

# GARCETTI V. CEBALLOS: PUBLIC EMPLOYEES LEFT TO DECIDE “YOUR CONSCIENCE OR YOUR JOB”\*

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## INTRODUCTION

The Supreme Court recognized that the First Amendment “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”<sup>1</sup> Memorializing that ideal, the Supreme Court stated that the government

may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. . . . Such interference with constitutional rights is impermissible.<sup>2</sup>

However, in contrast to this articulated ideal, in *Garcetti v. Ceballos*,<sup>3</sup> the Court permitted interference with the free speech rights of public employees. In *Garcetti*, a sharply divided 5-4 Court held that a public employee’s speech made “pursuant” to the speaker’s official job duties was afforded no First Amendment protection against an employer’s retaliatory actions because such speech is made in the capacity of an *employee* and not in the capacity of a *citizen* for First Amendment purposes.<sup>4</sup> While certain circuit courts of appeals had previously established *Garcetti*-type exclusions for First Amendment protection of public employees’ speech relating to their official job duties, before *Garcetti*, the Supreme Court had not categorically excluded such speech from First

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\* Press Release, American Federation of State, County and Municipal Employees, Supreme Court to Public Employees: ‘Your Conscience or Your Job’ (May 30, 2006), <http://www.afscme.org/press/6659.cfm> (quoting the reaction of Gerald W. McEntee, President of the American Federation of State, County and Municipal Employees, to the United States Supreme Court decision in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006)). McEntee cautioned, “[T]he Supreme Court has sent a chilling warning to potential government whistleblowers that their anxiety about potential retaliation is well-founded. The Court has said to public employees, in effect: ‘Your conscience or your job. You can’t have both.’” *Id.*

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1. *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

2. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (reaffirming that a teacher’s public disagreement with superiors on issues of public concern may warrant First Amendment protection from retaliatory action).

3. 126 S. Ct. 1951 (2006).

4. *Id.* at 1960.

Amendment protection.<sup>5</sup> Rather, the Supreme Court required that the speech address a matter of public concern and then weighed the employee's interest in commenting on a matter of public concern against the employer's interest in effectively carrying out its functions.<sup>6</sup> *Garcetti* significantly alters the judicial approach to public employee First Amendment claims. It creates a threshold requirement: Before reaching the established balancing test for potential First Amendment protection, the employee's speech must be made in the capacity of a citizen and not in the capacity of an employee speaking pursuant to the employee's official duties.<sup>7</sup> This threshold test must be met regardless of whether the speech touches on a matter of public concern.

Part I of this Note briefly reviews several key Supreme Court holdings respecting First Amendment protections afforded to public employee speech prior to *Garcetti*. Part II examines the *Garcetti* decision and the likely First Amendment rights of public employees following this decision. Part III explores lower courts' early applications of *Garcetti*, including courts' disparate treatment of employee speech made privately versus publicly, reasoning for broadly or narrowly applying *Garcetti*, and approaches for determining what constitutes an employee's official duties. Part IV addresses policy concerns stemming from *Garcetti*, including the need for continued judicial involvement to resolve the factual disputes involved in defining an employee's official duties, and the detrimental impact on society's access to informed commentary on matters of public concern resulting from this wide-sweeping exclusion of speech from constitutional protection. The Note concludes that courts applying *Garcetti* should narrowly define the scope of an employee's official duties so as to minimize unjustified interference with the constitutional rights of public employees when commenting on matters of public concern.

## I. BRIEF OVERVIEW OF FIRST AMENDMENT RIGHTS OF PUBLIC EMPLOYEES PRIOR TO *GARCETTI*

The Court in *Garcetti* presented the issue as "whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties."<sup>8</sup> Analysis of constitutional protections afforded to public employees for their speech has routinely commenced with a discussion of the foundational free speech principles set forth by the Court in *Pickering v. Board of Education*.<sup>9</sup> In *Pickering*, a teacher was fired for writing a letter to a local newspaper criticizing the school board's handling of efforts to

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5. See Marni M. Zack, Note, *Public Employee Free Speech: The Policy Reasons for Rejecting a Per Se Rule Precluding Speech Rights*, 46 B.C. L. REV. 893, 901-03 (2005).

6. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

7. *Garcetti*, 126 S. Ct. at 1960. The Tenth Circuit Court of Appeals characterized this threshold requirement for First Amendment protection as a "heavy barrier erected by the Supreme Court." *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323, 1331 (10th Cir. 2007).

8. *Garcetti*, 126 S. Ct. at 1955.

9. See 391 U.S. 563 (1968).

raise new revenues for the school and the board's allocation of financial resources between school programs.<sup>10</sup> The Court held that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."<sup>11</sup> The Court additionally reasoned that the "problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."<sup>12</sup> After balancing the interests, the Court recognized the "interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."<sup>13</sup> Additionally, the Court noted:

Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.<sup>14</sup>

Thus, the Court recognized that the specialized knowledge and expertise public employees acquire through their employment represent an important contribution to societal discourse, the expression of which should not be subject to employer retaliation.

The Supreme Court further clarified the First Amendment rights of public employees in *Givhan v. Western Line Consolidated School District*,<sup>15</sup> in which the Court ruled that a teacher was not categorically denied First Amendment protection for speech made *privately* containing allegations that school policies and practices were racially discriminatory.<sup>16</sup> The Court held that its previous decisions "do not support the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides

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10. *Id.* at 564-66.

11. *Id.* at 574 (footnote omitted).

12. *Id.* at 568. The Court noted numerous considerations that might affect the outcome of the balancing test, including, but not limited to, whether the statements (1) were directed to any specific person with whom the speaker would normally be in contact during daily performance of employment duties, (2) involved issues respecting maintaining discipline by supervisors or harmony between coworkers, (3) were made by a speaker whose "personal loyalty and confidence" can persuasively be tied to the proper functioning of the employment relationship, (4) interfered with the speaker's performance of daily job duties, and (5) interfered with the operation of the employer. *Id.* at 569-70, 572-73.

13. *Id.* at 573.

14. *Id.* at 572.

15. 439 U.S. 410 (1979).

16. *Id.* at 412-13.

to express his views privately rather than publicly.”<sup>17</sup>

In *Connick v. Myers*, the Court reaffirmed *Pickering* by stating that a “public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment,”<sup>18</sup> but acknowledged that the “State’s interests as an employer in regulating the speech of its employees ‘differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.’”<sup>19</sup> At issue in *Connick* was the discharge of an assistant district attorney who, in response to a proposed transfer to a different division, distributed an in-office questionnaire soliciting other employees’ views on issues such as office policies and morale, confidence in supervisors, the employee grievance process, and perceived pressure to work on political campaigns.<sup>20</sup>

The *Connick* Court made clear that the *Pickering* balancing test focused on the rights of public employees when commenting on matters of public concern and acknowledged that the functioning of government operations would be impaired if “every employment decision became a constitutional matter.”<sup>21</sup> As such, the Court held that First Amendment protections are implicated only when a public employee speaks as a citizen on a matter of public concern and not when an employee speaks on a matter of personal interest.<sup>22</sup> The Court expressed that whether speech addresses a matter of public concern is “determined by the content, form, and context of a given statement, as revealed by the whole record.”<sup>23</sup> The Court determined that with the exception of one question on Myers’ questionnaire, the content of the questionnaire did not address a matter of public concern; therefore, it was not entitled to First Amendment protection.<sup>24</sup>

Further, the Court addressed the relationship between a public employee’s speech and the job responsibilities of that employee in *Rankin v. McPherson*.<sup>25</sup> McPherson was a deputy constable in the county constable’s office who performed solely administrative functions.<sup>26</sup> McPherson was terminated after being overheard saying, in response to a failed assassination attempt on the President of the United States, “‘if they go for him again, I hope they get him.’”<sup>27</sup> The Supreme Court determined McPherson’s speech addressed a matter of public

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17. *Id.* at 414.

18. *Connick v. Myers*, 461 U.S. 138, 140 (1983).

19. *Id.* (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

20. *Id.* at 140-41.

21. *Id.* at 143.

22. *Id.* at 147.

23. *Id.* at 147-48.

24. *Id.* at 148 (finding that the questionnaire inquiry regarding whether employees felt pressure to work on political campaigns was a matter of public concern, but ultimately balancing the interests on that sole inquiry in favor of the employer).

25. 483 U.S. 378 (1987).

26. *Id.* at 380-81 (noting that all employees in the constable’s office had the job title of deputy constable regardless of their employment responsibilities and duties within the office).

27. *Id.* at 381-82.

concern because McPherson's comment was made in the context of a discussion of the President's policies and the recent assassination attempt.<sup>28</sup> The Court's application of *Pickering* balancing included weighing the administrative functions McPherson was actually required to perform and the interests of the state in the efficient functioning of the governmental office.<sup>29</sup> The balancing in this case demonstrated that the interests involved in preserving First Amendment rights for private speech on a matter of public concern outweighed the government's interest in firing McPherson for such speech.<sup>30</sup>

## II. GARCETTI V. CEBALLOS

Richard Ceballos was a deputy district attorney for the Los Angeles County District Attorney's office and was contacted by a defense attorney who alleged that an affidavit in a pending criminal matter contained misrepresentations.<sup>31</sup> Ceballos investigated the allegations and determined that the affidavit was inaccurate.<sup>32</sup> He brought the matter to his superiors' attention and prepared a memorandum recommending disposition of the case on the basis of the affidavit inaccuracies.<sup>33</sup> A heated exchange occurred during a meeting with superiors and others about the affidavit allegations, and Ceballos was openly criticized during the meeting.<sup>34</sup> The case proceeded to prosecution despite Ceballos's recommendations, and he was subsequently called by the defense to testify with respect to the affidavit inaccuracies.<sup>35</sup> Ceballos alleged that following his handling of the case, his employers retaliated against him by reassigning him to another position, transferring him to a different courthouse, and denying him a promotion.<sup>36</sup>

Ceballos filed a claim in district court under 42 U.S.C. § 1983, alleging employer retaliation for employee speech in violation of the First and Fourteenth Amendments, and the court granted the defendants' motion for summary judgment.<sup>37</sup> Relying on the *Pickering/Connick* test, the Ninth Circuit Court of Appeals found that Ceballos's memorandum alleging affidavit inaccuracies and

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28. *Id.* at 386.

29. *Id.* at 389-92 (finding persuasive that Rankin's formal job description involved limited actual or potential involvement with law enforcement).

30. *Id.* at 390, 392.

31. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1955 (2006).

32. *Id.* Ceballos believed the affidavit mischaracterized a separate roadway as a long driveway, and he doubted the affidavit's accuracy regarding tire tracks on the road because the road's composition prevented tire tracks. *Id.*

33. *Id.* at 1955-56.

34. *Id.* at 1956.

35. *Id.*

36. *Id.*

37. *Ceballos v. Garcetti*, No. CV0011106AHMAJWX, 2002 WL 34098285, at \*2, \*4-5 (C.D. Cal. Jan. 30, 2002) (unpublished), *rev'd*, 361 F.3d 1168 (9th Cir. 2004), *rev'd*, 126 S. Ct. 1951 (2006).

government misconduct involved a matter of public concern and was protected by the First Amendment.<sup>38</sup> The court found that public employees' freedom to speak on matters of public concern "is important to the orderly functioning of the democratic process, because public employees, by virtue of their access to information and experience regarding the operations, conduct, and policies of government agencies and officials, 'are positioned uniquely to contribute to the debate on matters of public concern.'"<sup>39</sup> As such, the court forcefully cautioned:

Not only our own precedent, but sound reason, Supreme Court doctrine, and the weight of authority in other circuits support our rejection of a *per se* rule that the First Amendment does not protect a public employee simply because he expresses his views in a report to his supervisors or in the performance of his other job-related obligations.<sup>40</sup>

However, the United States Supreme Court reversed the Ninth Circuit, finding the controlling factor to be that Ceballos's memorandum was written pursuant to his official duties as a calendar deputy.<sup>41</sup> The Court established a bright-line rule that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."<sup>42</sup> The Court explained that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."<sup>43</sup> Rather, the restriction "reflects the exercise of employer control over what the employer itself has commissioned or created."<sup>44</sup>

The Court was careful to note two factors that were not dispositive in this case. First, consistent with the precedents set forth in *Givhan* and *Rankin*, the Court stated that it was not controlling that Ceballos's speech occurred privately, rather than publicly, as First Amendment protection may be available in some instances for speech made privately at work.<sup>45</sup> Second, it was also not controlling that Ceballos's memorandum concerned the subject matter of his employment, as First Amendment protection may be available for some speech related to a speaker's job.<sup>46</sup> Rather, the critical factor was that Ceballos wrote the memorandum as part of his official duties as a calendar deputy and was fulfilling

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38. *Ceballos v. Garcetti*, 361 F.3d 1168, 1180 (9th Cir. 2004), *rev'd*, 126 S. Ct. 1951 (2006).

39. *Id.* at 1175 (quoting *Weeks v. Bayer*, 246 F.3d 1231, 1235 (9th Cir. 2001)).

40. *Id.* at 1178.

41. *Garcetti*, 126 S. Ct. at 1957, 1960.

42. *Id.* at 1960.

43. *Id.* The Court clarified by stating "[w]hen a public employee speaks pursuant to employment responsibilities . . . there is no relevant analogue to speech by citizens who are not government employees." *Id.* at 1961.

44. *Id.* at 1960.

45. *Id.* at 1959.

46. *Id.* The Court cited *Pickering* as support for this proposition, noting that the *Pickering* principles apply to numerous other categories of public employees in addition to teachers. *Id.*

the employment functions that he was hired to perform.<sup>47</sup>

The Court acknowledged its prior decisions recognized the value to a democratic society of public employees' commentary on matters of public concern, noting both the interests of the speaker in disseminating the information and the interests of the public in obtaining the information.<sup>48</sup> However, the Court maintained that a public employee, by virtue of entering government service, must be subject to certain restraints on freedoms that are freely enjoyed by non-public employees.<sup>49</sup> Specifically, certain limitations on public employees' First Amendment rights are necessary, according to the Court, to ensure the efficient functioning of the individual employee's governmental unit and to prevent employees from "'constitutionaliz[ing] the employee grievance.'"<sup>50</sup>

Three Justices wrote dissenting opinions in *Garcetti*, sharply calling into question many aspects of the majority's reasoning. First, Justice Stevens's dissent advocated that constitutional protection should *sometimes* be available for government employees who speak out pursuant to their official job duties, rather than *never* available.<sup>51</sup> Justice Stevens reasoned that speech may merely be unwanted or unwelcome by the employer because it exposes information regarding the functioning of the governmental unit that the employer does not want anyone to discover.<sup>52</sup>

Second, Justice Souter's dissenting opinion, in which Justices Stevens and Ginsburg joined, also advocated against a categorical exclusion from First Amendment protection for public employee speech made pursuant to official duties, especially in cases of an employer's "official wrongdoing and threats to health and safety."<sup>53</sup> Justice Souter argued that the majority drew an arbitrary line without adequate justification for such a distinction and advised adjusting the *Pickering/Connick* balancing test to address the majority's concern for promoting the efficient functioning of the government unit.<sup>54</sup> Such an adjustment would require that speech be "on a matter of unusual importance and satisf[y] high standards of responsibility" in the manner of communication to be eligible for First Amendment protection.<sup>55</sup>

Third, Justice Breyer also dissented, finding the *Garcetti* exclusion from First

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47. *Id.* at 1959-60.

48. *Id.* at 1959.

49. *Id.* at 1958.

50. *Id.* at 1958-59 (quoting *Connick v. Myers*, 461 U.S. 138, 154 (1983)). "Refusing to recognize First Amendment claims based on government employees' work product does not prevent them from participating in public debate. The employees retain the prospect of constitutional protection for their contributions to the civic discourse." *Id.* at 1960.

51. *Id.* at 1962 (Stevens, J., dissenting).

52. *Id.*

53. *Id.* at 1963 (Souter, J., dissenting).

54. *Id.* at 1965, 1967.

55. *Id.* at 1967 (noting that "only comment[s] on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee's favor").

Amendment protection “too absolute.”<sup>56</sup> Justice Breyer found relevant that Ceballos’s speech was governed by the canons of the legal profession and additionally that Ceballos, as a deputy prosecutor, had certain constitutional disclosure obligations respecting the government’s possession of exculpatory evidence.<sup>57</sup> Therefore, Justice Breyer advocated applying the *Pickering/Connick* balancing test in those limited circumstances where public employee speech is governed by both professional canons and constitutional obligations.<sup>58</sup>

### III. PRELIMINARY INTERPRETATIONS OF “OFFICIAL DUTIES” UNDER *GARCETTI*

The *Garcetti* Court specifically refrained from “articulat[ing] a comprehensive framework for defining the scope of an employee’s duties in cases where there is room for serious debate.”<sup>59</sup> Instead, the Court instructed that the appropriate inquiry is a “practical one,” involving assessment of what “duties an employee actually is expected to perform” and acknowledging that job descriptions often do not accurately reflect the duties with which an employee is actually tasked.<sup>60</sup> Without having occasion to provide specific guidance as to what constitutes an employee’s official job duties, lower courts must find an appropriate standard by which to measure whether *Garcetti* applies to the speech at issue. This task has been met with varying approaches as lower courts grapple with *Garcetti* and search for a consistent and reliable framework with which to assess whether the speech at issue was made pursuant to an employee’s official duties.

While nearly all circuit courts of appeals have already cited to *Garcetti* in at least limited fashion, as of the time of writing of this Note, the Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits have each engaged in a thorough analysis of *Garcetti* when determining whether speech was made pursuant to an employee’s official duties. The sixteen decisions by the circuit courts of appeals that, at the time of writing of this Note, have fully explored this issue, have overwhelmingly interpreted *Garcetti* broadly enough to preclude all but five plaintiffs’ First Amendment claims.<sup>61</sup> This strong initial trend by circuit

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56. *Id.* at 1974 (Breyer, J., dissenting).

57. *Id.*

58. *Id.* at 1975.

59. *Id.* at 1961 (majority opinion). Ceballos did not dispute that he wrote the memo pursuant to his calendar deputy duties. *Id.* at 1960. The district court in *Ceballos v. Garcetti* found the fact that Ceballos’s memo requested permission to dismiss the charges against the defendants supported a determination that the memo was written as part of Ceballos’s employment duties because Ceballos acknowledged the need for his superiors’ permission. *Ceballos v. Garcetti*, No. CV0011106AHMAJWX, 2002 WL 34098285, at \*6 n.5 (C.D. Cal. Jan. 30, 2002) (unpublished), *rev’d*, 361 F.3d 1168 (9th Cir. 2004), *rev’d*, 126 S. Ct. 1951 (2006).

60. *Garcetti*, 126 S. Ct. at 1961-62 (rejecting any attempt by employers to merely create overly broad job descriptions to widen the speech subject to the *Garcetti* exclusion from First Amendment protection).

61. *See Fairley v. Fermaint*, 482 F.3d 897, 902 (7th Cir. 2007) (noting that *Garcetti* does not



courts of appeals to find in favor of public employers in such cases may be due, in part, to virtually irrefutable evidence and deposition testimony by employees admitting the speech at issue was made pursuant to their employment duties.<sup>62</sup> The drastic shift in First Amendment protections afforded to public employees significantly benefited public employers who were already involved in litigation when *Garcetti* was issued and before plaintiffs became aware that their official duties were the threshold inquiry determining the constitutional protection afforded to their speech. The district court in *Ceballos v. Garcetti* noted Ceballos had, in fact, admitted that the disposition memo, which formed the core of his First Amendment claim, was written pursuant to his official duties as a prosecutor.<sup>63</sup> More recently, for example, the Eighth Circuit found that a letter written by a school psychologist clearly demonstrated the employee wrote the letter pursuant to official job duties and not as a public citizen when the letter closed with the statement, “I consider any time I spend addressing this matter with you or the agency to be services I am giving the state as a consultant.”<sup>64</sup> Following *Garcetti*, defendants will have a more difficult time demonstrating speech was made pursuant to official duties. Plaintiffs will justifiably respond to *Garcetti* through attempts to preserve their First Amendment protections by characterizing speech as that of a concerned citizen rather than as speech required

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apply to testimony given by county jail guards in inmates’ suits because assisting prisoners in their litigation does not fall within the guards’ official duties); *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323, 1332-33 (10th Cir. 2007) (holding that statements made by a school superintendent to the Attorney General regarding the school board’s alleged violations of the New Mexico Open Meetings Act survive *Garcetti*’s threshold requirement); *Freitag v. Ayers*, 468 F.3d 528, 544-46 (9th Cir. 2006) (finding, with one possible exception, no constitutional protection available for a female corrections officer’s internal reports alleging sexually hostile inmate conduct and the prison’s failure to rectify the situation, but holding that similar complaints made externally to a senator and the inspector general were made in the capacity of a citizen “expos[ing] such official malfeasance to broader scrutiny”); *Fuerst v. Clarke*, 454 F.3d 770, 774 (7th Cir. 2006) (finding *Garcetti* inapposite when a deputy sheriff’s comments publicly criticizing the sheriff were made by the speaker in the capacity of a union representative, rather than pursuant to the official duties of a deputy sheriff); *Hill v. Borough of Kutztown*, 455 F.3d 225, 242-43 (3rd Cir. 2006) (finding as a matter of law, that a borough manager was speaking pursuant to official duties when reporting complaints about the borough mayor to the borough council, but reversing the district court’s grant of a motion to dismiss a First Amendment retaliation claim for additional speech that could possibly have been made in the capacity of a citizen).

62. *See Battle v. Bd. of Regents for Ga.*, 468 F.3d 755, 761 (11th Cir. 2006) (finding that a federal financial aid counselor’s retaliation claim failed under *Garcetti* because she admitted in her deposition testimony that she had an employment duty to report the discovery of mismanagement or fraud in the financial aid records).

63. *Ceballos v. Garcetti*, No. CV0011106AHMAJWX, 2002 WL 34098285, at \*6 (C.D. Cal. Jan. 30, 2002) (unpublished), *rev’d*, 361 F.3d 1168 (9th Cir. 2004), *rev’d*, 126 S. Ct. 1951 (2006).

64. *Bailey v. Dep’t of Elementary and Secondary Educ.*, 451 F.3d 514, 520 (8th Cir. 2006).

under official employment duties.<sup>65</sup>

A. *Broad Interpretations of the Reach of Garcetti*

The Seventh Circuit has construed the holding of *Garcetti* to reach further than public employee speech that is part and parcel of an employee's "core" job functions, finding that standard to be too narrow following *Garcetti*.<sup>66</sup> While *Garcetti* has predominantly been used to insulate the public employer from employee First Amendment claims of retaliation when the employee speaks pursuant to official duties, it has also been used by at least one circuit court of appeals when the speech at issue was *not* made pursuant to the employee's official duties.<sup>67</sup> The Seventh Circuit in *Piggee v. Carl Sandburg College*<sup>68</sup> cited the underlying principles of *Garcetti* in explaining its reasoning in affirming that a college could lawfully force a part-time cosmetology instructor to refrain from speech involving her views on homosexuality, even though her speech *did not* relate to her official job duties of instructing students in cosmetology.<sup>69</sup> The court noted that while the *Garcetti* decision was "not directly relevant[,] . . . it does signal the Court's concern that courts give appropriate weight to the public employer's interests."<sup>70</sup>

As a practical matter, extending the principles of *Garcetti* to influence and bear upon constitutional protections afforded to speech made in the capacity of a citizen and *not* made pursuant to an employee's official duties would seem to have far-reaching effects beyond those intended by the Supreme Court in *Garcetti*.<sup>71</sup> The Court in *Garcetti* acknowledged its prior decisions focused on the

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65. See *Casey*, 473 F.3d at 1329-30 (finding the parties' "principal briefs filed before *Garcetti* . . . cut against the result they wish this Court to reach after *Garcetti*" and that the parties have "swap[ped] positions to meet their respective litigation objectives"). The court noted that the defendants originally argued that the plaintiff acted ultra vires when reporting alleged financial eligibility violations to Head Start headquarters, while the plaintiff originally argued that she had a "duty" to report the wrongdoing. *Id.* Following *Garcetti*, the defendants' reply brief argued that the plaintiff was acting pursuant to her official duties as a superintendent or CEO of the Head Start program when reporting the violations, while the plaintiff argued that the speech was made in the capacity of a citizen. *Id.*

66. *Spiegla v. Hull*, 481 F.3d 961, 967 (7th Cir. 2007).

67. See *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667 (7th Cir. 2006).

68. 464 F.3d 667.

69. *Id.* at 668, 672.

70. *Id.* at 672. Cf. *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 480 (7th Cir. 2007) ("Our remark that *Garcetti* was 'not directly relevant' did not reflect doubt about the rule that employers are entitled to control speech from an instructor to a student on college grounds during working hours . . . . The speech to which the student (and the college) objected was not part of [the plaintiff's] teaching duties.").

71. See *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1958 (2006) ("So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.").

“dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment.”<sup>72</sup> However, in explaining the “theoretical underpinnings” of its First Amendment decisions, the Court reaffirmed that “[e]mployees who make public statements *outside* the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government.”<sup>73</sup> The decisions of the Court do not prevent public employees from participation in public debate and civic discourse, but do eliminate their First Amendment protection when their speech is made “pursuant” to their official duties.<sup>74</sup>

Following *Garcetti*, the possibility of First Amendment protection remains for public employee speech made in an employee’s capacity as a citizen and not pursuant to an employee’s official duties, subject to the outcome of the *Pickering/Connick* balancing test.<sup>75</sup> The Court identified the proper inquiry as “whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.”<sup>76</sup> As described in *Pickering*, this analysis involves weighing the interests of the employee in commenting on matters of public concern against the government entity’s need to efficiently run its operations.<sup>77</sup> Therefore, as advocated by the Seventh Circuit in *Piggee*, if courts interpret *Garcetti* as signaling the Supreme Court’s “concern that courts give appropriate weight to the public employer’s interests,”<sup>78</sup> even in cases where the employee was speaking as a citizen, such a broad interpretation of the reach of *Garcetti* has the potential to permanently tip the *Pickering/Connick* balancing test in favor of the employer’s interests regardless of the weight of the employee’s interests in commenting on a matter of public concern. *Garcetti* was not intended to swallow up the *Pickering* balancing test. Rather, the scope of *Garcetti* was specifically limited by the Court to exclude “statements or complaints (such as those at issue in cases like *Pickering* and *Connick*) that are made outside the duties of employment.”<sup>79</sup>

Perhaps the most expansive interpretation of the reach of *Garcetti* in determining whether an employee’s speech is made pursuant to official job duties can be found in a recent opinion issued by the Tenth Circuit Court of Appeals.<sup>80</sup> In *Green v. Board of County Commissioners*, an employee of the county’s Juvenile Justice Center who worked as a drug-lab technician and a detention officer, suspected that a drug test had produced a false positive result.<sup>81</sup> Green

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72. *Id.* at 1959 (quoting *Rankin v. McPherson*, 483 U.S. 378, 384 (1987)).

73. *Id.* at 1961 (emphasis added).

74. *Id.* at 1960.

75. *Id.* at 1958.

76. *Id.*

77. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

78. *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 672 (7th Cir. 2006).

79. *Garcetti*, 126 S. Ct. at 1961.

80. *See Green v. Bd. of County Comm’rs*, 472 F.3d 794 (10th Cir. 2007).

81. *Id.* at 796.

had previously alerted her employers to the lack of a drug testing confirmation protocol, but was not met with support for establishing any testing confirmation policy.<sup>82</sup> Green took it upon herself to independently contact the testing equipment manufacturer to discuss reliability issues and sent the sample in question to an outside hospital for a confirmation test, which confirmed a false positive result.<sup>83</sup>

The court compared Green's speech with her written job description, finding ultimately that the case was more similar to *Garcetti* and others decided in its wake than to "activities undertaken by employees acting as citizens."<sup>84</sup> The court reasoned that:

On the one hand, the speech and conduct at issue can be categorized as activities undertaken in the course of Ms. Green's job. She had the responsibility for collecting samples and testing them, and by extension, making sure the tests were as accurate as possible . . . . She also had the responsibility for communicating with clients and with third parties regarding testing. Under this view, by making arrangements for the confirmation test without consulting her supervisors, Ms. Green decided to ignore her supervisors' instructions . . . and thereby properly should be subject to discipline.

On the other hand, one could argue that Ms. Green was not a policymaker and her job responsibilities focused on the logistics of taking tests and keeping records, so she was not required to improve the Center's system by advocating for a confirmation policy or obtaining the confirmation test. Under this view, by arranging for the confirmation test to underline the validity of her previously expressed concerns, Ms. Green was not doing the job she was hired to do, but was acting outside her day-to-day job responsibilities for the public good.<sup>85</sup>

In affirming the grant of summary judgment to the defendants on Green's First Amendment claim, the court noted that the "unauthorized obtaining of the confirmation test to prove her point[], inescapably invoke *Garcetti's* admonishment that government employee's First Amendment rights do 'not invest them with a right to perform their jobs however they see fit.'"<sup>86</sup>

The *Green* decision raises two concerns. First, the court's analysis includes two very plausible interpretations of how Green's communications could be characterized; one interpretation affords her the possibility of constitutional protection while the other precludes protection. Granting summary judgment does not seem appropriate in this procedural posture, given that there appears to be a genuine issue of material fact as to whether the speech at issue was in fact made pursuant to Green's official duties.

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82. *Id.*

83. *Id.*

84. *Id.* at 799-801.

85. *Id.* at 800.

86. *Id.* at 801 (quoting *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006)).

Second, the court seems to be merging the concepts of communications that can subject a public employee to discipline for insubordination with concepts of communications that do not maintain constitutional protection under *Garcetti*. Certainly, an employer retains the right to discipline an employee for insubordination; *Garcetti* confirms that “[s]upervisors must ensure that their employees’ official communications are accurate, demonstrate sound judgment, and promote the employer’s mission,” and they have the “authority to take proper corrective action.”<sup>87</sup> However, *Garcetti* was addressing a situation where the speech at issue was undisputedly made pursuant to official job duties. By contrast, Green’s speech was “unauthorized” by her employers, which seems to be compelling evidence of insubordination, rather than speech characterized as official government communications, as in *Garcetti*. As such, if this unauthorized speech was *not* made pursuant to Green’s official job duties, it is properly addressed by weighing the interests under the *Pickering/Connick* test, rather than by categorically stripping the speech of its constitutional protection.

#### B. Courts’ Disparate Treatment of Public Versus Private Speech

While the Supreme Court held in *Givhan* that communications made by public employees *privately* can be afforded First Amendment protection,<sup>88</sup> early application of *Garcetti* has led to a sharp distinction in constitutional protection afforded to speech made privately versus publicly. The courts’ disparate treatment of speech made privately and speech made publicly seems in direct conflict with *Givhan*.<sup>89</sup> As the Supreme Court noted in *Garcetti*, “[t]hat Ceballos expressed his views inside his office, rather than publicly, is not dispositive[,]” citing *Givhan* as support for that proposition.<sup>90</sup> The practical effect of the lower courts’ application of *Garcetti* in this manner is to encourage employees who are considering speaking out about their official job duties to deviate from following internally established reporting guidelines for fear that their speech will be subject to the *Garcetti* exclusion from First Amendment protection. As cautioned by Justice Stevens in his dissenting opinion in *Garcetti*, the majority opinion encourages employees to air their grievances publicly rather than privately and to ignore chain-of-command protocols.<sup>91</sup> Preliminary applications of *Garcetti* bear out Justice Stevens’s prediction; many courts have already held that speech

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87. *Garcetti*, 126 S. Ct. at 1960-61.

88. *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 412-13 (1979).

89. *See Ceballos v. Garcetti*, 361 F.3d 1168, 1176 (9th Cir. 2004) (“To deprive public employees of constitutional protection when they fulfill this employment obligation, while affording them protection if they bypass their supervisors and take their tales, for profit or otherwise, directly to a scandal sheet or to an internet political smut purveyor defies sound reason.”), *rev’d*, 126 S. Ct. 1951 (2006).

90. *Garcetti*, 126 S. Ct. at 1959.

91. *Id.* at 1963 (Stevens, J., dissenting) (“[I]t seems perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors.”).

preserves constitutional protection when it is made to media outlets or to elected officials because such speech is not made pursuant to official duties. Perhaps the most striking evidence of a court basing constitutional protection, in part, on whether employee speech was made publicly or privately can be found in *Green*.<sup>92</sup> The court in *Green* found it persuasive that the plaintiff's speech at issue did not involve the plaintiff "communicating with newspapers or her legislators or performing some similar activity afforded citizens."<sup>93</sup> The application of *Garcetti* should depend upon more than whether the employee's speech was made to the media or to legislators. The message such an interpretation sends to a public employee is that if the employee fears retaliation from the employer for speech made pursuant to the employee's official job duties, then *Garcetti* can be circumvented if the employee makes enough noise. When viewed in light of *Garcetti*'s foundational purpose of providing government entities with a higher degree of control over employees' speech to better ensure the "efficient provision of public services,"<sup>94</sup> the judicially-created incentive to air grievances to the media tends to undermine the Court's declared purpose. Numerous cases follow to demonstrate this principle.

In *Freitag v. Ayers*, the Ninth Circuit held that a female corrections officer alleging sexual harassment by inmates was speaking as a citizen, outside of her official job duties, when she contacted a state senator and the Office of the Inspector General regarding the State's "failure to perform its duties properly, and specifically its failure to take corrective action to eliminate sexual harassment in its workplace."<sup>95</sup> Similarly, in *Benoit v. Board of Commissioners of the New Orleans Levee District*,<sup>96</sup> a federal district court held that the senior counsel for the Board of Commissioners of the New Orleans Levee District was not acting pursuant to his official duties when he sent letters to both Louisiana Governor Kathleen Blanco and U.S. Senator David Vitter regarding misuse of time and taxpayer money by the levee district officials in the months preceding Hurricane Katrina.<sup>97</sup> The court noted that the plaintiff's speech was that of a "citizen exposing misconduct and malfeasance" when he wrote the letters to Governor Blanco and U.S. Senator Vitter, and that it was not part of his duties to provide such information to the governor or the senator.<sup>98</sup>

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92. *Green v. Bd. of County Comm'rs*, 472 F.3d 794, 800 (10th Cir. 2007).

93. *Id. Accord Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 694 n.2 (5th Cir. 2007) (finding significant that the case was different from *Pickering* in that it did not involve a letter to the local newspaper or school board).

94. *Garcetti*, 126 S. Ct. at 1958 (majority opinion). "Public employees . . . often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions." *Id.*

95. *Freitag v. Ayers*, 468 F.3d 528, 545-46 (9th Cir. 2006) (finding that plaintiff's "right to complain both to an elected public official and to an independent state agency is guaranteed to any citizen in a democratic society regardless of his status as a public employee").

96. 459 F. Supp. 2d 513 (E.D. La. 2006).

97. *Id.* at 515.

98. *Id.* at 518; *see also Sassi v. Lou-Gould*, No. 05 Civ 10450(CLB), 2007 WL 635579, at

By contrast, in *Mills v. City of Evansville, Indiana*,<sup>99</sup> a city police department sergeant discussed with other officers her opposition to a proposed plan to reallocate certain crime prevention officers to active duty.<sup>100</sup> In finding *Garcetti* applicable to the plaintiff's speech, the Seventh Circuit characterized the speech as "contributing to the formation and execution of official policy," specifically noting that at the time of the speech the plaintiff was on duty, in the workplace, and in uniform.<sup>101</sup> Applying similar reasoning, the Sixth Circuit in *Haynes v. City of Circleville, Ohio*,<sup>102</sup> found that a police officer, who worked part time as a handler in the police department canine unit, retained no constitutional protection against employer retaliation for a memorandum written to his police chief opposing cutbacks in training for canine handlers, which the plaintiff believed would likely pose a risk of harm to the public.<sup>103</sup> In relying on *Mills*, the court in *Haynes* explained that "[t]he fact that Haynes communicated *solely to his superior* also indicates that he was speaking 'in [his] capacity as a public employee contributing to the formation and execution of official policy,' not as a member of the public writing a letter to the editor as in *Pickering*."<sup>104</sup>

The critical question that emerges based on the circuit courts of appeals' holdings in *Mills* and *Haynes* is whether the outcomes would have been different had the plaintiffs not raised their concerns internally, but had voiced their opinions in a more public forum, similar to the plaintiffs in *Freitag* and *Benoit*. Specifically, Justice Stevens declared in his dissent the "notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment is quite wrong" and further "it is senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description."<sup>105</sup> Here, in direct contradiction to *Garcetti* and *Givhan*, many courts' interpretations of *Garcetti* seem to let constitutional protection for exactly the same words hinge on whether the plaintiff chose to speak out publicly rather than privately. The *Garcetti* opinion acknowledged this "perceived anomaly" and suggested that government employers can avoid it by establishing internal protocols and policies governing employee speech to "discourage [employees] from concluding that the safest avenue of expression is to state their views in public."<sup>106</sup> This recommendation serves to further limit the public employee's options by providing employers with alternative grounds on which

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\*1, \*3 (S.D.N.Y. Feb. 27, 2007) (noting a police chief was not acting within the scope of official duties when writing public letters critical of police funding policies to the city council and identifying himself as a "resident taxpayer").

99. 452 F.3d 646 (7th Cir. 2006).

100. *Id.* at 647.

101. *Id.* at 648.

102. 474 F.3d 357 (6th Cir. 2007).

103. *Id.* at 359-60.

104. *Id.* at 364 (quoting *Mills*, 452 F.3d at 646) (citation omitted) (emphasis added).

105. *Garcetti v. Ceballos*, 126 S.Ct. 1951, 1963 (2006) (Stevens, J., dissenting) (characterizing the majority's opinion as "misguided").

106. *Id.* at 1961 (majority opinion).

to base an employee's termination, namely, failure to follow employer-mandated internal protocols governing employee speech.

### C. Lower Court Approaches to Determining Official Duties

In navigating through post-*Garcetti* waters, district courts are forced to establish their own framework for what constitutes a public employee's official duties. One court observed that “[a]s comprehensive as *Garcetti* is, we are still left without a standard or a guide to help us balance or maneuver through those public statements that may be mixed, or rather disguised because the scope of job responsibilities are not so manifest.”<sup>107</sup> The district courts have placed emphasis on a wide variety of factors in defining the scope of an employee's official duties, often with conflicting and unpredictable results. The following illustrate a number of noteworthy preliminary interpretations of what constitutes speech pursuant to a public employee's official duties.

1. *Job Relatedness Approach*.—In *Pittman v. Cuyahoga Valley Career Center*,<sup>108</sup> while the court ultimately did not apply *Garcetti* to the speech at issue, the court determined that *Garcetti*'s analysis rests on “job relatedness.”<sup>109</sup> The court reasoned that if the speech was “required” by the employee's job, *Garcetti* controls, precluding constitutional protection; if the speech is not categorized as “specifically job-related,” then the availability of constitutional protection for the speech at issue is weighed by the *Pickering/Connick* balancing test.<sup>110</sup>

The job relatedness approach advocated by the *Pittman* court misconstrues the Court's limited guidance on what constitutes an employee's official duties. The Court carefully crafted its holding as targeting public employees' speech made “pursuant to their official duties.”<sup>111</sup> The *Pittman* court instead based a portion of its *Garcetti* analysis of available constitutional protections on job relatedness.<sup>112</sup> A standard that broadly includes all job-related speech would be over-inclusive because it would encompass speech falling well outside an employee's official job duties. Other courts have identified the risk of widening *Garcetti* to encompass all job related speech and have declined to do so. Specifically, one court declined to “transform *Garcetti* into an impermeable rule that all speech by governmental officials, no matter the facts presented, is fully engulfed by their governmental duties” and expressly rejected applying *Garcetti* as a “bright-line rule—an all or nothing determination—on an employee's speech

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107. *Jackson v. Jimino*, No. 1:03-CV-722, 2007 WL 189311, at \*16 (N.D.N.Y. Jan. 19, 2007) (noting the court's difficulty in determining whether the plaintiff was speaking pursuant to official job duties resulting in a material issue of fact).

108. 451 F. Supp. 2d 905 (N.D. Ohio 2006).

109. *Id.* at 929.

110. *Id.*

111. *Garcetti*, 126 S. Ct. at 1960 (emphasis added).

112. *Contra McLaughlin v. Pezzolla*, No. 06-CV-00376, 2007 WL 676674, at \*6 (N.D.N.Y. Feb. 28, 2007) (“The fact that some of these matters may have been ‘job related’ does not mean, *a fortiori*, that [a] claim is barred under *Garcetti*.”).



even if it tangentially concerns the official's employment."<sup>113</sup> The Supreme Court specifically anticipated an interpretation based on job relatedness and reaffirmed its prior holdings that the dispositive factor in *Garcetti* was not that the speech related to Ceballos's job.<sup>114</sup> Rather, the Court recognized that the "First Amendment protects some expressions related to the speaker's job."<sup>115</sup>

2. *Effect of Statute.*—Courts have also addressed the application of *Garcetti* in cases involving statutes or federal guidelines imposing a legal duty upon public employees. A number of courts have considered such statutory and regulatory requirements as a determinative factor in finding that speech was made pursuant to official duties. In *Pagani v. Meriden Board of Education*,<sup>116</sup> a teacher alleged retaliatory employment action for filing a report with the Department of Children and Families ("DCF") regarding a substitute teacher who showed middle school students photographs of his vacation, including a photograph of himself posing nude with two other nude females.<sup>117</sup> Although Pagani's supervisor discouraged him from reporting the incident to DCF, a Connecticut statute mandated reporting suspected child abuse to DCF, and the school's faculty had previously received training on statutory compliance.<sup>118</sup> The court found that when Pagani made the report to DCF, he "understood he was doing so because, as an educator, he had a duty to do so," and broadly held that reports made to DCF by teachers in Connecticut are afforded no constitutional protection under *Garcetti*.<sup>119</sup>

Taking a similar approach, the Tenth Circuit Court of Appeals in *Casey v. West Las Vegas Independent School District*<sup>120</sup> found the plaintiff acted within her official job duties as school district superintendent and chief executive officer of the school district's Head Start program when instructing a subordinate to contact the Federal Head Start regional office to report the school district's financial noncompliance with federal regulations.<sup>121</sup> The plaintiff acknowledged awareness that failure to report financial irregularities in the program could result in liability, but alleged that school board members repeatedly dismissed her concerns regarding financial noncompliance, discouraging her from further investigating the irregularities.<sup>122</sup> The Tenth Circuit cited civil and criminal statutes subjecting individuals to liability for knowingly submitting false claims, including imposing civil penalties, fines, and imprisonment.<sup>123</sup> The court was

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113. *Jackson v. Jimino*, 506 F. Supp. 2d 105, 109 (N.D.N.Y. 2007).

114. *Garcetti*, 126 S. Ct. at 1960.

115. *Id.*

116. No. 3:05-CV-01115 (JCH), 2006 WL 3791405 (D. Conn. Dec. 19, 2006).

117. *Id.* at \*1-2.

118. *Id.* at \*3.

119. *Id.* at \*4.

120. 473 F.3d 1323 (10th Cir. 2007).

121. *Id.* at 1329-30.

122. *Id.* at 1326, 1330. An investigation by the United States Department of Health and Human Services ultimately revealed improper enrollment in the school's Head Start program and required repayment of over five hundred thousand dollars in federal aid awards. *Id.* at 1326.

123. *Id.* at 1330 n.7.

persuaded that, because federal law required such disclosure and the plaintiff conceded that she was required to report noncompliance to federal authorities, the plaintiff was acting pursuant to official duties rather than speaking as a citizen for First Amendment purposes.<sup>124</sup>

Extending *Garcetti* to categorically exclude all speech by a public employee that can be tied to a statutory or regulatory duty reaches too far, placing the public employee in an impossible position. The employee either remains silent to avoid employer retaliation, thereby failing to comply with the applicable statute or regulation, or the employee complies with the mandatory disclosure requirement risking backlash from the employer, including possible termination or demotion. Selecting either option is likely a losing proposition for the public employee when *Garcetti* is interpreted so expansively.<sup>125</sup> Ceballos argued this issue to the Court by identifying a federal regulation governing basic obligations of public employees that mandates that federal “[e]mployees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.”<sup>126</sup> Ceballos opposed adopting a rule that could strip First Amendment protection from all federal employees for compliance with this government regulation.<sup>127</sup>

These conflicting obligations were present in *Garcetti*, prompting Justice Breyer’s recommendation that the *Pickering/Connick* balancing test be applied when constitutional and professional canons govern the employee’s speech.<sup>128</sup> Similarly, where statutory or regulatory duties command disclosure, the employee should not be penalized for compliance by being categorically stripped of constitutional protection for the very speech that the government mandated. Rather, in this circumstance, the interests of the parties should be weighed under the *Pickering/Connick* balancing test.

3. *Expected Duty Versus Actual Performance.*—Some courts distinguish whether *Garcetti* applies to public employee speech on the basis of what an employee is actually performing versus what the employer expects the employee to perform. A court might consider the employee’s official duties to include

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124. *Id.* at 1330-31. *Accord* *Battle v. Bd. of Regents for Ga.*, 468 F.3d 755, 761, 761 n.5 (11th Cir. 2006) (citing Department of Education Guidelines compelling federal financial aid workers to report suspected fraud to the Office of Inspector General or local law enforcement).

125. This problem has been characterized as catching a public employee ““on the horns of a dilemma,”” likely resulting in the employee being “gored” regardless of the employee’s selected course of action. *The Supreme Court, 2005 Term—Leading Cases*, 120 HARV. L. REV. 273, 279 (2006) (quoting Brief of Ass’n of Deputy Dist. Attorneys & Cal. Prosecutors Ass’n as Amici Curiae in Support of Respondent at 2, *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006) (No. 04-473), 2005 WL 1767121).

126. Brief for Respondent at 50, *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006) (No. 04-473), 2005 WL 1801035 (quoting 5 C.F.R. § 2635.101(b)(11) (2005)).

127. *Id.* (citing the existence of corresponding state and local reporting obligations).

128. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1975 (2006) (Breyer, J., dissenting) (“Where professional and special constitutional obligations are both present, the need to protect the employee’s speech is augmented, the need for broad government authority to control that speech is likely diminished, and administrable standards are quite likely available.”)

those duties the employer *expects* the employee to perform, not those duties the employee is actually performing. For example, the court in *Barclay v. Michalsky*<sup>129</sup> found *Garcetti* did not control when a nurse reported other nurses were sleeping on the job and using excessive restraints on patients, even though certain work rules technically imposed a requirement that employees report behavior that endangers the welfare of others and report any rule violations.<sup>130</sup> The court found the following significant: the rules involved a *general duty* by all employees, the plaintiff had not received special training on such rules or rule violations, and the plaintiff alleged that attempts to report such work rule violations were discouraged by superiors.<sup>131</sup> These facts proved persuasive to the court that while there may have been an *actual* duty to report the misconduct, such reporting was not *expected* of employees and the speech fell outside *Garcetti*'s control.<sup>132</sup>

Taking an opposite approach, the district court in *D'Angelo v. School Board of Polk County, Florida*,<sup>133</sup> appeared to rest its decision on the duties *actually* performed and engaged in by a school principal rather than the duties the employer *expected* the principal to perform.<sup>134</sup> D'Angelo was hired as a high school principal of a school scoring poorly on standardized tests, having crime and drug problems, and lagging behind the performance of other area high schools.<sup>135</sup> After implementing drastic changes with marked success, D'Angelo ultimately determined that pursuing charter school conversion was necessary to improve the quality of education available to the students.<sup>136</sup> This conversion effort was met with opposition by the school board, allegedly resulting in D'Angelo's termination.<sup>137</sup>

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129. 451 F. Supp. 2d 386 (D. Conn. 2006).

130. *Id.* at 395-96.

131. *Id.* ("Defendants have not demonstrated that reporting potential work rule violations relating to patient care was particularly within the province of plaintiff's professional duties, more so than that of any other . . . employees."); *see also* *Burke v. Nittman*, No. 05-cv-01766-WYD-PAC, 2007 WL 691206, at \*1, \*5 (D. Colo. Mar. 2, 2007) (finding unpersuasive under *Garcetti* that a security officer for a youth corrections facility may have had a "general" duty to report staff members' unethical behavior); *Abbatiello v. County of Kauai*, No. 04-00562 SOM/BMK, 2007 WL 473680, at \*10 (D. Haw. Feb. 7, 2007) (noting that the mere existence of police department standards of conduct mandating certain types of officer reporting is not dispositive in establishing an officer's official duties because an officer may not actually be expected to perform such reporting functions).

132. *Barclay*, 451 F. Supp. 2d at 395-96.

133. Transcript of Rule 50 Motion and Judge's Findings, *D'Angelo v. Sch. Bd. of Polk County, Fla.*, No. 8:05-CV-563-T-26TMB (M.D. Fla. June 15, 2006), *aff'd*, 497 F.3d 1203 (11th Cir. 2007).

134. *Id.* at 39-40.

135. Initial Brief of Appellant at 2-3, *D'Angelo*, 497 F.3d 1203 (11th Cir. 2007) (No. 06-13582), 2006 WL 2840509.

136. Transcript of Rule 50 Motion and Judge's Findings, *supra* note 133, at 10.

137. Initial Brief of Appellant, *supra* note 135, at 9, 11-13.

At trial, D'Angelo indicated his primary duty as principal was to do whatever was required for the students.<sup>138</sup> Broadly interpreting *Garcetti*, a Florida district court reluctantly granted the defendant's Rule 50(a) motion for judgment as a matter of law on D'Angelo's First Amendment claim, determining that *Garcetti* mandated a finding that D'Angelo was performing his official duties when he pursued converting the public high school into a charter school.<sup>139</sup> The court was not persuaded D'Angelo was acting outside of the scope of his official duties when pursuing charter conversion regardless of evidence that the school board strongly opposed charter school conversion and, ironically, that succeeding in a conversion would ultimately sever D'Angelo's employment relationship with the school board.<sup>140</sup> The court considered the conversion to be "part and parcel of his official duties," finding persuasive that the legislature designated the principal as one of the few parties that could seek conversion.<sup>141</sup>

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138. *Id.* at 9 (noting D'Angelo's trial testimony stressing that a principal's duty is to help students succeed in any way possible). D'Angelo argued that he was not required to pursue charter status and that his lengthy job description involved school management tasks and generally meeting students' needs. *Id.* at 6. Specific duties included "developing educational programs, evaluating personnel, conferring with teachers, students, and parents, requisitioning supplies, and planning and monitoring the budget." *Id.*

139. Transcript of Rule 50 Motion and Judge's Findings, *supra* note 133, at 39-42 (explaining Judge Lazzara's reluctance to grant the defendant's motion as defendant's actions were "morally outrageous" and "unconscionable," but granting the motion was required under *Garcetti*). Judge Lazzara apologized to the plaintiff for his decision, calling the remedy available to the plaintiff "hollow" based on *Garcetti*'s holding. *Id.* at 42. Further, Judge Lazzara encouraged the plaintiff to appeal the decision, stating he "hope[s] the Eleventh Circuit reverses [him] and says [he was] wrong." *Id.*

140. *Id.* at 27.

141. *Id.* at 39-40. Plaintiff argued that a mere grant of statutory authority to pursue charter status does not translate into an official duty under *Garcetti*. Initial Brief of Appellant, *supra* note 135, at 13.

Following the writing of this Note, the Eleventh Circuit Court of Appeals affirmed the district court's decision in this case. *D'Angelo v. Sch. Bd. of Polk County, Fla.*, 497 F.3d 1203, 1206 (11th Cir. 2007). The Eleventh Circuit found that D'Angelo did not speak as a citizen for First Amendment purposes for at least two reasons. *Id.* at 1210. First, the court identified that, under Florida statute, only certain parties, including school boards, principals, teachers, parents, and the school advisory council, were granted the authority to apply for charter conversion. *Id.* Having no evidence that D'Angelo was a parent or a teacher, the court determined that his attempts to convert the school to charter status must have been performed in his capacity as principal. *Id.* Second, the court relied on D'Angelo's own admission that his efforts to convert to charter status were performed in fulfillment of his professional duties. *Id.* Although the court acknowledged that D'Angelo was not expressly assigned the duty of pursuing charter conversion, it found persuasive that he admitted pursuing charter conversion to "'explore any and all possibilities to improve the quality of education at [his school],' which was one of his listed duties and he described as his 'number one duty' in his 'job as a principal.'" *Id.* (citing *Battle v. Bd. of Regents for Ga.*, 468 F.3d 755, 761 (11th Cir. 2006)). The court was not persuaded that these statements regarding his duty

As evidenced in *D'Angelo*, drawing a clear constitutional distinction between speech made pursuant to employment duties an employee was *expected to perform* and speech made pursuant to what the employee was *actually performing* seems a somewhat arbitrary place to make such a critical assessment. If *D'Angelo* was not performing what he was expected to perform by the school board, he was arguably acting outside of the scope of his official duties by pursuing the charter school conversion. Certainly the principal was not, in the language of *Garcetti*, “expected to perform” and pursue charter school conversion as part of his official duties as evidenced by the fact that this course of action conflicted with the school board’s objectives, but it is what he *actually* performed. However, the district court broadly held he was acting pursuant to his official duties based on *D'Angelo*’s sense of duty to “do[] the best he could for the students” and make changes to improve the school.<sup>142</sup> Such differentiations do not appear to adhere to the practical inquiry recommended in *Garcetti*. Rather, distinctions in constitutional protections afforded to speech, made strictly on the basis of expected duties versus actual duties are problematic because of the dynamic nature of many employment relationships, ultimately rendering such distinctions impractical.

As discussed, under *Garcetti* a court’s inquiry into what constitutes official duties is a “practical one” and should focus on the duties an employee is actually “expected to perform.”<sup>143</sup> Although dicta in *Garcetti* rejects any effort by employers to create overly-broad job descriptions so as to preclude as much employee speech as possible from First Amendment protection,<sup>144</sup> employers could conceivably craft vague or overly-inclusive job descriptions in an attempt to tie as much employee speech as possible to official job duties. Justice Souter envisions that the “government may well try to limit the English teacher’s options by . . . investing them with a general obligation to ensure the sound administration of the school.”<sup>145</sup> As a tangible example, consider also that in *D'Angelo*, the principal expansively described his primary responsibility as a duty, generally, to do whatever possible for the success of the students. Such a broad job duty could easily be inserted by employers into future principals’ official job descriptions to further insulate employers from liability for retaliatory employment actions resulting from employee speech tied to this general duty.

The range of factors and considerations that lower courts have utilized to define a public employee’s official duties demonstrates the difficulty involved in properly applying the bright-line rule announced in *Garcetti* to vastly different factual scenarios. *Garcetti* is an anomaly, in that *Ceballos*’s speech was undisputedly made pursuant to his official duties as a calendar deputy. This type of definiteness with respect to official duties will not likely be found in the

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to pursue charter status only reflected *D'Angelo*’s “moral obligations as a human being and not his responsibilities as a principal.” *Id.*

142. Initial Brief of Appellant, *supra* note 135, at 13.

143. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1961-62 (2006) (majority opinion).

144. *Id.* at 1961.

145. *Id.* at 1965 n.2 (Souter, J., dissenting).

majority of First Amendment claims involving public employer retaliation for employee speech. Accordingly, the facts of *Garcetti* cannot be easily analogized to assist courts in determining whether the speech at issue overcomes *Garcetti*'s threshold requirement. Further, public employees are left with uncertainty as to their constitutional free speech rights, and their reliance interests are damaged as a result of this unpredictability. *Garcetti* establishes a new pronouncement of law that profoundly affects a core, constitutionally-protected right without providing sufficient guidance on how to appropriately apply this requirement to varied factual situations.

#### IV. POLICY CONCERNS ARISING FROM *GARCETTI*

The effective operation of government entities undoubtedly is of paramount importance to a properly functioning society. Justice Breyer recognized that the "efficient administration of legislatively authorized programs reflects the constitutional need effectively to implement the public's democratically determined will."<sup>146</sup> However, while *Garcetti* identified this goal as the paramount reason behind its holding, other equally important policy considerations have arisen resulting from the removal of citizen status from public employees speaking pursuant to official job duties.

The *Garcetti* Court sought to avoid continued judicial involvement in a vast majority of the constitutional claims brought by public employees through its new pronouncement of law in *Garcetti*. The Court supported its holding, in part, by stating to "hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers."<sup>147</sup> Following *Garcetti*, the determination of whether a public employee's speech is made in the capacity of a citizen on a matter of public concern remains a question of law for the court.<sup>148</sup> However, the effect of *Garcetti* on courts' involvement has resulted in numerous disputes of material fact centered on the issue of what actually constitutes a public employee's official duties.<sup>149</sup> As Justice Souter aptly predicted in his dissent, the majority's holding in *Garcetti* "engender[s] litigation to decide which stated duties were actual and which were merely formal."<sup>150</sup> Therefore, rather than having the intended effect of removing public employees' First Amendment claims from judicial purview, the courts' role in such constitutional claims has merely shifted.

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146. *Id.* at 1973 (Breyer, J., dissenting).

147. *Id.* at 1961 (majority opinion).

148. *McGee v. Pub. Water Supply*, 471 F.3d 918, 920 (8th Cir. 2006).

149. *See Kodrea v. City of Kokomo, Ind.*, 458 F. Supp. 2d 857, 868 (S.D. Ind. 2006) (denying defendants' motion for summary judgment because of factual issues surrounding the scope of plaintiff's job responsibilities); *Shewbridge v. El Dorado Irrigation Dist.*, No. CIV. S-05-0740 FCD EFB, 2006 WL 3741878, at \*7 (E.D. Cal. Dec. 19, 2006) (identifying factual issues regarding plaintiff's job responsibilities that precluded granting defendant's motion for summary judgment).

150. *Garcetti*, 126 S. Ct. at 1965 n.2 (Souter, J., dissenting).

The *Pickering* Court properly assessed the difficulty in establishing a bright-line rule governing First Amendment protection for public employee speech. Its previously articulated principle cautioned:

Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.<sup>151</sup>

The principle of addressing these issues on a case-by-case basis reflected a high regard for the preservation of public employee free speech rights. By adopting this view, the Court essentially acknowledged that First Amendment claims are inherently fact sensitive and are thus better suited to a balancing of the interests based on the individual facts of each case than to a per se rule governing public employee First Amendment protection.

*Garcetti* conflicts with this previously articulated principle, and its per se rule draws an arbitrary line by holding that public employees are not citizens when they speak pursuant to their official job duties. The Fifth Circuit Court of Appeals explains *Garcetti* as shifting the “focus from the content of the speech to the role the speaker occupied when he said it.”<sup>152</sup> This new rule—this judicial line in the sand—does a disservice to society by categorically limiting society’s access to critical information on topics of public interest and concern. The Fifth Circuit expressed the current judicial approach as holding “[e]ven if the speech is of great social importance, it is not protected by the First Amendment so long as it was made pursuant to the worker’s official duties.”<sup>153</sup> Justice Souter characterized the result as protecting a *Givhan* schoolteacher who speaks to a principal regarding school hiring policies, but not protecting a school personnel officer whose speech addresses the principal’s failure to hire minority candidates.<sup>154</sup> Ceballos suggested the problematic effects of the per se rule in several scenarios:

Suppose, for example, that a Capitol Police officer patrols the Capitol daily, looking for suspicious unattended packages, and every day she files a report with her findings. One day, the officer discovers a package containing a bomb; furthermore, after an investigation, she learns that a fellow police officer planted it. She reports her findings and is discharged. Similarly, imagine that a U.S. Customs Service employee

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151. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 569 (1968); *see also id.* at 574 (“This Court has also indicated, in more general terms, that statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors.”).

152. *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 692 (5th Cir. 2007).

153. *Id.*

154. *Garcetti*, 126 S. Ct. at 1965 (Souter, J., dissenting).

learns that some of his colleagues have been accepting bribes from a foreign entity, known to have ties to terrorist organizations, to ignore certain shipments when they arrive at U.S. ports. He reports his discovery and is fired.<sup>155</sup>

Ceballos argued to the Court that “it would be perverse to protect speech of such public significance *less* because the person *best* situated to alert his agency to the danger was the one who spoke.”<sup>156</sup>

The obvious query resulting from these examples is who is better suited to speak on issues of public health, safety, and ethical breaches than those most closely involved, and whose speech does society *most* need to hear on such subjects? The Supreme Court’s pre-*Garcetti* decisions resoundingly affirmed the “necessity for informed, vibrant dialogue in a democratic society” and identified that “widespread costs may arise when dialogue is repressed.”<sup>157</sup> The hypothetical scenarios suggested by Ceballos illustrate the incongruous result of *Garcetti*. The practical application of *Garcetti* takes away the constitutionally protected voice of public employees who are most familiar with the issues on which they may need to speak out and arguably those on which they are the most knowledgeable in their respective fields. The costs of silence are too high to provide the U.S. Customs officer or the Capitol Police officer with an incentive to withhold disclosure of critical information involving these matters of public concern for fear of retaliatory action by an employer.

A related criticism of *Garcetti* is that its effect is too far-reaching. *Garcetti* touches every person who makes the decision to become a public servant—teachers, bus drivers, police officers, public defenders, prosecutors, politicians—and strips them of their constitutional protection for speech made pursuant to their official duties. *Garcetti* simply affects too much speech. According to the 2005 U.S. Census Public Employment Data statistics, there are 18,361,208 federal, state, and local full time public employees.<sup>158</sup> The Supreme Court previously expressed “serious concerns” about widespread prohibitions on public employee speech, specifically relating to a ban that “chills potential speech before it happens.”<sup>159</sup> This exclusion from First Amendment protection will likely discourage public employees from stepping forward to disclose misconduct

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155. Brief for Respondent, *supra* note 126, at 43.

156. *Id.* Accord *Garcetti*, 126 S. Ct. at 1965 (Souter, J., dissenting) (noting that “it seems obvious that the individual and public value of such speech is no less, and may well be greater, when the employee speaks pursuant to his duties in addressing a subject he knows intimately for the very reason that it falls within his duties”).

157. *Garcetti*, 126 S. Ct. at 1959 (majority opinion).

158. U.S. CENSUS BUREAU, FEDERAL GOVERNMENT CIVILIAN EMPLOYMENT BY FUNCTION: DECEMBER 2005, <http://ftp2.census.gov/govs/apes/05fedfun.pdf>; U.S. CENSUS BUREAU, 2005 PUBLIC EMPLOYMENT DATA—STATE AND LOCAL GOVERNMENTS, <http://ftp2.census.gov/govs/apes/05stlus.txt>.

159. *United States v. Nat’l Treasury Employees Union*, 513 U.S. 454, 468 (1995).



and wrongdoing in the public workplace. As Gerald McEntee, President of the American Federation of State, County and Municipal Employees, observed:

This decision gives constitutional sanction to those who would fire a public worker for stepping forward to preserve the integrity of our public institutions as a government whistleblower.

Government employees should not be asked to sacrifice their First Amendment rights to work in the public sector. . . . [W]e ought to protect rank-and-file public employees who are courageous enough to risk their own careers to speak out about possible violations of the law or ethical breaches.<sup>160</sup>

As discussed, early findings demonstrate that interpretation and application of *Garcetti* have proven difficult for the courts. This is due in large part to the fact that the Court created a critical threshold requirement, yet refrained from establishing a framework by which lower courts can reliably implement this requirement. Not only was no framework provided, but the Court specifically refrained from deciding whether *Garcetti*'s analysis applies in the context of "academic scholarship or classroom instruction."<sup>161</sup> Failure to expressly carve out academic scholarship from the reach of *Garcetti* has raised significant concerns and commentary. Justice Souter identified that *Garcetti* is potentially "spacious enough" to encompass teaching in public universities and colleges and thereby eliminate constitutional protection for educators whose speech is required based on their official duties.<sup>162</sup> The majority's failure to explore its application to public employee speech involving scholarship or teaching will force lower courts to wrestle with this complex issue.

While no circuit courts of appeals have, as of the time of writing of this Note, specifically addressed *Garcetti*'s application to academic freedom in the post-secondary education setting, the Seventh Circuit Court of Appeals recently addressed how *Garcetti* applies in the context of the primary school setting in *Mayer v. Monroe County Community School Corp.*<sup>163</sup> In *Mayer*, an elementary school teacher claimed a violation of her First Amendment rights when her contract allegedly was not renewed because she expressed a political viewpoint

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160. Press Release, American Federation of State, County and Municipal Employees, *supra* note 1; *see also* Williams v. Riley, 481 F. Supp. 2d 582, 584-85 (N.D. Miss. 2007) (denying First Amendment protection where an officer reported a fellow officer for beating an inmate and stating the court is "gravely troubled" by the effect of *Garcetti* on such a factual scenario).

161. *Garcetti*, 126 S. Ct. at 1962.

162. *Id.* at 1969 (Souter, J., dissenting).

163. 474 F.3d 477, 478 (7th Cir. 2007). The Fourth Circuit, however, declined to apply *Garcetti* in a case involving a First Amendment claim relating to education, noting that the Supreme Court refrained from determining whether *Garcetti* is applicable in the educational setting. Lee v. York County Sch. Div. 484 F.3d 687, 694 n.11 (4th Cir. 2007). Rather, the Fourth Circuit instead chose to continue its application of *Pickering/Connick* in circumstances involving education. *Id.*

in her current-events class discussion.<sup>164</sup> Parents complained, and the principal instructed the faculty to refrain from voicing opinions concerning political debates.<sup>165</sup> In an opinion written by Chief Judge Easterbrook, the Seventh Circuit determined that *Garcetti* applied to Mayer's speech because the current-events lesson Mayer taught was considered part of her assigned duties.<sup>166</sup> The court held the "first amendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system."<sup>167</sup>

Although the Seventh Circuit specifically left open the issues of the breadth of "constitutional protection of scholarly viewpoints in post-secondary education," publications by primary and secondary teachers, and speech made by teachers outside of the classroom,<sup>168</sup> the court's reasoning in *Mayer* raises concerns for the protection of academic freedom in the post-secondary setting as well. Specifically, the court found that the "school system does not 'regulate' teachers' speech as much as it *hires* that speech. Expression is a teacher's stock in trade, the commodity she sells to her employer in exchange for a salary."<sup>169</sup> Further explaining its reasoning, Chief Judge Easterbrook identified that the facts of *Mayer* made for an easier case for the employer to prevail than the facts of *Garcetti* because "teachers hire out their own speech and must provide the service for which employers are willing to pay."<sup>170</sup> Thus, Mayer could discuss all sides of political controversies with her class, but could not express opinions on such topics.<sup>171</sup> Such a restriction on the free expression of opinions and exchange of ideas in the public university or college setting would severely restrict, if not eliminate, educators' ability to contribute in a meaningful way to scholarly dialogue or writing.<sup>172</sup> In order to adequately safeguard the vital role played by

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164. *Mayer*, 474 F.3d at 478.

165. *Id.* The teacher alleged that she answered a student's inquiry regarding whether she had participated in a demonstration against the United States' involvement in Iraq. *Id.* She informed the student that she honked her car horn in response to a sign encouraging motorists to "'Honk for Peace.'" *Id.*

166. *Id.* at 480.

167. *Id.*

168. *Id.*

169. *Id.* at 479.

170. *Id.* at 479-80 (noting as a particularly compelling factor that primary school students represent a captive audience, and the "Constitution does not entitle teachers to present personal views to captive audiences against the instructions of elected officials").

171. *Id.* at 480.

172. *See* Brief of Amici Curiae the Thomas Jefferson Center for the Protection of Free Expression, and the American Association of University Professors at 7, *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006) (No. 04-473), 2005 WL 1801034 ("Indeed, the most valuable contributions that most university scholars and teachers make to public debate and understanding typically derive from their academic disciplines or fields of expertise. Thus, any suggestion that 'matters of public concern' may not encompass job-related expression of professors would undermine the special protections the Court has given academic freedom for the past 50 years. Adoption of such a view

public educators in the post-secondary education arena, *Garcetti* should not be applied in the academic scholarship context.<sup>173</sup>

The numerous policy concerns arising from the early applications of *Garcetti* signal a warning that courts must seek to narrowly interpret *Garcetti* when defining a public employee's official duties. The *Connick* Court declared that its "responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government."<sup>174</sup> The *Garcetti* Court affirmed the authority and relevance of *Connick*, yet maneuvered around this self-identified responsibility to preserve public employee constitutional rights by eliminating citizenship status for those public employees speaking pursuant to official job duties. Public employees have a compelling interest in speaking on matters of public concern, and that interest is in no way lessened when the employee's official duties require such speech. As such, it does not seem appropriate to categorically preclude such speech from First Amendment protection when a public employee's duties require speech on a matter of public concern, such as, bringing health, safety, or ethical violations to light.

Society at large also holds a corresponding interest in hearing speech on matters of public concern. The *Garcetti* Court reaffirmed its prior decisions that if public employees were "not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues. 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."<sup>175</sup> Courts applying a broad interpretation of *Garcetti* serve to further frustrate citizens' participation in critical dialogue by stifling the vital exchange of ideas so fundamental to our society's ideals. As expressed in *Connick*, "[s]peech concerning public affairs is more than self-expression; it is the essence of self-government."<sup>176</sup> Applying a narrow interpretation of the meaning of "pursuant to their official duties" would encourage public employees' speech on matters of public concern by providing a greater likelihood for obtaining constitutional protection for their speech, ultimately furthering society's interest in receiving important commentary on matters of public concern.

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would also create a perverse irony: Constitutional protection for a professor's speech would now extend only to those public statements on which the speaker was *least well informed*, while denying such protection to statements reflecting the speaker's academic expertise. . . .").

173. See *id.* ("[T]he Court has not wavered in identifying the university as 'a traditional sphere of free expression so fundamental to the functioning of society' that First Amendment concerns apply with special force." (quoting *Rust v. Sullivan*, 500 U.S. 173, 200 (1991))).

174. *Connick v. Myers*, 461 U.S. 138, 147 (1983).

175. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1959 (2006) (majority opinion) (quoting *City of San Diego, Cal. v. Roe*, 543 U.S. 77, 82 (2004)). The Court also recognized that "large-scale disincentive to Government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said." *Id.* (quoting *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 470 (1995)).

176. *Connick*, 461 U.S. at 145 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964)).

## CONCLUSION

Courts confronted with evaluating whether *Garcetti* precludes First Amendment protection for public employee speech should take a narrow interpretation of *Garcetti* when defining "official duties" to minimize unjustifiable interference with constitutional protection for speech on matters of public concern. Adopting a narrow interpretation requires defining an employee's official duties such that they are not distorted or inflated in an artificial attempt to subject more speech to *Garcetti*. Courts must specifically reject any attempt to invest public employees with vague, over-reaching employment duties or general whistleblower duties in order to trigger the application of *Garcetti*. Additionally, courts must not deem legal or regulatory duties to be conclusive evidence that speech made in compliance with such obligations is necessarily made pursuant to official duties.

The interests of the public in receiving informed speech and the interests of the public employee in making informed speech demand minimal interference with such expressions. The elementary school bus driver needs to raise his concerns regarding bus inspection violations. The levee district official needs to communicate her observations on levee maintenance and safety. The police officer needs to raise allegations of police brutality. Society needs to be afforded the opportunity to hear speech on such matters of public concern. As the Supreme Court reaffirmed in *Connick*, "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection."<sup>177</sup> Rejection of a broad interpretation of the meaning of "pursuant to their official duties" is one meaningful step toward returning speech by public employees on matters of public concern to its rightful place in the hierarchy of First Amendment protection.

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177. *Id.* (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)).