

# 10-859-CV

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In The

United States Court of Appeals

FOR THE SECOND CIRCUIT

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JASON M. JACKLER,

Plaintiff-Appellant,

-against-

POLICE CHIEF MATTHEW T. BYRNE, Individually and in his  
official capacity, LT. PAUL RIKARD, Individually and in his  
official capacity, LT. PATRICK FREEMAN, Individually and in his  
official capacity,

Defendants-Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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BRIEF OF THE NATIONAL POLICE ACCOUNTABILITY  
PROJECT AS *AMICUS CURIAE* IN SUPPORT OF JASON  
M. JACKLER AND IN FAVOR OF REVERSAL

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS . . . . .	2
TABLE OF AUTHORITIES . . . . .	2
IDENTITY AND INTEREST OF <i>AMICUS CURIAE</i> NATIONAL POLICE ACCOUNTABILITY PROJECT . . . . .	5
QUESTION PRESENTED . . . . .	8
SUMMARY OF THE ARGUMENT . . . . .	10
ARGUMENT . . . . .	11
A LAW ENFORCEMENT OFFICER’S REFUSAL TO ENGAGE IN CRIMINAL ACTIVITY AT THE BEHEST OF HIS/HER SUPERIORS DOES NOT CONSTITUTE SPEECH MADE IN FURTHERANCE OF HIS OFFICIAL DUTIES . . . . .	11
CONCLUSION . . . . .	22

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Cases:</u>	
<i>Ariza v. City of New York</i> No. 93-5287, 1996 U.S. Dist. LEXIS 20250 (E.D.N.Y. Mar. 7, 1996). . . . .	21
<i>Barry v. New York City Police Dep’t</i> No. 01 Civ. 10627, 2004 U.S. Dist. LEXIS 5951 (S.D.N.Y. Apr. 7, 2004). . . . .	21
<i>Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics</i> 403 U.S. 388 (1971). . . . .	6
<i>Bolusi v. City of New York</i> 249 A.D.2d 134 (1 <sup>st</sup> Dep’t 1998) . . . . .	18
<i>Committee of the Interns and Residents v. Dinkins</i> 86 N.Y.2d 478 (1995) . . . . .	18

*Cunningham v. Gates*  
 229 F.3d 1271 (9<sup>th</sup> Cir. 2000). . . . . 6

*Feingold v. State of New York*  
 366 F.3d 138 (2d Cir. 2004). . . . . 11

*Garcetti v. Ceballos*  
 574 U.S. 410 (2006). . . . . *passim*

*Jeffes v. Barnes*  
 208 F.3d 49 (2d Cir. 2000). . . . . 19-20

*Jocks v. Tavernier*  
 97 F. Supp.2d 303 (E.D.N.Y. 2000),  
*vacated on other grounds*, 316 F.3d  
 128 (2d Cir. 2003). . . . . 18

*Jute v. Hamilton Sundstrand Corp.*  
 420 F.3d 166 (2d Cir. 2005). . . . . 16

*Katt v. City of New York*  
 151 F. Supp.2d 313 (S.D.N.Y. 2001), *aff'd*,  
 60 Fed. Appx. 357 (2d Cir. 2003) (Summary Order). . . . . 21

*Kubicko v. Ogden Logistics Servs.*  
 181 F.3d 544 (4th Cir. 1999). . . . . 16

*Lewis v. Cohen*  
 165 F.3d 154 (2d Cir. 1999). . . . . 13

*Pickering v. Board of Educ.*  
 391 U.S. 563 (1968). . . . . 11

*Reinhardt v. Albuquerque Pub. Schs.  
 Bd. of Educ.*  
 595 F.3d 1126 (10<sup>th</sup> Cir. 2010). . . . . 14

*Ricciuti v. New York City Trans. Auth.*  
 124 F.3d 123,130 (2d Cir. 1997). . . . . 14

*Ventura v. Town of Manchester*  
 No. 06 CV 630, 2008 U.S. Dist. LEXIS 66957  
 (D. Ct. Sep. 2, 2008). . . . . 20

*Weintraub v. New York City Bd. of Educ.*  
 593 F.3d 196 (2d Cir. 2010)). . . . . *passim*

*White-Ruiz v. City of New York*  
No. 93 Civ. 7233, 1996 U.S. Dist. LEXIS 15571  
(S.D.N.Y. Oct. 22, 1996)). . . . . 21

Statutes and Other Authority:

42 U.S.C. § 1983. . . . .	6
Fed. R. App. Proc. 29. . . . .	5
N.Y. Gen. Mun. L. § 50-k . . . . .	16-18
N.Y. Penal L. § 175.30. . . . .	9, 10, 13
N.Y. Penal L. § 175.35. . . . .	9, 10, 13
Report of the New York City Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department . . . . .	6, 18-19

IDENTITY AND INTEREST OF *AMICUS CURIAE*  
NATIONAL POLICE ACCOUNTABILITY PROJECT<sup>1</sup>

National Police Accountability Project ("NPAP") submits this brief as *amicus curiae* in support of plaintiff-appellant Jason M. Jackler pursuant to Fed. R. App. 29. By Order dated December 30, 2010, this Court granted leave to *amicus* to file this brief.

NPAP was founded in 1999 by members of the National Lawyers Guild in an effort to reduce the incidents of misconduct by police officers, prison guards and other law enforcement officers. It presently has more than four hundred attorney members throughout the United States. NPAP provides training and support for attorneys and other legal workers, public education and information on issues relating to police misconduct and accountability for the general public, and information and resources for non-profit and community groups involved with victims of law enforcement misconduct. NPAP also supports legislative reform efforts aimed at increasing accountability for law enforcement officials, and appears as *amicus curiae* in cases, such as this one, that present issues of particular importance for lawyers who represent plaintiffs in law enforcement misconduct actions.

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no party or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

One of the important missions of NPAP is to promote the accountability of law enforcement officers and their employers for violations of the United States Constitution or laws of the United States. In this vein, NPAP members frequently prosecute claims against state and federal law enforcement officers under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

The "Blue Wall of Silence" represents a serious threat to the administration of justice in our society. In its simplest form, the Blue Wall of Silence means that "cops don't tell on cops." Report of the New York City Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department (the "Mollen Commission Report") at 53. It encourages law enforcement officers to support one another even when a fellow officer engages in criminal activity, and, conversely, punishes law enforcement officers who report misconduct, criminal and otherwise, to other law enforcement personnel. *Cunningham v. Gates*, 229 F.3d 1271, 1283, n.19 (9<sup>th</sup> Cir. 2000) (the Code of Silence "consists of one simple rule, an officer does not provide adverse information against a fellow officer."). Appellant's experience, as alleged in his complaint, represents a typical consequence for a police officer who reports that one of his superiors has violated the constitutional rights of a citizen.

It has been, and remains, the experience of NPAP members that law enforcement officers face enormous internal pressures when confronted with the Blue Wall of Silence. It has also been the experience of NPAP members that police departments led by Commanding Officers who do not tolerate police misconduct represent the first and best line of defense against police misconduct. Yet, if the district court's decision stands, it will send a loud and clear message to law enforcement officers that their efforts to shatter the Blue Wall of Silence will be met with dire consequences. For this reason, NPAP urges this Court to reject the district court's application of *Weintraub v. New York City Bd. of Educ.*, 593 F.3d 196 (2d Cir. 2010), to the facts here, and to hold that a police officer's refusal to comply with his or her superior's orders to engage in criminal conduct does not constitute speech made "pursuant to [his/her] job duties." *Id.* at 203.

QUESTION PRESENTED

On the evening of January 5, 2006, plaintiff-appellant Jason Jackler ("Officer Jackler"), a probationary police officer with the Middletown Police Department (the "Department") (JA 9),<sup>2</sup> saw Sergeant Gregory Matkes ("Sgt. Matkes") punch Zachary Jones ("Jones") in the face in response to Jones having called him a "dick." At the time Sgt. Matkes punched Jones, Jones was handcuffed in the rear. (JA 9.)

Jones filed a civilian complaint with the Department complaining of Sgt. Matkes's unlawful use of force. Defendant-appellee Matthew Byrne, the Department's Chief of Police ("Chief Byrne"), ordered an investigation into Jones' complaint and actively participated in the investigation. (JA 9.) As part of the investigation, defendant-appellee Lieutenant Patrick Freeman ("Lt. Freeman") directed Officer Jackler to prepare a report regarding the complaint. (JA 10-11.) Officer Jackler's report, dated January 11, 2006, accurately described what he had observed, thereby substantiating Jones' complaint. (JA 32-33, 35.)

That same day Lt. Freeman and defendant-appellee Lieutenant Paul Rickard ("Lt. Rickard"), at the direction of Chief Byrne, placed enormous pressure on Officer Jackler to withdraw his

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<sup>2</sup> "(JA #.)" refers to the Joint Appendix. "(SA #.)" refers to the Special Appendix.

report and to file a new report containing false information, which, if true, would exculpate Sgt. Matkes. Chief Byrne and Lts. Freeman and Rickard did so even though they had reviewed video footage that confirmed the accuracy of Jones' complaint and Officer Jackler's report. Officer Jackler refused to file the requested report containing false information. (JA 12-13.) As a result, less than a week later Chief Byrne recommended to the City of Middletown Board of Police Commissioners (the "Board") that Officer Jackler's probationary employment be terminated. Acting on the recommendation of Chief Byrne, the Board terminated Officer Jackler's employment effective January 21, 2006. (JA 13.)

Under these circumstances, did Officer Jackler's refusal to commit the crimes of Offering a False Instrument for Filing in the First and Second Degrees (N.Y. Penal L. §§ 175.35; 175.30) represent speech made pursuant to his official duties within the meaning of *Garcetti v. Ceballos*, 574 U.S. 410 (2006), and *Weintraub v. Board of Educ.*, 593 F.3d 196 (2d Cir. 2010)?

SUMMARY OF THE ARGUMENT

Officer Jackler was ordered by his Superiors to commit the crimes of Offering a False Instrument for Filing in the First and Second Degrees. N.Y. Penal L. §§ 175.35; 175.30. It is the job of law enforcement officers to stop crime, however, not to commit it. In concluding that Officer Jackler's speech was made pursuant to his official duties, the district court ignored this fundamental distinction by giving an overly broad reading of this Court's decision in *Weintraub*, which, as Judge Calabresi pointed out in his dissent, already represented an expansive reading of the Supreme Court's decision in *Garcetti* (*Weintraub*, 593 F.3d at 205). While NPAP believes that Judge Calabresi's dissent hews closer to *Garcetti*, it also believes that the district court's decision in this case represents an unwarranted expansion of the majority opinion in *Weintraub*.

NPAP is further concerned about the impact of the district court's decision. As we discuss below, it is beyond cavil that law enforcement officers frequently confront vicious and persistent retaliation for breaching the Blue Wall of Silence. It is equally beyond cavil that the main line of defense against such harassment is a commanding officer who will not tolerate such retaliation and, conversely, the absence of such leadership permits retaliation to flourish. If the district court's decision stands, it all but guarantees that law enforcement

misconduct will go unchecked. For these reasons, NPAP urges the Court to reverse the decision of the district court and to permit Officer Jackler to proceed with his action.

ARGUMENT

A LAW ENFORCEMENT OFFICER'S REFUSAL TO ENGAGE  
IN CRIMINAL ACTIVITY AT THE BEHEST OF HIS/HER  
SUPERIORS DOES NOT CONSTITUTE SPEECH MADE IN  
FURTHERANCE OF HIS OFFICIAL DUTIES

In order to state a claim for relief with respect to his First Amendment claim, the factual allegations contained in Officer Jackler's complaint had to establish that his speech was constitutionally protected, that he experienced adverse employment action, and that his speech was a motivating factor in the defendants' decision to terminate his employment. Feingold v. State of New York, 366 F.3d 138, 160 (2d Cir. 2004).

According to the district court, appellees' argument below focused solely on whether Officer Jackler's complaint established that his speech was constitutionally protected. (SA 4.). For this reason NPAP's argument only addresses the *Garcetti/Weintraub* issue.

In *Garcetti*, the Supreme Court held that speech was constitutionally protected if "the employee spoke as a citizen on a matter of public concern." *Garcetti*, 547 U.S. at 418 (citing *Pickering v. Board of Educ.*, 391 U.S. 563 (1968)). The Court also held, however, that "when public employees make statements pursuant to their official duties, the employees are not speaking

as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti*, 547 U.S. at 421.

The *Garcetti* Court did not undertake to define what it meant by "pursuant to their official duties" because the parties agreed that Ceballos wrote the memo at issue pursuant to his official job responsibilities *Id.* at 424. The *Weintraub* Court undertook for the first time "to articulate a comprehensive framework of the scope of an employee's duties in cases where there is room for serious debate." *Garcetti*, 547 U.S. at 424. In *Weintraub*, this Court confronted the issue of whether a school teacher's filing of a grievance relating to the failure of school officials to discipline unruly students constituted speech made pursuant to his official duties. *Weintraub*, 593 F.3d at 198. The *Weintraub* Court held that the teacher's grievance was made pursuant to his official duties, and thus without constitutional protection, "because it was part-and-parcel of his concerns about his ability to properly execute his duties . . . as a public school teacher - - namely, to maintain classroom discipline, which is an indispensable prerequisite to effective teaching and classroom learning." *Id.* at 203. The *Weintraub* court did not contemplate a situation, however, where the speech at issue was an employee's maintenance of silence in the face of an employer's order to commit a crime.

While NPAP shares the concerns of the district court regarding the results of its decision (SA 8-9 & n.5), it disagrees with its conclusion. Properly understood, the district court's decision interprets *Weintraub* to stand for the proposition that any speech by an employee made while on duty that relates ever so slightly to his/her job responsibilities is made pursuant to the employee's official duties. (SA 7-9.) *Weintraub*, however, does not stretch so far because it still requires a nexus between the employee's speech and his/her job responsibilities. Simply put, Officer Jackler's refusal to engage in criminal conduct did not address his "ability to properly execute his duties." *Weintraub*, 596 F.3d at 203 (quotations and citation omitted).

Lest there be a mistake, Chief Byrne and Lts. Freeman and Rickard directed Officer Jackler to commit the crimes of Offering a False Instrument for Filing in the First and Second Degrees (N.Y. Penal L. §§ 175.35; 175.30). Officer Jackler's refusal to do so,<sup>3</sup> however, could not be in furtherance of his official duties because it would have served no legitimate purpose related to law enforcement activities. In fact, if Officer Jackler had falsified his report and the report had been turned over to the

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<sup>3</sup> As the district court correctly noted, one's right to refuse to speak is just as protected by the First Amendment as one's right to speak. (SA 5 n.4 (quoting *Lewis v. Cohen*, 165 F.3d 154, 161 (2d Cir. 1999).)

prosecution in connection with the prosecution of Jones, Officer Jackler would have engaged in the "corruption of the truth-seeking function of the trial-process." *Ricciuti v. New York City Trans. Auth.*, 124 F.3d 123,130 (2d Cir. 1997) (citations omitted).

As discussed above, it is not the function of police officers to engage in criminal activity. Yet, this is exactly what Chief Byrne and Lts. Freeman and Rickard pressured Officer Jackler to do. For this reason alone, this Court should not conclude that Officer Jackler's "speech was commissioned by the employer." *Reinhardt v. Albuquerque Pub. Schs. Bd. of Educ.*, 595 F.3d 1126, 1135 (10<sup>th</sup> Cir. 2010) (quotation and citation omitted). By failing to appreciate this distinction, the district court, despite its misgivings, erroneously interpreted *Weintraub* to stand for the proposition that any speech remotely touching upon an employee's job performance is necessarily unprotected speech. (SA 7-8 ("Officer Jackler's refusal to alter his report was done in his capacity as a police officer, and that refusal only occurred because he was an officer. Ironically, it is because he was a public employee with a duty to tell the truth that his insistence on fulfilling that duty is unprotected").)<sup>4</sup>

Sound policy reasons exist to hold that Officer Jackler's

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<sup>4</sup> The district court's interpretation of *Weintraub* virtually insulates officers from repercussions for misconduct by placing above the law the very officers charged with enforcing the law.

speech is protected. If Officer Jackler's speech in this case is not protected by the First Amendment, then the Officer Jacklers of the world will have every reason to give in to the demands of their supervisors and prepare false reports. In this scenario, society as a whole loses because cover-ups of unlawful police misconduct will be created. Conversely, if Officer Jackler's speech in this case *is* protected, it will ensure that official files will contain an accurate report of police misconduct. While the Officer Jacklers of the world may continue to be fired because of the content of such reports, or because of their refusal to falsify such reports, in either event the accurate report will remain "on file." And, perhaps most important, extending protection to Officer Jackler's speech insures that the federal courts do not lend their imprimatur to criminal conduct by law enforcement officials.

Like Judge Calabresi, NPAP does not understand *Garcetti* to hold that employee speech can only be protected if it has a relevant citizen analogue. Rather, we view the absence of a relevant citizen analogue as a potentially relevant factor in determining whether the employee's speech was made pursuant to his/her official duties. *Weintraub*, 593 F.3d at 206 (Calabresi, J., dissenting). In reaching its conclusion, the district court ignored the fact that Officer Jackler's refusal to alter his report has more in common with citizen speech than a law

enforcement's official duties. *Weintraub*, 593 F.3d at 203-04.

NPAP offers the following real life hypothetical. Police officers suspect that Mr. Smith is involved in a drug conspiracy. They detain Mr. Doe because they suspect (correctly) that he has information concerning drug activity - although, in fact, he has no information whatsoever that Mr. Smith has committed any crime. While Mr. Doe is detained, the police officers tell him (Mr. Doe) that if he does not cooperate with their investigation and implicate Mr. Smith, then the officers will arrest him. Mr. Doe, however, has not committed any crimes and does not know anything about criminal activity by Mr. Smith. Yet, he is confronted with the Hobson's choice of "cooperation" or prosecution.

The anti-retaliation provisions of Title VII also provide a relevant citizen analogue. For example, an employer may not retaliate against an employee who refuses to give false testimony in connection with an employer's defense against a claim of discrimination. See *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 174 (2d Cir. 2005). See also *Kubicko v. Ogden Logistics Servs.*, 181 F.3d 544, 554 (4th Cir. 1999) (employee who reported sexual harassment of a co-worker by a supervisor and who subsequently participated in the internal investigation engaged in protected activity even if the employer found that the witness's statement was unreasonable).

General Municipal Law § 50-k provides further support for

the conclusion that Officer Jackler was not speaking pursuant to his official duties. Section 50-k provides, in relevant part, as follows:

2. the city shall provide for the defense of an employee of any agency in any civil action or proceeding in any state or federal court including actions under sections nineteen hundred eighty-one through nineteen hundred eighty-eight of title forty-two of the United States code arising out of any alleged act or omission which the corporation counsel finds occurred while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged act or omission occurred.

3. The city shall indemnify and save harmless its employees in the amount of any judgment obtained against such employees in any state or federal court, or in the amount of any settlement of a claim approved by the corporation counsel and the comptroller, provided that the act or omission from which such judgment or settlement arose occurred while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged damages were sustained; the duty to indemnify and save harmless prescribed by this subdivision shall not arise where the injury or damage resulted from intentional wrongdoing or recklessness on the part of the employee.

N.Y. Gen. Mun. L. § 50-k(3).

By its terms, neither Sections 50-k(2) nor 50-k(3) would allow the City of Middletown to indemnify Officer Jackler if he were sued by Jones for violation of his federal constitutional

rights and the jury found that Officer Jackler had falsified his January 11<sup>th</sup> report because his conduct would not be part of his official job duties. See *Jocks v. Tavernier*, 97 F. Supp.2d 303, 313-14 (E.D.N.Y. 2000) (appropriate for the City of New York to deny indemnification to a member of the NYPD where the Corporation Counsel's Officer reasonably determined that the officer had engaged in criminal conduct), *vacated on other grounds*, 316 F.3d 128 (2d Cir. 2003); *Bolusi v. City of New York*, 249 A.D.2d 134, 134 (1<sup>st</sup> Dep't 1998) (appropriate to deny representation based upon determination that police Officer did not testify truthfully at his partner's criminal trial).<sup>5</sup>

The existence of the Blue Wall of Silence and the repercussions for those who violate it are well documented. The Mollen Commission issued its Report in July 1994. In the Report, the Commission described how the Blue Wall of Silence (referred to as the Code of Silence) operated to perpetuate police corruption by insuring that even honest officers stand mum in the face of criminal conduct by their colleagues. Report at 51. The Report also identified the consequences suffered by officers who

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<sup>5</sup> In *Committee of the Interns and Residents v. Dinkins*, 86 N.Y.2d 478, 484-85 (1995), the City of New York argued that arbitration of a particular dispute regarding its refusal to represent and indemnify a hospital employee violated public policy and Section 50-k because the physician had been convicted of a crime arising from the facts underlying the civil litigation. While the Court of Appeals agreed with the City's position, *id.* at 484, it ultimately held that the issue was for the arbitrator to decide.

broke the code of silence:

Officers who report misconduct are ostracized and harassed; become targets of complaints and even physical threats; and are made to fear that they will be left alone on the streets in a time of crisis. This draconian enforcement of the code of silence fuels corruption because it makes corrupt cops feel protected and invulnerable.

Report at 53.

*Jeffes v. Barnes*, 208 F.3d 49 (2d Cir. 2000), is a vivid reminder of the perils law enforcement officers confront when they break the Code of Silence, and the consequences that ensue when commanding officers fail to combat it--never mind uphold it. In *Jeffes*, plaintiffs, each of whom were correction officers assigned to the Schenectady County Jail (the "Jail"), alleged that they were subjected to repeated and vicious harassment as a result of their cooperation with an FBI-led investigation into flagrant abuses of inmates at the hands of corrections officers at the Jail. Specifically, plaintiffs alleged that they experienced the following harassment:

The reprisals included numerous menacing telephone calls from the Jail; a poster depicting Jeffes with his eyes blacked out, and bearing the words "NOW MAYBE I CAN DIE" . . . ; explicit threats of physical harm; a visit to Jeffes's home by unidentified men who told his wife that his Jail-connected acts were likely to cause Jeffes to be injured; acts that exposed Jeffes's home to the risk of destruction by fire; and the endangerment of Jeffes's life when harassing officers interfered with his attempts to communicate by walkie-talkie from the Jail's

cell blocks. . . . After Carlos testified at the trial of the four officers indicted in connection with that incident, Barnes called him a "'rat'" and a "'snitch'" and promised retribution. . . .

*Jeffes*, 208 F.3d at 62-63.

Equally disturbing is that the County Sheriff, who was best suited to protect Jail employees, *Jeffes*, 208 F.3d at 60, not only knew of, and acquiesced in, the harassment of his employees, but actually participated in the harassment. *Id.* at 62-64. Thus, *Jeffes* also demonstrates what can and does happen when commanding officers tolerate the Code of Silence. While Commanding Officers who do not tolerate misconduct represent the first and best line of defense against officer misconduct, Commanding Officers, like Chief Byrne here, who tolerate, either passively or actively, police misconduct all but doom the continued employment of law enforcement officers who risk their lives by reporting official misconduct. *Jeffes*, 208 F.3d at 62-64 (plaintiffs introduced sufficient evidence of a code of silence at the Jail, and the County Sheriff's personal involvement in the perpetuation of the code of silence, to permit the plaintiffs to proceed with their *Monell* claim that there existed a code of silence at the County jail).<sup>6</sup>

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<sup>6</sup> Unfortunately, the Blue Wall of Silence is alive and well. In addition to this matter, see, e.g., *Ventura v. Town of Manchester*, No. 06 CV 630, 2008 U.S. Dist. LEXIS 66957, \*58 (D. Ct. Sep. 2, 2008) ("a reasonable jury could conclude that "there existed a custom or practice within the [MPD] of retaliating

The allegations contained in Officer Jackler's complaint represent a cautionary tale: law enforcement officers who report police misconduct suffer dire consequences. Neither *Garcetti* nor *Weintraub* require this Court to sanction misconduct and lawlessness by government officials or to turn its back on those who report it. Yet, this is the result of the district court's decision. This Court should not countenance such a result.

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against officers who cross the thin blue line") (internal quotations omitted); *Barry v. New York City Police Dep't*, No. 01 Civ. 10627, 2004 U.S. Dist. LEXIS 5951, \*34-42 (S.D.N.Y. Apr. 7, 2004) (same); *Katt v. City of New York*, 151 F. Supp.2d 313, 359 & n.38 (S.D.N.Y. 2001) (Lynch, J.), *aff'd*, 60 Fed. Appx. 357 (2d Cir. 2003) (Summary Order); *White-Ruiz v. City of New York*, No. 93 Civ. 7233, 1996 U.S. Dist. LEXIS 15571 (S.D.N.Y. Oct. 22, 1996) (same); *Ariza v. City of New York*, No. 93-5287, 1996 U.S. Dist. LEXIS 20250 1996 U.S. 20250 (E.D.N.Y. Mar. 7, 1996) (same).

CONCLUSION

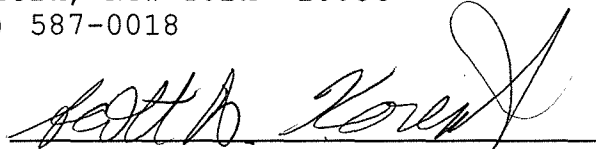
For the foregoing reasons, this Court should reverse the decision of the district court, and remand this matter for further proceedings.

Dated: New York, New York  
January 3, 2011

Respectfully submitted,

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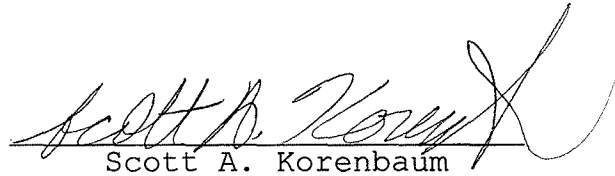
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CERTIFICATE OF COMPLIANCE

I, Scott A. Korenbaum, hereby certify, pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, that this brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 3,925 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), as determined by the word count of the word-processing system used to prepare this brief.

Dated: New York, New York  
January 3, 2011

  
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