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No. 07-595

IN THE

Supreme Court of the United States

ALAM SHER,

Petitioner,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

On Petition for a Writ Of Certiorari to the United States Court Of Appeals For The First Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Nine federal circuits and the courts of at least thirteen states are squarely in conflict over whether a public employee may be punished for refusing to make self-incriminating statements, absent prior notice that any statements cannot be used against him in criminal proceedings. (Pet. 8-14.) Respondent implausibly contends that this widely-recognized conflict purportedly is not "genuine" (Opp. 6), and, alternatively, seeks to dismiss this case as a "factbound" dispute that is an inappropriate vehicle for resolving the conflict (*id.*). Neither of these contentions has merit.

First, the claim that there is no "genuine" conflict is demonstrably specious. Respondent can make this claim only by (1) reading the Fifth and Eighth Circuit decisions (on the minority side of the split) contrary to their own language and contrary to how subsequent courts have consistently understood them; (2) ignoring, without explanation, the square holdings of multiple state high court decisions discussed in the petition (Pet. 13-14); and (3) likewise completely ignoring a recent decision by a divided Ninth Circuit panel that expressly recognizes, and deepens, the conflict. In short, the existence of a deep and genuine conflict is inarguable.

Second, respondent's efforts to portray this case as an inappropriate vehicle for resolving the conflict are equally ill-founded. Respondent implies that there is a factual issue as to whether petitioner may, in fact, have received notice of his immunity, but the findings below expressly resolve that issue, and—more fundamentally—neither this issue nor any other identified by respondent could even conceivably

prevent this Court from reaching and resolving the issue in conflict.

A. There Is A Deep And Undeniable Conflict Among The Lower Courts That Merits This Court's Review.

As the Ninth Circuit expressly recognized less than three months ago, there is a stark conflict in the courts of appeals over whether the government must notify an employee of his immunity under *Garrity v. New Jersey*, 385 U.S. 493 (1967), before it may punish him for refusing to make incriminating statements in an administrative investigation. *See Aguilera v. Baca*, 510 F.3d 1161, 1171-73 (9th Cir. 2007); *id.* at 1177-79 (Kozinski, C.J., dissenting). At least eight Circuits, in addition to the court below, are involved: five Circuits prohibit such punishment in the absence of prior notice, while the Fifth and Eighth Circuits—recently joined by the Ninth—permit punishment even in the absence of notice. (Pet. 8-13.) The state courts are also deeply divided, with at least nine states holding that notice is required by the federal Constitution, and the highest courts of four states holding to the contrary. (Pet. 11-14.)

In the face of this deep division, respondent implausibly claims that there is "no clear conflict." (Opp. 8-10.) This contention—which is supported solely by a strained attempt to deny that the Fifth and Eighth Circuits adopt the minority view (Opp. 9-10)—is simply untenable.

As an initial matter, respondent's reading of the Fifth and Eighth Circuit cases is insupportable. Respondent claims that *Hill v. Johnson*, 160 F.3d 469

(8th Cir. 1998), ruled only on whether qualified immunity could be overcome—not on whether there was a Fifth Amendment violation at all—and that *Hill* also purportedly "did not address the scope of the employer's duty to notify." (Opp. 10.) Both claims are decisively refuted by *Hill* itself. *Hill* held that even where a public employee was not told that his answers could not be used against him, his dismissal for refusing to incriminate himself "*does not violate*" the "privilege against self-incrimination." 160 F.3d at 471 (emphasis added) (employer only prohibited from compelling employee to affirmatively waive "immunity from the use of [his] answers"). In short, *Hill* plainly *did* address the consequence of a failure to notify, and plainly held that dismissing an employee in the absence of such notice "does not violate" the privilege—*not* merely that any violation was not "clearly established."

Similarly, respondent describes *Gulden v. McCorkle*, 680 F.2d 1070 (5th Cir. 1982)—which upheld the discharge of public employees who invoked their Fifth Amendment privilege and refused to take a polygraph exam—as holding only that notice is unnecessary "at the very threshold of an inquiry." (Opp. 9.) But respondent fails to note *Gulden*'s additional holding that, in general, there is no obligation to provide an "affirmative tender of immunity"—meaning notice of immunity[1]—and no

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[1] Respondent purports to find the phrase "affirmative tender of immunity" ambiguous (Opp. 9), but *Gulden* clearly uses the phrase to refer to Seventh Circuit cases requiring that the employee be advised of his *Garrity* immunity. 680 F.2d at 1074; *see also* Pet. App. 25a (adopting same interpretation of phrase).

"constitutional infirmity" unless the employer "demand[s] ... the *waiver* of [the] immunity" automatically conferred by *Garrity*. 680 F.2d at 1074-75 (emphasis added); *see also id.* at 1076 (one holding is that no Fifth Amendement violation absent request for affirmative waiver of immunity).

Moreover, respondent's implausibly narrow reading of *Hill* and *Gulden* is rejected by subsequent case law, which recognizes that both cases hold—contrary to the rule of the majority of Circuits—that no notice of *Garrity* immunity is necessary. Thus, the Ninth Circuit majority and dissent both recently recognized in *Aguilera v. Baca* that what Chief Judge Kozinski described as "the harsh and unfair rule of the Fifth and Eighth Circuits" permits punishment of "officers who refuse to make self-incriminating statements," even when they have not received notice and therefore "may not be sure whether or not they have immunity." 510 F.3d at 1177-78 (Kozinski, C.J., dissenting) (citing *Hill* and *Gulden*); *id.* at 1172 n.6 (majority opinion); *see also* Pet. App. 25a-26a (*Gulden* found that "the employer need not advise the employee of the immunity conferred by *Garrity*") (emphasis omitted); *Atwell v. Lisle Park Dist.*, 286 F.3d 987, 990 (7th Cir. 2002) (describing both *Hill* and *Gulden* as rejecting Seventh Circuit notice requirement); *Debnam v. N.C. Dep't of Corr.*, 432 S.E.2d 324, 330 (N.C. 1993) (*Gulden* rejects requirement that employee be given notice).

In any event, even aside from the Fifth and Eighth Circuits, respondent offers no explanation for ignoring numerous other cases on the minority side of the conflict. Most notably, the Ninth Circuit's recent decision in *Aguilera v. Baca* expressly recognized the

circuit split, and expressly rejected the "bright-line rule" adopted by the majority of Circuits "requir[ing] public employers to expressly inform employees" that their statements cannot be used to incriminate them "before taking disciplinary action against the employee for refusing to speak." 510 F.3d at 1172-73 & n.6. In contrast, Chief Judge Kozinski, in dissent, would have adopted the majority rule—in his view, the "only constitutionally permissible rule"—and held "that 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." *Id.* at 1177.

Respondent also completely fails to address the multiple *state* high court cases cited in the petition (Pet. 11-14), including, in particular, the four state high courts—North Carolina, New York, Nebraska, and California—adopting the minority side of the federal constitutional question on which the courts are split. (*See id.* at 13-14.) Nor does respondent offer any explanation for omitting these cases, which were discussed in the petition and are no less relevant than federal court of appeals cases to the existence of a conflict meriting this Court's review. *See* Sup. Ct. R. 10.

In sum, the existence of a genuine and widespread conflict on this important issue of federal constitutional law is beyond reasonable dispute.

B. This Case Squarely Presents The Issue On Which The Lower Courts Are Divided.

Respondent identifies a potpourri of case-specific reasons why this case assertedly is not an attractive vehicle for resolving the Fifth Amendment notice

issue on which the lower courts are divided. None has merit.

1. Respondent's principal contention (Opp. 6-8) is that the notice question on which the courts are in conflict purportedly is not presented here. In particular, respondent contends that the decision below turned on a "factbound" determination that petitioner *did* receive notice, and that accordingly "this case is an unsuitable vehicle for the Court's review of the question presented—which assumes *lack* of notice." (*Id.* at 8 (emphasis in original).) Respondent further suggests that this factual determination would (or could) prevent this Court from reaching and resolving the Fifth Amendment notice issue.

As an initial matter, this argument mischaracterizes the First Circuit's decision. The court held that petitioner could be "charged with" notice of his *Garrity* immunity (Pet App. 32a), *not* that petitioner actually *received* such notice. Indeed, the holding that petitioner could be "charged with" notice—based largely on the fact petitioner had counsel--was actually a rationale for concluding that petitioner could be punished *notwithstanding the failure to provide actual notice.* (Pet. App. 29a.) And, despite protesting that it sought to avoid broad rules, the First Circuit in fact squarely aligned itself in opposition to the majority "bright-line rule," *Aguilera*, 510 F.3d at 1173, that "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," *id.* at 1177 (Kozinski, C.J., dissenting). *See* Pet. App. 32a-33a n.18 (rejecting "a

broad rule imposing a duty upon the government employer to warn the employee about . . . *Garrity* immunity, even in cases where the employee is represented by counsel").[2]

More fundamentally, there is simply no basis for the suggestion that factual issues concerning notice might prevent this Court from resolving the question presented: the findings below leave no room to dispute the absence of notice. Respondent's attempt to raise doubts on this score—by asserting that "the VA expressly alerted petitioner's counsel to cases that explained the application of *Garrity* immunity" (Opp. 7)—is a red herring. As the ALJ found—in findings that have never been questioned—this "alert[]" occurred *after* the July 11, 2001 interview for which petitioner was penalized. Pet. App. 158a-159a. In short, petitioner was charged only for his silence on July 11, 2001, *see id.* at 111a, and the ALJ's dispositive factual findings definitively establish that at that time petitioner had not even arguably received notice.

Nor can respondent make the VA "alert[]" relevant by arguing that petitioner could somehow be penalized (contrary to the terms of the charging instrument) for failing to cooperate *after* receiving the post-July 11 "alert[]." As noted in the petition (Pet. 18 n.6)—and not disputed by respondent—the ALJ found that petitioner expressly *did* offer to return for an interview under the immunity

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[2] The First Circuit's belief that it was avoiding "broad" grounds appears to have been based largely on its erroneous understanding that petitioner's representation by counsel made the case unusual. *See infra* p. 11.

described in the cases cited by the VA, Pet. App. 159a, and the VA chose not to schedule another interview.[3] Thus, the VA alert provides no basis for disputing the complete absence of notice to petitioner at the relevant time, and therefore no basis on which the Court might fail to reach the issue of whether such notice is constitutionally required.

Even more far-fetched is respondent's mining of the record for the possibility that petitioner may have received notice at a *previous* interview he attended without counsel, in February 2001, that his statements at that interview could not be used to incriminate him. (Opp. 8.) There is no suggestion in the record that petitioner was informed that this immunity would apply to *future* interviews, and the First Circuit (as well as the district court, MSPB, and ALJ) properly declined to attach any significance to it. Indeed, if petitioner was notified prior to the February 2001 interview that his statements could not be used to incriminate him, the VA's failure to provide a similar notice in July can only have suggested to petitioner that his statements in July were *not* subject to the same protection.[4] The

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[3] To be sure, the opinion below observes—without citation—that petitioner could have "schedule[d] another interview" after receiving the VA's alert. Pet. App. 31a. However, the First Circuit appears to have simply overlooked the ALJ's contrary finding of fact, and respondent does not contend that the court's unsupported observation casts any doubt on the ALJ's dispositive finding.

[4] That suggestion would have been consistent with the VA's apparent position that petitioner was entitled to fewer protections once criminal prosecution was declined in March

February 2001 notice, if it was given at all, can hardly have served as an assurance that his statements in July 2001 would be protected by use immunity.

In sum, there are no "factbound" issues that could prevent this Court from reaching and deciding the question presented.

2. Respondent also contends that the fact petitioner was represented by counsel is "an independent factor" that prevents this case from implicating the conflict in the lower courts. This contention is entirely unpersuasive; moreover, to the (minor) extent the presence of counsel is relevant at all, it is a factor in *favor* of granting review.

First, as respondent concedes, one of the seminal cases recognizing a right to notice of an employee's *Garrity* immunity, *Kalkines v. United States*, 473 F.2d 1391 (Ct. Cl. 1973), expressly rejected the argument that an employee's representation by counsel should affect the notice required. *Id.* at 1396. Respondent attempts to dismiss *Kalkines* as "outdated" (Opp. 10), arguing that it was based on the unfamiliarity of the *Garrity* rule to contemporary counsel and "provides no reliable guidance" now, "40 years after the Court's well-recognized teachings in *Garrity* and *Gardner*." (*Id.* at 12.) However, the premise of this argument—that the "teachings" of *Garrity* and *Gardner* are so "well-recognized" that

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2001 and the investigation became an administrative one. *See* Pet. App. 6a.

counsel will routinely be familiar with them—cannot withstand scrutiny. The First Circuit conceded below that "the consequences of *Garrity* immunity are not self-evident," Pet. App. 23a, and Chief Judge Kozinski observed that even he "had no idea" that "public employees who are pressured to give a statement . . . have immunity," "even though [he] ha[s] been a government employee involved in law-related activities for almost three decades." *Aguilera*, 510 F.3d at 1179.

In addition, respondent ignores—again without explanation—multiple state decisions that, in conflict with the decision below, recognize a right to notice despite an employee's representation by counsel. *See Carney v. City of Springfield*, 532 N.E.2d 631, 634 (Mass. 1988) (noting involvement of counsel); *Jones v. Franklin County Sheriff*, 555 N.E.2d 940, 942 (Ohio 1990) (same); *Gandy v. State ex rel. Div. of Investigation & Narcotics*, 607 P.2d 581, 583 (Nev. 1980) (same); *Gardner v. Mo. State Highway Patrol Superintendent*, 901 S.W.2d 107, 110 (Mo. Ct. App. 1995), *Mot. for Transfer to Sup. Ct. denied* (Jul. 25, 1995) (same); *Banca v. Town of Phillipsburg*, 436 A.2d 944, 948 (N.J. Super. Ct. App. Div. 1981) (same).

Moreover, even aside from these cases, the majority rule is accurately described in *Aguilera*—a case which itself involved employees who declined to make statements "based on the advice of counsel," 510 F.3d at 1166, but attached no significance to the involvement of counsel—as a "bright-line rule." *Id.* at 1173. Respondent offers little reason to believe that the courts adopting this bright-line rule would abandon it in the frequent cases in which an employee is represented by counsel.

Indeed, to the extent petitioner's representation by counsel at the time he invoked the privilege is relevant at all, it is a factor that weighs in favor of granting review. As explained more fully in the petition (Pet. 19-20), an employee's representation by counsel is a common feature in cases addressing this issue, and the presence of that feature in this case will allow this Court to resolve not only the question whether notice of *Garrity* immunity is required, but also whether that obligation may be satisfied, for a represented employee, by something other than actual notice.

3. Respondent also claims (Opp. 15) that certiorari should be denied because it is possible that—even if petitioner were to prevail in this Court, and his failure-to-cooperate charge were dismissed—petitioner's suspension and demotion arguably could be upheld on remand on the basis of the separate charge that petitioner violated the VA's gift ban. This contention borders on the frivolous. The First Circuit upheld the penalties against petitioner solely on the basis of his alleged "failure to cooperate with an investigation," and did not address any other ground. Pet. App. 38a. There is no claim that this issue could prevent this Court from reaching the question presented, and no claim that it will in any way reduce petitioner's incentive to zealously pursue a reversal in this Court.

C. The Decision Below Conflicts With Decisions Of This Court

The decision below also conflicts with decisions of this Court. (Pet. 14-16.) Respondent denies that the decision conflicts with *Pillsbury Co. v. Conboy*, 459

U.S. 248 (1983), because—even though *Pillsbury* holds that a witness cannot be required to make incriminating statements based on a "predictive judgment" that a future court will afford him use immunity—the "automatic immunity available under *Garrity* means that no such prediction by petitioner is required." (Opp. 13.) This simplistic assertion is completely unsupported, and respondent offers no response to petitioner's demonstration that determining whether *Garrity* immunity has been triggered necessarily requires *numerous* "predictive judgments." (*See* Pet. 18-19 & n.7.)

In addition, respondent concedes that the Fifth Amendment privilege may be asserted by a witness to protect any statements he "reasonably believes" could be used to incriminate him, *Kastigar v. United States*, 406 U.S. 441, 445 (1972), but contends that the First Circuit applied this rule. (Opp. 15.) However, respondent is unable to point to any specific language in the lower court opinion purportedly applying this rule, and, again, offers no response to the petition's demonstration (Pet. 17-19) that the First Circuit clearly failed to apply it.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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