station duties the day after asserting their Fifth Amendment rights. Three were reinstated to their original patrol assignments within days of providing compelled statements. Two colleagues were reinstated immediately after waiving their Fifth Amendment rights and providing voluntary statements. *See supra* note 2. The timing of these reassignments and reinstatements shows that respondents were attempting to coerce petitioners into making "voluntary," non-immunized statements, or at least punish them for failing to do so.

The penalties at issue here were undoubtedly substantial. Petitioners lost the opportunity to earn overtime pay, scheduled promotions, and pay increases. It is irrelevant that these benefits had been expected but not guaranteed. *See Cunningham*, 431 U.S. at 807 ("[W]e must take into account potential economic benefits realistically likely of attainment. Prudent persons weigh heavily such legally unenforceable prospects in making decisions; to that extent, removal of those prospects constitutes economic coercion."); *Turley*, 414 U.S. at 84 ("A significant infringement of constitutional rights cannot be justified by the speculative ability of those affected to cover the damage."); *Click v. Copeland*, 970 F.2d 106, 110 (5th Cir. 1992) (although pay was not reduced, deputies' transfers from law enforcement to jail guard positions treated as demotions for purposes of 42 U.S.C. § 1983).

The harm to petitioners' reputations as law enforcement officers also constituted coercion. This Court has recognized that loss of prestige is a sufficient penalty to violate the Fifth Amendment. *See Cunningham*, 431 U.S. at 807 (the threatened loss of "widely sought" political positions, "with their power and perquisites, is inherently coercive"; "[a]dditionally, compelled forfeiture of these posts diminishes [one's] general reputation in his community"); *Spevack v. Klein*, 385 U.S. 511, 516 (1967) ("The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion.").

C. Petitioners' Fifth Amendment Rights Were Violated Even Though They Were Never Charged With A Crime

The majority below also declared that petitioners' "Fifth Amendment claim also fails because [they] were never charged with a crime, and no incriminating use of their statements has ever been made." App. 21a. That illogical conclusion is based on an improper application of this Court's decision in *Chavez v. Martinez*, 538 U.S. 760 (2003). *Chavez* held that, if a criminal suspect is coerced to speak, "mere coercion does not violate the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case against the witness." *Id.* at 769 (plurality opinion). But *Chavez* applies only if the suspect actually made a statement, and the violation occurs when the statement is used in a subsequent criminal proceeding. Being penalized for asserting Fifth Amendment rights, without assurance of immunity, as petitioners were here, is a distinct constitutional violation. As Chief Judge Kozinski explained, App. 32a–33a, *Chavez* is irrelevant—except to the extent that the *Chavez* Court recognized that the government can neither "penalize public employees . . . to induce them to waive their *immunity*, 538 U.S. at 768 n.2, nor "condition public employment on the waiver of constitutional rights," *id.* at 769 n.2.

III. WHETHER *GARRITY* NOTICE IS REQUIRED IS AN ISSUE OF EXCEPTIONAL IMPORTANCE

In addition to the general importance of clarifying the Fifth Amendment privilege against self-incrimination, resolving the currently entrenched split—deepened by the Ninth Circuit's decision

below—is important to public employees, who lack certainty as to the scope of their Fifth Amendment rights; to public employers, whose conduct of internal investigations is burdened by the current conflict; and to the public at large.

The problem is particularly acute in those jurisdictions in which the state and federal courts adopt conflicting rules. The decision below, for example, conflicts with decisions of two state supreme courts within the Ninth Circuit. *See Gandy*, 96 Nev. at 284, 607 P.2d at 583–84; *Seattle Police Officers' Guild*, 80 Wash.2d at 316, 494 P.2d at 490–91; *compare*, *e.g.*, *Uniformed Sanitation Men*, 426 F.2d at 627 (adopting *Garrity* notice rule); and *Carney*, 403 Mass. at 609, 532 N.E.2d at 635 (same), *with Matt*, 71 N.Y.2d at 162, 518 N.E.2d at 1176 (rejecting *Garrity* notice rule); and *Sher*, 488 F.3d at 502–05 (same).

A. Resolving The *Garrity* Notice Issue Is Important To Public Employees

Without a bright-line rule requiring an employer to give a *Garrity* notice, tens of thousands[9] of public employees involved in internal investigations each year are subject to *Garrity*'s opacity. They face intractable choices that *Garrity* was supposed to correct—the threat of criminal prosecution based on their testimony and the threat of employment sanc-

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[9] In 2002, law enforcement agencies employing 100 or more officers received 26,556 citizen complaints. MATTHEW J. HICKMAN, U.S. DEP'T OF JUSTICE, CITIZEN COMPLAINTS ABOUT POLICE USE OF FORCE 1 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ccpuf.pdf. Each complaint would require interviewing one or more employees who have been accused of wrongdoing. And of course the issue also arises outside the law enforcement context. *See*, *e.g.*, *Uniformed Sanitation Men*; *Sher*; *Atwell*; *Kalkines*.

tions for their silence. *See* 385 U.S. at 498; *see also*, *e.g.*, *Sher*, 488 F.3d at 511 (Stahl, J., dissenting). They are left "uninformed and guessing as to how their statements may be used, what their constitutional rights are, and how to respond to ambiguous requests for statements." *Hill*, 160 F.3d at 473 (Heaney, J., dissenting). Employers, in contrast, focus their understanding of when *Garrity* is triggered on whether they explicitly compel employees to answer questions.[10]

Requiring employer clarification is particularly appropriate because the nature of *Garrity*'s protection is so counterintuitive. In an age when even children recite *Miranda* warnings, public employees may justifiably expect any statement they make "can and will be used against [them]," *Miranda*, 384 U.S. at 469, and therefore mistakenly "plead the Fifth" when interrogated. *See Atwell*, 286 F.3d at 990; *Sher*, 488 F.3d at 511 (Stahl, J., dissenting); App. 32a (Kozinski, C.J., dissenting). Permitting public employers to punish this mistaken assertion exacerbates the uncertainty *Garrity* was intended to elimi-

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[10] *See*, *e.g.*, 1 L.A. POLICE DEP'T, MANUAL § 210.47 (2007) ("Under . . . federal law, any testimony or statement made by an officer under administrative compulsion of this policy cannot be used against that officer in any pending or future criminal prosecution."); Michael E. Brooks, *Statements Compelled from Law Enforcement Employees*, 71 FBI L. ENFORCEMENT BULL. 26, 31 (2002) ("While . . . investigators must be careful to avoid 'compelling' a subject to provide information when criminal prosecution is contemplated . . . they still have significant power to encourage cooperation by all law enforcement employees."), av*ailable at* http://www.fbi.gov/publications/leb/2002/june02leb.pdf; Randy Rider, Garrity—*How it Works*, OFFICER.COM, Feb. 28, 2007 (*Garrity* is triggered only if a statement is compelled), http://www.officer.com/web/online/Investigation/Garrity--How-It-Works/18$35064.

nate. Resolving the intolerable conflict is exceptionally important to dispel public employees' confusion regarding their Fifth Amendment right against self-incrimination.

B. Resolving The *Garrity* Notice Issue Is Important To Public Employers

In 2002, large law enforcement agencies fielded more than 25,000 citizen complaints, but only 8% of them involved sufficient evidence to justify disciplinary action. *See* HICKMAN, *supra* note 9, at 1. Los Angeles County alone averages 4,128 investigations per year of its more than 95,000 public employees, a large portion of whom are employed in law enforcement.[11] In separating the wheat from the chaff, investigators continually risk sabotaging criminal prosecutions before they begin if *Garrity* immunity attaches when investigators did not intend to compel a statement. Recognizing this problem, the Justice Department's Civil Rights Division has repeatedly exhorted local law enforcement agencies to establish "guidelines regarding when to compel statements pursuant to *Garrity*."[12] But the entrenched conflict over *Garrity*'s application demonstrates the persis-

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[11] Application for County of Los Angeles for Leave to File Amicus Curiae Brief at 1, *Spielbauer v. County of Santa Clara*, No. S150402 (Cal. filed Sept. 14, 2007).

[12] Letter from Civil Rights Division, U.S. Dep't of Justice, to Ruth Carter, City of Detroit Corporation Counsel, Re: Investigation of the Detroit Police Department (Mar. 6, 2002), *available at* http://www.usdoj.gov/crt/split/documents/dpd/detroit_3_6.htm. For similar letters regarding other departments, see, e.g.:

http://www.usdoj.gov/crt/split/documents/wpd_talet_3-2-06.pdf;
http://www.usdoj.gov/crt/split/documents/split_alabaster_talet_11_09_04.pdf;
http://www.usdoj.gov/crt/split/documents/cleveland_uof.pdf.

tent difficulty facing law enforcement agencies in navigating "between the grey legal waters of *Garrity* and compelled information and the potential contamination of a criminal case with compelled information"[13] and impedes such agencies from developing effective investigatory protocols.

A rule requiring *Garrity* notice also benefits public employers because it allows supervisors and investigators to conduct effective internal investigations and it protects them from inadvertently immunizing statements and hampering criminal prosecutions. Prosecutors ordinarily decide whether to grant immunity to potential witnesses. In internal investigations of public employees, however, *Garrity* immunity attaches automatically—without the prosecutor's involvement—when questioning reaches the level of "compulsion." Because compulsion is not clearly or consistently defined, investigators acting in good faith could inadvertently "compel" employees to speak, resulting in use immunity for any statements made. Requiring investigators to clarify the situation would ensure that investigators do not inadvertently interfere with prosecutorial interests.

C. Resolving The *Garrity* Notice Issue Is Important To The General Public

Well-publicized episodes of police brutality and corruption have damaged the public's trust in law enforcement agencies and have prompted public de-

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[13] Michael Merkow, Commanding Officer Prof'l Standards Bureau, L.A. Police Dep't, Keynote Address at the National Summit on Police Use of Force (Jan. 23, 2006), *in* REPORT: NATIONAL SUMMIT POLICE USE OF FORCE 16, 20 (Inst. for Law Enforcement Admin. 2006), *available at* http://www.cailaw.org/ilea/publications/National_Summit_Police_Use_Of_Force_Report 06.pdf.

mands for increased oversight and transparency in internal investigations of police conduct. To restore the public's trust, various enforcement models have emerged, such as citizen review boards and separate internal investigative departments.[14] In many such models, every alleged instance of police excessive force must be investigated.[15]

The inability to establish a predictable protocol to investigate allegations of officer misconduct undermines the public's trust in law enforcement agencies for two reasons. First, any resources spent investigating the thousands of complaints under *Garrity*'s opaque standards diverts funds available for the general protection of the public. Such investigative efforts, which typically are high profile in any community, contribute to public distrust of law enforcement agencies' ability to enforce the law and protect the

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[14] *See*, *e.g.*, San Francisco Gov't: Office of Citizen Complaints, http://www.sfgov.org/site/occ_index.asp (citizen review board); Consent Decree § III, *United States v. City of Los Angeles*, No. 00-11769 GAF (C.D. Cal. June 15, 2001) [hereinafter LAPD Consent Decree] (independent internal affairs unit), *available at* http://www.usdoj.gov/crt/split/documents/laconsent.htm. *See also*, *e.g.*, Letter from Civil Rights Division, U.S. Dep't of Justice, to Stu Gallaher, Chief of Staff Office of the Mayor, Re: Department of Justice Investigation of the Easton Police Department 8 (Nov. 26, 2007) ("Having a well-run, independent internal affairs unit/personnel is critical for ensuring . . . [t]he integrity of the criminal investigation."), *available at* http://www.usdoj.gov/crt/split/documents/easton_talet_11-26-07.pdf.

[15] *See*, *e.g.*, S.F., CAL., CHARTER art. IV, § 4.127 (2006) ("Complaints of police misconduct . . . shall be promptly, fairly and impartially investigated by staff of the Office of Citizen Complaints."), *available at* http://www.municode.com/Resources/gateway.asp?pid=14130&sid=5; LAPD Consent Decree, *supra* note 14, at § III.G.93 (requiring internal affairs unit to investigate all complaints that allege, inter alia, unauthorized use of force).

populace. Second, if the agencies do not expend more resources on investigations subject to the specter of *Garrity*'s uncertain application, then continued investigatory errors will result in an unacceptably low rate of criminal prosecutions. Failing successfully to prosecute otherwise sanctionable conduct will call law enforcement agencies' competence into question and likewise erode the public's trust. This Court's clarification of *Garrity*'s application is exceptionally important to provide a clear standard by which officer misconduct may efficiently and effectively be investigated, thus reinforcing public trust in law enforcement agencies.

IV. THIS CASE PROVIDES AN IDEAL VEHICLE FOR RESOLVING THE ENTRENCHED CONFLICT AMONG THE LOWER COURTS

This case provides the necessary vehicle to resolve a long-standing and important conflict. The essential facts are undisputed. There is no question that petitioners faced the choices that *Garrity* abhors. As both the majority and the dissent below recognized, the established law of different circuits (and different states) mandates different conclusions on these facts regarding the legality of petitioners' punishment. No alternate holding exists to support the majority's decision.

This Court recently denied certiorari in *Sher v. U.S. Department of Veteran's Affairs* (No. 07-595), which presented a similar question for review. This case has none of the vehicle problems found there. The First Circuit expressly noted that its holding could be reached on alternate grounds, *Sher*, 488 F.3d at 506, which is not true here. The First Circuit charged Sher with constructive notice of his *Garrity* rights, *see id.* at 505–06, whereas the court below

held that notice was unnecessary. Unlike in *Sher*, the court below clearly reached, instead of avoiding, the broader doctrinal issues.

Because petitioners were denied any *Garrity* notice before being punished—much less the "proper proceedings" that this Court envisioned in *Uniformed Sanitation Men*, 392 U.S. at 285, and on which Judge Friendly established the *Garrity* notice requirement—the Court's resolution of the question dividing the circuits will either supply or deny relief. If this Court were to find that no *Garrity* notice is required, then petitioners' claims fail. But, if some notice was required, then they could not constitutionally be punished for refusing to testify. Thus, the case plainly presents the crucial question in a manner fit for resolution by this Court. The facts of petitioners' case do not obscure the question but rather place it in clear focus. The *Garrity* notice question is at the heart of this case. A decision would resolve nearly 40 years of confusion among the courts of appeals and state supreme courts.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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