No. 04-473

In The
Supreme Court of the United States

GIL GARCETTI, FRANK SUNDSTEDT,
CAROL NAJERA and COUNTY OF LOS ANGELES,

Petitioners,

vs.

RICHARD CEBALLOS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' BRIEF ON THE MERITS

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QUESTION PRESENTED

Should a public employee's purely job-related speech, expressed strictly pursuant to the duties of employment, be blanketed with First Amendment protection simply because it touches on a matter of public concern, or should First Amendment protection also require the speech to be engaged in "as a citizen", in accordance with this Court's holdings in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983)?

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OPINION

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 361 F.3d 1168 (9th Cir. 2004) and is annexed in the printed appendix to the Petition for Writ of Certiorari as Appendix A.

JURISDICTION

The opinion of the Court of Appeals was filed on March 22, 2004. (Appendix to Petition ["P.A."] 1.) A timely petition for rehearing en banc was denied by order filed July 6, 2004. The underlying action arose under the Civil Rights Act of 1871, 42 U.S.C. § 1983 and the district court's jurisdiction was based on 28 U.S.C. § 1331. (Joint Appendix ["J.A."] 137.) The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1). The Petition for Writ of Certiorari was filed in the Supreme Court on October 1, 2004 (Supreme Court Case No. 04-473). This Court's order granting certiorari was issued on February 28, 2005.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The statutory and constitutional provisions involved in this case are as follows:

1. 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected,

any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. . . .

2. The First Amendment to the United States Constitution provides in pertinent part:

Congress shall make no law . . . abridging the freedom of speech, . . . ; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

A. Plaintiff's First Amendment Claim Was Based On Speech Expressed Pursuant To His Prosecutorial Duties And Responsibilities.

Since 1989, Richard Ceballos ("Ceballos") has been employed with the Los Angeles County District Attorney's Office as a deputy district attorney. (J.A. 7-8.) In this First Amendment-based retaliation action, brought pursuant to

42 U.S.C. § 1983, among other things,[1] Ceballos alleged that he was subjected to various adverse employment actions in retaliation for expressing speech strictly *within the scope of his employment duties* and in accordance with his prosecutorial responsibilities. (J.A. 141, 387-388, 390, 435; P.A. 42, 64.) These alleged retaliatory acts were purportedly committed by two supervisors, Frank Sundstedt ("Sundstedt") and Carol Najera ("Najera"), and former District Attorney for the County of Los Angeles Gil Garcetti (whose involvement was limited to the decision to not promote Ceballos from a grade III to a grade IV deputy district attorney level). (J.A. 138, 460.)

The circumstances surrounding the nature of the subject speech are largely undisputed. In February 2000, a criminal defense attorney approached Ceballos and discussed with him his concerns regarding the accuracy of a search warrant affidavit in a pending criminal case involving three defendants charged with several narcotics and weapon violations. (J.A. 434, 495.) The criminal case had been filed by the Los Angeles County District Attorney's Office after incriminating evidence was discovered upon execution of the search warrant. (J.A. 28, 434.) One of the defendants had already pled guilty and was currently serving a one year jail sentence while the other two had filed a motion to quash, sever and traverse ("motion to traverse") the search warrant. (J.A. 202, 496.)

At that time, Ceballos was a calendar deputy whose duties and responsibilities included handling all phases of

[1] Ceballos also alleged state law claims. The district court, however, declined to exercise supplemental jurisdiction over them after it dismissed the federal claims. (P.A. 5, 53.)

the criminal cases assigned to a particular court, including evaluating the progress of cases, negotiating dispositions and preparing disposition reports or memorandums like the one at issue in this case. (J.A. 9, 24-25, 30, 40-41.) Moreover, it was not uncommon for a calendar deputy to re-evaluate, when appropriate, the potential weaknesses of a pending criminal case. (J.A. 28-29.)

In accordance with these duties and obligations, Ceballos reviewed the search warrant affidavit, personally inspected the subject property, and concluded that the affidavit contained factual inaccuracies. (J.A. 435.) Therefore, Ceballos believed that the criminal case should be dismissed. (J.A. 48, 436.)

Because Ceballos was not authorized to dismiss the case without supervisor approval, he discussed his concerns regarding the search warrant affidavit with Sundstedt – one of his supervisors. (J.A. 436.) Subsequently, on March 2, 2000, Ceballos prepared a disposition memorandum/report – a routinely prepared intra-office document setting forth the reasons for dismissing pending criminal charges – which was reviewed by Sundstedt. (J.A. 40-41, 436, 495-502.) As a result of the disposition memorandum, Sundstedt held a meeting with the sheriff's deputy who prepared the search warrant affidavit and his lieutenant and captain to discuss potential problems with the criminal case. (J.A. 27, 437-438.) Also present at this meeting, which was conducted on March 9, 2000, were Najera and Ceballos. (J.A. 27, 438.)

Based on the discussions held at this meeting, Sundstedt concluded that the criminal charges should not be dismissed at that juncture but that the District Attorney's Office should proceed with the motion to traverse that had already been filed. (J.A. 47-48, 50-51, 116-117,

202.) Sundstedt believed that proceeding in this fashion would have allowed an independent judicial officer to assess the pertinent evidence surrounding the affidavit and to rule on its propriety. (J.A. 117-118.)

On March 20, 2000, the hearing on the motion to traverse was conducted, and Ceballos was one of four witnesses who testified. (J.A. 198-199, 202.) After considering the testimony presented, the criminal court denied the motion, finding that based on the deputies' observations of possible criminal activity at the crime scene, the only reasonable conclusion the magistrate judge could have reached was that there was probable cause for the issuance of the search warrant. (J.A. 348-352.) Accordingly, the criminal court denied the motion to traverse. (J.A. 352.) One of the three criminal defendants was convicted at trial, and the other remaining defendant entered a guilty plea. (J.A. 440.)

Ceballos's First Amendment claim was based on the theory that he was subjected to several adverse employment actions within six months after these March 2000 events, including: 1) his reassignment from a calendar deputy to a trial deputy position; 2) the reassignment of his one murder case to a lower level deputy district attorney; 3) his transfer to another courthouse; and 4) the denial of promotion from grade III to grade IV. (J.A. 9, 12, 22, 66-67, 142-143, 443.)

Importantly, Ceballos alleged that these employment actions were in retaliation for speech he engaged in pursuant to his *prosecutorial duties*. (P.A. 42, 64.) This undisputed fact played a critical role in the district court's determination that Ceballos's First Amendment claim was based on constitutionally *unprotected speech*.

B. The District Court Correctly Found That The Disposition Memorandum Did Not Warrant First Amendment Protection Because It Was Prepared "As Part Of His Job".

In its summary judgment order, the district court explained that "Plaintiff alleges the defendants subjected him to several acts of retaliation *on account of his March 2, 2000 memorandum*." (P.A. 55, emphasis added; *see* J.A. 140.) In determining whether Ceballos's First Amendment claim was based on constitutionally protected speech, the district court initially noted that "there are no significant factual disputes regarding the communication at issue – Plaintiff's March 2, 2000 memorandum". (P.A. 61.) While recognizing that the memorandum related to a matter of public concern, the district court relied on controlling case law and discussed "several cases in which federal courts have held that speech engaged in not merely as a concerned citizen but within the scope of the plaintiff's employment does not address a matter of public concern . . . . " (P.A. 62-63.) In applying this body of law to the facts of this case, the district court explained that Ceballos had acknowledged that the subject memorandum was commonly prepared and that it was prepared pursuant to his prosecutorial duties. (P.A. 64.) Thus, because "the memorandum was prepared as part of his job", the district court correctly found that the speech upon which Ceballos's First Amendment claim was based, was constitutionally unprotected. (P.A. 64-65.)

The district court also ruled that Garcetti, Sundstedt and Najera were entitled to qualified immunity because "a reasonable official may have believed – even if incorrectly – that the speech was not protected by the First Amendment." (P.A. 66.) Accordingly, the district court did not address the

remaining arguments, including the argument there were non-retaliatory reasons for the employment actions (J.A. 159-162, 170-174) and entered judgment against Ceballos. (P.A. 67.)

C. In Reversing The Entry Of Summary Judgment, The Ninth Circuit Held That The First Amendment Protects *All* Public Employee Speech Regarding A Matter Of Public Concern.

In writing for the majority opinion, Judge Reinhardt, relying almost exclusively on a prior Ninth Circuit decision (*Roth v. Veteran's Administration of the United States*, 856 F.2d 1401 (1988)), made clear that even if the disposition memorandum was an example of routine prosecutorial work product, it was constitutionally protected since it touched on a matter of public concern: "[i]t is only 'when it is clear that . . . the information would be of *no* relevance to the public's evaluation of the performance of governmental agencies' that speech of government employees receives no protection under the First Amendment." (P.A. 10, internal citations omitted; emphasis in original.)

Judge O'Scannlain, however, in his special concurrence, identified fundamental flaws in the *Roth* decision:

> . . . *Roth* minimized – indeed, it entirely ignored – the significance of *Connick*'s distinction between citizen speech offered by a public employee acting *as an employee* in carrying out his or her ordinary employment duties and speech spoken by an employee acting *as a citizen* expressing his or her personal views on a matter of public import.

(P.A. 36, emphasis in original.)

Moreover, in advocating an approach that is more consistent with this Court's precedents and the attendant emphasis on citizen speech, Judge O'Scannlain made astute observations regarding the basic nature of public employee speech that supported his criticism of *Roth*:

> The problem is that 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. Instead, their speech is, in actuality, the State's.

(P.A. 41, emphasis in original.)

Judge O'Scannlain expounded on this important point further by persuasively arguing that job-required speech like Ceballos's should be subject to governmental regulation, as is the case with government-subsidized speech. (P.A. 45-46.) Judge O'Scannlain's summarizing remarks are especially instructive:

> There simply is no plausible basis for *Roth*'s holding that the government may not exercise control over its employees' routine job-related speech, when it assuredly may exercise precisely such control over the speech it subsidizes through its funding decisions.

(P.A. 46.)

Thus, Judge O'Scannlain has presented a compelling basis for this Court to reaffirm the boundaries of First Amendment protection in the public employment setting and reject Judge Reinhardt's oversweeping approach mandating all public employee speech relating to a matter of public concern be constitutionally protected, even if the

speech is expressed strictly pursuant to the duties of public employment.

SUMMARY OF ARGUMENT

The fundamental purpose of the free speech clause of the First Amendment is to establish an unbridled free speech marketplace where citizens are empowered to vigorously debate and openly exchange ideas and opinions. *See*, *e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

By protecting against undue governmental encroachment on this most basic of freedoms, the First Amendment has ably served its noble purpose. Since its ratification, the First Amendment has shouldered the burden in paving numerous inroads into the constitutional backwoods, broadening all citizens' rights to participate in public debates and contribute their personal opinions, ideas and philosophies (mainstream or not). Indeed, from establishing the power and freedom of the press[2] to safeguarding the internet from content-based regulations, the First Amendment's impact can neither be quantified nor undervalued.

Until the latter half of the twentieth century, however, public employees enjoyed little or no First Amendment protection for traditional free speech activities. Simply

[2] *Mills v. State of Ala.*, 384 U.S. 214, 219 (1966) ("The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars . . . to play an important role in the discussion of public affairs.") (citation omitted).

put, public employees had been forced to leave their First Amendment rights at their employer's door. This constitutional vacuum resulted in the termination of public employees for their past exercises of their First Amendment rights and the abdication of these fundamental rights by virtue of their public employment status.

It was not until this Court's decision in *Pickering v. Board of Education*, 391 U.S. 563 (1968) that public employees were empowered to "comment[] upon matters of public concern" through speech engaged in "as the member of the general public". *Id.* at 569, 574. In holding that the First Amendment protects a public school teacher's right to participate in a public debate regarding school funding, this Court emphasized that the subject speech related to a question on which "*free and open debate* is vital to informed decision-making by the electorate." *Id.* at 571-72 (emphasis added). Furthermore, this Court also noted that the school teacher's employment was "only tangentially and insubstantially involved in the subject matter of the public communication." *Id*. at 574. Therefore, that the subject speech was *not job-required* was a significant factor that weighed *in favor* of constitutional protection.

In the next seminal case, this Court further emphasized the inexorable link between citizen speech and First Amendment protection in the public employment setting by stating that the "repeated emphasis in *Pickering* on the right of a public employee '*as a citizen*, in commenting upon matters of public concern,' was not accidental." *Connick v. Myers*, 461 U.S. 138, 143 (1983) (emphasis added). This Court also highlighted the nexus between the protection afforded in *Pickering* and the fundamental purpose of the First Amendment: "The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes

desired by the people. . . . *Pickering* . . . followed from this understanding of the First Amendment." *Id.* at 145 (internal quotations and citations omitted).

The Ninth Circuit's approach, as articulated in Judge Reinhardt's majority opinion below, represents an irreconcilable breach with these historical and legal backdrops. By declaring all public employment speech to be protected by the First Amendment with the only caveat being that the speech be of "relevance to the public's evaluation of the performance of government agencies", the Ninth Circuit has ignored the rationale of this Court's precedents and left in its wake public employers who must now assume that virtually all job-required speech is constitutionally protected. This is because on some level, all work of public employees provides a basis for the public's evaluation of the performance of government agencies.

The adoption of this extremely low threshold for constitutional protection will not only increase the flow of First Amendment litigation and severely hinder the ability of public agencies to efficiently execute their public services, but it will also signal a complete break from the significant concerns identified in this Court's seminal opinions regarding the limits of First Amendment protection in the public employment setting. As Judge O'Scannlain urged below, "the time has come for us to reappraise our jurisprudence concerning the free speech rights of the publicly-employed and the scope of legitimate governmental regulation in its capacity as employer." (P.A. 51.)

Thus, preventing the revamped approach espoused by the Ninth Circuit from irrevocably altering the landscape of First Amendment jurisprudence requires a firm pronouncement that the holdings in *Pickering* and *Connick*

were not for naught. The moment is ripe for this Court "to steer [the] drifting First Amendment jurisprudence back to its proper moorings." (P.A. 51.) As before, this Court should tread with care to ensure that the First Amendment protects speech engaged in "as citizens", not any and all speech that happens to relate in one way or another to a matter of public concern.

ARGUMENT

I. BLANKETING SPEECH EXPRESSED STRICTLY PURSUANT TO THE DUTIES OF PUBLIC EMPLOYMENT WITH CONSTITUTIONAL PROTECTION DOES NOT ADVANCE THE FUNDAMENTAL PURPOSES OF THE FIRST AMENDMENT.

A. Since Its Adoption, The Free Speech Clause Of The First Amendment Has Guaranteed *Citizens* Access To An Open Forum For Public Debate.

This Court has, on numerous occasions, commented on the fundamental purposes of the First Amendment. *Boos v. Barry*, 485 U.S. 312, 322 (1988) ("As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate "breathing space" to the freedoms protected by the First Amendment.' ") (quoting from *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988)); *Pacific Gas and Elec. Co. v. Public Utilities Com'n of California*, 475 U.S. 1, 8 (1986) ("By protecting those *who wish to enter the marketplace of ideas* from government attack, the First Amendment protects the public's interest in receiving information.") (emphasis added); *Mills v. State of Ala.*, 384 U.S. 214, 218 (1966) ("Whatever

differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."); *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969) ("*It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas* in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.") (emphasis added).

This perception of the underlying purpose of the First Amendment certainly is not a recent development:

> The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty *to discuss publicly and truthfully all matters of public concern* without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply *the public need for information and education with respect to the significant issues of the times*. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

Thornhill v. State of Alabama, 310 U.S. 88, 101-02 (1940) (footnotes omitted; emphasis added).[3]

[3] In his discussion of the Founding Fathers' motivations underlying the First Amendment, Justice Brandeis wrote:

(Continued on following page)

The fundamental intent of the First Amendment should be given due consideration in establishing the boundaries of its protection, and in particular, the determination of whether these boundaries should encompass speech expressed pursuant to ordinary job duties. Indeed, such speech neither represents nor advances the unquestioned goals of the First Amendment, and blanketing such speech with constitutional protection was hardly the driving concern in the removal of the barriers depriving public employees of the most basic First Amendment protection.

B. The Analyses In *Pickering* And *Connick* Are Inextricably Intertwined With The Fundamental Purposes Of The Free Speech Clause.

Throughout much of our history, public employees, by virtue of their public employment, had very little First Amendment protection.

> For most of this century, the unchallenged dogma was that a public employee had no right to object

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> Those who won our independence believed . . . that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile. . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Whitney v. California, 274 U.S. 357, 375-76 (1927) (J. Brandeis, conc.).

> to conditions placed upon the terms of employment – including those which restricted the exercise of constitutional rights. . . . The Court cast new light on the matter in a series of cases arising from the widespread efforts in the 1950s and early 1960s to require public employees, particularly teachers, to swear oaths of loyalty to the state and reveal the groups with which they associated.

Connick, 461 U.S. at 143-44.

Through these earlier cases, this Court expanded constitutional protection to public employees by invalidating statutes that compelled the relinquishment of First Amendment rights – statutes that "sought to suppress the rights of public employees to participate in public affairs." *Id.* at 144-45. The strong stance developed against such statutory infringements was wholly consistent with the main purpose of the First Amendment – "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957).

The claims in these earlier cases, however, did not directly implicate the free speech clause of the First Amendment. Instead, the plaintiffs, who had been denied public employment pursuant to state statutes requiring loyalty oaths, absence of ties with certain associations, and the like, based their claims on the due process clause of the Fourteenth Amendment or on challenges to the facial validity of the subject statutes as being impermissibly vague, ambiguous or overbroad. *See*, *e.g.*, *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961) (holding that a state statute requiring state employees to pledge an oath swearing a lack of association with the Communist party

was unconstitutionally vague and constituted a denial of due process of law); *Baggett v. Bullitt*, 377 U.S. 360 (1964) (holding that a state statute requiring state employees to execute a loyalty oath was unconstitutionally vague).

The trend toward recognizing and defining the extent of First Amendment protection for public employees was continued in *Pickering*. Faced with the claim by a public school teacher that he had been discharged based solely on his public criticisms of the school board in violation of the *free speech clause* of the First Amendment, this Court held that such speech by public employees is constitutionally protected. At the same time, the door to First Amendment protection was not swung wide open in that the protection was carefully limited and in great part wedded to the underlying purposes of the First Amendment. Because the analysis in almost every case involving a public employee's First Amendment claim has begun (and oftentimes ended) with a discussion of *Pickering*, the facts and relevant legal analysis from this landmark case are worth revisiting.

1. The Holding In *Pickering* Was Carefully Limited And Did Not Espouse First Amendment Protection For Purely Job-Required Speech.

Marvin Pickering was a public high school teacher in the Township High School District 205 in Will County, Illinois. From 1961 to 1964, the Board of Education sought approval of two bond proposals and two tax rate increases, three of which were defeated. In the days prior to the defeat of the second tax rate measure, several articles and a letter from the superintendent were published in the local newspaper. After the tax rate measure was defeated, Pickering submitted a letter to the newspaper's editor,

"attack[ing] . . . the School Board's handling of the 1961 bond issue proposals and its subsequent allocation of financial resources." *Pickering*, *supra*, 391 U.S. at 566. Pickering also alleged that the superintendent had sought to prevent teachers from "opposing or criticizing the proposed bond issue." *Ibid*.

Pickering was then "dismissed for writing and publishing the letter." *Ibid*. A hearing was then held before the Board, at which time the Board contended that the letter contained false and defamatory statements, "would be disruptive of faculty discipline" and cause widespread dissension. *Id.* at 567. Without reaching any findings on the effects of the letter on the community, the Board "found the statements to be false as charged." *Ibid*. The Illinois state courts upheld the dismissal, rejecting Pickering's claim that "he could not be constitutionally dismissed from his teaching position." *Id.* at 568.

As an initial matter, this Court made clear a public employee could not be "compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public concern", and that this principle had been established in cases dating back to 1952. *Ibid.* Pickering's First Amendment claim, however, could not be resolved on the basis of this principle alone due to the significant interests that affect the government's role as employer:

> [I]t cannot be gainsaid that the State has interests as an employer in regulating *the speech of its employees* that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a *balance between the interests of the teacher, as a citizen, in commenting*

> *upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees*.

Ibid. (emphasis added).[4]

Just from these comments, it is readily apparent that the contemplated balancing of interests comes into play where the employee engages in citizen speech on a matter of public concern, thereby requiring the weighing of those interests against the employer's interests in workplace efficiency and harmony. Conversely, these very instructive statements do not suggest that First Amendment protection should be triggered *whenever* the subject matter of job-required speech touches on a matter of public concern.

This link between citizen speech and First Amendment protection was also integrated into the ensuing analysis of Pickering's speech. While declining to articulate a single test by which to evaluate public employees' criticisms of their employers, this Court articulated "some of the general lines along which an analysis of the controlling interests should run." *Id.* at 569. In doing so, implicitly and explicitly, this Court repeatedly emphasized the relationship between First Amendment protection for public employees and the extent to which the subject speech contributed to the *public debate*:

- "More importantly, the question whether a school system requires additional funds is a matter of legitimate public concern. . . . On such a question,

[4] *See Connick*, *supra*, 461 U.S. at 151 ("The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public.").

free and open debate is vital to informed decision-making by the electorate." *Id*. at 571-72.

- [Where a public school teacher's erroneous and critical statements about a matter of public concern have not been shown to have had a disruptive effect in the workplace], "we conclude that the interest of the school administration in limiting teachers' opportunities *to contribute to the public debate* is not significantly greater than its interest in limiting a similar contribution to any member of the general public." *Id*. at 573.

- "The public interest in having *free and unhindered debate on matters of public importance* – the *core value of the Free Speech Clause of the First Amendment* – is so great" that a public official may recover damages for defamatory statements only if they are made with knowledge of their falsity or reckless disregard for their truth or falsity. *Ibid*. (emphasis added).

- "[I]n a case as such as the present one, in which *the fact of employment is only tangentially and insubstantially involved* in the subject matter of the public communication made by a teacher, we conclude that *it is necessary to regard the teacher as the member of the general public he seeks to be*." *Id.* at 574 (emphasis added).

- "In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's *exercise of his right to speak on issues of public importance* may not furnish the basis for his dismissal from public employment." *Ibid.* (emphasis added).

Thus, this Court did not find Pickering's speech to be constitutionally protected simply because the speech

pertained to a matter of public concern but identified as significant factors 1) the relationship between the speech and the speaker's employment and 2) the speaker's intent to be treated as a citizen – and not as an employee.

Not only can *Pickering* rightly be considered to be the first case where this Court addressed issues directly pertinent to the instant case, it can also be considered the most pivotal because its focus on Pickering's motivation to participate in the public debate "as a citizen" echoes just as loudly over 35 years later. At this juncture in the development of First Amendment jurisprudence, what needs to be answered is whether the emphasis on citizen speech in *Pickering* should be maintained (and thereby preserving the nexus between First Amendment protection and its fundamental purpose) or abandoned and left by the wayside, as the Ninth Circuit has chosen to do. In addressing this critical question, the continued emphasis of these First Amendment themes in this Court's next benchmark case should not be ignored.

2. Under *Connick*, First Amendment Protection Requires Speech To Be Expressed "As A Citizen."

Although this Court has had the opportunity on a number of occasions since *Pickering* to address the protected or unprotected nature of various types of public employee speech, the one case that has come to be considered as the "bookend" to *Pickering* is *Connick v. Myers*. It is therefore not surprising that the term "*Pickering-Connick* balancing test" has also become engrained in the legal vernacular of First Amendment jurisprudence in the

public employment context. Thus, the facts and analysis in *Connick* also merit special attention here.[5]

In light of the relationship that has been formed between these two cases, it is fitting that Justice White began the majority opinion with a concise description of the essence of *Pickering*: "In *Pickering* . . . , we stated that a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment." *Connick*, *supra*, 461 U.S. at 140.

Justice White also explained in his introduction that *Pickering* had identified the competing interests at stake: on one side, the interests of the government to promote the efficiency of the public services performed through its employees, and on the other side, the interests of the employee, "'*as a citizen*, in commenting upon matters of public concern[.]'" *Ibid.* (quoting from *Pickering*, *supra*, 391 U.S. at 568; emphasis added). Against this backdrop of competing interests, Justice White explained further that the Court was "return[ing] to this problem . . . [to] consider whether the First and Fourteenth Amendments prevent the discharge of a state employee for circulating a questionnaire concerning internal office affairs." *Ibid.*

The plaintiff in *Connick*, Sheila Myers, was a prosecutor employed by the New Orleans District Attorney's Office. After learning that she was to be transferred to a different department, Myers expressed her opposition to

[5] In *Waters v. Churchill,* 511 U.S. 661 (1994), this Court stated that *Connick* "set forth a test for determining whether speech by a government employee may, consistently with the First Amendment, serve as a basis for disciplining or discharging that employee." *Id.* at 664.

several supervisors, including the district attorney, Harry Connick. Myers subsequently prepared a questionnaire designed to obtain the views of her fellow prosecutors on a number of topics, including the transfer policy, office morale, level of confidence in the supervisors and whether anyone had felt pressured to work in political campaigns. *Id.* at 141. Myers circulated the questionnaire to 15 of her coworkers. *Ibid.* Immediately after learning about the questionnaire and being told that it had created a "mini-insurrection", Connick informed Myers that she was being terminated because she had refused to accept the transfer and that the questionnaire was considered an act of insubordination. *Ibid.*

In her section 1983 action, Myers alleged that the termination was unlawful because "she had exercised her constitutionally-protected right of free speech." *Ibid.* The district court and the Fifth Circuit Court of Appeals agreed, finding that the questionnaire involved matters of public concern and the state had not clearly demonstrated that the questionnaire had substantially interfered with the operation of the district attorney's office. *Id.* at 142. In reviewing the lower courts' findings, this Court reiterated the pertinent "task" at hand: "to seek 'a balance between the interests of the [employee], *as a citizen*, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Ibid.* (quoting from *Pickering*, *supra*, 391 U.S. at 568).

Prior to determining whether any part of Myers's questionnaire involved constitutionally protected speech, this Court discussed the analysis in *Pickering* at length, noting at the outset that the repeated emphasis in *Pickering* that a public employee has a right, "as a citizen"

to comment upon matters of public concern, "was not accidental." *Id.* at 143. This Court also explained that this critical language "reflects both the historical evolvement of the rights of public employees, and the common sense realization that government offices *could not function if every employment decision became a constitutional matter*." *Ibid.* (emphasis added).

These remarks regarding the historical backdrop to the holding in *Pickering* were not merely made in passing. Rather, this Court explained further that the cases upon which *Pickering* had been "rooted" – cases that chipped away at the constitutional restrictions imposed on public employees – involved "statutes and actions sought to suppress the rights of public employees to participate in *public affairs*." *Id*. at 144-45 (emphasis added). Moreover, "[t]he explanation for the Constitution's special concern with threats to *the right of citizens to participate in political affairs* is no mystery. The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . . *Pickering* . . . *followed this understanding of the First Amendment.*" *Id.* at 145 (emphasis added).

In direct conjunction with this discussion of the historically driven rationale of *Pickering*, this Court articulated the standard for determining constitutional protection for public employee speech:

> [W]hen a public employee *speaks not as a citizen upon matters of public concern*, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken

> by a public agency allegedly in reaction to the employee's behavior.

Id. at 147 (emphasis added). This Court, therefore, specifically identified citizen speech as a key variable in this constitutional equation, and underscored this point further with the very next statement: "Our responsibility is to ensure that *citizens* are not deprived of fundamental rights by virtue of working for the government. . . . " *Ibid.* (emphasis added).

Although this Court did not explicitly find that Myers's questionnaire involved citizen speech, there can be no dispute that the questionnaire was *not* prepared pursuant to her prosecutorial duties.[6] This Court, however, did closely review the questionnaire to determine whether any part of it involved a matter of public concern and found that the portion regarding the pressure to participate in political campaigns was the only part of the questionnaire that was constitutionally protected. *Id.* at 149. Thus, the essence of this finding was that with respect to this part of the questionnaire, Myers had spoken *as a citizen upon a matter of public concern*.[7]

The fundamental relationship between the underlying purposes of the First Amendment and incorporating a

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[6] In direct contrast, Ceballos's disposition memorandum was indisputably prepared in accordance with his normal prosecutorial duties and therefore devoid of any citizen speech.

[7] This Court then balanced the competing interests and held that "[t]he limited First Amendment interest involved here does not require that Connick tolerate action he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships." *Id.* at 154.

citizen speech element in the test for constitutional protection was further addressed in this Court's telling concluding remarks:

> Although today the balance is struck for the government, this is no defeat for the First Amendment. For it would be a Pyrrhic victory for *the great principles of free expression if the Amendment's safeguarding of a public employee's right, as a citizen, to participate in discussions concerning public affairs* were confused with the attempt to constitutionalize the employee grievance that we see presented here.

Id. at 154 (emphasis added).

Despite this warning against the excessive expansion of the scope of First Amendment protection, the "Pyrrhic victory" discussed in *Connick* could be achieved if purely routine, job-required speech is deemed constitutionally protected. Such an ignominious "victory" can be prevented by maintaining boundaries for First Amendment protection that are consistent with its fundamental purposes, as opposed to virtually eradicating them by only requiring that the subject speech touch on a matter of public concern.

II. PUBLIC EMPLOYEE SPEECH EXPRESSED STRICTLY PURSUANT TO THE DUTIES OF EMPLOYMENT SHOULD NOT BE AFFORDED FIRST AMENDMENT PROTECTION.

A. This Court Has Never Held That Purely Job-Required Speech Is Constitutionally Protected.

Since 1968, this Court has addressed First Amendment claims arising from the public employment setting

on a number of occasions. While the Court's holdings and analyses in *Pickering* and *Connick* have been the most influential on the lower courts in addressing such claims, this Court's other opinions in this area further suggest that the Ninth Circuit's approach ventures far beyond the parameters established by this Court. Indeed, at no time since *Pickering* has this Court held that job-required speech should be afforded First Amendment protection.

Perry v. Sindermann, 408 U.S. 593 (1972) involved facts reminiscent of *Pickering* and the resulting holding was also similar. The plaintiff, Robert Sindermann, was a college professor employed by the state of Texas. While teaching at Odessa Junior College, he was elected president of the Texas Junior College Teachers Association. *Id.* at 594. While acting in this capacity (and not in his capacity as an employee), Sindermann "*left his teaching duties* on several occasions to testify before committees of the Texas Legislature" and "became involved in public disagreements with the policies of the college's Board of Regents." *Id.* at 594-95 (emphasis added). When Sindermann's employment contract was subsequently terminated, he filed a federal action alleging in part that his right to free speech had been violated because he had not been rehired due to "his public criticism of the policies of the college administration". *Id.* at 595. The district court granted the defendants' summary judgment motion on the ground Sindermann was not a tenured professor. *Id.* at 596.

This Court, however, found that the lack of tenure was "immaterial to his free speech claim." *Id.* at 598. More importantly, this Court held that Sindermann's allegation that "his nonretention was based on his testimony before legislative committees and his other public statements"

and that "this public criticism" was protected by the First Amendment presented "a bona fide constitutional claim." *Ibid.* This Court stated further:

> For this Court has held that a teacher's *public criticism* of his superiors on matters of public concern may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment.

Ibid. (emphasis added).

Thus, four years after *Pickering*, this Court did not suggest at all that a public employee was entitled to First Amendment protection for speech engaged in during the normal course and scope of employment, in accordance with the duties of employment. Moreover, no such suggestion has been made in the cases since *Perry*. *See*, *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 284 (1977) (reiterating *Pickering* test for determining whether "speech of a government employee is constitutionally protected" and finding protected a public school teacher's communication with a radio station regarding the school's dress code for teachers); *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 415-17 (1979) (finding constitutionally protected a teacher's personal opinions regarding the school district's desegregation efforts, expressed to a supervisor); *United States v. National Treasury Employees Union*, 513 U.S. 454, 465 (1995) (in holding unconstitutional the prohibition of government employees from receiving honoraria, the plaintiffs were found to have sought "compensation for their expressive activities in their *capacity as citizens*" and the speeches were found to lack "relevance to their employment") (emphasis added).

In this Court's most recent opinion in this area, the linkage between citizen speech and First Amendment protection was reiterated. "Were [public employees] not able to speak on [matters of public concern], *the community would be deprived of informed opinions* on important public issues. [Citation.] The interest at stake is as much *the public's interest in receiving informed opinion* as it is the employee's own right to *disseminate it*." *City of San Diego v. Roe*, 125 S.Ct. 521, 525 (2004) (emphasis added).[8] Thus, neither these most recent remarks nor the analyses in this Court's earlier cases, suggest a viable connection between purely job-required speech and First Amendment protection.

B. Many Courts Have Readily Recognized The Nexus Between Citizen Speech And First Amendment Protection.

Notwithstanding the holdings and analyses in this Court's cases since *Pickering*, the Ninth Circuit and others have decided that a public employee's First Amendment claim should be contingent on only one factor – whether the subject speech touches on a matter of public concern. Contracting the constitutional analysis in this manner (and thereby compelling public employers to demonstrate either at summary judgment or at trial that the subject

[8] In *Roe*, the Ninth Circuit had held that a police officer who sold videotapes of himself engaging in sexually explicit acts, while dressed as a law enforcement officer, enjoyed protection under the First Amendment because his "speech" may have been of interest to a small segment of the general public. Without oral argument, this Court reversed, holding that the officer's sexually explicit acts did not implicate a matter of public concern that triggered the application of the balancing of factors under *Pickering* and *Connick*. *Id.* at 526.

speech was disruptive enough to justify the challenged employment action) renders moot the important consideration of whether the subject speech had been expressed "as a citizen". The undeniable result is something that this Court in *Connick* warned expressly against – that "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Connick*, *supra*, 461 U.S. at 149.

Not all courts, however, have adopted the Ninth Circuit's approach, thereby maintaining the vitality of "citizen speech" in this constitutional equation. *See*, *Gonzalez v. City of Chicago*, 239 F.3d 939, 941-42 (7th Cir. 2001) (holding that a police officer's reports, prepared pursuant to his official duties, regarding police misconduct were not constitutionally protected); *Thompson v. Scheid*, 977 F.2d 1017, 1021 (6th Cir. 1992) (holding that a county fraud investigator's conversations with federal investigators regarding a pending confidential investigation were not constitutionally protected because they related to his "duties as an employee" and "cannot be considered speaking on matters of public concern").

The Fourth Circuit has also consistently found job-required speech to fall outside the scope of First Amendment protection. In *Urofsky v. Gilmore, III*, 216 F.3d 401 (4th Cir. 2000), the Fourth Circuit addressed at length the importance of *citizen speech* in this equation:

> The *threshold inquiry* thus is whether the Act regulates speech by state employees *in their capacity as citizens* upon matters of public concern. If a public employee's speech made in his capacity as a private citizen does not touch upon a matter of public concern, the state, as employer, may regulate it without infringing any First

> Amendment protection. [Citations.] To determine whether speech involves a matter of public concern, we examine the content, context, and form of the speech at issue in light of the entire record. [Citation.] . . . Further, the place where the speech occurs is irrelevant: An employee may speak as a citizen on a matter of public concern at the workplace, and may speak as an employee away from the workplace. [Citations.] *The Supreme Court has made clear that the concern is to maintain for the government employee the same right enjoyed by his privately employed counterpart.* To this end, in its decisions determining speech to be entitled to First Amendment protection the Court has emphasized the *unrelatedness of the speech at issue to the speaker's employment duties.* [Citations.] Thus, critical to a determination of whether employee speech is entitled to First Amendment protection is whether the speech is "made primarily in the [employee's] role as citizen or primarily in his role as employee." [Citations.]

Id. at 406-07 (emphasis added) (quoting from *Terrell v. University of Texas System Police*, 792 F.2d 1360, 1362 (5th Cir. 1986)).

The Fourth Circuit's unwavering focus on these important distinctions has also been mirrored in the Fifth and Eighth Circuits. *See*, *Kinsey v. Salado Independent School Dist.*, 950 F.2d 988, 994 (5th Cir. 1992) ("cases involving public employees who occupy policymaker or confidential positions fall much closer to the employer's end of the spectrum, *where the government's interests more easily outweigh the employee's (as a private citizen)*") (emphasis added); *Terrell*, 792 F.2d at 1362 ("Because almost anything that occurs within a public agency *could*

be of concern to the public, we do not focus on the inherent interest or importance of the matters discussed by the employee. Rather, our task is to decide whether the speech at issue in a particular case was made primarily in the plaintiff's role as citizen or primarily in his role as employee. In making this determination, the mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment.") (emphasis in original); *Sparr v. Ward*, 306 F.3d 589, 594 (8th Cir. 2002) ("When a public employee's speech is purely job-related, her speech will not be deemed a matter of public concern."); *Roberts v. Van Buren Public Schools*, 773 F.2d 949, 955 (8th Cir. 1985) ("We need not proceed to the *Pickering* balance when the employee spoke not as a citizen but as an employee expressing a personal grievance as to internal office policy."); *see also* the cases cited in the Petition at 15-16 and Reply to Opposition at 3-7.

Thus, many courts have already recognized the pivotal nature of citizen speech and duly considered this Court's cautionary words against allowing public employees to craft actionable First Amendment claims based on speech involving a matter of public concern but expressed strictly pursuant to their job duties. This more balanced approach should be adopted in favor of the truncated approach endorsed below.

C. Routine, Job-Required Speech, Which By Definition Constitutes Government Speech, Should Not Give Rise To A First Amendment Claim.

As discussed above, there are ample grounds for reversing the judgment below and finding that the subject

speech was not constitutionally protected because Ceballos had not expressed himself as a citizen. As Judge O'Scannlain ably articulated, there is an additional layer in this analysis that has been largely overlooked – that First Amendment protection should be reserved for true citizen speech because public employees necessarily speak on behalf of the government when they engage in routine, job-required speech. Concomitantly, such speech (expressed *on behalf* of the government) should not give rise to actionable First Amendment claims *against* the government.

This Court has already addressed the incongruity of a similar scenario involving the regulation of speech by recipients of governmental funding. In *Rust v. Sullivan,* 500 U.S. 173 (1991), the plaintiffs challenged on various grounds the facial validity of the regulations that govern funding under Title X, in particular the regulations that prohibited abortion counseling in federally funded family planning projects.[9] Plaintiffs' First Amendment argument was that the regulations "impermissibly discriminat[ed] based on viewpoint because they prohibit 'all discussion about abortion as a lawful option . . . while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term.'" *Id.* at 192 (citation omitted). This Court's explanation as to why the regulations did not result in the unlawful abridgment of free speech has compelling value in the instant case:

> Individuals who are voluntarily employed for a Title X project must perform their duties in accordance with the regulation's restrictions on

[9] The plaintiffs were "Title X grantees and doctors who supervise Title X funds". *Id.* at 181.

> abortion counseling and referral. *The employees remain free, however, to pursue abortion-related activities when they are not acting under the auspices of the Title X project.* The regulations, which govern solely the scope of the Title X project's activities, do not in any way restrict the activities of those persons acting as private individuals. The employees' freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority.

Id. at 198-99 (emphasis added).

Moreover, since *Rust*, this Court has clarified that government-funded speech is equivalent to "governmental speech". *Legal Services Corp. v. Velasquez*, 531 U.S. 533, 541 (2001) ("The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, . . . [w]e have said that viewpoint-based funding decisions can be sustained in instances in which *the government is itself the speaker* . . . ") (emphasis added); *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217, 229 (2000) ("funds raised by the government will be spent for speech and other expression to advocate and defend its own policies"); *see also*, *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 211-12 (2003) (requiring public libraries that received federal funding to install internet filtering software to block obscene material did not violate the First Amendment).

While the majority opinion below refused to acknowledge the parallels between the speech engaged in by the

governmentally funded and the *governmentally employed* (despite Judge O'Scannlain's efforts to bring them to light), the Fourth Circuit has recognized that these two groups are very similarly situated vis-à-vis the First Amendment:

> [R]estrictions on speech by public employees in their capacity as employees are analogous to restrictions on government-funded speech. . . . In both situations – public employee speech and government-funded speech – the government is entitled to control the content of the speech because it has, in a meaningful sense, "purchased" the speech at issue through a grant of funding or payment of a salary. The limits of government control are similar in both types of cases, as well: *Just as the government as provider of funds cannot dictate the content of speech made outside the confines of the funded program [citation], the government as employer is restricted in its ability to regulate the speech of its employees when they speak not as public employees, but as private citizens on matters of public concern.*

Urofsky, *supra*, 216 F.3d at 408 n. 6 (emphasis added).

Thus, over the last 15 years, this Court has made clear that government-funded speech and First Amendment protection do not mix. This well-established principle and its underlying rationale provide valuable insight to the First Amendment issue raised in this case, i.e., whether the First Amendment protects job-required government employee speech. Indeed, it is difficult to distinguish between the speech engaged in by individuals whose services have been funded by the government from those individuals whose salaries have been paid by the government.

When measured against these compelling parallels, the deficiencies of the Ninth Circuit's approach (which renders irrelevant the fact that the subject speech was paid for by the County of Los Angeles and engaged in pursuant to Ceballos's job duties and responsibilities) become even more evident. Simply put, the Ninth Circuit's failure to recognize that the disposition memorandum – prepared by Ceballos pursuant to his prosecutorial duties and responsibilities – was in essence the work product of the district attorney's office, renders its holding inherently flawed.

III. THE NINTH CIRCUIT'S OVERLY SIMPLIFIED APPROACH WILL SEVERELY DISRUPT GOVERNMENTAL OPERATIONS BY CREATING UNDUE CONFUSION AND UNPREDICTABILITY, WHILE ALSO DRAMATICALLY INCREASING THE VOLUME OF FIRST AMENDMENT LITIGATION.

Ever since *Pickering*, public employee plaintiffs have been required to meet a basic pleading threshold – that their First Amendment claims were based on *constitutionally protected speech*. If they met this pleading burden, then their government employers' only method of prevailing in the action prior to trial has been to demonstrate with sufficient admissible evidence that the factors in the *Pickering-Connick* balancing test weighed in their favor, as a matter of law. Due to the prohibitive costs and fees incurred during the defense of federal employment actions, government employers have in the past incurred tremendous drains on their limited financial resources whenever employees satisfy their initial pleading burden. This litigational reality has undoubtedly acted as a significant

deterrent against the unlawful retaliation against public employees for their bona fide First Amendment activities.

This reality, however, will be transformed into an operational nightmare for all government employers if the Ninth Circuit's approach is adopted, thereby allowing any and all routine, job-required speech to act as the basis for an actionable First Amendment claim subject to dismissal at the summary judgment stage at the very earliest. The repercussions of this legal scenario will be especially debilitating on government offices where subjects related to matters of public concern are constantly discussed or where employees' primary job duties are to speak about such matters.

For example, under the Ninth Circuit's one-step analysis for determining First Amendment protection, virtually every statement made to the press corps by the White House press secretary would be draped with First Amendment protection since these statements undoubtedly will relate to a matter of public concern. Consequently, if the President or other supervisory official were to ever take an adverse employment action against the press secretary, he or she would state an actionable First Amendment retaliation claim by simply alleging that the employment action was in retribution against one of the countless prior statements issued to the press corps. Moreover, because such a claim would not be subject to dismissal at the pleading stage, the defendant in that action (possibly even the President) would have to wait until the summary judgment stage, at the very least, to obtain dismissal of the claim.

Another illustrative example is one that can be taken from today's headlines regarding the unending efforts of

this country's law enforcement and intelligence agencies to prepare against and to prevent another terrorist attack. Every communication (written or otherwise) regarding the effectiveness with which information is shared by this country's various intelligence agencies, between and amongst intelligence analysts employed by these agencies, would be given First Amendment protection. Although these job-required assessments, opinions and conclusions relate to a genuine matter of public concern, they should not be blanketed with constitutional protection because they lack the essence of citizen speech that lies at the heart of the free speech clause of the First Amendment.

Finally, the examination of the normal duties of federal, state and county prosecutors throughout the nation further demonstrates the impropriety of extending First Amendment protection to all public employee speech that relates to a matter of public concern. In addition to engaging in the type of speech at issue in the instant case – the preparation of memorandums containing prosecutorial assessments of evidence and witness credibility – prosecutors are trained and *required* to speak on behalf of the government (and "The People") whenever they argue a matter in court or conduct a criminal trial before a jury. Without question, under the Ninth Circuit's approach, virtually all such communications will be constitutionally protected, notwithstanding the absence of any hint of "citizen speech".

The unavoidable practical consequence will be that the prospect of future First Amendment claims based on past job-required communications will have to be factored into any necessary employment action which may be deemed to be adverse by the employee involved. If permitted to stand, the Ninth Circuit's decision will require

public entities to ascribe actual or potential constitutional significance to public employee expression made in the context of routine, job-required duties. This quagmire is not one that could have been anticipated when this Court ensured that public employees be afforded constitutional protection for traditional First Amendment activities, and it should not be permitted to continue.

Indeed, the manipulation of this Court's pronouncements to find purely job-required speech to be constitutionally protected will create a set of rules that bears no resemblance to those established in *Pickering*. Possibly even more importantly, these new rules will do nothing to promote the fundamental purposes of the First Amendment, as repeatedly and eloquently described by this Court. Unquestionably, the Ninth Circuit's approach of focusing exclusively on whether the subject speech touches on a matter of public concern will cause a descent down the slipperiest of slopes. By boiling the test for First Amendment protection down to this single element (an element that can be easily met for pleading purposes), the doors to every courtroom in this country will suddenly be swung wide open for an inevitable rise in First Amendment-based retaliation claims *where the plaintiffs never sought to be members of the general public* (as Marvin Pickering undoubtedly did).

The flip side of this litigational coin is that the ease with which a cognizable First Amendment claim could be alleged will undoubtedly cause a widespread chilling effect on necessary and appropriate employment actions, for fear that such actions could be linked (by allegation) to a prior instance of routine, job-required speech that happened to touch on a matter of public concern. Because government employers will be deterred in many instances from taking

appropriate employment actions in the first instance or will be tied up in litigation when they do, like in this case,[10] their ability to perform the public services expected of them will necessarily be undermined. The productivity and efficiency of government offices – the operations of which are funded by taxpayer dollars – will be placed in unnecessary jeopardy if government employers are forced to face the prospect of expensive and complicated First Amendment litigation whenever they contemplate taking what they believe to be legitimate employment actions against incompetent and unproductive employees.

Thus, allowing government employees to seek relief under the First Amendment for speech expressed strictly pursuant to their job duties would constitute an unjustified departure from the body of First Amendment jurisprudence that paved the way for public employees to have constitutional protection for speech or activities engaged in "as citizens", and not as government employees. Limiting First Amendment protection to true exercises of the free speech rights afforded to *all citizens* will restore this

[10] Notwithstanding the non-retaliatory reasons demonstrated by petitioners which were not reasonably disputed by Ceballos through admissible evidence (J.A. 12-13, 62-66, 71-72, 103-109, 119-130, 133, 134-135, 364-366, 368-371, 374-379, 444-461, 531-536), the Ninth Circuit nevertheless reversed the district court's grant of summary judgment and remanded the case back to the lower court for a jury trial:

> It is possible that [petitioners] will be able to show at trial that the adverse acts Ceballos alleges were not taken in retaliation for his constitutionally protected speech. However, "[a]s with proof of motive in other contexts, this element of a First Amendment retaliation suit . . . involves questions of fact that normally should be left for trial."

(P.A. 25, citations omitted.)

constitutional continuity, while also enabling government offices to be efficiently operated and managed, and public services to be carried out without undue infringement. Accordingly, *any remaining ambiguities should be erased with a declaration that public employees enjoy the benefits of First Amendment protection when they, as citizens, speak about matters of public concern – not when they happen to address such matters while carrying out their ordinary job duties.*

CONCLUSION

For the reasons hereinabove stated, petitioners Gil Garcetti, Frank Sundstedt, Carol Najera and the County of Los Angeles request that this Court reverse the Ninth Circuit's opinion.

Dated: May 27, 2005.

Respectfully submitted,

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