

10-15-2007

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### Recommended Citation

Jayne Chen, *When Public Employees Speak out on Issues of Public concern: The Applicability of Pickering in Garcetti v. Ceballos*, 27 J. Nat'l Ass'n Admin. L. Judiciary Iss. 2 (2007)  
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# **When Public Employees Speak Out on Issues of Public Concern: The Applicability of *Pickering* in *Garcetti v. Ceballos***

**By Jayne Chen\***

## **I. INTRODUCTION**

A government lawyer writes a memo and meets with his supervisors, recommending the dismissal of a case due to a flawed search warrant.<sup>1</sup> After his supervisors disagree and proceed with the case despite the lawyer's concerns, he is called by the defense to testify regarding his memo.<sup>2</sup> Shortly thereafter, the lawyer is reassigned and transferred to another office.<sup>3</sup>

Is this a justifiable action brought on by such unexciting circumstances as changing staffing needs?<sup>4</sup> Or is this a retaliatory action for speaking up about a work-related matter?<sup>5</sup> A government employer's inexcusable response to a citizen speaking out on a matter of public concern?<sup>6</sup> Or, worse yet, is it both?<sup>7</sup>

When public employees make statements pursuant to their official duties, may their speech be protected from employer

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\* J.D. candidate, 2008, Pepperdine University School of Law. B.A., 2001, Harvard University. Thanks to Professor Ogden, who suggested this case to Journal members as a possible paper topic. In addition, thanks to Christina Royce for her encouragement and advice.

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

2. *Id.* at 1956.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 1963.

discipline by the First Amendment? The Supreme Court addressed this question in *Garcetti v. Ceballos*, and held that: (1) when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes;<sup>8</sup> and (2) the Constitution does not protect their communications from employer discipline.<sup>9</sup> Further, the Court held that Richard Ceballos, the government lawyer, did not speak as a citizen when he wrote his memo, thus his speech was not protected by the First Amendment.<sup>10</sup>

*Garcetti v. Ceballos* is the latest in a series of Supreme Court decisions addressing the heavily debated area of First Amendment protection for government employees. At the heart of this debate is an intersection between the importance of speaking out on issues of public concern and the Constitutional limitations of public employment.<sup>11</sup> The area of First Amendment protection for government employee speech is broad and can encompass countless permutations and outcomes based on the various types of speech, speakers, and circumstances involved. In *Garcetti*, the Court specifically addresses the notion that public employees that speak about matters pursuant to their official duties are not entitled to full First Amendment protection of their speech.<sup>12</sup>

The purpose of this note is to address the *Garcetti* decision and its implications. Part II reviews the history of the Court's decisions regarding First Amendment protection for public employee speech, and the different outcomes depending on various factors; Part III summarizes the facts of *Garcetti*; Part IV reviews and analyzes Justice Kennedy's majority opinion, as well as the dissenting opinions of Justices Stevens, Souter, and Breyer; Part V discusses both the legal and societal impact of the *Garcetti* decision; and Part VI concludes the note.

## II. HISTORICAL BACKGROUND

At issue in *Garcetti* is the subject of First Amendment protection

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8. *Id.* at 1962.

9. *Id.* at 1960.

10. *Id.*

11. *See id.* at 1951.

12. *See id.*

for speech made pursuant to an employee's official duties. To understand how speech from an employee can affect a citizen's First Amendment rights, we must first look to the relevant historical development of free speech issues for employees, and more specifically, for government employees.

The First Amendment provides that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."<sup>13</sup> However, courts have long debated whether and to what extent the First Amendment protects government attorneys from disciplinary actions because of their speech.<sup>14</sup>

As the spectrum of free speech cases regarding public employees is far reaching, there are numerous cases regarding employee speech and defamation.<sup>15</sup> Although false statements are not at issue in *Garcetti*, past cases regarding defamation raise concepts relevant to *Garcetti*.<sup>16</sup> In particular, cases such as *Garrison v. Louisiana* address the scope of First Amendment protection for speech regarding matters of public concern.<sup>17</sup>

In *Garrison*, the Court held that statements made by public officials regarding issues of public concern are protectable under the First Amendment.<sup>18</sup> In that case, Jim Garrison, a district attorney of Orleans Parish, Louisiana, had a dispute with eight criminal district court judges over funds used to help defray the District Attorney's office expenses.<sup>19</sup> Garrison held a press conference, where he

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13. U.S. Const. amend. I.

14. *Garcetti*, 126 S. Ct. at 1973.

15. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Roth v. United States*, 354 U.S. 476 (1957).

16. *Garcetti*, 126 S. Ct. at 1955. In *Garcetti*, petitioners never asserted that Ceballos made false statements in his memo regarding alleged misrepresentations made in the search warrant at issue. See generally *id.* at 1951, 1955.

17. *Garrison v. Louisiana*, 379 U.S. 64, 65 (1964).

18. *Id.* at 77.

19. *Id.* *Garrison's* allegedly defamatory statements attributed the inefficiency of the court system to the judges' inefficiency, laziness, and excessive vacationing, among other claims. *Id.* at 66.

criticized the judges' judicial conduct.<sup>20</sup> As a result, Garrison was convicted of criminal defamation under the Louisiana Criminal Defamation Statute.<sup>21</sup>

The *Garrison* Court held that the Louisiana statute was constitutionally invalid regarding criticism of official conduct of public officials.<sup>22</sup> Incorrectly applying *New York Times v. Sullivan*,<sup>23</sup> the Louisiana statute punished those who made false statements criticizing public officials' official conduct, regardless of whether there was actual malice.<sup>24</sup>

Under *Garrison*, any criticism that touches upon a public official's reputation is relevant.<sup>25</sup> The *Garrison* Court held that statements made by public officials on matters of public concern must be afforded First Amendment protection even though the statements are directed at their nominal superiors.<sup>26</sup>

In the late 1960s, the Court created a balancing test to be implemented when evaluating First Amendment claims by public employees. In 1968, the Court in *Pickering v. Board of Education* held that there must be a balancing of both the individual's interests and the public's interests.<sup>27</sup> In *Pickering*, Marvin Pickering, a teacher in Township High School District of Will County, Illinois, was fired for sending a letter to a local newspaper regarding a proposed tax increase that was critical of the way the school board had handled such proposals in the past.<sup>28</sup> The Board dismissed Pickering for writing and publishing the letter, from which Pickering

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20. *Id.* at 65.

21. *Id.* at 66.

22. *Id.* at 77.

23. *Sullivan* held that unless there is a false statement made with actual malice, a public official may not receive damages in a civil action for criticism of his official conduct. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

24. *Garrison*, at 77; see *N.Y. Times Co.*, 376 U.S. 254.

25. *Garrison*, 379 U.S. at 77.

26. *Id.* at 64.

27. *Pickering v. Bd. of Ed.*, 391 U.S. 563 (1968).

28. *Id.* at 564. The Board of Education asked the school district to approve a bond issue to raise money to build two new schools, and to that end later proposed an increase in the tax rate. *Id.* at 565. Pickering's letter addressed what he felt was the School Board's mishandling of the bond issue proposals as well as the school superintendent's alleged attempt to prevent teachers from speaking out against the issue. *Id.* at 566.

claimed the Board violated his First and Fourteenth Amendment rights.<sup>29</sup>

The *Pickering* Court contended that a public employee does not give up his First Amendment right to comment on matters of public concern simply because he is employed by the government.<sup>30</sup> However, the Court conceded 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>31</sup>

Also, the statements at issue in *Pickering* were in no way directed towards anyone Pickering would normally interact with on a daily basis as a school teacher.<sup>32</sup> Further, Pickering's letter was written after the second tax increase proposal failed, thus it had no effect on the school district's ability to raise the necessary funds for the schools.<sup>33</sup> The *Pickering* Court found that the letter addressed a matter of legitimate public concern regarding the local school system.<sup>34</sup>

The fact that Pickering's employment by the school district is only tangentially related to the essence of his letter, the *Pickering* Court concluded Pickering must be regarded as a citizen, and not an employee, for the purposes of assessing his speech.<sup>35</sup> Ultimately, the Court held that Pickering's right to speak on issues of public importance and the fact the letter was critical of the board's past actions could not serve as a basis for firing him.<sup>36</sup>

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29. *Pickering v. Board of Ed.*, 391 U.S. 563, 566-67 (1968). The Board of Education concluded that numerous statements in Pickering's letter were false, and that the publication of the statements unjustifiably impugned the motives and honesty of both the Board and the school administration. *Id.* at 567.

30. *Id.* at 568.

31. *Id.*

32. *Id.* at 569-70. In fact, the *Pickering* Court writes that Pickering's relationships with the Board and the superintendent were not the type where personal loyalty is required as it would be in other public employment jobs. *Id.* at 570. However, the school board and superintendent could be construed as Pickering's ultimate employer. *Id.* at 572.

33. *Id.* at 571.

34. *Id.*

35. *Id.* at 574.

36. *Id.* at 575.

In *Pickering*, the Court sought to balance the teacher's interests as a citizen in commenting on matters of public concern, with the state's interests as an employer in efficiently performing its public services.<sup>37</sup> Thus, *Pickering* established that a court must first determine whether the employee spoke as a citizen on a matter of public concern to then determine whether or not there is a potential First Amendment claim.<sup>38</sup>

The result of *Pickering* is that it framed the issue of First Amendment rights of public employees as a balancing act between seemingly competing issues. Since *Pickering*, courts have applied its balancing test in cases dealing with public employees who allege that their First Amendment rights have been violated through retaliatory actions.

Since the *Pickering* decision in 1968, the Court has continued to explore the balance between the interests of the individual and the employer, and the various situations in which an employee's First Amendment rights may or may not be recognized.

In 1973, the California Court of Appeal explored one such situation in which a public employee's interests were outweighed by that of the employer's.<sup>39</sup> In *Johnson v. County of Santa Clara*, the court held that a probation officer who wrote and posted a poem expressing his dissatisfaction at being transferred was not entitled to full First Amendment protection.<sup>40</sup>

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37. *Id.* at 568. According to the *Pickering* Court, the threat of dismissal from public employment is an effective means of inhibiting speech. *Id.* at 574.

38. *Id.* According to *Pickering*, teachers were deemed a class of community members likely to have informed opinions on how school funds should be spent. *Id.* at 572.

39. *Johnson v. County of Santa Clara*, 31 Cal. App. 3d 26 (1973).

40. *Id.* The county superintendent of probation services transferred Philip Johnson, deputy county probation officer, to the adult probation department as part of its general policy to provide employees with a variety of professional opportunities. *Id.* at 28. Upon being told of the transfer, Johnson wrote a poem expressing his dissatisfaction about the transfer, and described a bomb blowing his supervisor out of his window. *Id.* at 29. Johnson showed the poem to a few of his friends in the office, as well as to his immediate supervisor. *Id.*

As a direct result of writing the poem, Johnson was temporarily suspended and transferred to a different unit.<sup>41</sup> The court in *Johnson* felt that the poem indicated Johnson's insubordinate attitude, and that the reference to a bomb indicated an intention to take some sort of strong action against his supervisor.<sup>42</sup> Thus, the court held that the poem's expression harmed the public service and was not entitled to absolute First Amendment protection.<sup>43</sup>

Under *Johnson*, a government agency seeking to restrict an employee's exercise of his constitutional rights must show: "(1) the governmental restraint rationally relates to the enhancement of the public service; (2) the benefits that the public gains by this restraint outweigh the resulting impairment of the constitutional right; and (3) no alternatives less subversive to the constitutional right are available."<sup>44</sup> The court distinguished *Johnson* from *Pickering* stating that, unlike the expression in *Johnson*, the teacher's letter in *Pickering* did not demonstrate an attitude of non-cooperation.<sup>45</sup>

Whereas *Johnson* determined a situation in which a public employee's right to speak out against his employer was outweighed by his employer's interests, *Madison Joint School District v. Wisconsin Employment Relations Commission* determined that a public employee could speak out, not only as an employee, but as a citizen on important public issues.<sup>46</sup> In 1976, *Madison* centered around a public discussion which turned into a pending labor negotiation between the board and the teachers' union during an open Board of Education meeting.<sup>47</sup> Over the union's objection, a nonunion teacher addressed an aspect of the pending negotiations.<sup>48</sup>

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41. *Id.* at 30. As a result of writing the poem, Johnson was suspended without pay for one month and transferred to the adult probation department. *Id.* There was no dispute that Johnson was disciplined because he wrote the poem. *Id.* at 31.

42. *Id.* at 33-34. The court felt that Johnson's supervisor was justified in deeming the poem an overly emotional reaction to a routine transfer. *Id.* at 34.

43. *Id.*

44. *Id.* at 31.

45. *Id.*

46. *City of Madison, Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm'n*, 429 U.S. 167 (1976).

47. *Id.* at 170-71.

48. *Id.* In his speech at the school board meeting, the teacher stated he represented an informal committee of 72 teachers in 49 schools. *Id.* at 171. The



In *Madison*, the teachers' union sued the school board for violating a Wisconsin statute by committing a prohibited labor practice of engaging in negotiations with someone other than the designated exclusive collective-bargaining representative.<sup>49</sup> The *Madison* Court held that the First Amendment required that a school teacher be permitted to speak at a public school board meeting despite the board's contention that doing so violated Wisconsin statute.<sup>50</sup> Under the holding in *Madison*, when the board conducts public meetings to seek public opinion regarding issues such as their pending negotiations, it may not be required to categorize speakers based on their employment or the content of their speech.<sup>51</sup>

The *Madison* Court held that a teacher could not be constitutionally prohibited from speaking at the meeting where public participation was permitted.<sup>52</sup> According to *Madison*, because the board meeting was open to the public, the nonunion teacher spoke out as *both* an employee and as a concerned citizen on an important public issue.<sup>53</sup>

Like *Johnson* and *Madison*, cases following *Pickering* continued to explore the delicate balance between employer and employee interests. In *Hosford v. California State Personnel Board*, Horace Hosford was fired from the highway patrol for willful disobedience

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teacher discussed the union's demand for a "fair share" clause, which would require all teachers (regardless of whether they were union members or not) to pay union dues. *Id.* He read a petition signed by the teachers in the district, which called for postponement of the issue. *Id.* Afterwards, a collective-bargaining agreement without the "fair share" clause was signed, and the union sued the board. *Id.*

49. *Id.* at 172.

50. *Id.* at 175.

51. *Id.* at 176.

52. *Id.* at 175.

53. *Id.* at 174-75. Under *Madison*, the teacher was not speaking solely as a citizen because the teacher stated that he represented an informal committee of teachers, he spoke before the school board as both as an employee and a citizen exercising his First Amendment rights. *Id.* at 171, 177. The Court noted that in *Madison*, almost all speech regarding the way the school system operates could also be characterized as relating to collective bargaining. *Id.* at 177. The *Madison* Court further noted that teachers comprise the core and majority of the school system, thus to restrict their freedom of speech regarding the operation of the school system would severely impair the school board's ability to manage the district. *Id.*

and repeated disrespect towards his supervisor, among other things.<sup>54</sup> Hosford sued to overturn his termination alleging a violation of his First Amendment rights.<sup>55</sup> The California Court of Appeal upheld his dismissal finding that the highway patrol's interests in maintaining morale and discipline far outweighed Hosford's right to unfettered speech during work.<sup>56</sup>

The court rejected Hosford's contention that the punishment violated his First Amendment rights, and in fact, found that the Highway Patrol's interest in maintaining morale and discipline far outweighed the member's interest in exercising an unfettered right of speech in the course of duty.<sup>57</sup> According to the court, dismissal as a punishment was not an abuse of discretion.<sup>58</sup>

In addition to the balancing of employer and employee interests, the court began to establish the various circumstances which could ultimately affect the application and outcome of the *Pickering* balancing test. In *Givhan v. Western Line Consolidate School District*, for example, the Court held that First Amendment protection still applies when a public employee arranges to communicate privately with his employer rather than express his views publicly.<sup>59</sup>

Bessie Givhan was a junior high school teacher who filed a complaint in intervention in the desegregation order of her school, and claimed she was terminated in violation of her First and Fourteenth Amendment rights for criticizing the policies and practices of her school district.<sup>60</sup> Among the speech at issue was a

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54. *Hosford v. Cal. State Pers. Bd.*, 74 Cal. App. 3d 302 (1977). Horace Hosford worked for the highway patrol. *Id.* at 305. The Personnel Board found he was guilty of inefficiency, neglect of duty, insubordination, and willful disobedience because he was chronically absent, and showed repeated disrespect to his immediate supervisor. Hosford was subsequently fired. *Id.*

55. *Id.* at 306.

56. *Id.* The Court of Appeal affirmed the trial court denial of Hosford's petition for writ of mandamus to overturn the Personnel Board's decision to uphold his dismissal from the patrol. *Id.* at 305-06.

57. *Id.* at 306.

58. *Id.* at 313.

59. *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979).

60. *Id.* at 412.

series of private interactions between Givhan and the school principal where Givhan allegedly made unreasonable demands.<sup>61</sup>

The Fifth Circuit held that her criticism of the school's desegregation efforts was not protected, holding that there is no constitutional right to impose one's ideas on another.<sup>62</sup> However, the Court in *Givhan* held, in line with *Pickering*, that a public employee does not give up his First Amendment rights when he chooses to express his views in a private instead of in a public forum.<sup>63</sup>

In referring to *Pickering*, the *Givhan* Court noted that balancing public and private interests involve different considerations depending on the context.<sup>64</sup> Under *Givhan*, private expression, such as a government employee confronting his supervisor in private, may threaten the employer's institutional efficiency not only by the content of the employee's speech but also by its manner, time, and place.<sup>65</sup>

In addition to the various circumstances which can affect a *Pickering* analysis, the *Givhan* Court examined the content of the speech at issue. In *Connick v. Myers* the Court held that a public employee's speech on a matter of purely private concern is not protected by the First Amendment.<sup>66</sup>

Under *Connick*, a public employee's speech is potentially protected only if it is a matter of public concern.<sup>67</sup> The *Connick* Court applied *Pickering* and determined that whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement.<sup>68</sup> In *Connick*, Sheila Myers, a former assistant district attorney, was informed she would be transferred to a different section of her department.<sup>69</sup> Upon

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61. *Id.* at 412-13.

62. *Id.* at 413.

63. *Id.* at 414.

64. *Id.* at 415.

65. *Id.* at 415 n.4.

66. *Connick v. Myers*, 461 U.S. 138, 147-48 (1983).

67. *Id.*

68. *Id.*

69. *Id.* at 140. Myers was employed by petitioner Harry Connick. *Id.* Although she performed her responsibilities competently, in October of 1980, Myers was told she was being transferred to a different section. *Id.* Myers strongly

expressing her opposition to the transfer, Myers prepared and distributed a workplace questionnaire regarding internal office affairs and was subsequently fired.<sup>70</sup>

Myers filed a section 1983 claim alleging that she was terminated because she exercised her First Amendment right to free speech.<sup>71</sup> The Supreme Court in *Connick* held that the lower courts misapplied *Pickering*, and that terminating Myers did not violate her First Amendment rights.<sup>72</sup>

According to the *Connick* Court, in applying *Pickering*, the lower court wrongly characterized the subject matter of Myers' questionnaire as a matter of public concern, when instead it dealt with internal office matters only.<sup>73</sup> The *Connick* Court noted that because Myers' questionnaire could not be fairly characterized as speech regarding public concern, the Court did not need to initiate a First Amendment inquiry into why she was fired.<sup>74</sup> At the same time, *Connick* does not go so far as to suggest that speech on private matters be treated the same across the board.<sup>75</sup>

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opposed this, expressed her view to several of her superiors, including Connick, but was transferred anyway. *Id.*

70. *Id.* at 141. Myers prepared a questionnaire soliciting the views of her fellow staff members regarding office transfer policy, office morale, need for a grievance committee, level of confidence in the supervisors, and whether employees felt pressured to work in political campaigns; she distributed it to fifteen assistant district attorneys. *Id.* When Dennis Waldron, an assistant district attorney, learned Myers was passing out the survey, he told Connick that Myers was creating a "mini-insurrection" in the office. *Id.* at 141. Myers was told that distributing the questionnaire was an act of insubordination. *Id.*

71. *Id.* at 140-41. Connick fired Myers and told her she was being terminated because she refused to accept the transfer. *Id.* at 142. However, the *Connick* Court asserts that the facts showed the real reason for being fired was the questionnaire. *Id.*

72. *Id.* at 142.

73. *Id.*

74. *Id.* at 146-47. Justice White noted: "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.* The *Connick* Court also acknowledged that regular dismissals from government service are not subject to judicial review, even if they are allegedly unreasonable or mistaken. *Id.* at 147-48.

75. *Id.* at 147.

Instead, *Connick* established that in determining whether an employee's speech deals with a matter of public or private concern the Court must look at the content, form and context.<sup>76</sup> In Myers' case, the Court found her questionnaire overwhelmingly addressed her own private concerns of office morale and her own complaint regarding being transferred to another division.<sup>77</sup>

However, the *Connick* Court acknowledged that one question in Myers' questionnaire—whether an employee ever felt pressure to work in political campaigns of office-supported candidates—reflected an ancillary issue of employers coercing particular beliefs on their employees in violation of the Constitution, which would then become a matter of public concern.<sup>78</sup> In such situations, public employees facing such coercion must be able to speak out freely without the threat of retaliatory discharge.<sup>79</sup>

According to *Connick*, not all expressions of speech that take place in a government employment setting are matters of public concern.<sup>80</sup> Unlike the letter to the newspaper in *Pickering*, Myers' questionnaire impacted her close working relationship. Under *Connick*, when such close working relationships are necessary to fulfill official duties, there is a wide discretion of deference to the employer's judgment.<sup>81</sup>

In Myers' case, where, when, and how her speech was expressed presented additional factors to the *Connick* Court when balancing various interests. They considered the fact that Myers' questionnaire was prepared and distributed at the office, and the fact that she wrote the questionnaire, not out of academic interest, but in response to receiving word of her transfer both supported the notion that her expression was disruptive to the office and threatened her employer's

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76. *Id.* at 147-48.

77. *Id.* at 148. The *Connick* Court points out that Myers' questionnaire did not bring to light any actual wrongdoing or seek to tell the public about some substantive aspect of her employer's responsibilities. *Id.* There was no demonstration that the questionnaire impeded Myer's ability to perform her responsibilities. *Id.* at 151.

78. *Id.* at 149.

79. *Id.*

80. *Id.*

81. *Id.* at 151-52. In her supervisors' eyes, Myers' questionnaire was an act of insubordination, and thus evidently disruptive to the office environment. *Id.* at 151.

attempt to maintain authority and efficiency in the workplace.<sup>82</sup> Thus, while Myers' questionnaire dealt briefly with a public concern, on balance, the *Connick* Court found her speech to be of a private concern.<sup>83</sup>

The Circuits have also applied the *Pickering* balancing test to weigh in on First Amendment protection of employee speech. In *Giacalone v. Abrams*, the Second Circuit held that a state government attorney was not entitled to First Amendment protection against discipline because of speech that included communications with superiors.<sup>84</sup> In 1982, Arthur Giacalone, an assistant attorney general in Buffalo, New York, was assigned to a matter involving two corporations who failed to pay their employees in conformance with New York Law.<sup>85</sup>

After Giacalone negotiated a settlement agreement where the corporations would pay back wages, a dispute arose over his department's failure to withhold income taxes exposing the unpaid employees to liability.<sup>86</sup> When Giacalone disapproved of the action his department took, he wrote a memo expressing so, and submitted it to upper management.<sup>87</sup> After discussing the memo with his supervisor, Giacalone wrote another memo addressing the issue. Subsequently, his department decided to terminate Giacalone's employment.<sup>88</sup>

In *Giacalone*, the court concluded that it was not clearly established that firing Giacalone violated his First Amendment rights.<sup>89</sup> According to the court in *Giacalone*, the *Pickering* balancing test and its successors would likely have revealed to

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82. *Id.* at 153.

83. *Id.* at 154.

84. *Giacalone v. Abrams*, 850 F.2d 79 (1988); *see also* *Lefcourt v. Legal Aid Soc.*, 445 F.2d 1150 (1971); *Steinberg v. Thomas*, 659 F. Supp. 789 (1987).

85. *Giacalone*, 850 F.2d at 81.

86. *Id.* After Giacalone drafted a memo recommending payment be delayed, his supervisors wanted to keep the tax dispute under wraps until after the election of their department head, the Attorney General. *Id.* at 82.

87. *Id.* at 82.

88. *Id.* at 83.

89. *Id.* at 88.

Giacalone's supervisors that his First Amendment interest was outweighed by the disruption his speech created.<sup>90</sup>

The Ninth Circuit has found employee speech regarding public concern to be constitutionally protected in certain circumstances. In *Roth v. Veteran's Administration*, Barry Roth, a physician at the Veterans Administration ("VA") Medical Center, was fired after reporting to his superiors his criticisms of his job and workplace.<sup>91</sup> Among his contentions, Roth complained that the VA wasted resources, violated safety regulations, and acted unethically.<sup>92</sup> As such, the Ninth Circuit in *Roth* held that Roth's speech regarded a matter of public concern and was thus constitutionally protected.<sup>93</sup>

Specifically, the Ninth Circuit looked at the context of Roth's statements in finding his speech was constitutionally protected.<sup>94</sup> Roth's criticisms of his workplace were not in response to his termination, demotion, or transfer.<sup>95</sup> Instead, Roth was specifically hired as a troubleshooter, whose job obliged him to make such evaluations of his department.<sup>96</sup> The Ninth Circuit then discounted any disruptive effect of Roth's comments partially because his supervisors' failure to support Roth in instituting the necessary reforms likely worsened any disruption. Secondly, whistleblowing, by its very nature, will cause commotion, at the very least, in the workplace.<sup>97</sup>

While *Pickering* established the broad basis of balancing the interests of a public employee and employer when evaluating the employee's First Amendment rights, its predecessors have continued

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90. *Id.* at 88.

91. *Roth v. Veterans Admin.*, 856 F.2d 1401 (1988). Roth sued various Veterans Administration officials for First and Fifth Amendment violations. *Id.* at 1403. Roth was hired as a trouble shooter, where Veterans Administration officials told him he could undertake necessary steps to fulfill his duties and he did so. *Id.*

92. *Id.* at 1406.

93. *Id.* The Ninth Circuit distinguished *Roth* from *Connick* by contrasting Roth's complaint of safety and ethical violations with Myers' questions regarding office morale. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 1407.

to flesh out the various situations and circumstances that can affect such an analysis.

In *Madison*, the Court determined that a public employee could speak, not only as an employee, but also as a citizen on important public issues.<sup>98</sup> In *Hosford*, the California court found a public employee's right to engage in repeated disrespectful and disobedient speech at work was outweighed by his employer's interest in maintaining morale and discipline.<sup>99</sup> In *Givhan*, the Court noted that a *Pickering* analysis must take into consideration various circumstances such as the content and context of a given statement, holding that First Amendment protection still applies when a public employee arranges to communicate privately with his employer rather than express his views publicly.<sup>100</sup> As in *Givhan*, the Court in *Connick* held that a public employee's speech on a matter of purely private concern is not protected by the First Amendment.<sup>101</sup>

### III. FACTS

Starting in 1989, Richard Ceballos was a deputy district attorney for the Los Angeles County District Attorney's Office.<sup>102</sup> In February 2000, a defense attorney contacted Ceballos about a pending criminal case, saying that there were inaccuracies in an affidavit used to obtain a critical search warrant, and he wanted Ceballos to review the case.<sup>103</sup> Ceballos determined that the affidavit had serious misrepresentations.<sup>104</sup>

On March 2, 2000, Ceballos reported his findings and submitted a memo recommending the case's dismissal to his supervisors,

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98. *Madison Joint Sch. Dist. v. Wis. Employment Relations Comm'n*, 429 U.S. 167 (1976).

99. *Hosford v. Cal. State Pers. Bd.*, 74 Cal. App. 3d 302, 306 (1977). The Court of Appeals affirmed the trial court denial of Hosford's petition for writ of mandamus to overturn the Personnel Board's decision to uphold his dismissal from the patrol. *Id.* at 305, 306.

100. *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415 (1979).

101. *Id.* at 147-48.

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

103. *Id.* at 1955

104. *Id.* An example of one of the serious misrepresentations was that the affidavit referred to a separate roadway as a "long driveway." *Id.*



petitioners Carol Najera and Frank Sundstedt.<sup>105</sup> After a meeting was held (with Ceballos, Najera, Sundstedt, and others) to discuss the affidavit in question, Sundstedt decided to proceed with the prosecution anyway.<sup>106</sup> The trial court held a hearing on the defense's motion to traverse, and Ceballos was called by the defense to recount the observations he made in the affidavit.<sup>107</sup>

Ceballos claimed that, after these events, he was subjected to a series of retaliatory employment actions including: reassignment to a trial deputy position, transfer to another courthouse, and denial of a promotion.<sup>108</sup>

First, Ceballos initiated an employment grievance.<sup>109</sup> Ceballos' supervisors denied his grievance asserting Ceballos did not suffer any retaliation.<sup>110</sup> Second, he filed a 42 U.S.C. § 1983 claim in district court, claiming the county and his supervisors at the District Attorney's office, including Najera and Sundstedt, violated his First and Fourteenth Amendment rights.<sup>111</sup> In particular, Ceballos alleged he was subject to adverse employment actions in retaliation for writing a memo where he recommended the dismissal of a case on the basis of government misconduct.<sup>112</sup>

In response, petitioners said they did not take retaliatory actions and that their actions at issue were legitimate due to reasons such as staffing needs.<sup>113</sup> Further, the petitioners claimed the memo was not protected under the First Amendment and moved for summary judgment.<sup>114</sup> The United States District Court granted the petitioners' motion for summary judgment, finding Ceballos wrote

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105. *Id.* at 1955-56.

106. *Id.* at 1956.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 1955-56.

112. *Id.* at 1955. Ceballos was a calendar deputy in the office's Pomona branch, where he exercised certain supervisory responsibilities over other lawyers.  
*Id.*

113. *Id.* at 1956.

114. *Id.*

his memo pursuant to his employment duties; thus, was not entitled to First Amendment protection for the memo's contents.<sup>115</sup>

The Ninth Circuit reversed and remanded the case.<sup>116</sup> The court held that the allegations of wrongdoing contained in Ceballos' memorandum constituted protected speech for the purposes of the First Amendment.<sup>117</sup> In particular, the Ninth Circuit relied on circuit precedent and looked to several prior cases involving free speech and public concerns including *Pickering v. Board of Education* and *Connick v. United States*.<sup>118</sup>

The Ninth Circuit held that Ceballos' memo was inherently a matter of public concern.<sup>119</sup> However, it did not consider whether the speech was made in Ceballos' capacity as a citizen.<sup>120</sup> Using the *Pickering* balancing approach, the Ninth Circuit weighed Ceballos' interest in his speech against his supervisors' interest in responding to his memo.<sup>121</sup> The Ninth Circuit ultimately found in Ceballos' favor, contending that Petitioners "failed even to suggest disruption or inefficiency in the workings of the District Attorney's Office" as a result of the memo.<sup>122</sup>

The Supreme Court reversed and remanded the case, and held that, when making statements pursuant to their official duties, public employees are not speaking as citizens for First Amendment purposes.<sup>123</sup> The Court also held that the Constitution does not protect public employees' communications from employer

115. *Id.* at 1956.

116. *Id.*

117. *Id.*

118. *Id.* In *Connick*, the Court instructs courts to first consider "whether the expressions in question were made by the speaker 'as a citizen upon matters of public concern'" *Connick v. Meyers*, 461 U.S. 138, 146-147 (1983).

119. *Garcetti*, 126 S. Ct. at 1956.

120. *Id.*

121. *Id.* at 1957; *see id.* at 1180.

122. *Id.* Judge O'Scannlain specially concurred, saying that the court was compelled by Circuit precedent and emphasized the difference between speech offered by a public employee acting as an employee and acting as a citizen. *Id.* at 1185. "When public employees speak in the course of carrying out their routine, required employment obligations, they have no personal interest in the content of that speech that gives rise to a First Amendment right." *Id.* at 1189.

123. *Id.* at 1962.

discipline.<sup>124</sup> Further, the Court found that Ceballos did not speak as a citizen when he wrote his memo, thus his speech was not protected by the First Amendment.<sup>125</sup>

#### IV. ANALYSIS

##### *A. Majority Opinion: Justice Kennedy*

In the majority opinion, Justice Kennedy holds that the *Pickering* balancing test does not apply in *Garcetti*, and that statements made by public employees pursuant to their official duties are not subject to First Amendment protection.<sup>126</sup> First, Justice Kennedy holds that there is a general notion that a public employee has no grounds to object to constitutional restrictions that may be placed on the job.<sup>127</sup> However, Justice Kennedy acknowledges there are numerous qualifications to that notion.<sup>128</sup> In particular, and most relevant to *Garcetti*, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.<sup>129</sup>

In assessing the instances where a public employee's speech may be protected, Justice Kennedy first addresses the effect and implications of *Pickering* and its balancing approach.<sup>130</sup> In

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124. *Id.* at 1960.

125. *Id.* at 1961.

126. *Id.* at 1958.

127. *Id.* at 1957. The *Connick* Court states that, "the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Connick v. Meyers*, 461 U.S. 138, 143 (1983).

128. *Garcetti*, 126 S. Ct. at 1957.

129. *Id.*

130. *Id.* In *Pickering*, the Court had to decide if a school teacher's letter to a local newspaper, addressing issues such as funding policies of the school board, was protected by the First Amendment or not. *Pickering v. Board of Ed.*, 391 U.S. 563, 567-68 (1968). The *Pickering* Court sought to balance the interests of the school teacher as a citizen and the interests of the state as an employer. *Id.* at 568. The Court found that the teacher's speech did not impede the teacher's proper performance of his daily duties, thus the school administration's interest in limiting teachers' chances to contribute to public debate was not significantly greater than

determining whether there is constitutional protection for a public employee's speech, Justice Kennedy asserts that a *Pickering* analysis asks two main questions.

First, the court must ask whether or not an employee spoke as a citizen on a matter of public concern.<sup>131</sup> If not, the employee has no First Amendment cause of action.<sup>132</sup> If so, there is a possibility of a First Amendment claim.<sup>133</sup> Second, the court must ask whether the relevant government entity has an adequate justification for treating the employee differently from any other member of the general public.<sup>134</sup>

Seeming to find the answer to the first *Pickering* question to be no—that Ceballos did not speak as a citizen on a matter of public concern—Justice Kennedy determines that when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes.<sup>135</sup> As such, the

its interest in limiting any similar contribution by any member of the general public.” *Id.* at 573.

131. *Garcetti*, 126 S. Ct. at 1958; see *Pickering*, 391 U.S. at 568.

132. *Garcetti*, 126 S. Ct. at 1958, see *Connick*, 461 U.S. at 147.

133. See *Pickering*, 391 U.S. at 568.

134. *Garcetti*, 126 S. Ct. at 1958, see *Pickering*, 391 U.S. at 568. According to Justice Kennedy in *Garcetti*, this second question emphasizes importance of relationship between speaker's expressions and employment. *Garcetti*, 126 S. Ct. at 1958.

135. *Id.* Justice Kennedy's rationalization for finding Ceballos' speech to be unprotected seems to rest squarely on his assumption that Ceballos did not speak as a citizen on a matter of public concern. *Id.* According to Professor Martin Schwartz, *Garcetti* effectively created a new dichotomy between “an employee's speech that is part of the employee's official duties, which is never protected speech, and speech in the employee's capacity as a private citizen which, if a matter of public concern, may be protected.” Martin A. Schwartz, *Supreme Court Review: October 2005 Term, Section 1983 and Other Civil Rights Cases*, at 14. In creating a new dichotomy, Justice Kennedy appears to overlook speech that is part of an employee's official duties which also happen to be matters of public concern. *Id.* In contrast, prior cases such as *Givhan* and *Connick* acknowledged that specific circumstances, such as context, time, place, and manner, can affect the analysis of providing First Amendment protection. See *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415 (1979); *Connick*, 461 U.S. at 147-48. Further, Justice Kennedy's resounding belief that public employees who speak out pursuant to their job duties may not also speak out as citizens concerned about public matters preclude a balancing of various interests from even occurring by foreclosing *Pickering* from applying to such cases.

Constitution does not protect their communications from employer discipline.<sup>136</sup> Justice Kennedy further contends that, when a citizen becomes a government employee, because of the very nature of the work, the citizen must accept that certain limitations on his freedom come with the job, such as a restriction on his First Amendment rights.<sup>137</sup>

In reaching his conclusion, Justice Kennedy evaluates the facts of *Garcetti*.<sup>138</sup> First, Justice Kennedy dismisses the factors he didn't find to be dispositive in his analysis; the fact Ceballos expressed his views (that the affidavit had serious misrepresentations) inside his office (instead of publicly);<sup>139</sup> and the fact that the memo concerned the subject matter of Ceballos' employment.<sup>140</sup>

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136. *Garcetti*, 126 S. Ct. at 1958. Justice Kennedy seems to imply that, because one works for the government, he has a heightened duty of responsibility. Later, Justice Kennedy comments that there is an established precedent of giving government employers discretion to efficiently and effectively manage their employees. *Id.* at 1960. However, along that logic, there seems to be no reason for any elevated status for a government employer as compared to a non-government employer. The goals of efficiency and effectuating an employer's particular policies and targets seems universal, and not just limited to government work.

137. *Id.*

138. *Id.* at 1959.

139. *Id.* Justice Kennedy notes that, in some cases, employees may receive First Amendment protection for expressions made at work. *Id.* In *Givhan*, a school teacher voiced her concerns against desegregation in private conversations with her supervisor. *Givhan*, 439 U.S. at 412-13. The *Givhan* Court held that First Amendment protection still applies when a public employee arranges to communicate privately with his employer rather than express his views publicly. *Id.* at 410. Had Ceballos voiced his concerns in a public forum, say at a town hall meeting, Justice Kennedy may have had to give this fact more consideration. Further, Justice Kennedy appears to quickly dismiss the apparent benefit to the District Attorney's office from Ceballos disseminating his memo privately instead of holding a press conference or the like. Justice Kennedy later discusses the importance a government employer establishing managerial efficiency and protocol for handling inter-office communication. *Garcetti*, 126 U.S. at 1960. Clearly, Ceballos chose the arguably more respectful avenue of handling his complaints of the allegedly faulty search warrant internally. For Justice Kennedy to conclude this fact is not dispositive seems strange in light of his previous and subsequent comments.

140. *Garcetti*, 126 U.S. at 1959. Justice Kennedy does not elaborate on why the fact Ceballos' memo related to the subject matter of his employment does not weigh for or against a finding of First Amendment protection. However, Justice Kennedy acknowledges that some expressions related to an employee's job may be

Instead, Justice Kennedy asserts that the pivotal factor in denying Ceballos' memo constitutional protection is that Ceballos' recommendations to his supervisors were made pursuant to his duties as a calendar deputy.<sup>141</sup> Justice Kennedy contends that restricting speech made solely as a result of one's employment does not infringe on any Constitutional rights an employee might enjoy as a private citizen, but instead displays the employer's control over its workplace.<sup>142</sup>

To support this notion, Justice Kennedy cites the assessment of *Rust v. Sullivan* in *Rosenberger v. Rector and Visitors of University of Virginia* saying that "[w]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."<sup>143</sup> Justice Kennedy argues that Ceballos wrote his disposition memo because that was part of his employment duties.<sup>144</sup>

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protected, as was the case in *Givhan* and *Pickering*. *Id.*; see generally *Givhan*, 439 U.S. at 415-16; *Pickering v. Bd. of Ed.*, 391 U.S. 563, 574-75 (1968). In *Pickering*, a school teacher wrote a letter to his local newspaper regarding the school board's funding of local schools, and the Court held that teachers are deemed a class in a community who would most likely have informed opinions as to how the funds should be spent. *Id.* at 572. In doing so, the *Pickering* Court found that the teacher spoke as a citizen regarding a public concern. *Id.* Similarly, one could argue that Ceballos, as an educated deputy district attorney devoted to public service, would be in the best position to know if a search warrant in a pending investigation was faulty or not. Admittedly, only those involved with the case and search warrant at issue would have an adequate basis to speak out about the matter. However, it would not seem remotely far-fetched for the *Garcetti* court to find that Ceballos spoke as both an employee and a citizen regarding a public concern.

141. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1959-60 (2006).

142. *Id.* at 1960. Under previous cases such as *Givhan v. Western Line Consolidated School District.*, and *Connick v. Myers*, the Court looked at various factors to determine the strength of the competing parties' interests in protecting and suppressing whatever speech was at issue. See *Givhan*, 439 U.S. at 415, and *Connick v. Meyers*, 461 U.S. 138, 147-48 (1983). Among others, such factors include: when the speech was made, where the speech took place, how the speech was presented, and the subject matter of the speech and the relation of the speaker to the subject matter. *Id.* Justice Kennedy seems to quickly brush over any consideration of these factors by simply asserting that they are not dispositive, without any substantive justification for why they are not relevant to the discussion of whether Ceballos' speech is protectable under the First Amendment.

143. *Id.*; see *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995); *Rust v. Sullivan*, 500 U.S. 173 (1991). Justice Souter, in his dissenting opinion, later notes that Justice Kennedy wrongly summarizes *Rust* and

According to Justice Kennedy, Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how to best proceed with a pending case.<sup>145</sup> Justice Kennedy contends that, in *Pickering*, when the school teacher wrote a letter to a local newspaper, it had no official significance to his job as a teacher. In

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wrongly equates statements made by a public employee in the scope of employment to be treated as government speech. *Garcetti*, 126 S. Ct. at 1968. In *Rust v. Sullivan*, the Court held that regulations that barred recipients of Title X funds from participating in abortion counseling, referral, and activities advocating abortion as a method of family planning did not violate the First Amendment. *Rust*, 500 U.S. at 178. The *Rust* court contended that the government can selectively fund a program to encourage activities it believes are in the public interest while choosing not to fund alternative programs without violating the Constitution. *Id.* at 193. To hold the government in violation of the First Amendment for selective funding would make numerous government programs constitutionally suspect. *Id.* at 194.

144. *Garcetti*, 126 S. Ct. at 1960. One could also argue, however, that the memo was a matter of public concern. Certainly, there are many professions where an employee's comments made during and related to the scope of his employment have little to no bearing on important public issues. A soap opera writer, for example, who chooses to air his grievances about a particular plot point, would not be in fear of addressing a substantive public issue. Likewise, there are several professions where an employee's opinions, because of the very nature of the work involved, have the capacity to directly affect important public concerns. A doctor or nurse who voices his opinion regarding potential malpractice of another on staff can be a matter of life and death, or at the least, a matter of public health; a law enforcement officer's evaluations of his work or workplace can easily be construed as issues of public safety; and, like Ceballos, an attorney who writes a memo to his supervisors about a potential misrepresentation made in the legal process can be understood to be raising important public issues such as ethical conduct and an honest commitment to justice.

145. *Id.* at 1959. Admittedly, one could imagine any number of average citizens writing a letter to their local newspaper to criticize the impending demise of small, local businesses and the arrival of a new Wal Mart. Conversely, it is unlikely an average concerned citizen would contact their District Attorney's office to alert them to a possible bad affidavit for a particular case. On the surface, such a comparison seems to make sense—a citizen is speaking as a government employee, about a job-related matter, is not the same as a citizen speaking as a citizen about a general public issue. However, such a comparison seems to obfuscate the reality that many government employees' jobs deal primarily with public concerns. For example, a janitor for the government, who chooses to speak out about some aspect of his job to his supervisors, is not likely expressing himself regarding matters of public concern. In contrast, Ceballos expressed his opinion about his work, but his work is also a matter of public concern—arguably, the accuracy of the American criminal and judicial system.

fact, Justice Kennedy argues, the letter was one that would have likely been written by a normal citizen.<sup>146</sup>

Next, Justice Kennedy asserts that such reduced First Amendment protection for government employees speaking on matters pursuant to their jobs does not unnecessarily censure them.<sup>147</sup> In fact, according to Justice Kennedy, government employees may speak freely in a setting of a public debate or civic discourse.<sup>148</sup> Further, Justice Kennedy finds that the *Garcetti* holding supports past precedent of giving government employers discretion to efficiently and effectively manage their employees.<sup>149</sup> Justice Kennedy argues that employers have heightened interests in controlling their employees' work-related speech, as a means of ensuring professionalism and properly reacting to potentially inflammatory speech.<sup>150</sup>

Because statements made by public employees may receive reduced constitutional protections, Justice Kennedy acknowledges the importance of "promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion."<sup>151</sup> He further recognizes the fine balancing act between

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

147. *Id.* at 1960. In fact, Justice Kennedy cautions that public employees' ability to participate in public debate does not give them a right to perform their jobs without restriction. *Id.*

148. *Id.* It seems strange that Justice Kennedy would suggest they must go to a public forum instead of directly address the issue with those with whom they work.

149. *Id.* There is certainly a difference between speech in the workplace and speech in a public forum. I agree that employers have a need to maintain a professional and efficient work place; however, this seems at odds with Justice Kennedy's previous comment of how government employees are not hindered in their ability to voice their public concerns in a public forum.

150. *Id.* One may argue that most employees would prefer to voice their concerns to their supervisors, and only reach out publicly or to a third party when existing managerial infrastructure does not properly or comfortably allow employees to communicate openly and honestly with their supervisors. Thus, if an employer does as he feels and acts in response to a heightened interest in maintaining office decorum, theoretically an employee would not feel the need to speak out publicly.

151. *Id.* at 1958. Here, Justice Kennedy seems to briefly touch upon the point that public employees' duties are often, by their very nature, related to important public issues. Further exploring that line of thinking, any fear of retaliatory



promoting individual and societal interests in having employees speak as citizens and needs of government employers to perform their important public functions.<sup>152</sup>

Thus, Justice Kennedy believes that, when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes; the Constitution does not protect their communications from employer discipline.<sup>153</sup> Justice Kennedy distinguishes *Garcetti* from *Pickering*, stating that, in *Pickering*, the letter written by a school teacher to a newspaper has no official significance to the teacher's job and would be the same as letter submitted by average Joe Shmoe.<sup>154</sup>

Instead, Justice Kennedy finds *Garcetti*'s holding to be consistent with past precedent's emphasis on giving government employers adequate discretion to properly manage their workplaces.<sup>155</sup> According to Justice Kennedy, *Garcetti*'s proposed contrary rule would compel state and federal courts to engage in the permanent and intrusive task of overseeing communications between and among government employees and their superiors in the course of official business.<sup>156</sup> While Justice Kennedy acknowledges that the First Amendment requires a delicate balancing when an employee speaks as a citizen, he sees no need for the same degree of scrutiny for an employee who is simply performing his job duties.<sup>157</sup> According to Justice Kennedy, applying a *Pickering* balancing analysis to an employee speaking out about a work-related issue would result in a

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discharge would seem to significantly hinder a government employee's desire, or duty even, to honestly assess his job and anything related to it.

152. *Id.* at 1959. While Justice Kennedy acknowledges the utility of the *Pickering* balancing test, he fails to explain why it does not apply to *Ceballos*.

153. *Id.* at 1960.

154. *Id.* The *Pickering* court stated that the teacher's letter did not impede his performance of his daily duties as a teacher. *Pickering v. Bd. Of Educ.*, 391 U.S. 563, 572-73 (1968). However, it also acknowledged that the teacher was critical of the school board, the teacher's ultimate employer. *Id.* at 572. Further, teachers were deemed a class of community members likely to have informed opinions on how school funds should be spent. *Id.*

155. *Garcetti*, 126 S. Ct. at 1960. By denying *Ceballos* First Amendment protection, *Garcetti* indeed reinforces a government employer's ability to respond to such speech using retaliatory tactics.

156. *Id.* at 1961.

157. *Id.*

permanent judicial intervention in the basic, everyday functions of government operations.<sup>158</sup>

In reversing and remanding the Ninth Circuit's decision, Justice Kennedy asserts that the Ninth Circuit's decision was both impractical and based on a limited doctrinal anomaly of relating only to expressions an employee makes during the course of official job-related duties, not to statements made as a citizen and outside the scope of his job.<sup>159</sup> Further, Justice Kennedy believes that the Ninth Circuit's holding misperceives the theoretical foundation of *Garcetti*: when an employee makes a public statement outside the scope of their job, he retains First Amendment protection for such expression because it is the type of activity a non-government employee would make.<sup>160</sup>

Justice Kennedy also asserts that the Ninth Circuit's decision is impractical because it would result in state and federal courts permanently and intrusively overseeing work-related communications between government employees and employers.<sup>161</sup> Justice Kennedy argues that, if a public employer wants to encourage its employees to voice their concerns privately, within the company and not to a third party, it may institute its own internal set of policies and protocol.<sup>162</sup> By doing so, the employer discourages its employees from preferring to voice their concerns in public.<sup>163</sup>

According to Justice Kennedy, the First Amendment does not disallow managerial discipline made in response to an employee's

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158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* Justice Kennedy's push for employers to strategize when implementing internal communication policies seems effective. When employees feel comfortable in their workplace, and feel free to communicate to their supervisors and fellow co-workers their grievances and related issues in an environment safe from unwarranted retaliatory action, they will likely do so and avoid resorting to airing their complaints in a public setting, reaching out to a third party, or otherwise bypassing their supervisors in the process.

163. *Id.* Justice Kennedy is vague when it comes to explaining how this will happen. An employee may be discouraged from voicing his job-related concerns internally instead of in a public forum if an employer's internal communication policies are highly regimented, regulated, and prohibitive.

job-related expressions.<sup>164</sup> Hence, because Ceballos' memo was made pursuant to his official responsibilities, Ceballos' claim of retaliatory actions by Garcetti fail.<sup>165</sup>

Finally, Justice Kennedy raises two points.<sup>166</sup> First, he emphasizes that there is no dispute Ceballos wrote his memo as part of his job duties.<sup>167</sup> Justice Kennedy rejects the suggestion that employers will be able to restrict employees' rights by creating excessively broad job descriptions.<sup>168</sup> According to Justice Kennedy, a job description usually does not accurately describe the job's actual duties.<sup>169</sup> Thus, listing a given task is neither necessary nor sufficient to show that a particular task is within the scope of one's official job duties for First Amendment purposes.<sup>170</sup>

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164. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1961(2006).

165. *Id.* Here, Justice Kennedy seems to skip a step in his analysis and equate the fact the memo was made pursuant to official responsibilities with diminished First Amendment protection without exploring why speech made pursuant to one's job deserves it. Instead, Justice Kennedy's justification seems limited to the need for increased managerial control over employer-employee communications and the fact Ceballos' memo was made pursuant to official job responsibilities, which almost seems circular.

166. *Id.*

167. *Id.*

168. *Id.* Justice Kennedy's dismissal of an employer being able to effectively chill an employee's freedom of expression by creating a broad job description, theoretically making anything the employee speaks of something that is pursuant to an official job duty, seems superficial and unfounded. If a job description does not accurately depict an employee's job duties, it would logically follow that perhaps a reasonable person's understanding of one's job or the collective impressions of both a supervisor and employee would suffice in establishing an employee's job duties. Yet, this reasoning creates a sort of vague hodge-podge of what an employee's duties are. The very fact that determining what exactly an employee's specific job duties are so that a court can then determine if speech was made pursuant to a job duty is one-dimensional and completely ignores all of the other factors involved in determining if speech is of a public concern, such as what, how, and when a statement is made.

169. *Id.* at 1962.

170. *Id.* Ostensibly, because an employee's job duties often defy established definition, it would be difficult for an employer to censure its employees by holding them to such inflexible measures. However, it is because of this sort of loose and indeterminate method of establishing what exactly an employee's job duties are, and consequently what speech is made pursuant to an employee's job duties, that seems to cut against Justice Kennedy's argument for finding that a

Second, while *Garcetti* may have a significant impact on speech related to scholarship or teaching, the Court does not address it in the opinion. Although Justice Kennedy acknowledges the importance of exposing governmental inefficiency and misconduct, he rejects the notion that the First Amendment “shields from discipline the expressions employees make pursuant to their professional duties.”<sup>171</sup>

### *B. Dissenting Opinion: Justice Stevens*

In his dissenting opinion, Justice Stevens dismisses Justice Kennedy’s conclusion as overly broad and contends that the majority should have used the *Pickering* balancing approach.<sup>172</sup> To begin, Justice Stevens agrees with Justice Kennedy that the issue surrounding *Garcetti* is whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee’s official duties.<sup>173</sup> Yet, unlike Justice Kennedy, Justice Stevens believes that a government employee *can sometimes* speak as a citizen on a matter of public concern.<sup>174</sup>

Justice Stevens agrees with Justice Souter that, “public employees are still citizens while they are in the office.”<sup>175</sup> Further, according to Justice Stevens, the notion of a categorical difference between speaking as a citizen or during course of employment is

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government employee speaking on a matter pursuant to his job duties is not speaking as a concerned citizen. Often times, one’s job duties are intertwined with what citizens deem to be important public concerns. When a doctor speaks out about a lack of funding at his local hospital, he is not only speaking as an employee of the hospital pursuant to his duty as an employee, but also as a concerned citizen speaking out about health care issues that affect numerous citizens.

171. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1962 (2006).

172. *Id.* at 1962-63.

173. *Id.* at 1962.

174. *Id.* In his majority opinion, Justice Kennedy implies that Ceballos did not speak as a citizen on a matter of public concern. *Id.* at 1960. Justice Stevens acknowledges that a supervisor may take necessary action when speech is “inflammatory or misguided.” *Id.* at 1962. Similarly, in *Hosford*, a disobedient and disrespectful employee was fired and the California Court of Appeal found that the employee’s First Amendment rights were not violated. *Hosford v. State Pers. Bd.*, 74 Cal. App. 3d 302 (1977).

175. *Garcetti*, 126 S.Ct. at 1963. Here, Justice Stevens and Justice Souter attack the crux of Justice Kennedy’s argument, which appears to convey the message that public employees cannot speak as citizens.

wrong.<sup>176</sup> According to Justice Stevens, it seems contrary to make a new rule that gives employees an incentive to voice their concerns in public before talking frankly with employers.<sup>177</sup>

*C. Dissenting Opinion: Justice Souter with  
Justices Stevens and Ginsberg joining.*

In his Dissenting Opinion, Justice Souter takes a broad and practical look at the vast spectrum of situations that exist within the realm of employee speech.<sup>178</sup> Like Justice Stevens, Justice Souter believes that the majority should have used a *Pickering*-type balancing approach in *Garcetti*.<sup>179</sup> However, Justice Souter does so with certain qualifications.<sup>180</sup> He acknowledges and agrees with the majority that a government employer may have substantial interests in achieving its own policies and objectives by requiring competency and honesty from its employees.<sup>181</sup>

Justice Souter asserts, however, that both private and public interests in addressing wrongdoing in the workplace can outweigh such a governmental interest.<sup>182</sup> In support of his assertion, Justice Souter outlines the wide variety of potential speech issues.<sup>183</sup> At one end of the spectrum, Justice Souter places open speech by a private

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176. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1963 (2006). Justice Souter astutely recognizes that Justice Kennedy makes an unparallel comparison. Instead, the Court should look at whether a person spoke as a citizen on a matter of public concern and whether a person spoke pursuant to his duties as an employee as *separate* factors to consider.

177. *Id.* Justice Stevens is right to suggest that the *Garcetti* holding will encourage employees to air their grievances or other work-related concerns elsewhere for fear of retaliatory employment action.

178. *Id.*

179. *Id.*

180. *Id.* at 1963-68.

181. *Id.* at 1963.

182. *Id.* Unlike Justice Kennedy, Justice Souter does not make the illogical leap from attempting to protect a government employer's managerial concerns of decorum to stripping away an employee's First Amendment right to speak out. Instead, Justice Kennedy acknowledges the legitimate concern, but balances it with a consideration of other factors.

183. *Id.*

citizen on public matter.<sup>184</sup> Such speech, according to Justice Souter, is the heart of expression subject to First Amendment protection.<sup>185</sup>

At the other end of the spectrum, Justice Souter places statements made by a government employee complaining about nothing more than treatment under personnel rules.<sup>186</sup> Such speech, according to Justice Souter, is no greater of a claim to First Amendment protection against retaliatory response than the remarks of a private employee.<sup>187</sup> In the middle of the spectrum is “public employee’s speech unwelcome to the government but on a significant public issue.”<sup>188</sup>

According to Justice Souter, a speaker’s interest in commenting on a public concern is not ignored just because the government employs him.<sup>189</sup> Justice Souter contends that the reason employee speech is not wholly protected by the First Amendment is because it can be distracting and make a workplace less productive, particularly if an employee is griping about his work.<sup>190</sup> Instead, Justice Souter believes, as is the case in *Garcetti*, that the *Pickering* balancing test is the proper approach to take when an employee speaks critically about his own employer’s administration.<sup>191</sup>

Justice Souter compares *Garcetti* to two cases following *Pickering*: *Givhan* and *Madison*.<sup>192</sup> In *Givhan*, a school teacher who complained to a superior about potentially discriminatory hiring

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184. *Id.*

185. *Id.*

186. *Id.* at 1964.

187. *Id.*; see *Connick v. Meyers*, 461 U.S. 138, 147 (1983).

188. *Garcetti*, 126 S. Ct. at 1964. Like Justice Stevens, Justice Souter raises the issue of employee speech that is made *both* pursuant to official duties and concerning public issues.

189. *Id.* However, under *Garcetti*, Ceballos’ comment on an arguably public concern of a faulty search warrant is unprotected by the First Amendment.

190. *Id.*

191. *Id.* In deferring to *Pickering*, Justice Souter acknowledges the First Amendment’s purpose of protecting an individual’s right to freedom of speech. Without a proper balancing of often competing interests, and by bypassing *Pickering*, the *Garcetti* majority takes away an individual’s interest in his own speech before it can even be protected.

192. *Id.*; see *Madison Joint Sch. Dist. v. Wis. Employment Relations Comm’n*, 429 U.S. 167 (1976).

practices was protected from being fired.<sup>193</sup> In *Madison*, a school teacher spoke out, in a public meeting, to a school board about pending teachers' union negotiations.<sup>194</sup> In both cases the Court held each school teacher to be speaking as citizens, with the *Madison* Court emphasizing that its school teacher spoke as both a citizen and an employee, simultaneously.<sup>195</sup>

Justice Souter asserts that the Court in both *Givhan* and *Madison* acknowledge that a citizen can speak on subjects closely tied to his own job.<sup>196</sup> However, according to Justice Souter, *Garcetti* and *Givhan*, when viewed together, create a strange distinction where a school teacher would be protected from complaining about hiring policies, but a school personnel officer would not be.<sup>197</sup>

Instead, Justice Souter argues that the need for a *Pickering*-type balancing approach does not disappear when an employee speaks on matters pursuant to his job duties. According to Justice Souter, both the public and individual's interest in such speech may be even *higher* when an employee's speech is made pursuant to his duties because his job requires him to have intimate knowledge of the subject.<sup>198</sup> To that end, Justice Souter argues that a citizen, such as Ceballos, who chooses to make public issues the subject of his work would likely prize his right to speak on such issues.<sup>199</sup> Further,

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193. *Garcetti*, 126 S. Ct. at 1964.

194. *Id.*; see *Madison*, 429 U.S. 167.

195. *Garcetti*, 126 S. Ct. at 1964. See *Givhan*, 439 U.S. 410; *Madison*, 429 U.S. 177. It is unclear from Justice Souter's opinion whether or not he views Ceballos as having spoken out as a citizen, an employee, or both, as was the case in *Madison*.

196. *Garcetti*, 126 S. Ct. at 1964.

197. *Id.* at 1965. Justice Souter feels the distinction made in *Garcetti*—that of denying *Pickering* protection to speech made pursuant to official duties—requires justification, which the Court has yet to give.

198. *Id.* Justice Souter's distinction between those who speak out on issues of public concern that have experience with the issue (such as employees, as is the case here) and average citizens is perceptive and exemplifies the Ninth Circuit's need to employ *Pickering* on remand. As Justice Souter suggests, the more knowledgeable a speaker is on a topic related to an employer, the more potential there is for the speech to disrupt the workplace.

199. *Id.* at 1965-66. Here, Justice Souter attacks the heart of the majority opinion in *Garcetti*. Not only is it possible for a public employee to speak out on a topic related to his work duties that is also a public concern, but the reason why it is so likely there will be an overlap between what is pursuant to an employee's work

Justice Souter notes that the *Pickering* Court recognized a public interest in hearing the speech of informed employees.<sup>200</sup>

Justice Souter concedes that the majority was right to find that a government employer has heightened concerns regarding employee speech.<sup>201</sup> An employee who speaks out pursuant to his job duties has “greater leverage to create office uproars and fracture the government’s authority to set policy to be carried out coherently through the ranks.”<sup>202</sup> Yet, beyond such shared concerns, Justice Souter strays from the majority in *Garcetti*, arguing that a categorical exclusion of First Amendment protection against retaliatory action by bypassing *Pickering* is unnecessary.<sup>203</sup>

In support of using *Pickering* and with respect to the associated risks of a government employee speech in his workplace, Justice Souter contends that an employee’s speech made pursuant to his job duties should not prevail unless it is of a matter of unusual importance and satisfies high standards of responsibility in the way the speech was brought forth.<sup>204</sup>

In fact, according to Justice Souter, only speech addressing official dishonesty and threats to health and safety can help an employee overcome the balancing of interests.<sup>205</sup> Further, Justice

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and what is a public concern is that a public employee’s work is likely to revolve around public concerns.

200. *Id.* at 1966. As Justice Souter touched upon earlier, public employees are often in a superior position of being knowledgeable about the topics about which they speak. Justice Souter notes that when a public auditor speaks out on discovering embezzlement of public funds, it weighs as much in the public’s interest as in his own duty as a public employee to share such information. *Id.* at 1966-67.

201. *Id.* at 1967.

202. *Id.*

203. *Id.* By employing a *Pickering* balancing test, Justice Souter respects the interests of both the government employer and the individual employee.

204. *Id.* A presumption in favor of the government employee appears to be Justice Souter’s solution to placating the majority’s fear that a *Pickering* balancing approach would disregard the government’s legitimate concerns of maintaining office decorum and achieving its prescribed policy goals.

205. *Id.* Justice Souter also includes deliberately unconstitutional behavior and other serious wrongdoings as causes to tip the balance in the government employee’s favor. *Id.* Such standards for being able to overcome Justice Souter’s presumption in favor of a government employee seem extreme. However, it is in line with *Giacalone*’s finding that an employee’s speech on a work issue was



Souter contends that the majority's position does not guarantee against an influx in litigation regarding whether an employee's speech was made pursuant to his official duties.<sup>206</sup> Justice Souter claims that recent history shows the circuit courts have not seen an overwhelming flood of retaliatory discharge claims.<sup>207</sup>

In sum, Justice Souter charges the *Garcetti* majority with accepting two erroneous beliefs. First, that a government employee's speech made pursuant to his official duties is in fact the government's own speech.<sup>208</sup> Second, that First Amendment protection need not apply in *Garcetti* because existing whistle-blower statutes have, and will, protect government employees such as Ceballos.<sup>209</sup>

Justice Souter argues that statutory protection for government employees speaking out varies widely depending on their particular jurisdictions.<sup>210</sup> To show the insufficiency of relying on existing statutory protection alone, Justice Souter contends that the school teacher in *Givhan*, for example, would not have qualified as a whistle-blower, who exposes an official's wrongdoing to a third party or to the public.<sup>211</sup>

On remand, Justice Souter suggests that the Ninth Circuit take into account several facts the majority fails to mention, including: the fact that after showing Sundstedt, his supervisor, his memo, Ceballos complied with Sundstedt's plan to soften the accusatory rhetoric to make it less incendiary; and the fact that after meeting with his

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sufficiently disruptive to his workplace to deny him First Amendment protection. *Giocalone v. Abrams*, 850 F.2d. 79 (1988).

206. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1967-68 (2006).

207. *Id.* at 1968.

208. *Id.* Justice Souter argues that Ceballos was "paid to enforce the law by constitutional action: to exercise the county government's prosecutorial power by acting honestly, competently, and constitutionally." *Id.* at 1969. In *Rust v. Sullivan*, when the government uses public funds to promote a particular policy, it is entitled to say what it wishes. *Rust v. Sullivan*, 500 U.S. 173 (1991). However, Justice Souter believes that the Majority wrongly relied on the interpretation of *Rust* in *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), which equates statements made by a public employee in the scope of employment to be treated as government speech.

209. *Garcetti*, 126 S. Ct. at 1968-69.

210. *Id.* at 1971.

211. *Id.* at 1970.

department, Ceballos told Najera, his immediate supervisor, he felt obliged to give the defense his memo as exculpatory evidence, but when she ordered him to write a new memo with only the sheriff's statements, he instead turned over the existing memo with his own conclusions redacted.<sup>212</sup>

Further, Justice Souter suggests that the Ninth Circuit use a *Pickering* analysis in assessing all of Ceballos' statements, not only the memo he submitted to his superiors.<sup>213</sup> In support of his conclusion, Justice Souter raises several facts which were overlooked in the Ninth Circuit's analysis.<sup>214</sup> Ceballos' section 1983 claim was for the alleged retaliatory actions his supervisors took in response to submitting his memo and discussing the subject with Najera and Sunstedt, testifying truthfully about the subject at the hearing, and speaking about the subject at a Mexican-American Bar Association event.<sup>215</sup> Justice Souter notes that not all of Ceballos' statements were made pursuant to official duties, and a court would surely have to analyze Ceballos' testimony separately to preserve the integrity of the judicial process.<sup>216</sup>

#### *D. Dissenting Opinion: Justice Breyer*

In his dissenting opinion, Justice Breyer disagrees with both the Majority and Justice Souter's dissenting opinions.<sup>217</sup> Parting with the Majority, Justice Breyer contends that the *Pickering* balancing test should have been used in *Garcetti*.<sup>218</sup> However, unlike Justice Souter, Justice Breyer believes that the *Pickering* balancing test should not be applied freely and indiscriminately in all cases

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212 *Garcetti*, at 1971-72. Justice Souter also emphasizes the fact that Ceballos sought his position as a deputy district attorney out of a personal commitment to civil service. *Id.* at 1971. This fact supports Justice Souter's argument that a citizen, such as Ceballos, who chooses to make such public issues the subject of his work would likely place a high value on his right to speak on such issues. *Id.* at 1965-66.

213. *Id.* at 1972-73.

214. *Id.* at 1973.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

regarding employee speech made pursuant to official duties.<sup>219</sup> To begin, Justice Breyer addresses and establishes what all members of the Court agree on in *Garcetti*.<sup>220</sup>

First, Justice Breyer states that the First Amendment cannot offer all speech the same degree of protection.<sup>221</sup> Second, he contends that where speech of government employees is at issue, the First Amendment offers protection “only where the offer of protection itself will not unduly interfere with legitimate governmental interests, such as the interest in efficient administration.”<sup>222</sup> Third, Justice Breyer contends that “where a government employee speaks as an employee upon matters only of personal interest, the First Amendment does not offer protection.”<sup>223</sup>

Next, Justice Breyer asserts that the majority should have applied the *Pickering* standard for several reasons, largely because the speech at issue in *Garcetti* is professional speech (from a lawyer) which deserves special Constitutional protection.<sup>224</sup> To that end, according to Justice Breyer, the Constitution imposes speech obligations on professional government employees, stating: “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.”<sup>225</sup>

Justice Breyer claims that he understands the majority’s concern that there is a need to give government employers sufficient discretion to manage their operations.<sup>226</sup> However, he also contends

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219. *Id.* at 1971-73.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*; see *Connick v. Myers*, 461 U.S. 138, 157 (1983). “Where the employee speaks ‘as a citizen...upon matters of public concern,’ the First Amendment offers protection but only where the speech survives a screening test.” See also *Pickering v. Bd. of Ed.*, 391 U.S. 563, 568 (1968). Prior cases do not decide what screening test a judge should apply in circumstances such as Ceballos’ situation. *Garcetti*, 126 S. Ct. at 1974.

224. *Id.*

225. *Id.*

226. *Id.*

that there is also a need, under certain circumstances, to protect speech.<sup>227</sup>

Justice Breyer then critiques Justice Souter's dissenting opinion, asserting that Justice Souter's conclusion falls short of adequately addressing the managerial and administrative concerns government employers have with employee speech.<sup>228</sup> Instead, Justice Breyer asserts that Justice Souter's proposal would require the Court to apply the *Pickering* balancing test to all cases of government employee speech, which would be too inclusive.<sup>229</sup> Justice Breyer argues that such broad application of *Pickering* is at odds with Justice Souter's assumption that the government should prevail in such balancing unless the employee speaks on a matter of unusual importance or serious wrongdoing.<sup>230</sup>

For example, Justice Breyer notes that police officers, firefighters, and building inspectors are among the numerous public employees who speak about issues of public health, safety, and integrity.<sup>231</sup> According to Justice Breyer, a substantial amount of public employee speech deals with such wrongdoing, safety, and honesty.<sup>232</sup>

In Justice Breyer's estimation, Justice Souter's overly inclusive use of *Pickering* does not avoid the need to undertake a balancing, and instead interferes and substantially overlaps with existing statutory protections such as whistle-blower statutes.<sup>233</sup> Justice Breyer contends that the overuse of *Pickering* and judicial activity,

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227. *Id.*

228. *Id.* at 1975.

229. *Id.* According to Justice Breyer, Justice Souter's assessment of *Garcetti* includes too many issues of public concern, whereby the screening test would not screen out very much. *Id.* Justice Breyer asserts that the main problem is that the standard does not avoid the judicial need to undertake the balance in the first place. *Id.* at 1976. Also, the list of categories substantially overlaps areas where there are already whistle-blower statutes that cover these issues. *Id.*

230. *Id.* at 1975. In his dissenting opinion, Justice Souter contends that, in a *Pickering* balancing test, the risks to the government are great enough that employees should not prevail on the balancing test unless the employee spoke on a matter of unique importance and satisfied high standards of responsibility in the way he spoke. *Id.* at 1967.

231. *Id.* at 1975.

232. *Id.*

233. *Id.* at 1975-76.

such as filing a complaint or engaging in discovery, would unduly interfere with a government employer's managerial capacity and efficacy.<sup>234</sup>

Unlike the majority, Justice Breyer argues that a First Amendment cause of action can apply to government employee speech that takes place pursuant to official duties and which involves a matter of public concern.<sup>235</sup> Nevertheless, unlike Justice Souter, Justice Breyer argues judicial action only applies when there is a demonstrated need for constitutional protection and a decreased risk of undue interference with managerial concerns and goals.<sup>236</sup> On balance, Justice Breyer concludes a *Pickering* balancing test should have been applied since the circumstances in *Garcetti* meet both prerequisites.<sup>237</sup>

## V. IMPACT & SIGNIFICANCE

### A. Legal Impact

Because the case law regarding First Amendment protection for government employee speech is already expansive and continues to grow, the legal impact of *Garcetti* is significant because it establishes a clear and previously uncharted exception where the Court finds employee speech to have diminished protection under the Constitution.<sup>238</sup> Under *Garcetti*, when a public employee speaks out on a matter pursuant to his official duty, his speech is not protected under the First Amendment.<sup>239</sup>

In particular, *Garcetti* raises the issue of when the *Pickering* balancing test should be applied in cases of public employee speech.<sup>240</sup> Under the *Pickering* balancing test, the Court must balance between the teacher's interests, as a citizen, in commenting on matters of public concern and the state's interests, as an employer

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234. *Id.* at 1975.

235. *Id.* at 1976.

236. *Id.*

237. *Id.*

238. *Id.* at 1960, 1962.

239. *Id.* at 1962.

240. *Id.* at 1957.

in efficiently performing its public services.<sup>241</sup> Thus, under *Pickering*, a court must first determine whether the employee spoke as a citizen on a matter of public concern, and second, whether or not there is a potential First Amendment claim.<sup>242</sup>

In *Garcetti*, Justice Kennedy established that the *Pickering* balancing test did not apply to Ceballos, a deputy district attorney voicing his concerns about his work.<sup>243</sup> As a result, the Court held that government employees who speak pursuant to their official responsibilities cannot speak as citizens on matters of public concern.<sup>244</sup>

Whether *Garcetti* correctly addressed *Pickering*'s applicability to government employee speech made pursuant to official job responsibilities is debatable.<sup>245</sup> Under previous cases such as *Givhan v. Western Line Consolidated School Dist.*, and *Connick v. Myers*, the Court looked at various factors to determine the strength of the competing parties' interests in protecting or suppressing whatever speech is at issue.<sup>246</sup> Some factors included: when the speech was made; where the speech took place; how the speech was presented; the subject matter of the speech; and the relation of the speaker to the subject matter.<sup>247</sup> However, *Garcetti* established that such factors are not dispositive when a government employee speaks out on matters pursuant to official work-related duties.<sup>248</sup>

Arguably, as suggested in Justice Breyer's dissenting opinion, *Garcetti* misinterprets protections offered by federal and state whistle-blower statutes.<sup>249</sup> As such, federal and state lawmakers

241. *Pickering v. Bd. of Ed.*, 391 U.S. 563, 568 (1968). According to the *Pickering* Court, the threat of dismissal from public employment is an effective means of inhibiting speech. *Id.* at 574.

242. *Id.* According to *Pickering*, teachers were deemed a class of community members likely to have informed opinions on how school funds should be spent. *Id.* at 572.

243. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006).

244. *Id.*

245. *Id.* at 1962-76.

246. See *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415 (1979); *Connick v. Meyers*, 461 U.S. 138, 147-48 (1983).

247. *Id.*

248. *Garcetti*, 126 S.Ct. at 1959-60.

249. *Id.* at 1976.

would be wise to evaluate current statutory protections. Similarly, the Court should explore the various factual circumstances when denying First Amendment protection to a government employee who spoke out concerning a job-related matter, would leave the employee without any viable or reasonable courses of action to respond to alleged retaliatory employment actions.

If there are numerous circumstances that would leave a government employee unprotected and without a means of recourse, the Court would benefit from reconsidering if a *Pickering* balancing analysis should even be used in such situations, and perhaps carve out specific exceptions to *Garcetti*. Perhaps subsequent Court decisions could address specific factual circumstances in which a government employee who speaks out pursuant to his employment duties is deemed to be speaking as a citizen on a matter of public concern.

If the Court still finds that *Pickering* should not apply in such situations, it should then ask whether the Court's interests in preserving and promoting an efficient government is met by denying First Amendment protection to such speech. Otherwise, the Court may want to consider if an alternative balancing analysis would be less offensive and more palatable than a *Pickering* balancing.

As suggested by Justice Souter's dissenting opinion, *Garcetti* suggests a need to clarify the categorical distinctions between government employees and non-government employees, and the possible categorical distinctions among the type of employee duties involved.<sup>250</sup> As it stands, *Garcetti* creates a broad categorical distinction between public and non-public employees.<sup>251</sup> Whether the distinction is proper or agreed upon is up for debate; however, the relevance to future government employee cases is undisputed.

### *B. Societal Impact*

By and large, *Garcetti* and its predecessors provide an ever changing and increasingly complex precedent. First and foremost, *Garcetti* will primarily impact government personnel, including both employers and employees, in all fields. Beyond government

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250. *Id.* at 1963.

251. *Id.* at 1962.

workers, *Garcetti* may impact lawmakers, the judiciary, and society at large.

Generally speaking, from a government employee's perspective, *Garcetti* stands as a warning call to carefully contemplate the necessity of expressing any work-related concerns for fear of retaliatory discharge. From *Garcetti*, one may argue that a government employee, or any employee for that matter, is less likely to attempt to express himself and address any grievances or work-related criticisms directly to his superiors for fear of retaliatory employment practices.

Arguably, *Garcetti* creates little incentive for a government employee to choose to express their concerns internally.<sup>252</sup> Government employee may find that voicing their concerns directly to a supervisor may result in retaliatory actions, and instead may prefer to consult with and voice their concerns to an outside party in a public forum. Government employees may also seek to bypass direct supervisors with whom communications may be sensitive and target top management instead.

According to Justice Kennedy's reasoning, a public employee who speaks on matters of public concerns cannot do so as a concerned citizen.<sup>253</sup> Thus, a government employee might conclude that his role as an employee, despite working on matters of public concern, is distinctly separate from his role as a private citizen.

Under *Garcetti*, a public employee might surmise he would have to hope and pray his supervisors are not offended, threatened, or merely annoyed by any suggestions he may have to make in regards to a particular office matter. Because, if his supervisors are threatened, annoyed, or simply tired of the public employee's comments and suggestions, or are frustrated by the related notion of having a troublesome or irritating employee, such employers can respond in kind and the employee will have little recourse or means to protect himself.

If, in response to the government employee's expression of his concerns, a government employer demotes, transfers, or even discharges the employee, the employee would have little choice but to believe that voicing his concerns was the cause of such action.

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252. *Id.* at 1960.

253. *Id.* at 1958.



Such situations would likely impact the interoffice dynamic in a government workplace.

In *Garcetti*, a significant emphasis was placed on the importance of government employers establishing and maintaining internal office communication infrastructure and standards.<sup>254</sup> However, the scale of what is proper office protocol and atmosphere varies, and depends very much on the particular office itself. In some areas of work, a high level of structure and chain of command is necessary. In other areas of work, workers who are self-reliant and work independently may be valued. *Garcetti* appears to discount such differences in public workplaces.

Instead of potentially abusing their latent ability to dictate interoffice communications, hopefully government employers will look at *Garcetti* as a wakeup call. *Garcetti* can be used as an opportunity to reassess whether the policies already in place foster an environment where employees feel free and unthreatened to voice their opinions in the hopes of making the workplace better.

To that end, if government employers, in taking stock of their own office practices, see room for improvement (certainly, there is always room for improvement), they will hopefully take the opportunity to clean up their existing office protocol and further, the government employers should take preemptive measures to avoid situations similar to *Garcetti*.

Beyond *Garcetti*'s effect on government employers and employees, *Garcetti* may affect policy makers as well.<sup>255</sup> As Justice Breyer discussed in his dissenting opinion in *Garcetti*, the majority misinterpreted the current landscape of federal and state whistleblower statutes.<sup>256</sup> Policy makers at all levels may use *Garcetti* as a spring board from which to examine existing protections and now their efficacy in light of *Garcetti*.

According to the majority in *Garcetti*, by denying First Amendment protection to government employees who speak on issues pursuant to their job duties, the Court will avoid the burdensome and intrusive judicial oversight that such a holding

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254. *Id.*

255. *Id.* at 1976.

256. *Id.*

would have required.<sup>257</sup> By concluding that a public employee who speaks pursuant to his job duties is not subject to First Amendment protection, *Garcetti* streamlines the categorization of public employees in assessing that protection. However, *Garcetti* does so at the expense of potentially leaving some public employees without a means of defending themselves.

Meanwhile, *Garcetti*'s effect on retaliatory discharge related lawsuits is questionable. As Justice Souter contends, *Garcetti* does not guarantee against a flood in litigation regarding whether an employee's speech was made pursuant to his official duties.<sup>258</sup> In fact, according to Justice Souter, recent history shows the circuit courts have not seen an overwhelming flood of retaliatory discharge claims.<sup>259</sup>

There is a popular notion that government work, and often those who seek its employment, strive to promote and effectuate the higher goals of the government, including protecting and encouraging public service.<sup>260</sup> However, the outcome of *Garcetti* seems to undermine this largely accepted notion, and suggests that while government workers goals may be in line with issues of public concern, such workers fall into a broad exception thereby denying them full First Amendment protection.

The initial impact on government employers may be positive through the chilling of government employee speech related to work and by reducing litigation in connection with alleged retaliatory discharge and other employment actions. However, the holding in *Garcetti* seems to engender an internal tension among government employers and employees, and the ways in which they communicate and interact with each other in their efforts to achieve their larger work-related goals. The long-term effect of *Garcetti* may result in government employees cultivating an increasing mistrust of their supervisors and the bureaucratic system which fundamentally lacks the confidence in and respect for its employees to protect their speech.

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257. *Id.* at 1961.

258. *Id.* at 1967-68.

259. *Id.* at 1968.

260. *Id.* at 1965-66.

## VI. CONCLUSION

In denying First Amendment protection for employee speech made pursuant to official job-related concerns, *Garcetti* sends a clear message to government employees: in the Court's eyes there is no distinction between statements made pursuant to official duties about matters of public concern and those that are not matters of public concern.<sup>261</sup>

When Ceballos spoke out on a matter of public concern, the Court concluded he spoke as a public employee pursuant to his job duties, and not as a citizen voicing his concerns.<sup>262</sup> As such, the Court did not balance Ceballos' interests with that of his employer. Nor did the *Garcetti* Court give much thought to the context or content of Ceballos' speech. Whether such a distinction is warranted and vindicated is debatable as the impact on the legal community and society at large remains unseen.

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261. See generally *Garcetti*, 126 S.Ct. 1951.

262. *Id.* at 1960-61.