No. 07-1547

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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTION AND STATUTES

Respondents' efforts to sow confusion with their brief in opposition cannot obscure the existence of a deep and entrenched conflict on the proper application of this Court's decisions in *Garrity v. New Jersey*, 385 U.S. 493 (1967), *Gardner v. Broderick*, 392 U.S. 273 (1968), and *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 U.S. 280 (1968). This case presents the Court with an ideal vehicle to resolve that conflict on an issue implicated in thousands of internal investigations every year and to clarify the protections accorded to public employees under the Fifth Amendment.

I. THE ISSUE PRESENTED IN THE PETITION WAS PROPERLY PRESERVED AND ADDRESSED BY THE COURTS BELOW

Respondents attempt to distract this Court from considering the critically important issue identified in the petition by raising issues that have nothing to do with the Question Presented in this case. Petitioners do not challenge the need to administer a law enforcement agency in a fair and even-handed fashion that both protects public safety and respects employees' constitutional rights, let alone argue that suspected child molesters must be given access to potential victims unless granted immunity (*cf.* Opp. 35). This case simply does not concern routine prophylactic procedures to protect the public during the course of an investigation. *See also infra* pp. 6–9.

Nor do petitioners challenge an agency's ability to seek truly voluntary statements from its employees without *Garrity* warnings—so long as the agency does not thereafter punish those employees who assert their Fifth Amendment rights and decline to testify.

The issue here is whether petitioners were unconstitutionally punished for exercising their Fifth Amendment rights. Petitioners raised that issue at every stage of the litigation, and both courts below resolved it.

In count two of their initial Complaint, petitioners alleged (at ¶ 99) that respondents had "retaliated and discriminated against [petitioners] by changing their work shifts and duty assignments as punishment for their exercise of their [Fifth] Amendment right to remain silent." 1 E.R. 20.

In their Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment, petitioners included (at 15–17) a full argument under the heading "Defendants May Not Discipline Plaintiffs for Refusing to Waive Their [Fifth] Amendment Rights." This argument not only raised the precise issue in the Question Presented, but also cited this Court's relevant cases, including *Garrity*, *Gardner*, and *Uniformed Sanitation Men*.

On appeal, petitioners' "issue presented" in their Opening Brief to the Ninth Circuit (at 2) was

> whether a governmental police employer is Constitutionally prohibited from retaliating against and punishing its police officer employees, who have been named by that employer as suspects in a criminal investigation, by reassigning the employees to less desirable work schedules and assignments, and thereafter extending those reassignments unnecessarily, as punishment for the employees' proper exercise of their [Fifth] Amendment rights to remain silent.

2006 WL 2982007, at *2. In the body of the brief (at 26), petitioners reiterated the argument that "their Fifth Amendment rights were violated by defendants'

intentional retaliation and imposition of a penalty for asserting their Fifth Amendment rights," again citing *Garrity*, *Gardner*, and *Uniformed Sanitation Men*. *Id.* at *26; *see also* Appellants' Reply Br. 12–16.

Not only did petitioners present this issue to both courts below, but both courts addressed the issue at length in their opinions. The district court, discussing this Court's decisions in *Garrity*, *Gardner*, and *Uniformed Sanitation Men*, devoted more than seven pages to petitioners' claim that the punishment inflicted upon them for asserting their Fifth Amendment rights was unconstitutional. *See* App. 62a–69a. The majority opinion below addressed and rejected petitioners' Fifth Amendment claim, *see* App. 16a–22a, while Chief Judge Kozinski's dissent both disagreed with the majority's resolution, *see* App. 27a–34a, and recognized the circuit split that militates in favor of granting this petition, *see* App. 30a ("The majority . . . adopts the harsh and unfair rule of the Fifth and Eighth Circuits . . . . The Second, Seventh and Federal Circuits have the better approach.").

Thus, the Question Presented in the petition was consistently raised below, argued in the relevant briefs with reference to this Court's applicable decisions, and carefully addressed by both courts below. It is appropriately presented for this Court's review.[1]

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[1] Even if petitioners had not clearly argued the Question Presented to the courts below, "the general rule that issues must be raised in lower courts . . . does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue." *Nelson v. Adams, USA*, 529 U.S. 460, 469 (2000). *See also Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("In fact, even if this *were* a claim not raised by petitioner below, we would ordinarily feel free to address it, since it was addressed by the court below.").

II. THE CONFLICT ON THE CORRECT APPLICATION OF *GARRITY* AND ITS PROGENY IS DEEP AND ENDURING, AND HAS BEEN ACKNOWLEDGED IN THE LOWER COURTS FOR MANY YEARS

Despite respondents' attempts to recharacterize the cases (and spin the facts), the lower courts are deeply and irreconcilably divided on the correct application of the *Garrity* rule in the frequently occurring circumstances of this case—as both the majority (App. 19a–20a n.6) and Chief Judge Kozinski in his dissent (App. 30a & n.10) acknowledge.[2]

Respondents seek to deny the well-recognized conflict by focusing on only half the issue and ignoring more than half the cases. The *Garrity* rule protects public employees not only from the risk that compelled statements will be used against them in criminal proceedings (the focus of *Garrity* itself), but also from the risk that they will be punished for asserting their Fifth Amendment rights (the focus in *Gardner* and *Uniformed Sanitation Men*). Respondents contend that no conflict exists by looking only to the first aspect of the *Garrity* rule and ignoring the second. Only with this myopic vision can they deny what so many others have acknowledged.

The first aspect of the *Garrity* rule admittedly is not at issue in this case because (1) petitioners declined to testify until respondents (after punishing petitioners for more than a year) finally clarified the ambiguous circumstances under which the testimony

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[2] Less than a year earlier, in *Sher v. U.S. Department of Veterans Affairs*, 488 F.3d 489 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 1924 (2008), both the majority and the dissent similarly acknowledged this conflict, as have other federal judges in prior cases. *See* Pet. 20.

was sought, and (2) respondents never attempted to use petitioners' compelled statements against them in criminal proceedings. *Cf.* Opp. 22–31. The concern in this case—as in *Gardner* and *Uniformed Sanitation Men*—accordingly is with the second aspect of the *Garrity* rule (which respondents ignore): whether public employees may be punished for asserting their Fifth Amendment rights.

The essential yet erroneous premise of respondents' entire argument is that *Garrity* is implicated "only . . . when a public employee is asked to provide a compelled . . . statement," Opp. 25–26. As the petition demonstrates (at 11–15), however, three circuits and at least five state supreme courts, following *Gardner* and *Uniformed Sanitation Men*, apply the *Garrity* notice rule to prohibit the punishment of employees who refuse to testify. That is precisely the context of this case.

Respondents repeat their error when they claim that no *Garrity* issue arose here until petitioners were formally compelled to testify. *See* Opp. 23. But between September 2002 and October 2003—when petitioners were enduring their reassignments and being offered an immediate return to their old jobs as soon as they testified—there was substantial uncertainty whether that pressure rose to the level of compulsion. Even Chief Judge Kozinski, with the benefit of 20/20 hindsight and his years of experience, could not predict with confidence whether testimony at that time would have been considered "compelled." *See* App. 28a–29a.[3] During periods of

[3] The ambiguity of the situation—which would have made it impossible for even a lawyer as distinguished as Chief Judge Kozinski confidently to advise petitioners of the consequences of their decision whether to testify—vividly illustrates the error of

extreme uncertainty such as this, the protections afforded by *Garrity* are critically important.

With the focus on the correct issue, the petition documents (at 10–21) the irreconcilable divisions among the federal circuits and state supreme courts. (1) Three circuits and at least five state supreme courts follow Judge Friendly's analysis in *Uniformed Sanitation Men*, 426 F.2d at 627. A public employer may not punish its employees for refusing to testify unless it has explicitly notified them of their *Garrity* rights. (2) Two other circuits and at least three state supreme courts agree with the Ninth Circuit's analysis below. (3) The First Circuit permits public employers to punish employees for refusing to cooperate with administrative investigations if the totality of the circumstances indicates that the employees had adequate notice of their *Garrity* rights.

This conflict is clear, long-standing, and well-recognized in the lower courts. Moreover, the conflicting positions are so entrenched that further percolation would not resolve the conflict.

III. PETITIONERS' REASSIGNMENTS FOR EXERCISING THEIR FIFTH AMENDMENT RIGHTS WERE PUNITIVE

Respondents' argument (at 16) that petitioners "never proved with admissible evidence" their assertions that they were punished for exercising their Fifth Amendment rights both ignores the procedural posture of this case and dramatically understates petitioners' compelling evidence of punitive retaliation.[4]

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any suggestion that the presence of counsel is an adequate substitute for the clarification that a *Garrity* notice would provide. *Cf.* Opp. 12, 30 n.9.

[4] Respondents' lengthy effort (at 3–10) to recharacterize the underlying facts is similarly unsupportable. For example, it is

This case was resolved on respondents' motion for summary judgment. This Court must therefore "view all facts and draw all reasonable inferences in favor of the nonmoving party." *Brosseau v. Haugen*, 543 U.S. 194, 195 n.2 (2004) (per curiam); *see also*, *e.g.*, *Pennsylvania State Police v. Suders*, 542 U.S. 129, 134 (2004); *Hope v. Pelzer*, 536 U.S. 730, 733 n.1 (2002).

Viewed in this light, the facts clearly establish that petitioners were punished in retaliation for exercising their Fifth Amendment rights. Petitioners were reassigned the day after asserting their rights, causing each petitioner significant and material hardship, including loss of overtime pay, disruption to their abilities to meet their dependent-care obligations, 2 E.R. 553, 565, 593, and ridicule and demeaning treatment by their superiors and peers, 2 E.R. 539, 552–53. They also suffered significant career setbacks as a result of the reassignments. For example, Deputy Arellano, who had been in his last month of patrol training, could not complete training and was thus ineligible for promotion. 2 E.R. 546. Similarly, Deputy Aguilera had been at the top of the list for a promotion to Narcotics Investigator, and also had been offered a promotion to Major Crimes,

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not even clear whether Flores was ever assaulted. Respondents quote the prosecutor's report for the conclusion "that . . . 'a crime occurred' and that 'there is a strong likelihood that' Petitioner Bardon was the assailant." Opp. 9. The report actually said that, "if the facts as alleged by Martin Flores are to be believed, then it follows that a crime occurred." 4 E.R. 1081. It goes on to note that "[t]he *only* evidence . . . that a deputy inflicted Flores' injuries is the statement of Flores," and "[t]he only evidence . . . suggesting it *might* have been Bardon . . . is not very compelling." *Id.* (emphases added).

but was barred from those opportunities because of the reassignment. 1 E.R. 15–16; 2 E.R. 539.

Despite respondents' vigorous advocacy (at 16–21), the only reasonable inference to be drawn from the summary judgment evidence is that the reassignments were punitive and coercive, not routine and prophylactic. Respondents concede that a suspect's voluntary statement, standing alone, would not have immediately exonerated that deputy of wrongdoing. 2 E.R. 400–13. Yet other officers returned to patrol duty within a day of agreeing to testify, notwithstanding the ongoing investigation and continued uncertainty as to the complicity of each deputy. Sergeant Burke gave a voluntary statement only four days after the alleged incident and three days after being reassigned to desk duty, 4 E.R. 1003, yet was returned to his regular shift immediately, 1 E.R. 16. Deputy Joseph Carrillo voluntarily testified after seven months of desk duty and was reinstated to patrol duties and his regular shift the next day. 1 E.R. 17; 4 E.R. 1066. In stark contrast, Deputies Aguilera, Arellano, Gustavo Carrillo, and Ramirez remained subject to punitive reassignments until they gave compelled statements in October 2003, even though it had become clear by June that only Deputy Bardon remained under suspicion. 2 E.R. 570–72.

Respondents' self-serving assertions (at 16) are not "undisputed evidence" (*id.*). On the contrary, petitioners presented substantial direct evidence (which must be accepted as true in this summary judgment context) that their reassignments were punitive and coercive, not routine and prophylactic. *See*, *e.g.*, 2 E.R. 570–71 (evidence that respondents Angel and McSweeney said that petitioners were reassigned because of their refusal to testify); 3 E.R. 658–59

(evidence that McSweeney said that petitioners were reassigned because of their refusal to testify); 2 E.R. 539 (evidence that petitioner Aguilera's direct superior said she could return to patrol duty as soon as she agreed to testify, as another deputy had done).

Respondents' suggestions that petitioners were not punished because they were not discharged, *see*, *e.g.*, Opp. 2, 8–9, 21, 23, 31, like the Ninth Circuit's statement to the same effect, *see* App. 20a, are flatly inconsistent with this Court's precedents. Punishments less severe than the loss of a job can still be illegal and unconstitutional. The petition (at 24–26) reviews the leading cases in the *Garrity* context, but the principle applies much more broadly. *See*, *e.g.*, *Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1935–36 (2008) (retaliation short of discharge constituted illegal retaliation in ADEA context); *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 71–73 (2006) (reassignment of responsibilities constituted illegal retaliation in Title VII context); *Rutan v. Republican Party*, 497 U.S. 62, 75 (1990) (denial of promotions, transfers, and recalls violated the First Amendment).

IV. THE ISSUE PRESENTED IN THE PETITION IS IMPORTANT AND CANNOT BE RESOLVED WITHOUT THIS COURT'S INTERVENTION

Respondents' attempts to minimize the importance of this case are unavailing. The mischief wrought by the confusion over this issue is rampant. As detailed in the petition and corroborated by the NAPO *amicus* brief,[5] public employees conduct "tens of thousands"

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[5] Respondents' assertion that the issue is unimportant because "legions of law enforcement agencies [and] inspectors general" failed to call for review is puzzling, given that a former Department of Justice Inspector General (1994–1999) filed the NAPO

of internal investigations each year. *See* Pet. 30–31; NAPO Br. 3. In each investigation, confusion concerning the appropriate application of *Garrity* potentially harms investigators, employees, and the public at large.

First, the confusion over when employee testimony has been compelled absent an explicit *Garrity* notice creates a "trap" for even the most conscientious investigator. As *amici* explain, "[s]ome investigators will fall into a trap created by that ambiguity and, without intending to do so, may inadvertently immunize officer statements and thereby eliminate a source of admissible evidence." NAPO Br. 13; *see also United States v. Friedrick*, 842 F.2d 382, 395–96 (D.C. Cir. 1988) (holding investigators had granted immunity to target of investigation); *cf. United States v. Saechao*, 418 F.3d 1073, 1076 (9th Cir. 2005) (excluding statement held to have been made under compulsion).

Second, the confusion over when and under what circumstances *Garrity* immunity attaches puts public employees in the untenable position of having to "guess" whether they are being compelled to testify and therefore enjoy immunity for their statements. *See* App. 31a–32a (Kozinski, C.J., dissenting). Public employees "deserve better than to be forced to make, without a clear 'bright line' defining their rights, the Hobson's choice between self-incrimination and their livelihood that *Garrity* was designed to eliminate." NAPO Br. 12. Moreover, the dilemma facing the public employees cannot be alleviated by the advice of counsel, as the relevant "guess" regards a matter

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brief on behalf of public safety organizations representing approximately 350,000 members. *See* NAPO Br. 3.

of fact—i.e., is the employer compelling the employee's cooperation?—not of law. *See also supra* note 3.

Third, the confusion undermines efforts of public employers—particularly public safety organizations—to establish and maintain public trust by effectively and efficiently investigating alleged misconduct. The confusion and its impact on investigative efforts are reflected in the various ways that police agencies seek to implement their understanding of *Garrity*. *See* Warnken Br. 6–10 (detailing areas of confusion and resulting array of policies). "When the involved parties—prosecutors, internal investigators, and subject officers—lack clarity about an accused officer's *Garrity* rights, there is significant risk that criminal investigations . . . will be jeopardized." NAPO Br. 13. The public, and public trust, suffers "when prosecutions of potential criminal violations by police officers are impaired due to poor or clumsy internal investigative procedures." *Id*.

Finally, this case provides an ideal vehicle for resolving the conflict. Respondents' argument (at 15–16) based on this Court's denial of certiorari in *Sher* is irrelevant. As the petition explains (at 33–34), this case offers the Court a much better vehicle to resolve the entrenched conflict among the lower courts. *Sher*'s only relevance is in demonstrating the existence of the conflict and the frequency with which this issue arises.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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