QUIETING DISRUPTION: THE MISTAKE OF CURTAILING PUBLIC EMPLOYEES' FREE SPEECH UNDER *GARCETTI V. CEBALLOS*

by
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This Note critiques the United States Supreme Court's 2006 decision in Garcetti v. Ceballos, *which restricted public employees' free speech rights. Building on more than fifty years of jurisprudence, the Court created a new threshold test denying First Amendment protection for speech made pursuant to duties. The author argues that this new rule creates more problems than it solves. The flaws in the Court's reasoning include suggesting its formulation be a per se rule, trapping employees in a winless corner, and vaguely directing employers to not respond to the pursuant-to-duties formulation by writing very broad job descriptions. The Note suggests several ways to refine the Court's inquiry to better protect both employees' jobs and society's interest in hearing what public employees have to say.*

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I. INTRODUCTION

Watch your mouth or relinquish your job. That Draconian choice for public employees, once representing the difference between the right to free speech and the privilege of employment,[1] has long since given way to greater, though still limited, First Amendment protections. The United States Supreme Court's more recent decision in *Garcetti v. Ceballos*[2] thrusts the newest limit upon public employees, creating an unnecessary threshold test to determine whether speech merits First Amendment protection when met with a retaliatory employment action. Namely, *Garcetti* asks whether the speech at issue is made pursuant to that employee's official job duties. This modified test (watch your mouth if speaking those words is part of your job) fails to adequately protect First Amendment freedoms. This Note examines how courts are working

[1] McAuliffe v. Mayor of New Bedford, 29 N.E. 517 (Mass. 1892) (stating Justice Oliver Wendell Holmes's well-known declaration that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman," a tenet that was roundly rejected in Shelton v. Tucker, 364 U.S. 479 (1960)).

[2] Garcetti v. Ceballos, 126 S. Ct. 1951 (2006).

within this new doctrinal framework, and suggests ways future courts may fairly adjudicate public employees' claims.

Part II of this Note explores the importance of First Amendment protections for public employees' speech, noting not only the individual employee's obvious interest in keeping her job while retaining her constitutional rights, but also society's interest in hearing the speech and, perhaps less obviously, the government's ultimate institutional interests. Part III briefly canvasses the Supreme Court's pre-*Garcetti* doctrinal evolution for background and also illustrates different lower court approaches during that time. The *Garcetti* decision itself, and its aftermath, are Part IV's focus, including arguments both supporting and cautioning against the Supreme Court's new approach. Finally, Part V suggests how courts should apply the new approach. Using the *Garcetti* Court's own suggested limitations plus other possible approaches, this Note explores the benefits and drawbacks of various analytical avenues and concludes that the Supreme Court should announce that *Garcetti* is not a per se rule and therefore fold its "pursuant to duties" inquiry into the existing doctrinal framework. Short of that, the lower courts' best option is to narrowly read job descriptions so that important speech is not denied protection under the current *Garcetti* threshold test.

II. PUBLIC EMPLOYEES' RIGHT TO FREE SPEECH IS A VITALLY IMPORTANT ISSUE

More than two centuries deep in our constitutional protections, Americans recognize First Amendment free speech rights as among our most sacred, despite the many limits upon them. Public employment retaliation cases contain an immediately obvious tension: the government has greater power to limit speech when acting as employer rather than as sovereign, but the content of the speech often at issue sits atop the ladder of protected speech. Expressions about "public issues" are prominent at the "highest rung of the hierarchy of First Amendment values"[3] and speech regarding governmental affairs is "at the heart of the First Amendment's protection."[4] In contrast, commercial speech and some entertainment speech are less strenuously guarded, though still entitled to constitutional protection.[5] Because the government-related content of public employees' speech often warrants the utmost protection, special care should be used in crafting new doctrinal boundaries around it. This hesitation to knock such speech all the way from the First Amendment's highest rung down to the ground remains even after factoring in the

[3] Connick v. Myers, 461 U.S. 138, 145 (1983).

[4] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978).

[5] Roe v. City of San Diego, 356 F.3d 1108, 1113–14 (9th Cir.) (also naming as unprotected speech categories: child pornography, imminent incitement, true threats, obscenity, libel, and fighting words), *rev'd on other grounds*, 543 U.S. 77 (2004).

government's stronger right to regulate speech when acting as an employer.[6]

While vital as a fundamental right in the abstract, there are also practical reasons to protect public employees' speech. The federal, state, and local governments in the United States employed more than 21 million people in 2002.[7] Data from 2005 shows 5.4% of the nation's entire populace was employed by state and local government and another 1% by federal government.[8] Clearly, limits on speech potentially affect millions of people each day at work.

Beyond employees' interests, there are other reasons to zealously guard public employees' free speech rights. First, the Constitution as a document better retains its credibility and force when its enumerated rights are upheld. Second, citizens in general deserve to know when their government acts against its citizens' collective interest or in an alarming manner. To that end, there is particular value in the concrete, insider view certain citizens gain as government employees. The *Garcetti* Court itself recognized the Supreme Court's former decisions as "acknowledg[ing] the necessity for informed, vibrant dialogue in a democratic society" and "suggest[ing] . . . that widespread costs may arise when dialogue is repressed."[9] The need for balance is clear. Taxpayers want an efficiently run government and disruptive speech can hasten inefficiency. On the other hand, an employee who feels her voice is heard may feel more committed to her job and employer, therefore decreasing job turnover and increasing work efficiency.

Perhaps less intuitively, there are reasons for the government itself to favor the maximum tolerable First Amendment protection for its employees. As an institution, the government may lose good thoughts or people by forcing employees to remain mum when it would fall under employees' job duties to question an issue of public concern. That can ultimately cause a less efficient government that is blind to its own waste and corruption, even though the employer's smooth operations are what increased limits on speech supposedly protect. At the day-to-day level,

[6] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (proposing a careful weighing of interests in recognition that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general").

[7] U.S. CENSUS BUREAU, 2002 CENSUS OF GOVERNMENTS, COMPENDIUM OF PUBLIC EMPLOYMENT: 2002, at 1 (Sept. 2004) *available at* http://www.census.gov/govs/www/index.html.

[8] U.S. Census Bureau, Federal, State, and Local Governments, http://www.census.gov/govs/www/index.html. The estimated U.S. population in July 2005 was 295,859,883. State and local employees numbered 15,923,650 when measuring as full-time equivalent employment (the number of full-time employees who could be employed if hours worked by part-time employees could have been worked by a full-time employees, which therefore lessens the raw number of people affected as "employees"). The total raw number of civilian federal employees was 2,720,462 in 2005, including both full- and part-time workers.

[9] Garcetti v. Ceballos, 126 S. Ct. 1951, 1959 (2006).

Garcetti's pursuant to duties formulation encourages employees to air grievances in public forums rather than in private. In many cases, this will surely prove more disruptive than if the employee had attacked the issue internally.

It would be unfair to accuse the Court of ignoring these concerns as it walks the same tightrope it has negotiated throughout this line of cases. This time, however, the Court has tipped too far to one side.

III. PRE-*GARCETTI* CASES RIPENED THE ATMOSPHERE FOR DOCTRINAL CHANGE

A. The Supreme Court's Precedent Already Built a Solid Framework

Free speech is not a right public employees have enjoyed since the dawn of our nation. Although free speech is a fundamental right the Constitution guarantees, public employees in the mid-twentieth century could not successfully argue it as a basis for challenging an adverse employment action. In 1952, the Court reasoned in *Adler v. Board of Education*[10] that "[while] it is clear that such persons have the right under our law to assemble, speak, think and believe as they will . . . [i]t is equally clear that they have no right to work for the State . . . on their own terms."[11] In other words, public employees (or hopeful applicants for the job) wishing to exercise their free speech rights had to forgo the privilege of public employment if the two conflicted.[12] That thinking has long since been rejected,[13] however, making *Garcetti*'s pursuant to duties inquiry just the latest in a string of tests sculpting free speech jurisprudence. It is necessary to understand this doctrinal evolution, as well as how the appellate courts later split in their approaches to First Amendment protections, in order to understand why the Court arrived at its latest limiting principle in *Garcetti*.

Sixteen years after *Adler*, the Court held that a public school teacher may freely express his dismay over school board decisions without being discharged from his job.[14] Thus, when Marvin Pickering wrote a letter to the editor criticizing school revenue handling, though "basically, an attack on the School Board," it was not a route to dismissal.[15] The *Pickering* Court found it centrally important that freely discussing issues of public importance is "the core value" of free speech, and teachers are

[10] Adler v. Bd. of Educ., 342 U.S. 485 (1952).

[11] *Id.* at 492.

[12] *Id.* at 496 (deciding that the Feinberg Law, listing Communists and thereby disqualifying them as teachers, did not violate First Amendment rights).

[13] *See* Shelton v. Tucker, 364 U.S. 479 (1960); Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).

[14] Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

[15] *Id.* at 566.

exactly the citizens with the most "informed and definite opinions" on the best expenditures of public funds in schools.[16]

That case gave birth to the *Pickering* balancing test, weighing the employee's interest in speaking against the government's interest in an undisrupted workplace.[17] It is on this bedrock of public employment free speech jurisprudence that the Court erected more recent decisions. In 1977, the Court loosened the lid slightly, permitting adverse employment decisions when the employer shows it still would have reached the same employment decision absent the employee's protected speech.[18] Two years later, the Court's tinkering went the other way, declaring that a public employee communicating her opinions privately to her employer rather than in a public forum does not surrender her First Amendment rights on that basis alone.[19]

Another landmark case, *Connick v. Myers*, made clear that whether the speech's content is of "public concern" is determinative.[20] Clearly concerned with the burden on government if every employment grievance could be brought to court under the banner of the First Amendment, the Court clarified that only speech of public concern is actionable.[21] Although a vague test, the Court gave guidelines to determine "public concern" matters by examining the "content, form, and context . . . as revealed by the whole record."[22]

Even while fine-tuning its doctrine,[23] the Court has consistently applied the *Connick-Pickering* approach, asking first whether the speech at issue is a matter of public concern, and if so, whether the interests in allowing the speech are outweighed by the government's interest in smoothly operating its enterprise. For example, following the attempted assassination of President Reagan, a law enforcement office employee remarked to a coworker: "If they go for him again, I hope they get him."[24]

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[16] *Id.* at 572–73.

[17] *Id.* at 568.

[18] Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

[19] Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 415–16 (1979) ("Neither the [First] Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public.").

[20] *Connick*, 461 U.S. 138 (1983); *see Pickering*, 391 U.S. at 571–74 (calling school funding "a matter of legitimate public concern" and weighing the employee's interest in speech more heavily than his employers' interest when the employee speaks about matters "currently the subject of public attention" which do not impact his job performance or school operations).

[21] *Connick,* 461 U.S. at 143, 149.

[22] *Id.* at 147–48.

[23] *See, e.g.,* Waters v. Churchill, 511 U.S. 661 (1994) (holding that an employer must do a reasonable investigation to learn what speech was made, and act based upon a good faith belief; the case is often cited for the proposition that an employer can fire its employee based on a reasonable belief of the speech's content rather than what was actually said).

[24] Rankin v. McPherson, 483 U.S. 378, 380 (1987).

The statement "plainly dealt with a matter of public concern" because it was made in reference to Reagan's policies and followed a very public news story of an assassination attempt.[25] Having passed the *Connick* analytical step, the Court next weighed the employee's interest in speaking those words against her employer's interest in providing efficient public services.[26] Even though that employer was a deputy constable charged with upholding the law (which presumably includes disavowing pro-crime statements), he failed to prove he discharged the employee based on concern over disruption to the office.[27] Instead, the employer made his discharge decision based on the content of the employee's speech. That action failed the *Pickering* balancing test and thus entitled the employee to First Amendment protection.[28]

B. The Gathering Storm—The Circuit Split Forecast Garcetti

Beneath this surface, however, lower court decisions revealed clear cracks in the jurisprudential façade.[29] The Seventh and Ninth Circuits illustrate this split between courts inching toward more nuanced inquiries to shut out employees' claims and those stretching doctrine to protect employees' speech.

1. The Seventh Circuit Exemplifies a Restrictive Approach

Not every public employee found safe harbor under the *Connick-Pickering* analytical line. Some courts narrowly read precedent or tacked on additional inquiries to deny First Amendment protection. In this restrictive vein, the Seventh Circuit moved several years ago to an approach asking whether speech was made pursuant to duties. In *Gonzalez v. City of Chicago*, a police officer assigned to internal investigations wrote a report about police misconduct.[30] When a new job left him working directly with officers impacted by his previous investigation, Officer Gonzalez claimed to be greeted with hostility, poor evaluations, suspension, and ultimately termination.[31] Although

[25] *Id.* at 386.

[26] *Id.* at 388.

[27] *Id.* at 388–89 (finding Constable Rankin never asked to whom the employee made the statement or whether it had disrupted the office, and that he also failed to show anyone outside the office heard the statement so as to damage his office's reputation).

[28] *Id.* at 392.

[29] My aim is not to rehash the differences between various circuits' competing interpretive methods, except to the extent necessary to examine the need, or lack of need, for the newest test presented in *Garcetti,* and to examine possible solutions to problems the doctrine poses.

[30] Gonzalez v. City of Chicago, 239 F.3d 939, 940 (7th Cir. 2001).

[31] *Id.*

admitting police misconduct is a matter of public concern,[32] the court denied First Amendment protection because Officer Gonzalez was required to pen the report as a job duty.[33] Relying on *Connick*'s statement that judicial protection is generally unavailable "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest,"[34] the *Gonzalez* court zeroed in on "as a citizen upon matters of public concern" to reject the claim because it was not made by "a citizen." In doing so, the court ignored *Connick*'s latter phrase contrasting employees speaking of personal interest issues. In other words, *Gonzalez* took *Connick*'s statement out of context because *Connick* distinguished two situations without reaching the case of someone speaking as an *employee* speaking about matters of *public concern*, the issue in *Gonzalez*. In doing so, the court said Officer Gonzalez was "clearly acting entirely in an employment capacity" when writing a report as a "routine requirement of the job"; because the context of his speech was "pursuant to duties of the job" he was not acting "as a citizen" under *Connick* and therefore earned no First Amendment protection.[35]

In the subsequent *Schad v. Jones*,[36] when Milwaukee police officer George Schad told another officer where to find a fugitive despite lacking authority to give him that information, the Seventh Circuit labeled the speech an "ordinary matter[] of internal operation and lacking connection to 'any matter of political, social, or other concern to the community.'"[37] Although public safety provided by police officers is clearly a matter of public concern, the court found it dispositive that Officer Schad relayed information to another police officer in a routine way, rather than informing the public.[38] Adopting *Gonzalez*'s "pursuant to duties" language, the *Schad* court noted that both Officer Schad and the police chief wanted the fugitive safely arrested and that Officer Schad never critiqued the police chief, instead agreeing to protocol and then failing to follow desired procedure.[39] Again, the Seventh Circuit declined to protect speech made pursuant to duties.

Public employees did sometimes find First Amendment protection in the Seventh Circuit. A police detective claiming retaliation after

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[32] *Id.* at 941. Indeed, the Seventh Circuit has stated "[i]t would be difficult to find a matter of greater public concern in a large metropolitan area than police protection and public safety." Auriemma v. Rice, 910 F.2d 1449, 1460 (7th Cir. 1990).

[33] *Gonzalez,* 239 F.3d at 942.

[34] Connick v. Myers, 461 U.S. 138, 147 (1983).

[35] *Gonzalez*, 239 F.3d at 941.

[36] 415 F.3d 671 (7th Cir. 2005).

[37] *Id.* at 674 (citation omitted).

[38] *Id.* at 676 (noting that while speech does not have to be directed at the public to qualify under *Connick*, an employee "choosing a form of speech routinely used for intra-office communications may suggest that the employee did not set out to speak as a citizen").

[39] *Id.* at 677.

investigating a well-connected individual for drug activity validly stated a First Amendment claim.[40] There, after an informant told police detective Octavio Delgado that a certain drug house regular was a public official's spouse (and that public official was in turn the police chief's good friend), a superior ordered Delgado to interview the informant and then write a memorandum.[41] However, upon learning of the memo, the police chief immediately instructed the officers to keep the matter quiet, then transferred Delgado the following day.[42] Asking simply whether the speech "addresses a matter of public concern,"[43] the court began with an analysis of content, form, and context.[44] Communicating information "essential to a complete and objective investigation of serious criminal activity" was "[c]ertainly" a matter of public concern in content.[45] The court distinguished *Gonzalez*, where the officer acted wholly pursuant to duties in writing reports and could have been fired for failing to do so.[46] Here, despite a direct order and professional obligations to report official wrongdoing, the court thought Delgado had "considerable discretion about how he communicated the information up the chain of command."[47] Thus the Seventh Circuit limited the pursuant to duties distinction to cases where the employee "routine[ly]" does "assigned" job tasks and where there is "no suggestion of public motivation."[48] Delgado stated a claim surviving *Connick* at the pleading stage because he inserted additional facts into his memo, showing independent discretion exercised above rote duties.[49]

The Seventh Circuit's approach had important distinctions from the subsequent *Garcetti* rule. First, it confined its pursuant to duties analysis as part of the *Connick* public concern test rather than inserting a separate threshold test. Second, the Seventh Circuit repeatedly and specifically declined to adopt a per se rule like *Garcetti*, noting that certain circumstances could afford an employee protection even when speaking

[40] Delgado v. Jones, 282 F.3d 511 (7th Cir. 2002).

[41] *Id.* at 514.

[42] *Id.* at 514–15 (after the unorthodox transfer order, Delgado was forced to take a drug test, placed under investigation by internal affairs for interviewing the informant against department protocol, and told his former supervisors were forbidden from talking to him per order of the police chief).

[43] *Id.* at 516 (compare to "*as a citizen upon* matters of public concern" in *Gonzalez v. City of Chicago*, 239 F.3d 939, 940 (7th Cir. 2001) (emphasis added)).

[44] *Delgado,* 282 F.3d at 516–17 (also noting that content of speech is the most important of the three factors).

[45] *Id.* at 517–18.

[46] *Id.* at 518–19.

[47] *Id.* at 519 (noting that reporting criminal activity was consistent with his duties, but that he did not report the activity as merely a "rote, routine discharge of an assigned duty, as in *Gonzalez*").

[48] *Id.*

[49] *Id.* ("Effective police work would be hopelessly compromised if police officers could be retaliated against for communicating factual details . . . that bear on the department's ability to conduct an objective investigation.").

pursuant to official duties.[50] Less drastic than *Garcetti*, this approach protected government employers while giving employees at least some chance to state a First Amendment claim even when speaking pursuant to duties.

2. The Ninth Circuit's Decisions Illustrate an Expansive Approach

Meanwhile, Ninth Circuit decisions tested Supreme Court precedent in the other direction, espousing a policy of protecting speech as long as it did not solely concern the plaintiff's status as an employee.[51] In *Roe v. City of San Diego*, the Ninth Circuit loosely read "public concern" and, perhaps in a taste of what was to come in *Garcetti*, the Supreme Court promptly reversed what it called "not a close case."[52]

In *Roe*, a police officer produced sexually explicit videos of himself in uniform and then sold them over the Internet.[53] Roe was fired after his supervisors discovered the videos and traced them back to their employee, who removed the actual products from the online sale but did not change his online profile giving information on how to buy the videos.[54] The Ninth Circuit held that an "employee's speech [that] is not about his government employer or employment, is directed to a segment of the general public and occurs outside the workplace" is a matter of public concern precisely because it does *not* concern the employee's workplace status.[55] The public concern inquiry, then, exists not to define newsworthy matters but "to preempt a narrow category of claims involving speech related to a public employee's status in the workplace."[56] The court then denied it was using a new definition for public concern, defending itself as applying the time-honored standard to non-work-related speech by an off-duty employee.[57]

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[50] *Id.* (noting there could be "additional facts," and citing *Koch v. City of Hutchinson*, 847 F.2d 1436 (10th Cir. 1988), as another court rejecting a per se rule). *See also* Delgado, 282 F.3d at 519–20 (rejecting defendants' argument as overly broad because it would amount to a per se rule).

[51] *See* Roe v. City of San Diego, 356 F.3d 1108, 1116 (9th Cir.), *rev'd. on other grounds*, 543 U.S. 77 (2004).

[52] *See* City of San Diego v. Roe, 543 U.S. 77, 84 (2004) (The Court rejected the Ninth Circuit's decision that Roe's activities were not related to his employment, instead finding Roe's speech inflicted injury on his employer's mission so warranted no First Amendment protection. The Court concluded Roe's speech was not a matter of public concern, declining to reach the second step of the *Pickering* balancing test.).

[53] *Roe*, 356 F.3d at 1110.

[54] *Id.* at 1110–11. Although undercover police work revealed the seller's identity by linking his username to another listing for a tan police uniform previously used by the police department, the employee was not easily identifiable as a San Diego police officer to ordinary Internet users; he took at least some steps to hide his identity.

[55] *Id.* at 1119–20.

[56] *Id.* at 1119 (approving of *Berger v. Battaglia*, 779 F.2d 992 (4th Cir. 1985), which held that an employee's off-duty "blackface" routine was a matter of public concern because all speech is generally protected unless purely concerning the employee's personal concerns).

[57] *Id.* at 1120 n.9.

In reversing *Roe*, the Supreme Court noted that despite the public concern inquiry's gray margins, a matter of public concern must be the "subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public."[58] Thus, the Court cut off the Ninth Circuit's expansive reading of public concern.[59]

In an earlier broad interpretation of public concern, the Ninth Circuit upheld a judgment for a police officer in *McKinley v. City of Eloy*.[60] Officer McKinley was terminated after objecting to the city council's decision to withhold officers' annual raise.[61] Interestingly, the court called police compensation a public concern because it bears on a city's ability to retain quality police officers, though the Ninth Circuit would later cite compensation as an example of "merely complaining privately about matters personal to [employees]."[62] The *McKinley* court also grounded its public concern finding on the facts that relationships between city management and employees relate to government efficiency, and that the way "an elected official . . . deal[s] with diverse and sometimes opposing viewpoints from within government is an important attribute of public service about which the members of society are entitled to know."[63] This expansive language seemed to say employment actions taken in reaction to employees' speech are themselves a matter of public concern.

The broad language in the *McKinley* decision never reached the Supreme Court, but even some of the Ninth Circuit's less expansive interpretations of public concern were reversed, including *Ceballos v. Garcetti* itself.[64] There, Los Angles Deputy District Attorney Richard Ceballos investigated a defense attorney's claim that deputy sheriffs lied in a search warrant affidavit.[65] After conducting interviews and visiting the

[58] City of San Diego v. Roe, 543 U.S. 77, 83–84 (2004).

[59] The Court had earlier accepted similar reasoning in the D.C. Circuit, however. *See* Nat'l Treasury Employees Union v. United States, 990 F.2d 1271, 1273 (D.C. Cir. 1993) (reading "public concern" to ask whether speech relates to an interest outside the "employee's bureaucratic niche" and, like *Roe*, emphasizing the lack of connection to a workplace complaint rather than the strength of society's interest) *aff'd in part, rev'd in part*, United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 466 (1995) (agreeing, without criticizing the lower court's language, that the public concern test was met because the speech was "on matters of public concern rather than employee comment on matters related to personal status in the workplace" and noting employees' "speeches and articles . . . were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their Government employment.").

[60] 705 F.2d 1110 (9th Cir. 1983).

[61] *Id.* at 1112.

[62] *Roe,* 356 F.3d at 1116 (quoting Eberhardt v. O'Malley, 17 F.3d 1023, 1026 (7th Cir. 1994)).

[63] *McKinley,* 705 F.2d at 1114–15.

[64] Ceballos v. Garcetti, 361 F.3d 1168 (9th Cir. 2004), *rev'd*, 126 S. Ct. 1951 (2006).

[65] *Id.* at 1170–71.

crime scene, Ceballos agreed the affidavit was falsified.[66] He then wrote two memos discussing his findings, recommended the case be dismissed, and was subpoenaed to testify at a hearing on the defense counsel's motion to dismiss.[67] Because he pursued his challenge to the affidavit, Ceballos claimed, he was met with hostility from several supervisors and was therefore reassigned, transferred, and denied promotion.[68] The Ninth Circuit found Ceballos's speech to be of public concern and to survive the *Pickering* balancing test. First, the court noted that speech about corruption and misconduct by other government employees is "inherently" a matter of public concern; it then found the *Pickering* balance test to weigh in Ceballos's favor.[69] It went on to specifically reject the per se rule that would become the Supreme Court's pursuant to duties formulation in the case, arguing such a rule would violate *Connick*, harm whistleblowers, and conflict with at least seven circuits rejecting a per se approach.[70] One clear sentiment underpinned the Ninth Circuit's decision—the "mere fact" that wrongdoing was reported while acting pursuant to a routine duty should not alone destroy First Amendment protections.[71]

The Supreme Court disagreed that *Ceballos* conformed to the traditional *Connick-Pickering* analysis. In finding a matter of public concern, the Ninth Circuit erred by failing to also ask whether the speech "was made in Ceballos' capacity as a citizen" and in thinking that speaking "pursuant to an employment responsibility" does not strip an employee of free speech protections.[72] To be sure, the Ninth Circuit was not constantly in the Supreme Court's crosshairs. It protected speech when it seemed to fit cleanly as a matter of public concern[73] and rejected

[66] *Id.* at 1171.

[67] *Id.* (The Ninth Circuit stated that "[e]veryone agreed that the validity of the warrant was questionable" but that a supervisor nonetheless directed Ceballos to edit his first memo "to make it less accusatory of the deputy sheriff." Ceballos also claimed that when he later told another supervisor he was professionally obligated to provide the defense with his original memo in response to a motion challenging the search warrant, that supervisor directed him to edit all but one detective's statements out of the memo and to limit his own testimony at the hearing on the motion.).

[68] *Id.* at 1171–72.

[69] *Id.* at 1174, 1180.

[70] *Id.* at 1176–77 (citing the Second, Third, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits as refusing to adopt a per se formula). In a lengthy response to arguments raised by Judge O'Scannlain's special concurrence, the court argued that the Fourth Circuit alone was "moving toward" a per se rule, while the other circuits "point to the nearly unanimous opposition of the federal courts to the imposition of a per se rule denying all First Amendment protection to public employees' speech pursuant to their job-related duties." *Id.* at 1177 n.7.

[71] *Id.* at 1177.

[72] Garcetti v. Ceballos, 126 S. Ct. 1951, 1956 (2006).

[73] *See generally* Coszalter v. City of Salem, 320 F.3d 968 (9th Cir. 2003) (employee reported health and safety dangers to the appropriate state regulatory agency).

claims lacking public concern.[74] Nonetheless, cases like *Roe* and *Ceballos* failed to withstand Supreme Court scrutiny.

IV. THE *GARCETTI* DECISION SPAWNED A PROBLEMATIC AFTERMATH

Against this fissured backdrop, the Supreme Court considered the alleged retaliatory employment actions against Los Angeles Deputy District Attorney Richard Ceballos after he continued to pursue accusations made in his memorandum.[75] Reversing the Ninth Circuit,[76] the Court held for the first time that public employees speaking "pursuant to their official duties" are "not speaking as citizens for First Amendment purposes" and therefore warrant no First Amendment protection from employer actions.[77] The Supreme Court had previously limited speech based on factors like employee status and speech content[78] but it had never gone this far.

Justice Kennedy's majority opinion[79] first retraced prior decisions to illustrate the main principles the Court should protect.[80] Examining Ceballos's claim against that backdrop, Kennedy wrote the "controlling factor . . . is that his expressions were made pursuant to his duties as a calendar deputy."[81] He distinguished this point from the facts that Ceballos spoke inside the office rather than publicly and that the memo's topic concerned Ceballos's employment; neither of these were dispositive.[82] In those latter circumstances alone, Kennedy noted, First Amendment protection may still kick in.[83] Driving home the point that speaking pursuant to job duties is the true test, Kennedy wrote it is

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[74] *See generally* Havekost v. U.S. Dep't of the Navy, 925 F.2d 316 (9th Cir. 1991) (holding dress code and scheduling were not matters of public concern, but instead common workplace grievances).

[75] The Court heard arguments on the case in October 2005, while Justice O'Connor was still serving on the Court, and then a second time in March 2006, following her retirement and replacement by Justice Alito. *See* David L. Hudson Jr., *Free Speech Case Points Up Change In Court: Alito's Presence May Have Tipped Ruling Against Public Employee*, ABA JOURNAL E-REPORT, June 2, 2006.

[76] The appellate court had previously reversed the district court's grant of summary judgment for defendants, and remanded the case back to the lower court before cert was granted. *See* Ceballos v. Garcetti, 361 F.3d 1168 (9th Cir. 2004).

[77] *Garcetti,* 126 S. Ct. at 1960.

[78] Connick v. Myers, 461 U.S. 138, 147 (1983) ("when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum").

[79] Kennedy was joined by Justices Roberts, Scalia, Thomas and Alito for a 5-4 majority; Justices Stevens and Breyer each filed separate dissents, and Justice Souter was joined in dissent by Justices Stevens and Ginsburg.

[80] *Garcetti*, 126 S. Ct. at 1957–59.

[81] *Id.* at 1959–60.

[82] *Id.* at 1959.

[83] *Id.*

"immaterial whether [Ceballos] experienced some personal gratification from writing the memo; his First Amendment rights do not depend on his job satisfaction."[84] In essence, Los Angeles County created Ceballos's opportunity to write the memo by hiring him to do so and it was the county that therefore had the right to its chosen "speech."[85]

A. The Case for the Garcetti *Inquiry is Weak*

The Court is not completely off-base to search for a tighter solution. First, judicial intrusion into employers' affairs, including associated costs, arguably weighs in favor of the new *Garcetti* inquiry. A more lax approach, the Court maintained, would convert courts into a permanent babysitter of employer-employee communications.[86] Raising both federalism and separation of powers concerns,[87] the Court summarily moved on from this point, without acknowledging that its own holding also increases judicial involvement. Specifically, *Garcetti*'s more fact-specific pursuant to duties inquiry generates an entirely new issue to litigate, potentially increasing these cases' complexity. Rather than creating judicial oversight of communications sent within an office—the Court's concern—the new test instead creates judicial oversight of what an employee's job description entails. On the other hand, it is true the *Garcetti* inquiry will quickly eliminate cases where speech is clearly pursuant to duties, removing this batch of cases from litigation much earlier. It remains to be seen how substantially the rule will affect judicial involvement in these First Amendment cases.[88]

A more substantial argument for the *Garcetti* inquiry is protecting the government's efficiency interest. More workplace disruption leads to more inefficiency; the same public harmed by employees' curtailed free speech rights is also harmed when public services are slower or cost more tax dollars. While this concern is serious, it is also easily dealt with. First,

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[84] *Id.* at 1960.

[85] *Id.* The appellate court considered Ceballos's written memo only, but he also submitted evidence of critical public comments he later made, alleging them as another motivation for retaliation. *See* Brief for Respondent at 8, Garcetti v. Ceballos, 126 S. Ct. 1951 (2006) (No. 04-473).

[86] *Garcetti*, 126 S. Ct. at 1961.

[87] The Court apparently meant by thrusting federal courts into state executive branch affairs. Technically, because state courts could also hear these cases and because judicial branch employers would also be subject to the *Garcetti* rule, these concerns would not arise in every single case. However, the general point is taken.

[88] For example, the Fifth Circuit recently spent more than half its decision analyzing what *Garcetti* means by "pursuant to duties" and parsing through the specific words used in an employee memorandum to decide whether the memorandum was written from the "perspective" of a father and taxpayer or that of a public employee concerned with the use of funds affecting his daily job duties. *See* Williams v. Dallas Indep. Sch. Dist., 480 F.3d 689 (5th Cir. 2007). *But see* Mills v. City of Evansville, 452 F.3d 646 (7th Cir. 2006) (deciding with a very cursory glance that the plaintiff did not speak as a citizen).

those who found no problem with the Court's pre-*Garcetti* approach will argue against fixing what was never broken.[89] Second, even assuming *arguendo* that tinkering was needed because the old *Connick-Pickering* line inadequately protected government interests, there were at least two clear and less drastic options. Namely, the *Connick-Pickering* inquiry could be more strictly applied, or *Garcetti*'s pursuant to duties formulation could be adopted as an ad hoc rule where needed rather than the sweeping per se rule adopted here.[90]

B. Garcetti *Creates Serious Problems in Theory and Application*

Despite advanceable arguments supporting *Garcetti*, its dissenters, lower court cases, and common sense all show the pursuant to duties formulation generates more turmoil than it eases.

1. Garcetti *Creates a "Public Uproar Catch-22" For Employees*

Garcetti leaves some employees in a no-win situation. It forces those with certain job duties to step outside their jobs and take their grievances to a public forum, even though doing so causes its own dilemmas.

First, employers naturally dislike this route. In *Mt. Healthy v. Doyle*, a school district discharged a teacher, Doyle, partly because he called a radio station regarding the teacher dress code.[91] Under *Garcetti*, if an employee's job description includes formally commenting on rules of employee dress, that employee lacks First Amendment protection for doing so pursuant to duties if supervisors dislike the comment. However, *Mt. Healthy* illustrates that an employer may dislike an employee circumventing internal channels to instead complain on the local radio station. In fact, Doyle apologized following the public remark in recognition that he "should have made prior communication of his criticism to the school administration" and the superintendent's stated reasons for discharge specifically listed Doyle's choice to talk to the radio station about the school board's decision.[92] Clearly that employer did not appreciate the "concern . . . within this community"[93] created by the public disclosure, and the Court would be remiss to think that school superintendent is alone in being embarrassed when dirty laundry is publicly aired.

Second, some courts have found public uproar resulting from publicly-made speech to weigh *against* First Amendment protection. The

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[89] That is, the in-place *Connick-Pickering* framework already teased out disruptive behavior seriously impacting the provision of government services.

[90] Part V more fully considers these options.

[91] Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 281–83 (1977) (the teacher's discharge was also prompted by unprofessional behavior including obscene gestures and language to students, but the district court found the radio station call played a "substantial" part in the discharge decision).

[92] *Id.* at 282–83.

[93] *Id.* at n.1.

Third Circuit noted that when "arousal of public controversy exacerbates the disruption of public service, then it weighs against, not for, first amendment protection in the *Pickering* balance."[94] That court, finding an assistant district attorney failed to garner constitutional protections for criticizing the district attorney in the newspaper, said the *Pickering* determination turned on whether the employee-employer relationship has been "seriously undermined" by public statements.[95] But *Garcetti* forces employees who want to keep their jobs to either close their mouths or go public. This creates a trap in like-minded courts, since either way the employee's actions caution against First Amendment protection. Some employees are therefore channeled into a winless corner: unprotected whether they cause or avoid a public uproar. The result will be inhibited speech.

A third consideration further highlights the public uproar catch-22. The *Garcetti* court blithely directed public employees to a "powerful network" of whistleblowing laws for extraconstitutional protection.[96] However, the very statutes the Court suggested using often contain a requirement the employee first warn his boss before going public,[97] a statutory obligation that could run afoul of the *Garcetti* test. Other states bar employers from imposing a whistleblower warning requirement.[98] From this patchwork, public employees apparently must discern whether they are free to directly expose wrongdoers or whether complying with statutory prerequisites will cost them First Amendment protections.

2. Doing One's Job and Failing To Do One's Job Should Not Both be Grounds For Dismissal

Garcetti tells employees they lack First Amendment protections if they speak per prescribed job duties. But common sense says failing to do a job-required task is also grounds for an adverse employment action. For example, if district attorneys with Ceballos's job description now refuse to write memos because they fear discipline, their superiors could just as easily discharge them for not completing job tasks. Moreover, a district attorney allowing criminal charges to be brought when he knows probable cause is lacking is breaching his professional duty.[99]

This contradiction was revealed when the Seventh Circuit used its *Garcetti*-style analysis in the earlier *Gonzalez* case.[100] That court refused to recognize protection for internal investigation reports about police misconduct written pursuant to Officer Gonzalez's duties. Those reports

[94] Sprague v. Fitzpatrick, 546 F.2d 560, 566 (3d Cir. 1976).

[95] *Id.*

[96] Garcetti v. Ceballos, 126 S. Ct. 1951, 1962 (2006).

[97] *Id.* at 1971 n.10 (Souter, J., dissenting) (citing Idaho, Maine, Massachusetts, New Hampshire, New York, New Jersey, and Wyoming as imposing this requirement).

[98] *Id.* at 1971 n.11 (Souter, J., dissenting) (citing Kansas, Kentucky, Missouri, Oklahoma, and Oregon as examples).

[99] Gerstein v. Pugh, 420 U.S. 103, 121 n.22 (1975).

[100] Gonzalez v. City of Chicago, 239 F.3d 939, 941 (7th Cir. 2001).

were part of his job duties, as "[a] failure to carry out this particular speech—writing accurate reports of assigned investigations—would be a dereliction of Gonzalez's employment duties" and Gonzalez's attorney admitted his client "could have been fired had he not produced the reports."[101] This paradox leaves employees little wiggle room.

3. Government Misconduct is the Pinnacle of Public Concern, so Speech Alleging Misconduct Should be Encouraged

Although societal and governmental interests caution against disruption of government operations, as doctrinalized in the *Pickering* balancing test, a little chaos can be a good thing. As Justice Souter wrote in his *Garcetti* dissent, there is a "need actually to disrupt government if its officials are corrupt or dangerously incompetent."[102] Richard Ceballos voiced his belief about police wrongdoing during a scandalous period in the Los Angeles Police Department's history when dozens of officers lost their positions after egregiously corrupt acts were exposed.[103] More generally, those employees in a position to observe and expose corruption are often those higher up the chain, who have broader job responsibilities including reporting on the efficacy of department policies or on other employees' actions.

Government policy itself also begs public employees to expose corruption. Souter's dissent pointed to a Congressional concurrent resolution recognizing public employees' continuing obligations as U.S. citizens, agreeing that all government employees should "[p]ut loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department," and "[e]xpose corruption wherever discovered."[104] Richard Ceballos did not complain about a frivolous, not-enough-pencils-in-the-office topic, but rather a criminal prosecution he believed was moving forward on a bad affidavit. Both the defendant's liberty and the sanctity of constitutional guarantees were at stake, but the Court's per se rule gave the speech's content the same weight as any other concern expressed within the scope of official duties. That is, none.

4. Garcetti *Wrongly Allows Broadly Defined Job Duties, Despite the Court's Claims*

Brushing away concerns that too much speech could fall into its pursuant to duties pit, the *Garcetti* Court claimed to prohibit employers

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[101] *Id.* at 942.

[102] *Garcetti*, 126 S. Ct. at 1967.

[103] Brief for Respondent at 1–2, Garcetti v. Ceballos, 126 S. Ct. 1951 (2006) (No. 04-473) (citing OFFICE OF THE INSPECTOR GEN., RAMPART INDEPENDENT REVIEW PANEL REPORT 5 (2000), http://www.lacity.org/oig/isgrp1.htm). The LAPD was recovering from the Rampart scandal, in which the public learned dozens of officers had engaged in actions like planting evidence, falsifying police reports, conducting unauthorized searches, and obstructing justice, as well as physical brutalities including beatings and attempted murder, according to the review panel's report.

[104] *Garcetti*, 126 S. Ct. at 1966 n.4 (quoting Code of Ethics for Government Service, H. R. Con. Res. 175, 85th Cong., 72 Stat. B12 (1958)).

from writing "excessively broad job descriptions."[105] Despite its protests, its decision does exactly the opposite. First, the Court declined to delineate the boundaries of acceptable job descriptions for close cases.[106] Moreover, by using the word "excessively" to modify "broad," the court opened the door for employer arguments that, while it admittedly wrote a broad job description, it was not excessively so. The Court gave no guidepost by which to determine what would be "excessively broad" as opposed to just "pretty broad."

Insisting that common sense will adequately sort out which employees get constitutional protections and which do not,[107] the *Garcetti* Court said formal job descriptions should be shunned in favor of examining the actual expectations of each employee's job performance. This standard, or lack thereof, does not give employees a fair starting point from which to gauge their position objectively before speaking. It also opens the door for abuses. A government department taking in a known rabblerouser from another division could easily require the employee to give certain reports to supervisors, knowing those individualized expectations will cover the employee's speech if trouble ever arises.

5. The Garcetti *Doctrine's Application in Academia was Poorly Thought Out*

While *Garcetti* and the majority of the cases cited here involve law enforcement officials, all public employees fall under the *Garcetti* rubric. Among them, teachers and professors are disproportionately vulnerable to the new rule because of the very nature of their professions: not only are they are required to speak and write pursuant to their duties, but western civilization has long recognized the academic's role in instigating critical social discourse. Practically speaking, classroom teachers and professors represent one of the largest segments of the public employee pool, making this a widespread concern.[108] Disturbed by what he read as an overly broad decision, Souter's dissent pointed out *Garcetti*'s potential to swallow public university professors' speech and emphasized the American commitment "to safeguarding academic freedom . . . [which] is therefore a special concern of the First Amendment."[109]

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[105] *Id.* at 1961.

[106] *Id.* at 1962.

[107] Not all courts agree this will be such an easy inquiry. *See* Hailey v. City of Camden, No. 01-3967, 2006 WL 1875402, at *16 (D.N.J. July 5, 2006) (noting that, while it could easily avoid the *Garcetti* inquiry because the plaintiff spoke at city council meetings and to newspaper reporters, there is "no doubt that many courts will struggle to define the breadth of *Garcetti*").

[108] U.S. Census Bureau, State Government Employment Data (Mar. 2006), http://ftp2.census.gov/govs/apes/06stus.txt. Classroom teachers in elementary, secondary, and higher education comprise 15.7% of all state employees.

[109] *Garcetti,* 126 S. Ct. at 1970 (Souter, J., dissenting) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

In response to this dissenting objection, the Court declined to decide whether the *Garcetti* analysis will or will not "apply in the same manner" to cases where the speech in question is "related to scholarship or teaching."[110] Sidestepping the issue with just three sentences, the Court noted a possible exception to its per se rule, which only emphasizes the unworkability of the doctrine as a one-size-fits-all rule.

6. The Court Drew an Arbitrary Line in the Wrong Place

Whether the Court was just searching for a way to limit *Connick-Pickering* or anxious to implement the brewing pursuant to duties analysis specifically, the line it drew at job duties' scope seems arbitrary. If the paralegal on Richard Ceballos's case had noticed misrepresentations in a warrant and approached higher-ups, the paralegal could presumably enjoy First Amendment protections because nothing in his job description involves investigating and reporting on that situation. However, the paralegal's opportunity to observe and report any such wrongdoing stems sheerly from his employment with the county; the paralegal is no more acting "as a citizen" than did Ceballos in the actual case. It is a strange line to draw, given the Court's insistence that speech "that owes its existence to a public employee's professional responsibilities . . . simply reflects the exercise of employer control over what the employer itself has commissioned or created."[111] The Court distinguished the government's right to express itself however it wants (in a case where a public employee is speaking by virtue of the salary he receives) from the *Pickering* plaintiff who wrote a letter to the editor that had "no official significance and bore similarities to letters submitted by numerous citizens every day."[112] While Ceballos's hypothetical paralegal is not paid specifically to investigate and report on the validity of warrants, a concerned email he sent to supervisors would not be similar to something an ordinary citizen would do, either. The line-drawing is not as neat as the Court insisted.

The Court's rule would, however, allow Ceballos to write a letter to the editor voicing his concerns. This does not smooth over the wrinkles the rule creates. The Court insisted its approach allows supervisors to evaluate employees' performance,[113] and clearly an employer does need latitude to replace a poorly performing employee in a position involving discretion. However, as Justice Souter pointed out, the Court's language conceding possible First Amendment protections for employees speaking outside the course of their duties seems to protect an employee who

[110] *Id.* at 1962.

[111] *Id.* at 1960 (relying on *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) and citing that decision for the proposition that "[w]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes").

[112] *Id.*

[113] *Id.*

publicly *repeats* a statement made pursuant to duties.[114] Arguably, this helps justify the rule because it only removes constitutional protections from public employees' work assignments and not from employees themselves. However, it results in a paradoxical situation and, as noted, leads to problems forcing employees to publicly air dirty laundry.

7. The Per Se Rule Sweeps Too Broadly

Even in circuits where a pursuant to duties approach was already taken, courts generally restrained themselves from establishing a per se rule. The Seventh and Tenth Circuits both rejected an automatic exemption for course of duty statements,[115] the latter labeling the official duty context to be a "significant factor" under *Connick-Pickering*.[116] In many cases, speech pursuant to duties will not be of public concern and therefore fail *Connick*, and in others it will highlight the employee's inability to perform his job without disruption and fail *Pickering*.[117] Justice Stevens picked up on this point in his *Garcetti* dissent, agreeing that speech made pursuant to duties will sometimes be unprotected but rejecting as "senseless" a per se rule hinging on job descriptions.[118] While the Ninth Circuit's decision in *Ceballos v. Garcetti* arguably "painted with too broad a brush" by basically creating a per se rule finding all on-the-job speech to pass *Connick*'s requirements,[119] the Supreme Court has painted back over that old canvas with an equally wide brush.

In sum, speaking pursuant to duties should not be the dispositive factor in free speech analysis. The policy behind protecting public employees' speech furthers three main goals: informing society, ensuring employees' constitutional rights, and protecting government from unnecessary disruption. Making an exception to First Amendment protections only for speech made pursuant to job duties does nothing to further the first two policies. While it certainly furthers the third concern, the government employer's interest is more a limiting principle than a right itself. That is, a safety valve like the *Pickering* balancing test exists not because there is a core right of efficient government but because a fundamental right (free speech) has the potential to adversely impact the pragmatic concern of well-run government departments. Therefore, the Court should aim first to protect the right to free speech, then act to

[114] *Id.* at 1965 (citing the majority opinion at 1961). *See also* Brief for Respondent at 8, Garcetti v. Ceballos, 126 S. Ct. 1951 (2006) (No. 04-473) (Richard Ceballos also alleged his employee grievance was denied two days after he spoke at a Mexican-American Bar Association meeting about related official misconduct. Even if his memo garners no protection, this speech outside of work does not involve job duties and should face the *Connick-Pickering* analysis.).

[115] Gonzalez v. City of Chicago, 239 F.3d 939, 942 (7th Cir. 2001); Koch v. City of Hutchinson, 847 F.2d 1436, 1442 (10th Cir. 1988).

[116] *Koch*, 847 F.2d at 1442.

[117] *Id.* at 1442–43.

[118] *Garcetti*, 126 S. Ct. at 1962–63 (Stevens J., dissenting).

[119] Thomas E. Wheeler II, *Striking a Faustian Bargain: The Boundaries of Public Employee Free Speech Rights*, RES GESTAE, Sept. 2006, at 13, 17.

limit that right as needed, not the other way around. Creating a distinction where speech falls under a job description focuses primarily on efficient government and forgets the core purpose.

V. *GARCETTI* SHOULD BE FURTHER REFINED TO LIMIT ITS OVERREACHING IMPACT

Many lower courts faced with implementing the *Garcetti* inquiry have already distinguished close fact scenarios, though several circuits have also rejected employee claims.[120] It will remain to be seen whether limits on the per se rule, some of which the *Garcetti* Court itself suggested, provide a satisfactory solution to this overreaching approach. A survey of restraining principles reveals the best possible paths under the new doctrine.

A. The Garcetti *Court's Own Limiting Suggestions are Partial Solutions at Best*

Muffling its holding's adverse effects, the Court notes several limiting principles. While each has some value, none adequately counterbalance the damage created by the pursuant to duties formulation.

1. The Warning to Not Write Excessively Broad Job Descriptions is Too Vague

As noted, the Court denied that employers may create "excessively broad job descriptions" in order to proactively curtail employees' rights.[121] While too early to determine whether employers are affirmatively changing job descriptions to circumvent *Garcetti*, it is clear that courts are using the Court's language to interpret job descriptions. A court clerk who complained about poor court practices did not fall under the *Garcetti* test because, having no "official responsibility" to report on court operations, she spoke as a private citizen.[122] That district court dismissed that threshold pursuant to duties question in a single paragraph. In *Rohrbough v. University of Colorado Hospital Authority*,[123] another district court refused to let a nurse's formal job title, "Transplant Administrator—Heart," control. Given the plaintiff nurse's allegation that her actual on-call job duties were that of a patient liaison, the court reasoned that criticizing staffing issues and quality-of-care deficiencies were not part of her official job duties, despite the administrative title.[124]

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[120] *See, e.g.,* Williams v. Dallas Indep. Sch. Dist., 480 F.3d 689 (5th Cir. 2007); Green v. Bd. of County Comm'rs, 472 F.3d 794, 800–01 (10th Cir. 2007); McGee v. Pub. Water Supply Dist. #2, 471 F.3d 918, 921 (8th Cir. 2006).

[121] *Garcetti,* 126 S. Ct. at 1961.

[122] Brescia v. Sia, No. 05 Civ. 7948(CLB), 2006 WL 2734231, at *2 (S.D.N.Y. Sept. 22, 2006).

[123] Rohrbough v. Univ. of Colo. Hosp. Auth., No. 06-cv-00995-REB-MJW, 2006 WL 3262854 (D. Colo. Nov. 9, 2006).

[124] *Id.* at *2–3.

A third district court ruled that a police chief who began critical letters to the city council with the explicit qualifier that he was writing them as a "resident taxpayer" was indeed not writing pursuant to his official duties, unlike Richard Ceballos "whose job it was to write the communications."[125] While these three courts were unwilling to read job descriptions broadly, they also illustrate courts' broad discretion to interpret job duties under *Garcetti*'s vague warning. Other courts will doubtless use this same discretion to more expansively define job duties. Because the Court did not carefully delineate this parameter, it is an insufficient limiting principle in its current form.

2. Whistleblowing Statutes are Only Effective in Some Situations

Various statutes aim to protect employees who provide information about misconduct and violations of law.[126] These "whistleblower statutes" set up investigatory mechanisms, though they may not grant the compensatory rewards plaintiffs seek under other causes of action.

The advantages of using whistleblowing and labor statutes as an alternative to constitutionally-based claims seemed clear to the Court, which gave the matter two sentences. It stated first that uncovering inefficiencies and misconduct in government is very important, and second that "powerful" legislation is available for aspiring whistleblowers.[127] The Court then pointed to other safeguards in professional conduct codes, the Constitution, and other laws, but did not acknowledge any difficulties with this bypass to First Amendment claims.

There are, however, practical difficulties with this option. Ceballos sued under 42 U.S.C. section 1983, a vehicle granting remedies not necessarily available under comparable whistleblowing statutes.[128] As already stated, procedural requirements in whistleblowing statutes may be contrary to *Garcetti*'s test because some state statutes require whistleblowers first warn their boss, but a job description could potentially make such a warning an action taken pursuant to duties.

[125] Sassi v. Lou-Gould, No. 05 Civ 10450(CLB), 2007 WL 635579, at *2–3 (S.D.N.Y. Feb. 27, 2007) (The court denied summary judgment for the employer, despite its argument that "merely characterizing his statements as being made 'in his capacity as resident and taxpayer' is not the sole standard; otherwise individuals could easily cloak themselves in First Amendment protection by stating such." In response, the court did concede the police chief "has shown an uncanny ability to conform his written words to current federal case law.").

[126] The Court cites 5 U.S.C. § 2302(b)(8) (2000), CAL GOV'T CODE § 8547.8 (West 2005), and CAL LAB. CODE § 1102.5 (West 2006). *See* Garcetti v. Ceballos, 126 S. Ct. 1951, 1962 (2006). Other examples include 5 U.S.C. § 1213 (2000) and a variety of state and local whistleblowing statutes.

[127] Garcetti v. Ceballos, 126 S. Ct. 1951, 1962 (2006).

[128] Along with equitable relief and attorney fees, successful plaintiffs in a § 1983 action may be awarded money damages (including back pay and punitive damages against the individual public official wrongdoer) and other compensatory damages, including emotional distress.

More broadly, Justice Souter's dissent took umbrage with the suggestion that whether First Amendment protections attach can be based on the adequacy of alternative statutory remedies.[129] To be fair, the Court did not seem to claim that First Amendment protections fall away just because other adequate safeguards exist. Rather, its point seemed to be that the First Amendment simply does not protect speech pursuant to official duties and that naysayers need not be too concerned because backup protections do exist.

Souter's other criticisms poke valid holes in the whistleblowing alternative, however.[130] He argued that speech concerning an employer's wrongdoing can fall outside statutory protections; that some state statutes protect only state employees and not those of municipalities or subdivisions; and that in the case of the federal Whistleblower Protection Act of 1989, employees must meet a higher level of proof of bad faith.[131] Lastly, he noted that at least one federal court has held that federal employees' statements "made in connection with normal employment duties" are not protected by the whistleblowing statute.[132] Whether future holdings on that issue would be altered following *Garcetti* or whether this is a real impediment to the Court's suggestion of an alternative route for protection will remain to be seen. Clearly, however, it points to weaknesses in another of the Court's ameliorating principles.

3. Creating Optional Internal Forums is a Good But Naïve Goal

Responding to the Ninth Circuit's concern that it is anomalous to protect publicly-made speech but restrict speech made pursuant to official duties, the Court first denied that inconsistency will exist in most cases,[133] then brightly announced a practical solution for the real world. Government employers "troubled by the perceived anomaly" retain the power to write "internal policies and procedures that are receptive to employee criticism."[134]

This optional "internal forum" has the benefit of letting those employers most worried about straight-to-the-media employees encourage using the internal forum first. It is, however, unrealistic. A government employer open to internal criticism is likely not one that finds such comments disruptive. Conversely, those employers most intolerant of critical speech (or with the most to hide) would be those least likely to institute internal forums, leaving the most oppressed

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[129] *Garcetti*, 126 S. Ct. at 1970 (Souter, J., dissenting) (quoting Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 680 (1996) for the proposition that "[t]he applicability of a provision of the Constitution has never depended on the vagaries of state or federal law").

[130] *Id.* at 1970–71.

[131] *Id.* at 1971 (citing Lachance v. White, 174 F.3d 1378, 1381 (Fed. Cir. 1999).

[132] *Id.* (citing Huffman v. Office of Pers. Mgmt., 263 F.3d 1341, 1352 (Fed. Cir. 2001).

[133] *Id.* at 1961.

[134] *Id.*

employees without recourse. Even faced with an employer who recognizes the benefits of encouraging free speech and internal rather than external criticism, it is unclear how many employers will plan for this. It is also unclear whether the internal forum would truly trump the *Garcetti* constitutional test in litigation—will an employee criticizing her employer in an internal forum still face the charge that her speech was unexpectedly and unduly disruptive so not entitled to protection? While this solution is appealing in theory because employees retain their pre-*Garcetti* protections and employers are better positioned to run damage control, it ignores workplace realities.

B. Limiting Approaches From Other Sources Could Better Ameliorate the Harm Garcetti *Inflicts*

While the Court's dicta provide some guidance, traditional interpretive methods and post-*Garcetti* lower court decisions give more workable ways to incorporate the pursuant to duties formulation.[135]

1. Modifying Existing Doctrine Would Have Been a Feasible Solution In Some Circumstances

Parameters laid out in *Connick, Pickering*, and *Mt. Healthy* have long protected the government employer's interests.[136] If the Court believed existing doctrine insufficient, however, it could have refined its analysis without adding a new threshold test at the outset.

To that end, Justice Souter's *Garcetti* dissent proposed adjusting the *Pickering* balance. Speech made pursuant to duties, he argued, could instead bar an employee from winning on the balancing test unless two conditions are met: the speech concerns "a matter of unusual importance" and the employee is extraordinarily responsible in his manner of speaking.[137] Unusual importance would include speech concerning "official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety."[138] Justice Breyer's dissent, however, attacked this as going too far and would apply *Pickering* only when constitutional and professional obligations require an

[135] This Note explores these options with the acknowledgment that *Garcetti*'s precedential effect may render some options moot.

[136] *See, e.g.,* Kenna v. U.S. Dep't of Justice, 727 F. Supp. 64, 72–73 (D.N.H. 1989) (tossing a former assistant U.S. attorney's complaint, fired after criticizing the office's subpoena policy, because his speech did not involve a matter of public concern. Striking the claim at the first *Connick* step, the court said that even if it were a matter of public concern, the *Pickering* balancing test would find for the employer because the attorney employee eroded settled office policy); Twist v. Meese, 854 F.2d 1421 (D.C. Cir. 1988) (holding that the *Mt. Healthy* test barred a former attorney's First Amendment claim because he failed to show his speech was a substantial or motivating factor in his employer's decision to terminate him).

[137] *Garcetti*, 126 S. Ct. at 1967 (Souter, J., dissenting).

[138] *Id.*

employee to speak.[139] Breyer argued Souter's screen would not filter enough cases; Souter countered that such an adapted *Pickering* balance worked nicely for nearly two decades in the Ninth Circuit without a vast expansion in the volume of litigation.[140]

Other modifications to existing doctrine have been proposed as well. One proposal is to alter Breyer's approach so that speech required by either constitutional *or* professional duties would trigger the *Pickering* balance, rather than requiring both obligations to be present.[141] In another modifying approach, the Tenth Circuit recently analyzed a retaliation claim beginning with the familiar *Connick* public concern inquiry followed by the *Pickering* balancing test.[142] The Tenth Circuit then explained that *Garcetti* "significantly modified" *Pickering* regarding when an employee speaks as a citizen and not as an employee.[143] While that court seemed to misapply the *Garcetti* Court's direction to first ask whether speech was pursuant to duties quite apart from the *Connick-Pickering* inquiry, the decision shows a willingness to focus on the Court's broader holding that, once found to be speaking pursuant to duties, an employee does not speak as a citizen. By doing so, the Tenth Circuit effectively moved *Garcetti*'s new threshold test into the *Pickering* framework.

Modifying existing doctrine could certainly protect the government employer's very real efficiency concerns. However, playing fast and loose with existing doctrine is also a dangerous option. Applying a stable balancing test too leniently can erode that test's credibility overall. In *Shahar v. Bowers*, the Eleventh Circuit held the Attorney General of Georgia's efficiency interest beat out a staff attorney's interest in having her sexual orientation publicly known.[144] Even recognizing an employer's greater leeway when dealing with policymaking attorneys, that court went too far in finding public disruption in order to deny the claim under *Pickering*.[145] While showing courts' adeptness at reaching a desired result by broadening concepts like public concern, disruption to government, and employee interests, this decision also illustrates that broad judicial interpretation can water down standards.

Despite this danger of doctrinal erosion, and considering the adjustments suggested by Justice Souter, Justice Breyer, and others, two

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[139] *Id.* at 1975 (Breyer, J., dissenting).

[140] *Id.* at 1968 (Souter, J., dissenting).

[141] *The Supreme Court, 2005 Term—Leading Cases*, 120 HARV. L. REV. 125, 281–82 (2006) (arguing Justice Breyer's formulation will present situations where an employee is constitutionally obligated to speak but still unprotected when doing so, and that this approach is a solid middle-ground between the lack of certainty for employers pre-*Garcetti* and the lack of protection for employees post-*Garcetti*).

[142] Casey v. W. Las Vegas Indep. Sch. Dist., 473 F.3d 1323, 1327 (10th Cir. 2007).

[143] *Id.* at 1328.

[144] Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997).

[145] *Id.* at 1110 (reasoning that public confusion and the attorney general's office's credibility were at stake if the public knew a staff attorney was a lesbian).

additional approaches emerge. First, simply adding a thumb to the employer's side of the *Pickering* scale when an employee speaks pursuant to public duties. This approach would not necessarily require tweaking *Pickering*—instead, it would merely acknowledge what speaking pursuant to duties naturally does to the balance. That is, an employee's critical speech made pursuant to prescribed duties is often naturally more disruptive than when her speech falls outside the scope of her job, simply because employers must rely on employees to provide certain nondisruptive work product. An employer should usually be able to demonstrate that its employee's speech, because it was made pursuant to duties, created greater friction and difficulty at work, and thus fails the *Pickering* balancing test. However, this approach requires modifying *Garcetti* itself. The Court would still have to analyze the *Connick* public concern question before reaching this modified *Pickering* balance, making it slower to dispose of claims than asking earlier on whether speech was pursuant to duties. A balancing test also gives courts greater leeway to protect speech pursuant to duties and therefore critics may argue it does not screen enough cases to be an effective tool against disruptive speech.

Second, the pursuant to duties inquiry could instead be collapsed into the *Connick* public concern question, using a standard like Souter's suggested "matter of unusual importance."[146] As further developed below,[147] asking both whether the speech was made pursuant to duties *and* of especially important public concern would more appropriately give weight to free speech concerns while simultaneously considering employer efficiency interests.

2. Identifying the Job's "Core Function" is Currently the Lower Courts' Best Option

Playing off the Court's admonishment against writing excessively broad job descriptions, thereby creating a bloated category of conduct done pursuant to official duties, some courts have latched on to the corollary of narrowly reading job descriptions.

Less than one month after *Garcetti* was decided, an Indiana district court heard a city recreation director's claim that he was fired in retaliation for reporting that other employees allegedly forged time sheets and mishandled funds.[148] Matthew Kodrea faced a summary judgment motion in which the defendants argued he spoke not as a citizen but instead pursuant to his employment duties under *Garcetti*.[149] Kodrea's job duties were to supervise recreational programs and concession stands, not to approve time sheets or handle money.[150]

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[146] *Garcetti*, 126 S. Ct. at 1967 (Souter, J., dissenting).

[147] *See* discussion, *supra* notes 177–184 and accompanying text.

[148] Kodrea v. City of Kokomo, 458 F. Supp. 2d 857 (S.D. Ind. 2006).

[149] *Id.* at 866.

[150] *Id.* at 863.

Distinguishing those facts from *Garcetti*, where Ceballos never argued that writing the memo fell outside his job duties, the district court here created a "core function" approach, asking whether work with the public funds in question was a core function of Kodrea's job.[151] Finding it was not, his claim survived summary judgment.

The Seventh Circuit's pre-*Garcetti* pursuant to duties framework had similarly led the *Delgado* court in 2002 to emphasize that the police detective's inclusion of "additional facts" in his report about drug activity by the police chief's acquaintance went "beyond" his regular job duty.[152] Detective Delgado's First Amendment retaliation claim went forward because, despite the employer's claim that a memo written as "part of an employee's regular duties" is not a matter of public concern under *Connick*, Delgado enjoyed "considerable discretion" in how he communicated and added other facts beyond the minimum assigned to him.[153] Distinguishing those facts from when an officer acts only within "routine" duties,[154] the Seventh Circuit was impressed by speech created by "some independent discretion or judgment."[155] While the court failed to indicate exactly what additional facts or discretionary judgment existed, the district court on remand pointed to detectives' discretion during investigations and reasoned that, despite Delgado's assignment to write the memo, the document's subject matter was in no way routine.[156] The Seventh Circuit later reflected on *Delgado* as a case where the employee "went beyond his normal job responsibilities by acting as a concerned citizen" about the police chief's ability to remain objective in an investigation involving a personal acquaintance.[157]

Similar to a core function test requiring fact-intensive scrutiny of actual job responsibilities, the question here was whether an employee went "beyond the normal job responsibilities" to act as a concerned citizen. The Seventh Circuit applied its "beyond the normal job responsibilities" distinction to differentiate public from private motive, an issue *Garcetti* stated was not dispositive. However, going "beyond the normal job responsibilities" could also be read the same way as the core

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[151] *Id.* at 868.

[152] Delgado v. Jones, 282 F.3d 511, 519 (7th Cir. 2002).

[153] *Id.*

[154] *Id.* (comparing Gonzalez v. City of Chicago, 239 F.3d 939 (7th Cir. 2001)).

[155] *Id.*

[156] Delgado v. Jones, 277 F. Supp. 2d 956, 963 (E.D. Wis. 2003) (finding it unique to write a memo sent straight to the police chief, especially one concerning the chief's personal acquaintance). Of course, one would hope a memo alleging forged affidavits is similarly non-routine, which would make Ceballos's actions protectable under this analysis.

[157] Schad v. Jones, 415 F.3d 671, 677 (7th Cir. 2005) (contrasting a plaintiff who "added nothing to the information he passed along" to another officer and "merely carried out, without comment, a typical aspect of his job as a police officer"). Again, under this reasoning, Ceballos's speech was certainly not "without comment." Clearly, the Supreme Court's test diverges from the earlier Seventh Circuit approach.

function test, as a narrow judicial interpretation of an employee's job duties.

Such narrow interpretation may be a true corollary to the Court's caution against broadly writing job descriptions, but *Garcetti*'s open-ended language concerning job descriptions means courts can just as easily interpret "pursuant to job duties" the opposite way. Faced with a high school athletic director alleging retaliation for writing a memorandum questioning the appropriation of school athletic funds, the Fifth Circuit reasoned in *Williams v. Dallas Independent School District*[158] that *Garcetti* barred the claim because while the athletic director was not required to write memoranda, doing so was nonetheless *related to* his job. Noting that *Garcetti* does not explain what "pursuant to . . . official duties" actually means, the *Williams* court reasoned that "activities undertaken in the course of performing one's job" qualify as being pursuant to official duties, even absent any job requirement to take the action.[159] In this case, the athletic director's letter accused school administrators of hampering his ability to buy equipment and pay tournament fees, allegations related to his job duties.[160] The court examined the memorandum's actual language and "perspective," along with its author's "special knowledge" about fundraising amounts, to decide the athletic director spoke as an employee and not as a citizen.[161]

This vastly and inappropriately expands the pursuant to duties language. One would expect public employees to have "special knowledge" about their department—that insider access is what prompts individuals to express criticism in the first place. The Fifth Circuit's *Williams* rule appears to be that employees' speech about work matters is "pursuant to" the official job, even though not officially part of the job. Finding job "relatedness" to be enough,[162] this court has already circumvented the Supreme Court's caution against writing job descriptions too broadly by instead *reading* job descriptions broadly.

Other courts have grappled with the pursuant to duties language with varying degrees of allegiance to *Garcetti*'s holding. In analysis similar to *Williams*, the Tenth Circuit barred a county employee's claim because, though her conduct was "not explicitly required as part of her day-to-day job responsibilities . . . [it was] the type of activit[y] she was paid to do."[163] And the Eighth Circuit rejected a water supply district manager's claim

[158] 480 F.3d 689 (5th Cir. 2007).

[159] *Id.* at 693.

[160] *Id.* at 694.

[161] *Id.*

[162] *But see* Garcetti v. Ceballos, 126 S. Ct. 1951, 1959 (2006) (clarifying that "[t]he First Amendment protects some expressions related to the speaker's job" and restating that teachers are the citizens with the most informed viewpoints on school funding expenditures. The court then noted that "[t]he same is true of many other categories of public employees" and here, analogous to teachers, an athletic director is a citizen with similarly informed viewpoints on athletic funds).

[163] Green v. Bd. of County Comm'rs, 472 F.3d 794, 800–01 (10th Cir. 2007).

that, because he was removed from a project prior to criticizing it, his comments could not possibly have been made pursuant to his official job duties.[164] Instead, because his general managerial duties involved supervising the water district and advising the water board of regulatory requirements, complaining about chosen methods was regardless "an exercise of [his] official duties."[165] Regardless of their results, these cases all exemplify close judicial scrutiny of job duties. However, not all courts have been as dutiful in examining employees' actual job duties. While acknowledging that *Garcetti* controlled, the Seventh Circuit skipped over its pursuant to duties language entirely in *Mills v. City of Evansville*,[166] holding that a police sergeant garnered no First Amendment protection because she did not "speak as a citizen."[167] Without any analysis of Sergeant Mills' actual job duties as supervisor of crime prevention officers, the court reasoned "Mills was on duty, in uniform, and engaged in discussion with her superiors . . . [and] spoke in her capacity as a public employee contributing to the formation and execution of official policy" when she denounced a plan to eliminate a position from her department.[168] The *Mills* court seemed to fall back to the *Connick* inquiry of whether the employee spoke "as a citizen upon matters of public concern"[169] without expressly asking *Garcetti*'s dispositive issue—whether the speech was made pursuant to her duties as a police sergeant. Arguably, the *Mills* court's assumption is consistent with *Garcetti*'s language that the scope of duties must be defined where there is no "serious debate,"[170] if there was really no debate over the scope of Sergeant Mills' job duties. But read another way, the court easily dismissed a case under *Garcetti* by ignoring the job description inquiry altogether to simply assume speech was pursuant to duties.

The multiple directions courts can and will take on *Garcetti*'s pursuant to duties language is thus already becoming clear. Whereas an employee in the Fifth Circuit can speak pursuant to duties when his job does not require the speech, like the athletic director in *Williams*, an employee in Colorado district court is not necessarily speaking pursuant to duties when her speech *is* required, like the *Rohrbough* plaintiff nurse who was instructed to report on problems in the heart transplant program.[171] The *Garcetti* test is confusing to courts and litigants alike. A mandate to use a core function approach would help clarify the scope of job descriptions, though even this test is fuzzy in application. However,

[164] McGee v. Pub. Water Supply Dist. #2, 471 F.3d 918, 921 (8th Cir. 2006).

[165] *Id.*

[166] 452 F.3d 646 (7th Cir. 2006).

[167] *Id.* at 647–48.

[168] *Id.* at 648.

[169] Connick v. Myers, 461 U.S. 138, 147 (1983).

[170] Garcetti v. Ceballos, 126 S. Ct. 1951, 1961 (2006).

[171] Rohrbough v. Univ. of Colo. Hosp. Auth., No. 06-cv-00995-REB-MJW, 2006 WL 3262854, at *3 n.2 (D. Colo. Nov. 9, 2006).

without further Supreme Court guidance, the core function approach appears to be the lower courts' best course of action given its consistency with *Garcetti*.

3. Distinguishing Garcetti *Case By Case is Not an Ideal Constitutional Analysis*

Claiming retaliation after refusing to falsify investigation reports and making other complaints, a state trooper survived summary judgment post-*Garcetti*.[172] The *Skrutski* court made pointed distinctions between that case and *Garcetti*'s facts. First, unlike Richard Ceballos's concession that his memo was written pursuant to his job duties, the plaintiff at bar disagreed that his complaints were within his job description.[173] Second, the court believed whether speech is pursuant to duties hinges on whether there is a "relevant analogue to speech" by non-employee citizens, and found the following analogies to the plaintiff's conduct: police could ask private citizens to make false statements, citizens could report officer misconduct, and citizens could complain about the handling of a police investigation.[174] The court thus used the Supreme Court's statement that "[w]hen a public employee speaks pursuant to employment responsibilities . . . there is no relevant analogue to speech by citizens who are not government employees"[175] to distinguish its case despite easily made analogies between the two cases.[176]

This ameliorating approach suggests distinguishing *Garcetti* on even close facts. Admittedly, district courts are well-versed in distinguishing their cases to do justice as they see fit, and this approach would undoubtedly avoid *Garcetti*'s threshold inquiry in many cases. However, a clearer and consistently applied method is ideal because it provides greater guidance and promotes uniform analysis. This ad hoc approach may nonetheless gain currency as courts struggle within *Garcetti*'s framework, and may lead to uniform patterns of application.

4. Further Delineating Garcetti*'s Boundaries Would Give Courts Better Guidance and Employees Greater Protection*

The Supreme Court should expound on the qualifications it has already made to use *Garceti* as a rough starting point rather than a

[172] Skrutski v. Marut, No. 3:CV-03-2280, 2006 WL 2660691 (M.D. Pa. Sept. 15, 2006).

[173] *Id.* at *9.

[174] *Id.* at *10.

[175] *Id.* at *9 (quoting *Garcetti*, 126 S.Ct. at 1961) (emphasis omitted).

[176] That is, while a citizen obviously could not write a memo on district attorney's office letterhead urging a criminal case's dismissal, a citizen certainly could complain about a bad warrant and investigation. Likewise, in *Skrutski*, a citizen's hypothetical false police report would be distinguishable from an officer's false report; the *Skrutski* plaintiff was asked to change his investigation report to make it look like another officer involved in an accident was intoxicated, but any analogous citizen speech would bear striking differences in form to an officer-generated document. *See id.* at *3–4 .

complete answer. The following modifications would help create a workable doctrine that still recognizes the *Garcetti* Court's concern of adequately protecting government employers' interests.

First, the Court should clarify that its inquiry is not a per se test that rejects at the threshold all speech made pursuant to duties. While *Garcetti*'s language sounds per se,[177] the Court does not explicitly hold that its test will bar every action at the outset. In fact, in response to the dissenting concern about the decision's impact on higher education, the Court agreed academia "implicates additional constitutional interests" and then declined to "decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."[178] This acknowledgement that its rule may not always apply also leaves the door cracked open for the Court to find other contexts in which its blanket rule rejecting First Amendment protection is inappropriate.

Second, to return to its earlier—and in my view, proper—focus on protecting free speech, the Court should then fold its pursuant to duties test into the *Connick-Pickering* inquiry, rather than use it as a precursor. This gives some consideration to the speech's content while providing ample opportunity to deny constitutional protection. Building on the myriad of options suggested by *Garcetti* dissenters and lower courts, the best alternative appears to be combining the pursuant to duties analysis with the type of heightened public concern Justice Souter suggested. That is, an especially important public concern issue involving official misconduct, threats to health and safety, or the like.[179] First Amendment protection would still be denied to speech made pursuant to duties if not a matter of especially important public concern.[180]

This approach would return focus to the fundamental issues at stake. The public concern test encourages efficient government by not constitutionalizing everyday workplace disputes of no concern to the public.[181] But more importantly, *Connick* reaffirmed the importance of speech regarding public affairs, finding it deserves special protection for

[177] *Garcetti*, 126 S. Ct. at 1961 (explaining that *Pickering* scrutiny is simply unwarranted when an employee speaks merely as a job duty as opposed to as a citizen upon a matter of public concern, and also stating there is no First Amendment bar to employers disciplining employees for speech made pursuant to job duties. Language like "[b]ecause Ceballos' memo falls into this category, his allegation of unconstitutional retaliation must fail" sounds unequivocal, but is not actually labeled "per se").

[178] *Id.* at 1962.

[179] Unlike Souter, however, I would not require an especially responsible manner of communication by the employee. An irresponsible manner will create greater disruption and therefore already be considered under *Pickering*. Here, still at the *Connick* level, the issue is getting essential information to the public, not disruption.

[180] Clearly, *Connick*'s regular public concern standard would still apply in cases where the speech at issue was not made pursuant to duties at all.

[181] Roe v. City of San Diego, 356 F.3d 1108, 1115 (9th Cir.), *rev'd on other grounds,* , 543 U.S. 77 (2004).

its place at the "highest rung of the hierarchy of First Amendment values"[182] and that such speech "is more than self-expression; it is the essence of self-government."[183] However, while *Garcetti* involved an especially important issue that citizens *would* care about—whether police officers falsified affidavits and whether the district attorney's office went along with the charade—it dropped the deserved special protection merely because of the manner of communication.

Third, upon asking both whether the speech was pursuant to official duties and whether it regarded a matter of especially important public concern, if the answers were yes and no, respectively, the Court could still dismiss the case based on its current *Garcetti* formulation. However, if both answers were yes (if made pursuant to duties and the speech's content was fundamentally important to citizens under the heightened standard), the Court could then use its balancing test to decide whether constitutional protections are warranted. At this *Pickering* step, it would be appropriate to add weight to the employer's side of the balance under the theory discussed above—that when speaking pursuant to duties, unwanted speech will naturally be more disruptive to an employer relying on that employee for certain work product. Thus, granting weight to the employer would occur only upon already passing the pursuant to duties-public concern question.

In restructuring its inquiry with these three steps—acknowledging that the rule is not per se; asking whether speech is both pursuant to duties *and* of especially important public concern, rather than using pursuant to duties as a threshold test resulting in automatic dismissal; and granting the employer more deference under *Pickering* when speech is pursuant to duties—the Court can reject many claims while recognizing the value of exposing serious problems like government waste or corruption. Though admittedly not as tidy an analysis as the *Garcetti* threshold test, it is more logical in purpose and fair in result.

VI. CONCLUSION

This debate cannot be boiled down to simply the employee's interests versus the employer's interests. The public, employee, and employer all possess interests in both freely exchanged information and efficient government.[184] Recognizing these common goals rather than the factual conflicts in individual cases, the Court should fold the *Garcetti* inquiry into the established *Pickering-Connick* line rather than using it at the threshold. At the moment, lower courts are left with only loosely-

[182] Connick v. Myers, 461 U.S. 138, 145 (1983) (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982)).

[183] *Id.* (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)).

[184] *Garcetti* 126 S. Ct. at 1966 ("The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." (quoting *Roe*, 543 U.S. at 82) (internal citation omitted)).

bound hands given *Garcetti*'s vague language, and should affirmatively seize the opportunity to narrowly read job descriptions. However, this approach still leaves discretion to individual courts and the same splits existing prior to *Garcetti* will certainly rear their heads again. For consistency, the Supreme Court should acknowledge that its pursuant to duties inquiry is inept as a one-size-fits-all doctrine—as it has already admitted in the classroom teacher context—and clarify its test accordingly to better fit workplace realities.