No. 04-856

IN THE

Supreme Court of the United States

City of Evanston, Illinois,
Petitioner,

v.

Edward Franklin.

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

BRIEF IN OPPOSITION TO CERTIORARI

Annemarie E. Kill
AVERY CAMERLINGO
KILL, LLC
218 N. Jefferson St.
Suite 200
Chicago, IL 60661

Pamela S. Karlan
(Counsel of Record)
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-4851

Thomas C. Goldstein
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

February 23, 2005

QUESTIONS PRESENTED

1. Does the due process clause prohibit the government from firing an employee for invoking his privilege against self-incrimination during job-related questioning unless it first informs him that he *can* be compelled to answer such questions but that his answers cannot be used against him in a criminal proceeding?

2. If the answer to the first question presented is "yes," does this Court's decision in *Chavez* v. *Martinez*, 538 U.S. 760 (2003), bar an employee from challenging his discharge under 42 U.S.C. 1983?

3. Should this Court overrule its decision in *Owen* v. *City of Independence*, 445 U.S. 622 (1980)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT

This case involves an issue which lower courts have been addressing for more than thirty years without conflict requiring this Court's intervention: how to accommodate the government's need, as an employer, to gather information about employees' performance of their duties while also respecting employees' Fifth Amendment privilege against self-incrimination.

The lower court decisions, which are necessarily fact-intensive, rely on three propositions established by this Court. First, because of "the important public interest in securing from public employees an accounting of their public trust," *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 806 (1977), the government *can* compel a public employee to "answer questions specifically, directly, and narrowly relating to the performance of his official duties," *Gardner* v. *Broderick*, 392 U.S. 273, 278 (1968). Second, public employees, like all other individuals, retain their privilege against self-incrimination and can assert the privilege if the government asks questions whose answers may later be used against them in a criminal proceeding. *Lefkowitz* v. *Turley*, 414 U.S. 70, 77 (1973); *Uniformed Sanitation Men Ass'n* v. *Comm'r of Sanitation*, 392 U.S. 280, 284-85 (1968); *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967). Third, if the government threatens a public employee with losing his job unless he responds to questions, any statements he makes are inadmissible in criminal proceedings against him because those statements have been compelled. *Garrity*, 385 U.S. at 497 (characterizing the "option to lose their means of livelihood or to pay the penalty of self-incrimination" as "the antithesis of free choice").

In this case, while respondent was facing later-dismissed criminal charges regarding his off-duty conduct, petitioner City of Evanston fired him after he invoked his Fifth Amendment privilege against self-incrimination at a pre-

termination hearing. The City denied his grievance seeking reinstatement based in part "on the City's determination that his refusal to respond to criminal charges * * * validated the termination." Pet. App. 4. In short, respondent was punished for invoking his constitutional right to remain silent. But the City never advised respondent that his invocation of the privilege against self-incrimination would be unjustifiable because nothing he said in the disciplinary hearing could have been used against him in the then-pending criminal case.

Petitioner's decision, which reflected a considered municipal policy, ran afoul of the Seventh Circuit's longstanding rule that a public employer may not discharge an employee for refusing to answer job-related questions unless the employer "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 (1973), cert. denied, 416 U.S. 956 (1974); see also *Atwell* v. *Lisle Park Dist.*, 286 F.3d 987, 990 (2002); *United States* v. *Devitt*, 499 F.2d 135, 141 (1974), cert. denied, 421 U.S. 975 (1975). The Seventh Circuit's approach is consistent with the decades-old rule adopted by the Federal Circuit governing the constitutional rights of federal employees, see *Weston* v. *Dep't of Housing & Urban Dev.*, 724 F.2d 943 (1983); *Kalkines* v. *United States*, 473 F.2d 1391 (Ct. Cl. 1973), as well as the rule articulated by the Second Circuit, see *Uniformed Sanitation Men Ass'n* v. *Comm'r of Sanitation*, 426 F.2d 619 (CA2 1970) (Friendly, J.), cert. denied, 406 U.S. 961 (1972). No circuit has definitively rejected this position, which is entirely consistent with this Court's decisions. Furthermore, because this case involves a concrete adverse employment decision, it does not implicate this Court's recent decision in *Chavez* v. *Martinez*, 538 U.S. 760 (2003). Finally, because the rule applied in this case antedated petitioner's conduct by nearly thirty years, this case does not present the issue raised by petitioner in its third

question presented but never addressed by the courts below: whether this Court should overrule its decision in *Owen* v. *City of Independence*, 445 U.S. 622 (1980).

1. Respondent Edward Franklin was employed as a driver/loader by the Streets and Sanitation Division of petitioner Evanston's Public Works Department from 1975 until his termination in December 1997. Pet. App. 26.

On November 7, 1997, when he was off duty, Franklin was arrested for possession of marijuana. Ultimately, all charges arising out of the arrest were dismissed. Pet. App. 4-5.

While the charges were pending, however, one of respondent's coworkers showed his supervisor, Zeltee Edwards, a report of the incident in a local newspaper. When Edwards confronted respondent with the report, respondent refused to respond due to the pending criminal charges. Pet. App. 3.

As a result, the City suspended respondent without pay. Pet. App. 3. Pursuant to City personnel rules, petitioner held a "due cause" meeting, at which the assistant city manager, a city lawyer, and various supervisory officials determined the maximum punishment that could be imposed upon respondent by his immediate supervisor, who would set the precise sanction. *Ibid*. As a matter of city policy, respondent was not permitted to attend. The "due cause board" determined that Edwards was entitled to impose any sanction up to and including termination of respondent's employment. *Ibid*.

Accordingly, the City served respondent with notice of a "pre-disciplinary meeting," informing him that he had been charged with possession of illegal drugs in violation of a city personnel provision, Rule 23.1(e) – a rule whose applicability respondent challenges[1]; that the level of discipline authorized

[1] Rule 23.1(e) prohibits employees from possessing illegal drugs at any time. Pet. App. 28 n.3. As noted *infra* at 16-17, both the district court and the court of appeals found it unnecessary to

was termination; and that he had the right to "discuss and/or rebut the charges," to call witnesses, and to have a union representative at the meeting. See C.A. App. Exh. D.[2]

The pre-disciplinary hearing was held on December 12, 1998. At the hearing, respondent "was again asked * * * to respond to the criminal charge pending against him." Pet. App. 3-4. Respondent refused to answer questions precisely because of the pending criminal charges. *Id.* at 4. As a result, his employment was terminated five days later, on December 17, 1997. *Ibid*. Respondent was the first employee ever discharged for a violation of Rule 23.1(e). *Id.* at 29.

Respondent's union subsequently filed an official grievance on his behalf and the City held a grievance hearing on January 26, 1998. Pet. App. 4. As the criminal charges were still pending, respondent again refused to answer questions, and petitioner denied his grievance because of this "non-response." Resp. C.A. Br. 9 (citing deposition testimony); see also Pet. App. 4 ("[respondent's] grievance was denied based on the City's determination that his refusal to respond to the criminal charges and his alleged admission to police that he had possessed the marijuana [an admission that responded denied having made] validated the termination").

On February 5, 1998, the criminal charges against respondent were dismissed. Pet. App. 4-5.

2. Respondent brought suit against petitioner in the United States District Court for the Northern District of Illinois. The only claim relevant to this petition was respondent's claim under 42 U.S.C. 1983 that the City had

---

resolve the question whether that 1989 work rule, or a revised 1991 drug policy (which does not allow termination based upon off-duty drug possession alone), applied to respondent's termination.

[2] Respondent's request to bring his attorney to the pre-disciplinary hearing, however, was denied. Resp. C.A. Br. 8 (citing deposition testimony).

violated his right to procedural due process by "insist[ing] that Plaintiff give up his Fifth Amendment rights against self-incrimination and participate in a meeting without * * * representation of his choice, the opportunity to confront his accusers, present witnesses, and refute the charges" and by "attempt[ing] to coerce Plaintiff to relinquish his Fifth Amendment Constitutional rights, to the extent that Plaintiff was forced to choose between his Constitutional rights and continued employment." Pl. Complaint ¶ 17.

The district court initially granted summary judgment for respondent on this procedural due process claim.[3] It held that the City had violated respondent's right to due process by failing to inform him that it was unnecessary to invoke the Fifth Amendment privilege against self-incrimination in response to its questions, given the case law clearly establishing that employees who speak under such circumstances will be protected by "use immunity" from having any statements they make used against them in a criminal prosecution. See Pet. App. 33-37. Upon petitioner's motion for reconsideration, however, the district court reversed its ruling because the City had offered a "long overdue" explanation of why the official who ratified respondent's termination was not a "policy maker" within the meaning of this Court's decision in *Pembaur* v. *City of Cincinnati*, 475 U.S. 469 (1986), which permits the imposition of municipal liability under Section 1983 for acts taken at the direction of such an official. See Pet. App. 20-21. The district court specifically declined, however, to revisit the merits of its underlying due process and Fifth Amendment analysis. *Id.* at 19. It entered final judgment for petitioner.

3. On appeal, the Seventh Circuit reversed the district court's dismissal of respondent's procedural due process

---

[3] The district court granted summary judgment for petitioner on all the other claims in respondent's complaint. See Pet. App. 39-46.

claim and remanded the case for further proceedings.[4] At oral argument, the City had admitted that its decision to terminate respondent for refusing to "respond at the hearing to the criminal charges against him without advising him that his responses could not be used against him in his pending criminal proceedings" reflected City policy. Pet. App. 2, 9. Thus, the court of appeals concluded that petitioner was an appropriate defendant under this Court's decision in *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658 (1978). See Pet. App. 7.

With respect to the merits of respondent's claim, the court of appeals held that because petitioner refused either to continue respondent's pre-disciplinary hearing until after the criminal charges were resolved or to inform him that his answers at the hearing could not be used in the criminal case, respondent had "effectively [been] forced to choose between his job and his Fifth Amendment rights, and this was an impermissible violation of his Fourteenth Amendment right to procedural due process." Pet. App. 9. Because respondent was never informed that he would enjoy "immunity from prosecution based on his answers and that a failure to answer would therefore be viewed negatively," petitioner's decision to terminate him based on his refusal to testify violated due process. *Id.* at 2. The court of appeals noted that this violation followed from petitioner's decision to "interpre[t] the line of cases leading up to *Atwell* in an exceedingly narrow manner." *Id.* at 8.

REASONS FOR DENYING THE WRIT

Petitioner's three questions presented ask this Court to overturn either its well-settled precedents or uncontroversial applications of them. The Seventh Circuit's implementation of this Court's decisions in *Garrity*, *Gardner*, and *Uniformed Sanitation Men* has been adopted by two other circuits and,

---

[4] The court of appeals affirmed the district court's dismissal of respondent's other claims. See Pet. App. 10-17. Those claims are not before this Court.

contrary to petitioner's assertion, squarely rejected by none. That some government employees have successfully challenged their terminations while others have failed reflects the intensely fact-bound nature of these cases, rather than a conflict among the circuits as to the governing legal principles. Furthermore, the Seventh Circuit's decision presents no conflict with this Court's decision in *Chavez* v. *Martinez*, because unlike the respondent there, respondent in this case was actually deprived both of constitutionally adequate procedures and of a protected property interest. Plaintiff's final question presented asks the Court to overrule *Owen* v. *City of Independence*, even though the facts in this case do not present this question and the issue was not argued or decided below. Thus, none of petitioner's questions presented merit the Court's review.

I. There Is No Split Among the Lower Courts as to the Application of *Garrity*, *Gardner*, and *Uniformed Sanitation Men* in Cases Where an Employee Will Be Discharged for Refusing to Speak Under Compulsion

Petitioner seeks this Court's review of the court of appeals' holding that respondent was denied due process when petitioner confronted him with "Hobson's choice between self-incrimination and forfeiting his means of livelihood." *Gardner* v. *Broderick*, 392 U.S. 273, 277 (1968). See Pet. App. 9. For at least thirty years, the law has been clear that an individual, including a public employee being investigated by his government employer, cannot be put to that choice, and cannot be penalized for refusing to answer questions "*unless and until* he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant." *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 805 (1977) (quoting *Lefkowitz* v. *Turley*, 414 U.S. 70, 78 (1973)) (emphasis added). The court of appeals' position in this case is entirely consistent with the position taken by other courts of appeals and with the decisions of this Court. Particularly given the

fact-intensive nature of the underlying inquiry, the decision does not warrant this Court's review.

A. The Circuit Conflict Claimed By Petitioner Is Illusory

The Seventh Circuit has long required that the government inform an employee before it disciplines him for invoking his Fifth Amendment privilege that his refusal to answer questions is unjustified because the fact that his answers have been compelled means that they cannot be used against him in any criminal proceeding. See, *e.g.*, *Atwell v. Lisle Park Dist.*, 286 F.3d 987, 990 (2002); *Riggins* v. *Walter*, 279 F.3d 422, 431 (1995), cert. denied, 516 U.S. 947 (1995); *United States* v. *Devitt*, 499 F.2d 135, 141 (1974), cert. denied, 421 U.S. 975 (1975); *Confederation of Police* v. *Conlisk*, 489 F.2d 891 (1973), cert. denied, 416 U.S. 956 (1974). Petitioner claims that the Seventh Circuit "stands alone on this issue," Pet. 11, and that several circuits have rejected its approach.

Petitioner is wrong on both counts. First, petitioner inexplicably fails to mention that the Federal Circuit – the circuit responsible for reviewing cases involving claims by federal employees – has for decades imposed an identical requirement. *Kalkines* v. *United States*, 473 F.2d 1391 (Ct. Cl. 1973),[5] held that "[a] public servant can be removed for not replying *if he is adequately informed* both that he is subject to discharge for not answering and *that his replies (and their fruits) cannot be employed against him in a criminal case*." *Id.* at 1393 (emphasis added). Because Kalkines had not been "duly advised of his options and the consequences of his choice" and "adequately assured of protection against use of his answers or their fruits in any

[5] The Federal Circuit was created in 1982 as the successor to the Court of Claims.

criminal prosecution," his discharge was invalid. *Id.* at 1394 (internal quotation marks omitted).

The Federal Circuit has repeatedly reaffirmed and applied the *Kalkines* rule. See, *e.g.*, *Weston* v. *Dep't of Housing & Urban Dev.*, 724 F.2d 943, 948 (1983) (holding that the government could compel an employee to answer job-related questions "when that employee is duly advised of his options to answer under the immunity granted or remain silent and face dismissal"); *Modrowski* v. *Dep't of Veterans Affairs*, 252 F.3d 1344, 1351-52 (2001) (holding that because the statement notifying the employee of his immunity was unclear, and the employee had been denied the opportunity to consult an attorney who might have clarified the warning, the employee could not be fired for failure to cooperate with the investigation). In light of this consistent and longstanding rule, the federal government has adopted standard forms providing such warnings. For example, before questioning employees of the Department of Labor, the Office of the Inspector General provides them with Form 117A, which states:

> You have a duty to reply to these questions and department disciplinary proceedings resulting in your discharge may be initiated as a result of your answers; however, neither your answers nor any information or evidence which is gained by reason of such statements can be used against you in any criminal proceedings, except that you may be subject to criminal prosecution for any false answers that you may knowingly give to the questions asked you. Your failure to answer questions or knowingly furnishing false and/or misleading information could be a basis for dismissal.

See *Hanna* v. *Dep't of Labor*, 18 Fed. Appx. 787, 789 (CAFC 2001) (quoting Form 117A). Other agencies use similar forms or provide scripts for oral warnings.[6]

The Second Circuit has articulated a similar approach. In *Uniformed Sanitation Men Ass'n* v. *Comm'r of Sanitation*, 426 F. 2d 619 (CA2 1970), cert. denied, 406 U.S. 961 (1972), Judge Friendly offered a gloss on this Court's statement that 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."

---

[6] See, *e.g.*, Treasury Inspector General for Tax Administration, Investigatory Interview Procedures, *available at* http://www.treas.gov/tigta/oi_interview.shtml (last visited Feb. 21, 2005) (providing scripted immunity warning and form for IRS employees); National Labor Relations Board, Civil Form for Administrative Investigations, *available at* http://206.16.201.226/nlrb/about/ig/civil_form.asp (last visited Feb. 21, 2005) (providing immunity warnings for NLRB employees via form); Federal Bureau of Prisons, Form A-194, *available at* http://www.bop.gov//policy/forms/Bp_a194.pdf (last visited Feb. 21, 2005) (providing immunity warnings for Bureau of Prisons employees via form); Federal Communications Commission, FCC Employee Rights and Warnings, *available at* http://www.fcc.gov/oig/oigrights.html (last visited Feb. 21, 2005) (describing FCC policy of providing immunity warnings to employees when required); Office of the Inspector General, Nuclear Regulatory Commission, The IG at the NRC 9, *available at* http://www.nrc.gov/reading-rm/doc-collections/nuregs/brochures/br0146/r3/br0146r3.pdf (last visited Feb. 21, 2005) (describing contents of *Kalkines* warnings and circumstances under which they should be given to NRC employees). See also Office of Personnel Management Work/Life Group, Dealing With Workplace Violence, a Guide for Agency Planners, *available at* http://www.opm.gov/ehs/workplac/handbook/p3-s1.asp (last visited Feb. 21, 2005) (describing contents of warnings that federal agencies should provide when statements are compelled).

Uniformed Sanitation Men Ass'n v. *Comm'r of Sanitation*, 392 U.S. 280, 285 (1968) (emphasis added). According to Judge Friendly, "'After proper proceedings' means proceedings * * * in which the employee * * * is duly advised of his options and the consequences of his choice." *Uniformed Sanitation Men*, 426 F.2d at 627. Only because the employees in that case *had* received such warnings was the city entitled to discipline them for refusing to answer pertinent questions. *Ibid.* The positions taken by the Federal and Second Circuits thus fatally undermine petitioner's assertion that the Seventh Circuit's approach is "unique." Pet. 10.

Contrary to petitioner's intimations, the Seventh Circuit's approach has not been squarely rejected by a single circuit. The cases petitioner cites as having "rejected the need to warn employees," Pet. 10 (citing *Gulden* v. *McCorkle*, 680 F.2d 1070 (CA5 1982), cert. denied, 459 U.S. 1206 (1983), and *Hill* v. *Johnson*, 160 F.3d 469 (CA8 1998)), are inapposite. *Gulden* involved an entirely distinct factual scenario: there, the employees were unquestionably aware of their right not to have their statements used against them[7] and refused to appear for questioning at all. Under those circumstances, the Fifth Circuit found that the Seventh Circuit cases that required warnings were inapposite, *a conclusion with which the Seventh Circuit in* Atwell *expressly agreed.* See *Atwell*, 286 F.3d at 991 ("[W]e have already registered our agreement with the Fifth Circuit that there can be no duty to warn until the employee is asked specific questions. The employee has

[7] The plaintiffs in *Gulden* were given information about their immunity: In response to their suit to enjoin the polygraph examinations they later refused to take, the government told them that "[n]o waiver of the self-incrimination privilege had been demanded." 680 F.2d at 1072. The employees were also asked to sign a document stating that they were being questioned pursuant to "an administrative investigation," not a criminal one. *Id.* at 1071 n.2, 1072 n.4.

no right to skip the interview * * * .") (citations omitted). Moreover, the Fifth Circuit explicitly refused to foreclose the possibility that warnings might be required when an inquiry "advance[s] to a level of specificity in which the competing concerns of immunity could be properly addressed." *Gulden*, 680 F.2d at 1076.

Other circuits have also left open that possibility. Justice Powell, writing for the Fourth Circuit by designation, noted that "*Garrity* immunity is self-executing. *In an appropriate case, it might be necessary to inform an employee about its nature and scope*." *Wiley* v. *Mayor & City Council of Baltimore*, 48 F.3d 773, 777 n.7 (1995) (emphasis added) (citations omitted), cert. denied, 516 U.S. 824 (1995). Similarly, when the Tenth Circuit was faced with such a claim, it noted only that "*this case* does not require us to decide whether the government must affirmatively advise a police officer who is undergoing an internal affairs interview that the officer is not being forced to waive his or her Fifth Amendment rights," while noting that other circuits had adopted such rules. *In Re Grand Jury Subpoenas Dated Dec. 7 & 8*, 40 F.3d 1096, 1102 n.5 (1994) (emphasis added), cert. denied, 514 U.S. 1107 (1995). Since the Fifth Circuit – like two of its sister circuits – expressly reserves judgment on the Seventh Circuit's *Conlisk-Atwell* approach, *Gulden* presents no conflict for this Court to resolve.

The other case that petitioner claims "rejected" the Seventh Circuit's rule – *Hill* v. *Johnson*, 160 F.3d 469 (CA8 1998) – is easily distinguishable on both legal and factual grounds. First, because *Hill* was decided before *Saucier* v. *Katz*, 533 U.S. 194 (2001), and involved assertions of qualified immunity by individual officer defendants,[8] the Eighth Circuit did not squarely decide the merits of the constitutional claim. It held only that any violation did not

[8] Qualified immunity is entirely inapposite to this case. See *infra* at 23-25.

involve "clearly established" law, and not necessarily that no violation occurred at all. See *Hill*, 160 F.3d at 472 ("Because the Sheriff's conduct did not violate a clearly established constitutional or statutory right of which a reasonable person would have known, the Sheriff and the officers are entitled to qualified immunity. We thus reverse the district court's denial of summary judgment on that ground.").

But even if the Eighth Circuit had ruled against Hill on the merits, that decision would not have posed a square conflict with the Seventh Circuit's approach. First, Hill was fired in part because he failed to appear at a polygraph test. See *Hill*, 160 F.3d at 472. As respondent has already explained, see *supra* at 11-12, the Seventh Circuit itself has held that an employee who fails to appear at a hearing – as distinct from refusing to answer specific questions – forfeits any *Conlisk-Atwell* due process claim. Second, the Eighth Circuit found that Hill, unlike respondent, had been told that the examination "would be * * * strictly for administrative purposes only, not for any criminal purposes" and had been given written notice that a meeting was an "administrative hearing, * * * not a criminal hearing." *Id.* at 471. As a result, "the only reasonable inference" was that the investigation was purely administrative. *Ibid.* Under these circumstances, the Eighth Circuit concluded that "the mere failure affirmatively to offer immunity" did not violate the plaintiff's constitutional rights. *Ibid.* That conclusion does not establish that in a case where an employee *did* reasonably fear that his answers might incriminate him and be used in a criminal proceeding, the Eighth Circuit would hold that the government could fire him without dispelling that misapprehension.

Petitioner attempts to shore up the purported circuit split by citing two additional cases that it claims rejected reasoning "similar" to *Atwell*. Pet. 10 (citing *Gniotek* v. *Philadelphia*, 808 F.2d 241 (CA3 1986), cert. denied, 481 U.S. 1050 (1987), and *Harrison* v. *Wille*, 132 F.3d 679

(CA11 1998)). Those cases, however, are entirely inapposite to petitioner's question presented: whether the government must "*warn employees* that they cannot refuse to answer questions *during a disciplinary proceeding relating to a criminal proceeding.*" Pet. i. (emphasis added).

First, the officers in *Gniotek* and *Harrison* were differently situated from the respondent in this case: they were already aware of their *Garrity* rights, having been represented by counsel at their investigative hearings. *Gniotek*, 808 F.2d at 242; *Harrison*, 132 F.3d at 681 & n.3 (plaintiff had an attorney and was even "provided *Garrity* protection" at his post-termination hearing). Respondent, by contrast, was specifically denied permission to bring his lawyer to his investigative hearing. Resp. C.A. Br. 8 (citing deposition testimony of respondent's supervisor). As the Seventh Circuit has explained, the warnings requirement is an "anti-mousetrapping rule" in place because "*[u]ncounselled persons* are much more likely to know about their 'Fifth Amendment' right than they are to know about an immunity that qualifies that right." *Atwell*, 286 F.3d at 990 (emphasis added). The Seventh Circuit itself has therefore expressed doubt as to whether its warning rule "has *any possible application* when the employee has a lawyer." *Id.* at 991 (emphasis added). Since *Gniotek* and *Harrison* concern a factual situation not presented by this case, and the Seventh Circuit has expressly reserved judgment as to whether warnings are required on their facts, those cases create no conflict with the Seventh Circuit's decision.[9]

---

[9] Petitioner's claim that "the Third Circuit has stated that the reasoning of *Atwell* is 'meritless,'" Pet. 10 (citing *Gniotek*), is highly misleading. *Gniotek* was decided sixteen years *before Atwell* and thus the Third Circuit could not have been addressing *Atwell*. In addition, petitioner's claim here contradicts its later claim that it could not have anticipated *Atwell's* reasoning when it fired respondent in 1997. See *infra* at 24.

Second, neither *Gniotek* nor *Harrison* directly concerned a disciplinary hearing "relating to a criminal proceeding." Pet. i. Unlike respondent, the plaintiffs in those cases were not questioned regarding pending criminal charges against them. Indeed, Harrison and six of the nine *Gniotek* plaintiffs were never indicted at all. See *Harrison*, 132 F.3d at 681; *Gniotek* v. *Philadelphia*, 630 F.Supp. 827, 830 (E.D. Pa. 1986). There is no indication that the remaining *Gniotek* defendants were involved in any criminal proceeding at the time they were questioned, since each officer's first appearance in front of the department's Ethics Accountability Division came only one day after being first identified in court testimony. *Gniotek*, 630 F.Supp. at 829.

Third, as a factual matter, the courts in *Gniotek* and *Harrison* held that those employees were terminated not because of their refusal to answer questions, but because of other evidence sufficient to establish their wrongdoing. In *Gniotek*, for example, the government informed the employees that a witness had testified under oath in federal court that they had accepted bribes, 808 F.2d at 244, and the Third Circuit concluded that the plaintiffs had been fired solely "on the basis of the city's evidence of bribery" and not because they had asserted their Fifth Amendment rights, *id.* at 245 n.7. Similarly, in *Harrison*, the Eleventh Circuit noted that "[t]he termination of Plaintiff's employment came after a lengthy investigation in which other evidence incriminated him. Plaintiff does not dispute that other evidence about the thefts, besides his silence, led to Plaintiff's leave without pay and to his ultimate termination." 132 F.3d at 683.

By contrast, in this case, the district and circuit courts found as a matter of fact that the City fired respondent at least in part because of "his refusal to respond to the criminal charges," Pet. App. 4, and they rejected petitioner's claims to the contrary, see Pet. 6. The Seventh Circuit held that "Franklin was forced to choose between his job and his Fifth

Amendment rights," Pet. App. 9, which necessarily implies that had he not remained silent he might have retained his job.

The conclusion that respondent's invocation of his privilege against self-incrimination was *at least* a but-for cause of his termination is reinforced by city policies that forbade the City from firing respondent simply for off-duty drug-related conduct. At the time of the events leading to this case, the 1995 collective bargaining agreement between the City and respondent's union (the American Federation of State, County and Municipal Employees or "AFSCME") expressly provided that the City's 1991 Revised Drug and Alcohol Policy was in effect and was to be considered part of the Unified Work Rules. Resp. C.A. Reply Br. 3 (citing 1995 Agreement); *id.* at 7 (citing deposition testimony by both petitioner's Director of Human Resources and respondent's supervisor conceding this point). The 1991 policy permitted the City to fire an employee for off-duty possession of illegal drugs only if the possession had a "demonstrable negative effect on his/her work performance, or rendered him/her unable or unsuited to perform his/her job." Resp. C.A. Br. 7 (quoting rule III.A.1 of the 1991 Revised Drug Policy).[10] Respondent's supervisor never saw him under the influence of drugs or saw his work performance impaired in any way (except on an entirely different occasion for legitimate health-related reasons); and while he suggested that workplace gossip or respondent's court appearances might at some point have a negative effect on the workplace, *ibid*, the City itself did not point to these factors in denying respondent's grievance. Thus, the only job-related conduct that could have triggered the City's decision to fire respondent was his refusal to answer questions at his pre-termination and grievance hearings about his then-pending criminal proceeding.

---

[10] Rule I.C of the 1991 Revised Drug Policy also supports respondent's claim that employees cannot be terminated for off-the-job drug possession that has no effect on work performance. See Pet. App. 28 n.3 (quoting Rule I.C).

Despite the 1995 Agreement and the testimony cited above, petitioner has claimed that the termination was governed by Section 23.1(e) of the 1989 AFSCME Unified Work Rules, which stated that municipal employees could be terminated for possessing or selling illegal drugs off-duty. See Pet. App. 28 n.3. Both the district court and the court of appeals declined to resolve this disputed question of fact because they found that petitioner would have been required to inform respondent of the consequences of remaining silent regardless of which work rules were in effect. See Pet. App. 3 n.1, 28 n.3. While the Seventh Circuit's decision does not conflict with *Gniotek* or *Harrison* because of the numerous differences discussed above, the Work Rules dispute also makes this case a poor vehicle to resolve any purported circuit split.

Finally, petitioner claims that the decision in *People* v. *Wyngaard*, 614 N.W.2d 143 (Mich. 2000), conflicts with the decision in this case. Pet. 10-11. *Wyngaard* is even less relevant than the preceding cases to the question whether municipalities must warn employees of their *Garrity* rights, since it concerned a *prisoner's* right to refrain from answering questions in an internal prison disciplinary proceeding.[11] The Michigan Supreme Court specifically distinguished prison disciplinary hearings from the employment situation at issue in *Garrity*, its progeny, and this case because "Michigan's prison disciplinary process does not place any direct penalty on an inmate's decision to exercise his Fifth Amendment

[11] Consistent with Michigan's then-existing rule, Wyngaard had in fact been told that his statements at the prison disciplinary hearing could not be used in a subsequent criminal proceeding. See *Wyngaard*, 614 N.W.2d at 145. Although the Michigan Supreme Court used the case to overturn the requirement that prisoners be given use immunity for statements made in prison disciplinary hearings, it held that Wyngaard was entitled to the exclusion of the statements in his case because he had relied on the now-superseded warning requirement. *Id.* at 150.

privilege." *Wyngaard*, 614 N.W.2d at 150. The *Wyngaard* opinion does not even mention – let alone distinguish – this Court's decisions in *Gardner*, *Turley*, and *Uniformed Sanitation Men*. Nor does it mention, distinguish, or disagree with the decisions of the Second, Seventh, and Federal Circuits regarding the necessity of providing public employees with advice about their options and the consequences of their choices.

In short, the conflict petitioner purports to identify is illusory. The Seventh Circuit's rule is not "unique," contra Pet. 10; it fully accords with the longstanding positions of the Second and Federal Circuits. The fact that some courts of appeals have rejected other plaintiffs' claims for reinstatement is attributable to factual differences among the cases rather than to any square conflict about underlying legal principles. And it shows that cases involving *Garrity* rights involve fact-intensive inquiries under which warnings are not always required, a point with which the Seventh Circuit itself expressly agrees. Particularly since the courts which have not adopted the Second, Seventh, and Federal Circuit treatment of warnings have reserved judgment on the question, the issue is best left to percolate among the lower courts unless and until categorical disagreements emerge.

B. The Seventh Circuit's Decision Was Correct on the Merits

The Seventh Circuit's application of its longstanding rule in this case correctly implements this Court's precedents. This Court has held that while governments may require employees to answer job-related questions, they may not require employees to waive their Fifth Amendment protection as a condition of continued employment. See, *e.g.*, *Uniformed Sanitation Men*, 392 U.S. at 284-85. In order for this compulsory questioning to be constitutional, "[s]tates must offer to the witness whatever immunity is required to

supplant the privilege and may not insist that the employee or contractor waive such immunity." *Turley*, 414 U.S. at 85.

These precedents would be undermined if the government were permitted to fire uncounseled employees who refuse to answer questions because they fail to understand this Court's by no means intuitive "reconciliation of the well-recognized policies behind the privilege of self-incrimination and the need of the State * * * to obtain information 'to assure the effective functioning of government.'" *Turley*, 414 U.S. at 81 (citations omitted). If employees are not told that the government is entitled to compel them to answer questions and consequently to discipline them for failing to answer, and are not told that the government will not be permitted to use their answers against them in any criminal proceeding, many employees may mistakenly conclude that they are entitled to remain silent or may decide that it is necessary to sacrifice their jobs in order to protect themselves against criminal prosecution. Cf. *Maness* v. *Meyers*, 419 U.S. 449, 466 (1975) (noting that "[a] layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege"). This may be especially true when, as here, the government expressly denies an employee the right to have his counsel present at a disciplinary hearing. See *supra* at 4 n.2. Without the information that the Second, Seventh, and Federal Circuits require, employees have no way of knowing the consequences of their choices before they are dismissed for failing to answer questions. Their firing is the event that indicates that they were subject to compulsion, but it comes too late for them to participate effectively in their disciplinary hearing. Similarly, employees whose statements are *not* compelled and who are therefore not entitled to immunity under *Garrity*, will have no way to know that they have the right to remain silent.

This Court found a Fourteenth Amendment violation in circumstances similar to those presented here in *Gardner* v.

Broderick, 392 U.S. 273 (1968). There, a police officer was fired for refusing to waive his immunity from prosecution and to answer questions regarding his involvement in illegal gambling operations. In passing, the Court suggested that even if the officer *had* signed the waiver, the waiver would have been involuntary because it would have been induced by the impermissible threat of being fired for remaining silent. *Id*. at 278-79; see also *Garrity*, 385 U.S. at 497-500. Even though the officer had not signed the waiver, the Court held that the firing was unconstitutional because an employee who had been asked to sign a waiver could not be expected to understand that he would possess immunity even if he refused to sign. See *Gardner*, 392 U.S. at 279 ("Petitioner could not have assumed – and certainly he was not required to assume – that he was being asked to do an idle legal act of no effect."). The dismissal's validity thus turned upon whether the plaintiff *could have known* that his testimony was immunized, not upon whether the testimony was actually immunized. *Id.* at 278-79 ("We need not speculate whether, if appellant had executed the waiver of immunity in the circumstances, the effect of our subsequent decision in *Garrity* v. *New Jersey* * * * would have been to nullify the effect of the waiver."). Respondent in this case faced the same predicament as Gardner. In the absence of warnings, he, too, could not have known whether his employer would fire him for refusing to answer – and therefore whether his statements were compelled and immunized – until the moment he was fired.

The uncertainty generated by a lack of warnings illustrates why the warnings requirement is actually well-suited to meet the government's need "to investigate allegations of wrongdoing by its employees." Pet. 11. Absent the warnings, many employees facing criminal charges will, like respondent, assume that their statements might be used against them and refuse to answer. This will make it considerably harder for the government to obtain the information to "respond appropriately for budgetary, morale, manpower and policy reasons" when confronted with

allegations of wrongdoing. *Ibid.* Indeed, the federal government's standardized warnings policies, discussed *supra* at 9-10, illustrate the ease with which a government entity can further its information-gathering needs through a policy of providing immunity warnings. With respect to the underlying policy concerns, petitioner has things exactly backwards: the advice requirement adopted by the Federal, Second, and Seventh Circuits and followed by federal agencies better achieves the government's goal of obtaining information from its employees and does so while fully respecting their Fifth Amendment rights.

In sum, a rule like the one adopted by the Federal, Second, and Seventh Circuits simply enforces this Court's principle that for all speakers, including government employees, "the witness may 'refuse to answer *unless and until* he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant.'" *Lefkowitz* v. *Cunningham*, 431 U.S. at 805 (quoting *Turley*, 414 U.S. at 78) (emphasis added). The Seventh Circuit's decision in this case thus reflects an appropriate response to this Court's Fifth Amendment employee speech cases.

II. The Decision in This Case Does Not Conflict with This Court's Decision in *Chavez* v. *Martinez*

Petitioner's claim that the decision in this case conflicts with *Chavez* v. *Martinez*, 538 U.S. 760 (2003), misconstrues both decisions. In *Chavez*, this Court held that the failure to give *Miranda* warnings prior to custodial interrogation is not, standing alone, actionable under Section 1983. The Court's primary rationale for this conclusion was that a Fifth Amendment violation does not occur unless and until an individual's compelled statements are used against him in a criminal proceeding. See *id.* at 766-67, 772-73 (plurality opinion); *id.* at 777-79 (opinion of Souter, J.). In *Chavez* itself, the respondent "was never prosecuted for a crime, let

alone compelled to be a witness against himself in a criminal case." *Id.* at 766. The failure to give *Miranda* warnings thus never affected the fairness of any subsequent proceeding, nor did it expose the respondent to any concrete adverse consequences.[12]

By contrast, the City's behavior in this case *did* affect the constitutional adequacy of its formal pre-disciplinary hearing and *did* result in concrete adverse consequences to respondent – namely, the loss of his job. Contrary to petitioner's characterization, respondent's cause of action does not rest simply on the City's "failure to provide '*Atwell* warnings.'" Pet. 12. Respondent had a "protectible property interest in his job because he was a government employee whose employment could be terminated only 'for cause.'" Pet. App. 9 n.3. Respondent also had the right to a constitutionally adequate hearing before being deprived of that property. See, *e.g.*, *Gilbert* v. *Homar*, 520 U.S. 924, 929 (1997); *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 542-46 (1985); Pet. App. 9, 33-34. The court of appeals held that the City's policy deprived respondent of a constitutionally adequate hearing by "effectively forc[ing him] to choose between his job and his Fifth Amendment rights." Pet. App. 9. Because the court of appeals' decision is premised on the actual deprivation of a constitutional right and a protected property interest, and not on a mere failure to provide a prophylactic warning, there is no conflict between this case and *Chavez*.

In fact, to the extent that *Chavez* has any bearing on this case, it actually supports the court of appeals' holding. In *Chavez*, the plurality expressly declared that its decision

---

[12] In a part of the decision not relevant to this case, a different majority of the Court left open the question whether Martinez had a substantive due process-based claim under Section 1983 for the *manner* in which he was interrogated. See *Chavez*, 538 U.S. at 779-80. On remand, the court of appeals held that he did, *Martinez* v. *City of Oxnard*, 337 F.3d 1091 (CA9 2003), and this Court denied certiorari, 124 S.Ct. 2932 (2004).

"does not alter our penalty cases jurisprudence, which allows [the] privilege [against self-incrimination] to be asserted prior to, and outside of, criminal proceedings." 538 U.S. at 772 n.3. And in explaining that jurisprudence as it relates to the right of public employees to assert the privilege in the course of administrative investigations, the plurality cited *Uniformed Sanitation Men*, see *Chavez*, 538 U.S. at 768 n.2, precisely the case on which the Seventh Circuit's rule is based. See, *e.g.*, *Devitt*, 499 F.2d at 141-42; *Conlisk*, 489 F.2d at 893-94.

Thus, nothing in this Court's decision in *Chavez* warrants review in this case.

III. This Court Should Decline Petitioner's Invitation to Overrule *Owen* v. *City of Independence*

Put in concrete terms, petitioner's third question presented – which seeks relief from liability if the finding of a constitutional deprivation depends on legal decisions that postdate its underlying conduct – asks this Court to overrule its decision in *Owen* v. *City of Independence*, 445 U.S. 622 (1980), an issue that was neither raised below nor decided by the courts below. In *Owen*, this Court held the municipality liable for failing to provide a pre-termination hearing to one of its employees, even though the law requiring such a hearing had not been clearly established at the time of the firing. See *id.* at 630 n.10, 634. *Owen* rejected the claim that a municipality's liability under 42 U.S.C. 1983 turns on an inquiry into the city's "good faith." 445 U.S. at 647 ("The critical issue is whether injury occurred while the city was exercising governmental * * * powers or obligations – not whether its agents reasonably believed they were acting lawfully in so conducting themselves."). Thus, whether or not the law was clearly established prior to their challenged acts, municipalities are liable for the consequences of their constitutionally defective policies.

Petitioner acknowledges the general principle that that a "controlling interpretation of federal law * * * must be given

full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the] announcement of the rule." *Harper* v. *Virginia Dep't of Transp.*, 509 U.S. 86, 97 (1993). Pet. 14. And it concedes, as it must, that straightforward application of *Owen* necessarily results in its being held liable, since the City admitted at oral argument that its treatment of respondent reflected city policy. See Pet. App. 2. But it seeks to avoid the force of these points by claiming that this case presents "another contour" of Section 1983 liability. Pet. 14. Petitioner never identifies precisely what this other "contour" involves. If anything, petitioner's claim for relief from liability is significantly weaker than the city's claim in *Owen*, where the rulings that rendered the city liable entirely postdated the underlying conduct. Here, petitioner's claim that it was unable to anticipate the need for so-called "*Atwell* warnings" ignores the fact that the rule described in *Atwell* did not originate in that case. As *Atwell* itself made clear, the Seventh Circuit had recognized the requirement that employees be informed that their statements will be protected by use immunity in cases stretching back to 1973. See *Atwell*, 286 F.3d at 990 (citing *Riggins*, 279 F.3d at 431 (noting that "this circuit requires that before taking disciplinary action, a public employer must inform the employee that any compelled statements could not be used in criminal proceedings"), *Devitt*, 499 F.2d at 141 (stating that "disciplinary action [may not] be taken against the witness for his refusal to testify, unless he is first advised that * * * evidence obtained as a result of his testimony will not be used against him in subsequent criminal proceedings"), and *Conlisk*, 489 F.2d at 894 (providing that "[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 answer he gives and fruits thereof cannot be used against him in criminal proceedings")).

Moreover, as this Court noted in *Owen*, holding a city "liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." 445 U.S. at 651-62. In this case, far from erring on the side of protecting citizens' constitutional rights, "the City conceded that it had interpreted the line of cases leading up to *Atwell* in an exceedingly narrow manner." Pet. App. 8.[13]

In any event, even if this Court were inclined to reconsider the scope of *Owen*, this case is an entirely inappropriate vehicle for undertaking that effort. The issue was neither raised nor decided below and, even if municipalities were to be accorded qualified immunity, under the facts of this case, petitioner would still be liable since the law regarding its obligations was clearly established by cases decided literally decades before the events that gave rise to this litigation.

CONCLUSION

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

---

[13] Petitioner's reliance on *Oklahoma City* v. *Tuttle*, 471 U.S. 808 (1985), is equally misplaced. *Tuttle* concerned only whether a single unconstitutional act by a city official can give rise to municipal liability on the theory that the act was caused by a failure to train. The court of appeals in this case did not find that petitioner had failed to train its officials, but rather that the City had made a policy decision not to provide employees with constitutionally sufficient warnings. See Pet. App. 2. This concession fatally undermines petitioner's claim that it simply had no policy addressing the issue, see Pet. 13, and once again places this case in the *Owen* rubric.

Respectfully Submitted,

Annemarie E. Kill
AVERY CAMERLINGO
KILL, LLC
218 N. Jefferson St.
Suite 200
Chicago, IL 60661

Pamela S. Karlan
(Counsel of Record)
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-4851

Thomas C. Goldstein
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

February 23, 2005[14]

[14] Counsel for respondent were principally assisted by the following members of the Stanford Law School Supreme Court Litigation Clinic: Michael P. Abate, Rachel P. Kovner, and Julia M. Lipez. Clinic Members Eric J. Feigin, Nathaniel Garrett, Lauren Kofke, Michael J. Mongan, C. Lee Reeves, and David B. Sapp also participated.