No. 04-473

IN THE
Supreme Court of the United States

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

Petitioners,

v.

RICHARD CEBALLOS,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Does a prosecutor who speaks on a matter of public concern by reporting suspected police misconduct to his superiors lose his First Amendment protection against retaliation by his employer solely because he communicated his message while performing his job?

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STATEMENT OF THE CASE

Respondent Richard Ceballos, a Deputy District Attorney in the Los Angeles ("LA") County District Attorney's Office ("DA's Office"), reported to his supervisors that he believed that a Deputy Sheriff had falsified an affidavit used to obtain a search warrant in a criminal matter under Ceballos's supervision. His superiors retaliated by taking several adverse actions against him. As we explain below, Ceballos should presumptively be entitled to First Amendment protection for his speech on a matter of public concern regardless of the fact that he communicated it in the course of performing his job duties.

1. The Facts. The facts, viewed in the light most favorable to Ceballos, are as follows. Richard Ceballos has served as a Deputy District Attorney in LA since 1989. J.A. 7. In 1997 or 1998, he was assigned to the Pomona Branch of the DA's Office as a trial deputy. J.A. 8-9. Less than a year later, petitioner Frank Sundstedt, Head Deputy of the Pomona Branch, promoted Ceballos to calendar deputy, a position giving him supervisory authority over more junior prosecutors and primary responsibility for prosecutions brought in the courtroom to which he was assigned. J.A. 9, 24-26; *see also* J.A. 100-102. Sundstedt rated Ceballos "outstanding" in his performance evaluation, intending that he be seriously considered for further promotion. J.A. 102-103, 106; *see also* J.A. 492.

In March 2000, when the events at issue here took place, the interest of the LA community in preventing, disclosing, and rectifying police misconduct was at its zenith. Six months earlier, LA had been shaken by one of the worst police scandals in U.S. history, involving corruption and widespread abuses by an anti-gang unit of the LA Police Department ("LAPD") assigned to the Rampart area of the city. The Rampart scandal broke in mid-September 1999, when a member of the Rampart unit, Rafael Perez, then being tried on drug-theft charges, revealed in exchange for leniency that he and another officer had shot an unarmed man and planted a gun on him to cover it up. Matt Lait & Scott Glover, *Rampart Case Takes on*

Momentum of Its Own, LA Times, Dec. 31, 1999, at 1; Scott Glover & Matt Lait, *Ex-Officer Calls Corruption a Chronic 'Cancer',* LA Times, Sept. 21, 1999, at 1. Perez implicated dozens of officers in the Rampart unit in criminal activities and serious acts of misconduct, including attempted murder, planting evidence, false imprisonment, beatings, theft of money and drugs, unauthorized searches, obstruction of justice, false police reports, and perjury. *Report of the Rampart Independent Review Panel* 5 (2000), *available at* http://www.lacity.org/oig. The scandal led to the overturning of more than 100 convictions, the departure of more than a dozen officers, the payment of $70 million to victims, and the LAPD's entry into a consent decree with the U.S. Department of Justice requiring extensive reforms. Scott Glover & Matt Lait, *LAPD Settling Abuse Scandal,* LA Times, Mar. 31, 2005, at A1.

a. Against that backdrop, in February 2000, Richard Escobedo, a lawyer representing one of the defendants in *People v. Cuskey,* a case assigned to Ceballos's courtroom, asked Ceballos to investigate whether one of the arresting deputies from the LA County Sheriff's Department had lied in an affidavit used to obtain a warrant to search Michael Cuskey's property. J.A. 28-30. The defense had filed a motion to traverse, or challenge, the warrant under *Franks v. Delaware,* 438 U.S. 154 (1978), which held that a defendant may attack the veracity of a facially valid search warrant affidavit. J.A. 506-13. Although the warrant sought evidence relating to a stolen and stripped pickup truck found on a street some distance from the premises to be searched, the defendants were charged with narcotics and weapons offenses after the deputies, with the aid of a drug-sniffing dog, uncovered methamphetamine and firearms on the property. J.A. 495-502; *see generally* J.A. 198-363. The search yielded no sign that Cuskey's property was used as a stolen-car "chop shop," and none of the defendants was charged with possessing stolen property. J.A. 346-47.

Ceballos agreed to look into the matter. J.A. 30. He considered the accusation in a deliberate manner. He reviewed

the case file and spoke to the prosecutor assigned to the case. J.A. 31-32. Comparing photographs and a videotape of the area in question with the property description in the affidavit, he noticed that "[t]here was clearly a mischaracterization of the description of the property. The way the deputy had described it . . . did not at all match what the photographs were depicting." J.A. 32. For example, the deputy had characterized as a "long driveway" the road on which two other deputies had supposedly observed tire tracks that "appeared to match the [truck's] tread pattern," leading from the stripped pickup truck to the defendant's home. In fact, however, the "driveway" was more like a separate road several hundred feet in length, several car lengths in width, and bordered by many residences, rendering it highly unlikely that the deputies could have traced tire tracks from the defendant's home to the street. J.A. 32-34, 497-500.

The discrepancy having raised a red flag, Ceballos visited the crime scene. He drove up and down the "driveway" in his truck to see whether he could leave detectable tire tracks or tread patterns and determined that it was impossible to do so because the road's composition of broken asphalt, gravel, and dirt was not conducive to maintaining tire tracks along its complete length. J.A. 34, 36, 499-500. Ceballos then called and spoke to the affiant, Deputy Sheriff Keith Wall. Ceballos confronted him with the defense's accusation that the tire tracks described in Wall's affidavit never existed. Wall responded to Ceballos: "Well, that's what they told me," alluding to Deputies Murray Simpkins and Daniel Spitulski, who had found the pickup truck and allegedly followed the tire tracks up the driveway to Cuskey's property. J.A. 35-37, 501.

His suspicions now thoroughly aroused, Ceballos talked to his fellow prosecutors, showing them the photographs and videotape and describing the facts. Every prosecutor Ceballos consulted agreed that the validity of the warrant was questionable. J.A. 39. At that point, Ceballos turned to his immediate supervisor, petitioner Carol Najera, and Head Deputy Sundstedt. Ceballos showed each of them the videotape and

photographs and described what he personally observed at the crime scene. J.A. 39-40. Najera and Sundstedt agreed with Ceballos that there was a problem with the warrant. J.A. 39. Ceballos determined that the prosecution could not justify pursuing the case if the warrant were invalid. J.A. 48.

b. It was only after this extended consideration of the facts and consultation with colleagues and superiors that, on March 2, 2000, Ceballos prepared a memorandum for Sundstedt reporting his assessment that Deputy Wall's affidavit had relied on inaccurate, misleading, and possibly outright false information. Ceballos recommended that the criminal cases against the three defendants be dismissed. J.A. 495-502 (revised version). Ceballos's initial version of the memorandum was direct and to the point, accusing Wall of perjury. J.A. 112-13. After reviewing the memorandum, Sundstedt directed Ceballos to revise it to make it less accusatory, particularly because it was to be shared with the Sheriff's Department. J.A. 41-42, 112-14. Ceballos complied, J.A. 42, 113, but the memorandum continued to reflect his conclusions that the deputy's characterizations in his affidavit were "grossly inaccurate," "clearly misleading," omitted key facts, and, quite possibly, were wholly fabricated. J.A. 495-502. Ceballos then destroyed the original version. J.A. 42. It is undisputed that Ceballos spoke up to bring the deputies' suspected abuse of authority to light and to do justice for the defendants in the criminal case, and not to further any personal grievance. Pet. App. 19.

Throughout their brief, petitioners characterize Ceballos's March 2 memorandum as a "routinely prepared" disposition memorandum/report, Pet. Br. 4, 6, 7, 25, 31, 32, 36, 38, but that characterization is misleading and unsupported by the record. Ceballos does not dispute that he prepared the memorandum "pursuant to his duties as a prosecutor." J.A. 435-36; *see also* Pet. App. 64. But as common sense would suggest, the March 2 memorandum was not only far from "routine," it was extraordinary. Petitioners' citation to J.A. 40-41 (Ceballos

Depo. Tr. 88), in which Ceballos explained that "disposition reports" are commonly prepared, skips an important statement by Ceballos in the same deposition passage. On omitted page 89, Ceballos testified in response to a question whether he had previously prepared a disposition report accusing a police officer of misconduct:

> No. This would have been the first disposition report I've ever written where I was recommending a dismissal or had dismissed a case because of questions regarding the credibility of a police officer. I've done it with other witnesses, but this is the first with a police officer.[1]

Although Ceballos believed he was ethically and constitutionally bound to report the deputies' suspected misconduct to Sundstedt, no policy of the DA's Office required him to do so. Not until November 2001, as part of the fallout from the Rampart scandal, did the office, under a new District Attorney, issue such a policy. *See* Special Directive 01-10, at 1 (Nov. 7, 2001), *available at* http://da.co.la.ca.us/restoring.htm.

On March 6, 2000, Ceballos wrote a second memorandum to Sundstedt reporting a conversation with Deputy Wall, in which Ceballos had stated that Wall's affidavit appeared to be "grossly inaccurate" and that Ceballos had visited the location of the search and found it implausible that discernible tire tracks could be seen along the roadway's entire length. J.A. 502-03. Wall had responded that, after speaking to Deputies Simpkins and Spitulski, he now believed the affidavit should have been "modified" to say the deputies had observed "tire gouges,"

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[1] Pages 87-88 and 90-92 of Ceballos's deposition testimony, J.A. 39-44, were made a part of the record at summary judgment, but page 89 was not. Ceballos respectfully submits that the Court should not rely on his testimony about the allegedly mundane nature of a disposition memorandum without considering his statement about this specific memorandum. He would be pleased to lodge the missing page of the deposition at the Court's request.

caused by the rims of the stolen truck scraping along the roadway, and not "tire tracks," as the affidavit stated. J.A. 503.

c. Frank Sundstedt was "extremely concerned" about Ceballos's allegations, J.A. 112, and treated them as an exceptional revelation, telling Ceballos that in his "25-plus years with this office, [he had] never come across this." J.A. 80; *see also* J.A. 81. Sundstedt agreed that Ceballos had followed exactly the right procedure in bringing his suspicions to Sundstedt's attention. J.A. 111. So seriously did Sundstedt initially take Ceballos's disclosures that he took the unusual step of authorizing Ceballos to obtain the release from custody of defendant Douglas Ojala, who had already pleaded guilty, pending an upcoming meeting with the Sheriff's Department about Ceballos's memorandum. J.A. 44, 54, 200-01, 496. At the hearing in connection with Ojala's authorized release, Ceballos explained to Richard Escobedo, who was standing in as Ojala's lawyer, why he was taking the action. J.A. 54.

The revised March 2 memorandum, if not both memoranda, was faxed to the Sheriff's Department, J.A. 27, 44, 487-88, and a meeting was held on March 9, 2000, attended by Ceballos, his supervisors, and representatives from the Department. J.A. 27, 114-16, 488. The tide now turned against Ceballos. A lieutenant verbally attacked him, accused him of acting like a "public defender," criticized him for not putting the case on and letting the judge decide, and demanded his removal from the case. J.A. 44-47, 488. A captain wanted the prosecution to proceed because he feared a lawsuit from one of the defendants, who had filed one against the Department before. J.A. 49; *see also* J.A. 238-39, 488. At the end of the meeting, Sundstedt decided to proceed with the case pending the outcome of the motion to traverse. J.A. 50-51, 116-18.

About a week later, the *Cuskey* defense issued a subpoena to Ceballos to testify at the hearing on the motion to traverse. J.A. 53-54, 503-06. Ceballos approached Najera to discuss his view that both his March 2 and 6 memoranda contained *Brady* material and should be turned over to the defense before the

hearing. J.A. 54-57, 418-19. Najera initially responded that they could not disclose the memoranda because they would be sued by the deputy sheriffs for defamation; she instructed Ceballos to write a new memorandum instead that contained only the statements of Deputy Wall and omitted everything else. J.A. 55; *see also* J.A. 418, 420-21. Ceballos told Najera that he did not believe rewriting the memoranda was appropriate and that the proper course was for him to turn over the memoranda with work product redacted. J.A. 56. Although initially Najera was not receptive to redaction, *id.,* she later agreed after consulting with others in the DA's Office. J.A. 419; *see also* J.A. 489-90. Ceballos, with Najera's authorization, provided the redacted memoranda to the defense.[2] Shortly thereafter, Najera called Ceballos into her office and made a veiled threat of reprisal if he insisted on testifying candidly at the hearing. J.A. 57-59; *see also* J.A. 490-91.

The hearing was held on March 20, 2000. J.A. 198-363. According to Sundstedt, he gave "marching orders" to Najera, who represented the prosecution at the hearing, to allow the trial judge to have "every piece of information out there so that he could make an informed decision" on the warrant's validity. J.A. 133. Najera apparently understood her orders differently, however. She objected to the defense calling Ceballos as a witness. J.A. 286. Although the court permitted Ceballos to testify, it sustained most of Najera's objections to his testimony, allowing Ceballos to testify only about the statements Wall had made to him. J.A. 295-307. The trial judge later remarked to Ceballos that Najera's conduct toward him on the stand was "very chastising, rude, and hostile." J.A. 87; *see also* J.A.

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[2] The amicus briefs reflect confusion about this chain of events. *See, e.g.,* U.S. Br. 2 n.1; Nat'l Ass'n of Counties Br. 20-21. Petitioners have never argued either that Ceballos's disclosure of the redacted memoranda to the defense was insubordinate, as the National Association of Counties asserts, or that the disclosure did not occur, as the brief of the United States suggests. References to the memoranda at the hearing confirm that the disclosures occurred. *See* J.A. 291-92, 294, 303, 304.

413-14, 492. The court denied the defense motion. J.A. 351.

d. Over the next six months, the DA's Office took a series of retaliatory employment actions against Ceballos because of his oral and written statements to his supervisors and his hearing testimony. Sundstedt demoted Ceballos from calendar deputy to trial deputy. J.A. 22-23, 26, 62-66. He reassigned one of Ceballos's murder cases to a junior colleague with no murder trial experience and stopped assigning Ceballos new murder cases, J.A. 66-73, undercutting his chances for promotion. J.A. 70, 125-26. At the end of August 2000, Ceballos was denied a promotion, a decision made by then-District Attorney Gil Garcetti, J.A. 364-65, but one heavily influenced by Sundstedt, who was asked, post-*Cuskey,* J.A. 110, to name his top three or four candidates for promotion at Ceballos's level and did not mention Ceballos. J.A. 73-79, 107-10, 365-67. Finally, in September 2000, Najera and Sundstedt transferred Ceballos to the Rio Hondo courthouse in El Monte, significantly lengthening his commute, J.A. 11-19, 493—a form of punishment Ceballos described as "freeway therapy." J.A. 13.

e. Ceballos filed a grievance challenging these actions. J.A. 485-513. While it was pending, he spoke out at the Mexican-American Bar Association ("MABA") about the Sheriff Department's alleged misconduct in the *Cuskey* case, the lack of a policy in the DA's Office for dealing with suspected police misconduct, and the retaliatory measures taken against him. J.A. 84-85. The MABA president called Garcetti to discuss the group's concerns about Ceballos's allegations. J.A. 85-86, 430-31. On October 5, 2000, only two days after Ceballos spoke at MABA, the DA's Office denied Ceballos's grievance. J.A. 84, 514-28. Ceballos contends that his grievance was denied at least in part because he spoke to MABA. J.A. 83-84, 144.

On October 28, 2000, Ceballos filed an action under 42 U.S.C. § 1983 against Sundstedt, Najera, Garcetti, and LA County challenging their retaliation for his exercise of First Amendment rights. He also asserted a state-law claim for

intentional infliction of emotional distress. J.A. 136-48; R.1.

2. The District Court Decision. On January 30, 2002, the district court granted petitioners' motion for summary judgment, concluding that they were entitled to qualified immunity on Ceballos's § 1983 claim because his speech was not protected by the First Amendment.[3] Citing *Connick v. Myers,* 461 U.S. 138 (1983), the court acknowledged that "[a]t first blush . . . Plaintiff's speech clearly involved a matter of public concern. For reasons that need not be recited—the code word 'Rampart' says it all—there can be no doubt that, in Southern California, police misconduct is a matter of great political and social concern to the community." Pet. App. 61-62. Yet "[d]espite the intrinsic and important public interest in excluding perjured evidence from court proceedings," the court continued, Ceballos's speech did not touch on a matter of public concern for First Amendment purposes because he wrote his memorandum "as part of his job," Pet. App. 62, and in fulfillment of his duties under the due process clause "not to introduce or rely on evidence known to be false." Pet. App. 64.

3. The Court of Appeals Decision. The court of appeals reversed and remanded for further proceedings, finding that "the law was clearly established that Ceballos's speech addressed a matter of public concern and that his interest in the speech outweighed the public employer's interest in avoiding inefficiency and disruption." Pet. App. 2.

a. In the court's view, critical under the threshold analysis established in *Connick* was whether the "point of the speech in question" was "to bring wrongdoing to light" or "to raise other issues of public concern." Pet. App. 10 (quoting *Roth v. Veteran's Admin.,* 856 F.2d 1401, 1406 (9th Cir. 1988)). The

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[3] Earlier, the district court had granted, on Eleventh Amendment grounds, a motion for summary judgment on Ceballos's claims against LA County and Garcetti in his official capacity. R. 20; Pet. App. 2. When the court granted summary judgment to the individual defendants, it declined to exercise supplemental jurisdiction over the state-law claim. Pet. App. 66-67.

court deemed Ceballos's allegations that a deputy sheriff may have lied in a search warrant affidavit to constitute "whistleblowing" and observed that "when government employees speak about corruption, wrongdoing, misconduct, wastefulness, or inefficiency by other government employees, including law enforcement officers, their speech is inherently a matter of public concern." *Id.* (citing cases). The court rejected petitioners' contention that "a public employee's speech is deprived of First Amendment protection whenever those views are expressed . . . pursuant to an employment responsibility." Pet. App. 11. The court cited *Roth*, in which it had held that a plaintiff employed as a "troubleshooter" at the Veterans Administration addressed matters of public concern under *Connick* when he exposed corruption, mismanagement, and other problems in written reports prepared as part of his job duties, along with other cases. Pet. App. 11-12.

The court of appeals explained that public employees "'are positioned uniquely to contribute to the debate on matters of public concern,'" Pet. App. 13 (citation omitted), and that "[s]tripping them of that right when they report wrongdoing or other significant matters to their supervisors would seriously undermine our ability to maintain the integrity of our governmental operations." *Id.* The court believed that the petitioners' proposed per se rule would be "particularly detrimental to whistle-blowers, such as Ceballos, who report official misconduct up the chain of command, because all public employees have a duty to notify their supervisors about any wrongful conduct of which they become aware." *Id.* It noted the perverse incentive that would be created by a rule protecting employees only if they bypassed their superiors and took their information directly to the press. Pet. App. 14. A blanket exclusion for on-the-job speech, the court continued, would also violate principles announced in *Connick,* which did not distinguish "between internal and external whistleblowing when it noted that speech that is 'of public import in evaluating the performance of the District Attorney' may include efforts by an

employee 'to bring to light actual or potential wrongdoing or breach of public trust.'" *Id.* (quoting *Connick,* 461 U.S. at 148).

b. Applying the balancing test of *Pickering v. Board of Education,* 391 U.S. 563 (1968), the court of appeals found Ceballos's speech of significant value because he sought "'to bring wrongdoing to light, not merely to further some purely private interest.'" Pet. App. 19 (citation omitted). It found no evidence that Ceballos had spoken recklessly or in bad faith. Pet. App. 20. Most importantly, the court observed that petitioners "offer[ed] no explanation as to how Ceballos's memorandum to his supervisors resulted in inefficiency or office disruption. Ceballos tried to address the problem initially by reporting the matter to his supervisors, obviously an appropriate way of seeking a responsible solution." Pet. App. 21. Because petitioners "failed even to suggest disruption or inefficiency in the workings of the District Attorney's Office, there is little for us to weigh in favor of the individual defendants under *Pickering*." Pet. App. 22.[4]

c. The court ruled that it was clearly established that Ceballos's speech was protected by the First Amendment. Pet. App. 23-25. It rejected petitioners' argument that the undisputed facts showed that the adverse employment actions were undertaken for nonretaliatory reasons, concluding that "a reasonable jury could infer that Ceballos's speech was a substantially motivating factor." Pet. App. 25-26 & n.10. Finally, the court reversed the district court's Eleventh Amendment ruling and its dismissal of Ceballos's state-law claim. Pet. App. 32.

d. Judge O'Scannlain specially concurred. He agreed that the Ninth Circuit's decision in *Roth* controlled, but believed that *Roth* should be overruled. Pet. App. 32-33. In his view, the court had ignored the significance of "*Connick*'s distinction

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[4] Because the court of appeals found that the March 2 memorandum was protected under the First Amendment, it did not consider Ceballos's other communications. Pet. App. 7.

between 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 disputed matters of public import." Pet. App. 36.

SUMMARY OF ARGUMENT

In the nearly 40 years since this Court recognized that public employees enjoy a First Amendment right to express themselves on matters of public concern without fear of retaliation by their employers, it has never held that speech addressing matters of public importance uttered by the public employee in his or her role as "employee" is unprotected. Indeed, what the Court's decision in *Connick v. Myers,* 461 U.S. 138 (1983), added to its ruling 15 years earlier in *Pickering v. Board of Education,* 391 U.S. 563 (1968), is an answer to the question whether expression by public employees is constitutionally protected when they speak as employees. That answer is yes—so long as the employee is speaking on a matter of public concern and her interest in speaking is not outweighed by her employer's interest in the efficient performance of its public mission. Taking their cue from this Court, nearly all of the circuits have held that speech by a public employee that occurs as part of his or her employment duties is *not*, for that reason alone, excluded from First Amendment protection.

In 2002, there were more than 21 million federal, state, and local government employees in the United States. U.S. Census Bureau, Statistical Abstract of the United States 2004-2005, No. 453, at 298. Although the government, *as employer,* has broad authority to control their workplace activities, those 21 million Americans are the best situated of all citizens to discover, disclose, and correct abuses of power that arise when the government is acting *as sovereign*. In service to the First Amendment principle of self-government, this Court and the lower courts have placed on the highest rung of First Amendment protection speech addressing the government's

conduct of its affairs, especially revelations of misconduct.

Like all citizens, the nation's public employees potentially have messages of critical public importance to communicate, sometimes to the public and sometimes to their employers—information about abuse of authority, violations of law, or gross mismanagement by the government; breaches of national security; dangers to public health and safety; and a host of other subjects of paramount significance to their communities. But if this Court accepts the per se rule urged by petitioners and the United States, the nation's millions of public employees will be stripped of constitutional protection from retaliation if they communicate that information as part of their jobs. The loss of First Amendment protection will create powerful incentives for them to remain silent, to avoid proper internal channels of communication and instead to "go public," or to turn information over to less knowledgeable workplace surrogates or members of the general public who could make the same disclosure without being accused of having "merely" fulfilled a job function. Neither sound First Amendment principles nor the exaggerated fears of petitioners and their amici that protecting on-the-job speech will undercut the ability of public employers to control their employees' job performance suggest that such a drastic change is wise or necessary.

ARGUMENT

It is undisputed that Richard Ceballos's speech reporting his suspicions that a deputy sheriff had engaged in misconduct addressed a topic of tremendous concern to his community. Whether Ceballos's interest in his speech outweighed that of his employer in punishing it, whether petitioners in fact retaliated against Ceballos for his speech, and whether, for purposes of qualified immunity, any violation of Ceballos's First Amendment rights was clearly established at the time of the retaliation, are not before the Court. The only question presented is whether the bulk of Ceballos's statements are constitutionally unprotected for the sole reason that he spoke as

part of his job. The answer to that question is no.[5]

I. THIS COURT'S PRECEDENTS HAVE RECOGNIZED FIRST AMENDMENT PROTECTION FOR SPEECH ON MATTERS OF PUBLIC CONCERN EXPRESSED BY PUBLIC EMPLOYEES IN THEIR ROLES AS EMPLOYEES.

A. According Constitutional Protection To Speech By Public Employees Comports With Fundamental First Amendment Principles.

Both the United States and the special concurrence proceed from the premise that the *sole* purpose of the First Amendment is to protect the personal interest of the speaker. U.S. Br. 19; Pet. App. 40-42. That premise is flawed. The First Amendment is concerned with far more than the individual's interest in self-expression. When government employees are silenced, it is the *public* that is the principal loser.

1. ***Principles of Self-Government.*** As much or more than any other value, the First Amendment serves the people's interest in self-government. "The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 503-04 (1984). Thus, "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964); *see also* Alexander Meiklejohn, *Free Speech And Its Relation to Self-Government* 25-27 (1948). Because of its central role in enabling the public to govern itself,

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[5] Both Ceballos's testimony as a witness under subpoena at the hearing on the defense motion and his communication to MABA, however, occurred outside his job duties and could not conceivably be deemed either "employee speech" or "government speech." Thus, at a minimum, the case must be remanded for further proceedings regarding these particular communications.

"expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 913 (1982) (citation omitted). The constitutional safeguard was fashioned for the very purpose of "assur[ing] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *New York Times Co. v. Sullivan,* 376 U.S. 254, 269 (1964) (citation omitted). "[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama,* 384 U.S. 214, 218 (1966).

But "public debate must not only be unfettered; it must be informed. For that reason this Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression." *Board of Educ. v. Pico,* 457 U.S. 853, 867 n.20 (1982) (plurality opinion) (citation omitted); *accord First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 782 n.18 (1978); *see also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 767 (1985) (White, J., concurring) ("In a country like ours, where the people purport to be able to govern themselves through their elected representatives, adequate information about their government is of transcendent importance."). "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. Alabama,* 310 U.S. 88, 102 (1940); *see, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 756-57 (1976).

Abuse of power, unlawful activity, misconduct, or gross mismanagement by government are chief among issues that demand a well-informed public so that the citizenry can compel government to correct its abuses and can hold public officials accountable. As Professor Meiklejohn put it: "[T]he body politic, organized as a nation, must recognize its own limitations of wisdom and of temper and of circumstance, and must,

therefore, make adequate provision for self-criticism and self-restraint." Meiklejohn, *supra,* at 12-13; *see also* Vincent Blasi, *The Checking Value in First Amendment Theory,* 3 Am. B. Found. Res. J. 521, 527-44 (1977). To that end, this Court has acknowledged that the disclosure of "information relating to alleged governmental misconduct . . . has traditionally been recognized as lying at the core of the First Amendment." *Butterworth v. Smith,* 494 U.S. 624, 632 (1990); *Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1034 (1991) (plurality opinion) ("There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment.").

2. *Public Employee Cases.* In *Pickering v. Board of Education,* 391 U.S. 563 (1968), this Court recognized that the First Amendment value of promoting self-government extends to speech by public employees. Marvin Pickering was a public-school teacher who was dismissed for writing a letter to a newspaper that criticized the school board's handling of revenue-raising proposals and allocation of financial resources. *Id.* at 564-66. In upholding the teacher's First Amendment right against discharge, the Court emphasized that school funding was "a matter of legitimate public concern" on which "free and open debate is vital to informed decision-making by the electorate." *Id.* at 571-72. The Court viewed the teacher's knowledge gained from his employment as an asset, not a detriment, to that vigorous public debate, observing that "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent," and thus, it was "essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." *Id.* at 572.

The Court's decision in *Pickering* did *not* depend on the rationale that the public-school teacher should have "the same right[s] enjoyed by his privately employed counterpart." U.S. Br. 23 (quoting *Urofsky v. Gilmore,* 216 F.3d 401, 407 (4th Cir. 2000) (en banc)). There is no First Amendment constraint that would prevent a *private* school from firing a teacher for

speaking out against the school's policies—regardless of whether the teacher expressed that view as part of her job *or* in a letter to the editor. Parity with the private sector would mean no First Amendment protection at all for public employees. The United States' effort to shrink the First Amendment rights of public employees in this manner, *id.* at 24, resurrects what, 35 years ago, Professor Van Alstyne called a "lazy analogy" that "is condemned by the express constitutional distinction between private and governmental action." William W. Van Alstyne, *The Constitutional Rights of Public Employees: A Comment on the Inappropriate Uses of an Old Analogy,* 16 UCLA L. Rev. 751, 753 (1969). Instead, the analogy the Court drew in *Pickering* was between public employees and members of the general public. When the public employer's interest in limiting its employee's opportunity to speak is not significantly greater "than its interest in limiting a similar contribution by any member of the general public," *Pickering,* 391 U.S. at 573; *see also id.* at 582 n.1 (White, J., concurring in part and dissenting in part), the employer's interest gives way to the employee's right to free expression. Thus, the relevant question is whether the employee's speech has such an impact on the employment relationship or the functioning of the workplace itself as would justify the employer's curtailing the expression. *See* Thomas I. Emerson, *The System of Freedom of Expression* 570-71 (1970).

Since this Court's decisions in *Pickering* and *Connick v. Myers,* 461 U.S. 138 (1983), expression by a public employee that relates "to any matter of political, social, or other concern to the community" is presumptively protected under the First Amendment. *Connick,* 461 U.S. at 146.[6] Of particular

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[6] *See, e.g., Rankin v. McPherson,* 483 U.S. 378, 386 (1987) (public employee statement that if another attempt to assassinate the President were made, she hoped "they get him," was on matter of public concern because it addressed "the policies of the President's administration" and involved "a matter of heightened public attention"); *Connick,* 461 U.S. at 149 (question on survey whether prosecutors felt pressured to work in political campaigns was "matter of interest to the community upon which it is essential that

relevance here, the Court has acknowledged that speech "seek[ing] to bring to light actual or potential wrongdoing or breach of public trust" or other fundamental governmental misdeeds is especially deserving of constitutional protection. *See Connick,* 461 U.S. at 148 & n.8; *Givhan v. Western Line Consol. Sch. Dist.,* 439 U.S. 410 (1979) (public school teacher's protest of school's racially discriminatory practices protected under the First Amendment).[7] In case after case, the Court has explained that public employees must be free to speak on matters of public import without fear of retaliation because "[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions." *Waters v. Churchill,* 511 U.S. 661, 674 (1994) (plurality opinion); *accord Board of County Comm'rs v. Umbehr,* 518 U.S. 668, 674 (1996); *see also City of San Diego v. Roe,* 125 S. Ct. 521, 525 (2004) ("[P]ublic employees are . . . likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues.").

To silence a public employee who seeks to bring to light a problem in her workplace of public importance both eviscerates

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public employees be able to speak out freely without fear of retaliatory dismissal"); *Perry v. Sindermann,* 408 U.S. 593, 598 (1972) (teacher's public criticism of superiors on matters of public concern protected).

[7] Circuit court decisions reflect an overwhelming consensus that speech by public employees addressing government corruption, unlawful activity, misconduct, or waste is of distinct public concern and that "whistleblower speech," in particular, merits special protection. *E.g., Oladeinde v. City of Birmingham,* 230 F.3d 1275, 1292 (11th Cir. 2000); *Prager v. LaFaver,* 180 F.3d 1185, 1190-91 (10th Cir. 1999); *Feldman v. Philadelphia Hous. Auth.,* 43 F.3d 823, 829 (3d Cir. 1994). The circuits have found an even more significant public stake in such expression when, as here, it concerns law enforcement misconduct. *E.g., Guilloty Perez v. Pierluisi,* 339 F.3d 43, 52 (1st Cir. 2003); *Branton v. City of Dallas,* 272 F.3d 730, 740 (5th Cir. 2001).

that employee's personal interest in her own speech and subverts the public's interest in holding government officials accountable. Equally important, silencing a public employee impairs the employer's ability to manage itself and correct its own failings. *See City of Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n,* 429 U.S. 167, 177 (1976) (restraining teachers' speech to board of education about school operations "would seriously impair the board's ability to govern the district"); *cf. Jackson v. Birmingham Bd. of Educ.,* 125 S. Ct. 1497, 1508 (2005) ("[T]eachers and coaches . . . are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators."). In other words, the disclosure of the government's ills by those employees most familiar with them best serves the principle of *self*-government.

So essential is it that a public employee be at liberty to inform her employer of government misconduct—which often arises when an agency is acting *as sovereign* vis-à-vis third parties—or to comment within the workplace on other matters of public concern, that this Court has held that even when the expression is *private,* it enjoys First Amendment protection. *See, e.g., Rankin,* 483 U.S. at 386 & n.11; *Givhan,* 439 U.S. at 413-16; *see also Roe,* 125 S. Ct. at 526. As then-Justice Rehnquist wrote for a unanimous Court: "Neither the [First] Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public." *Givhan,* 439 U.S. at 415-16.

B. This Court Has Never Held That Speech By Public Employees As Part Of Their Jobs Is Stripped Of First Amendment Protection From Workplace Retaliation.

Petitioners recognize that a fundamental purpose of the First Amendment is to foster free discussion of government affairs and promote informed self-government, Pet. Br. 10-13,

but insist that "speech expressed pursuant to ordinary job duties" does not advance these goals. *Id.* at 14. Their analysis, joined by the United States, does not withstand scrutiny.

1. In a series of decisions in the 1950s and 1960s, the Court held that public employers could not "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 144 (citing cases). Building on those cases, the Court ruled in *Pickering* that the government also could not punish teachers for exercising their rights "*as citizens to comment on matters of public interest* in connection with the operation of the public schools in which they work." *Pickering,* 391 U.S. at 568 (emphasis added). The Court recognized, however, that public employees' free speech rights are not absolute and that the government's interests as an employer in regulating the speech of its employees differ from those it possesses in relation to the general citizenry. Thus, the Court identified the pivotal problem as "arriv[ing] at a balance between the interest 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." *Id.* (emphasis added).

"As citizens" and "as a citizen" cannot be read apart from the "commenting upon matters of public concern" language that follows to create an independent prerequisite that, to enjoy constitutional protection, an employee must be speaking in a "citizen" capacity outside his employment. By setting off the "as a citizen" with commas, the Court revealed its meaning that teachers are like all other citizens in that they have an interest in commenting on matters of public concern. As the Court noted in *Waters,* "a government employee, *like any citizen,* may have a strong, legitimate interest in speaking out on public matters." 511 U.S. at 674 (emphasis added) (plurality opinion). Nothing in *Pickering* suggests that if the school board had circulated surveys to its teachers demanding their views about its performance on school-funding issues and then fired Pickering

for expressing a critical opinion in that survey, the Court would have denied him First Amendment protection outright because the message then would somehow not have been conveyed "as a citizen." The teacher's interest "as a citizen" in communicating his honest, personal opinion about the board's performance would have been no less if he had expressed it as part of his job rather than by writing a letter to the editor.

In ruling in favor of Pickering, the Court recognized that the teacher's statements were not directed toward a person with whom he would normally be in contact and did not threaten to undermine discipline by immediate superiors or harmony among coworkers. It noted that Pickering did not enjoy the kind of close working relationship with his employer for which personal loyalty and confidence are necessary for its proper functioning. 391 U.S. at 569-70. The Court commented that the teacher's statements could not be said to have impeded the proper performance of his job duties or to call into question his fitness to perform his duties. *Id.* at 572-73 & n.5. These observations by the Court do not suggest that any *one* of these factors—which are more likely to come into play when a public employee speaks in the course of doing his job—would, if present, have dictated a ruling for the school board as a matter of law. That the Court evaluated, as part of the balance, the relationship between the teacher's speech and his job duties underscored that such speech will often be related to, or even uttered as part of, those duties. That "the fact of employment [was] only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher," *id.* at 574, simply made balancing the competing interests that much easier. Far from drawing bright lines or erecting per se barriers to constitutional protection, the Court recognized "the enormous variety of fact situations in which critical statements by teachers and other public employees" may be made and accordingly did "not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged." *Id.* at 569.

The First Amendment's prohibition on retaliation against employees for speaking on the job on matters of public concern was even more clearly demonstrated in *Givhan,* a case that both resembles this one and underlines the unworkability of a test that draws the First Amendment line at speech uttered as part of a public employee's job. The public-school teacher in *Givhan* was dismissed after meeting privately with the school principal to protest school employment practices she perceived to be racially discriminatory. 439 U.S. at 413. The Court held that such speech was constitutionally protected. According to the logic of the position taken by petitioners and the United States, the teacher's protest *must* have been expressed solely in her capacity as "citizen" or else it would have been unprotected. Yet nothing in the Court's discussion in *Givhan* turned on the capacity in which the teacher spoke. Indeed, if a wooden distinction had to be drawn, then the teacher was speaking as an employee concerned about "the impressions on black students of the respective roles of whites and blacks in the school environment," *Ayers v. Western Line Consol. Sch. Dist.,* 555 F.2d 1309, 1313 (5th Cir. 1977) (lower court decision in *Givhan*), who expressed her concerns to her principal in a series of encounters at the school. Viewed at the same level of generality as drafting a "disposition memorandum," such conferences would certainly be part of a teacher's job. Why would it not also be part of her job to root out race discrimination within her school, just as it was part of Ceballos's job to address suspected police misconduct in one of his cases? But more importantly, why could the teacher not be speaking *both* as an employee trying to improve her workplace *and* as a concerned citizen?

Indeed, the Court held in *City of Madison* that a teacher could not constitutionally be prohibited from speaking at a public school board meeting on the ground that he was not a union representative. The Court recognized that the teacher "addressed the school board not merely as one of its employees *but also* as a concerned citizen, seeking to express his views on

an important decision of his government." 429 U.S. at 174-75 (emphasis added). Yet it also observed that "it [was] not the case that [the teacher] was speaking 'simply as a member of the community.'" On the contrary, the teacher had opened his remarks to the board by stating that he represented an informal committee of 72 teachers in 49 schools. The Court emphasized that "he appeared and spoke *both as an employee and as a citizen exercising First Amendment rights*." *Id.* at 176 n.11 (emphasis added). The two roles are not mutually exclusive.

The analytical flaws inherent in the argument advanced by petitioners and the United States become particularly evident when the facts of *Givhan* are changed slightly. Suppose that, instead of having only an implicit duty to oppose her school's racially discriminatory practices, the teacher was explicitly directed by an employee manual to work to eliminate race discrimination from her school. Or suppose Givhan had been hired as an ombudsman by the school district for the purpose of improving the schools' handling of racially sensitive matters. As petitioners and the United States would have it, the teacher's complaints to the principal in either variation would suddenly be robbed of constitutional protection. Nothing in *Givhan* or *Connick*, which reaffirmed Givhan's First Amendment "right to protest racial discrimination—a matter inherently of public concern," *Connick,* 461 U.S. at 148 n.8; *see also id.* at 146, supports such absurd results. *See Love-Lane v. Martin,* 355 F.3d 766, 771, 776-78 (4th Cir.) (assistant principal's complaints of race discrimination against students addressed matter of public concern, even though her "professional charge" was to raise awareness on minority issues), *cert. denied,* 125 S. Ct. 68 (2004).

The facts of this case, too, could readily be altered to underscore how untenable is the line petitioners and the United States would draw between speech that is per se unprotected and that which is presumptively protected. Suppose Ceballos's secretary found a draft of his then-uncirculated memorandum lying on his desk, and the secretary, on his own initiative, gave

it to Sundstedt and suffered retaliation as a result. Or suppose Ceballos learned that another prosecutor not under his supervision in the office suspected police misconduct in one of her cases and was reluctant to report it, so Ceballos took it upon himself to disclose it to Sundstedt. In either case, the disclosure would have fallen outside the speaker's job duties and would thus be transmuted, under the petitioners' and the United States' analysis, into "citizen speech."

Yet it is difficult to see why, if the messages in the hypotheticals were delivered in the same manner as Ceballos's statements were actually delivered, the employer's interest in retaliating against Ceballos in the case at hand would be any greater or its mission more threatened than in the hypotheticals. In fact, adopting such a distinction would encourage those public employees who are the most knowledgeable about a significant governmental breach to turn to uninformed proxies, who could not be accused of having spoken pursuant to an employment obligation, to convey controversial messages in their stead—diluting the employer's and public's right to be kept informed on matters of public import. While this Court recognized in *Givhan* that private expression in the workplace may "bring additional factors to the *Pickering* calculus," in that an employee's direct confrontation with his immediate superior can threaten the agency's institutional efficiency, depending on the "manner, time, and place" in which the message is delivered, 439 U.S. at 415 n.4, the Court did not suggest that the *source* of the information, rather than the mode and timing of its delivery, was controlling. *Cf. Bellotti,* 435 U.S. at 777 ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.").

2. Petitioners and the United States rest their claim that this Court has imposed a separate "citizen capacity" prerequisite for First Amendment protection primarily on *Connick*. But what *Connick* adds to *Pickering* is an answer to the question whether a public employee is protected when she speaks as an

employee, and that answer is yes—so long as the employee is speaking on a matter of public concern and the interest in her expression is not outweighed by the employer's interest in the efficient performance of its public services.

In *Connick,* Sheila Myers, an assistant district attorney, was informed that she would be transferred to a different section of the criminal court. Strongly opposed to the transfer, Myers prepared a questionnaire soliciting the views of her colleagues concerning office transfer policy, office morale, confidence in supervisors, and whether employees felt pressured to work in political campaigns. 461 U.S. at 140-41. She distributed the survey at the office during work hours. *Id.* at 153 & n.13. Her employer deemed its distribution a "mini-insurrection" and an "act of insubordination" and discharged Myers. *Id.* at 141.

In analyzing whether Myers's questionnaire was constitutionally protected, this Court repeated the "as a citizen" phrase from *Pickering,* but in the context of drawing a distinction between speech that concerned "only internal office matters" rather than "a matter of 'public concern.'" *Id.* at 143. For example, the Court stated: "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." *Id.* (emphasis added); *see* Pet. Br. 22-23. As in *Pickering,* the "as a citizen" phrase was followed by "in commenting upon matters of public concern," emphasizing the distinction between employee speech touching on matters of public importance and employee speech concerning personal grievances or internal office policy.

That the Court was most focused in *Connick* on the public-personal distinction is buttressed by its observation that the "public concern" threshold is the same standard used for determining whether an action for invasion of privacy may be brought, *id.* at 143 n.5 (citing cases); *accord Roe,* 125 S. Ct. 525, a context in which the standard is purely content-driven. The Court described the threshold requirement as follows:

> We hold only that *when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest,* . . . 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). Thus, far from establishing two distinct prerequisites to constitutional protection ("as a citizen" and "public concern"), the Court *equated* speech on matters of public concern with protected speech "as a citizen." Only "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community," do government officials "enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.* at 146. As in *Pickering,* the Court renounced the goal of establishing "a general standard" that would govern all cases. *Id.* at 154.

Turning to Myers's questionnaire, the Court focused on its "content, form, and context," *id.* at 147-48, not on Myers's capacity in circulating it. The Court held that, with one exception, the questions posed by Myers did not "fall under the rubric of matters of 'public concern.'" *Id.* at 148. Myers did not seek to inform the public that her office was not properly discharging its governmental responsibilities. She, in contrast to Ceballos, did not "seek to bring to light actual or potential wrongdoing or breach of public trust." *Id.* Instead, the Court found, the focus of her questions was "not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors," *id.*—again, in sharp contrast to Ceballos's statements, which were not made to further any personal grievance or agenda and did not even address his relationship with his employer.

Although the Court in *Connick* ruled that most of Myers's survey was unprotected, it found that one question about

pressure to work in political campaigns did touch upon a matter of public concern, *id.* at 149, and proceeded to balance Myers's interest in her speech against that of her employer, striking the balance in favor of the latter. *Id.* at 150-54. That the Court found one question to be of public concern severely undercuts the inflexible citizen/employee distinction urged by petitioners. According to petitioners and the United States, the Court implicitly found that Myers's questionnaire constituted "citizen speech" because it was not prepared pursuant to her prosecutorial duties. Pet. Br. 24; U.S. Br. 21 n.10, 25. Yet not only was the capacity of Myers's speech immaterial to the Court's analysis, but petitioners' and the United States' supposition begs the question, working backward from the result. The prosecutor's speech occurred on the job, during office hours, was communicated to her colleagues, and represented another salvo in a dispute with her employer over her employment conditions. If a rigid distinction must be drawn between speech in an "employee" versus "citizen" capacity, it is difficult to imagine speech more clearly expressed as an "employee" than that of the prosecutor in *Connick*, as the Court recognized in characterizing her survey as "an employee grievance concerning internal office policy." 461 U.S. at 154. And if Myers, a prosecutor, had sought to expose government wrongdoing or breach of trust, which the Court implied *would* have constituted a matter of public concern, *id.* at 148, she surely would have been speaking in the same capacity in which Ceballos, also a prosecutor, spoke when he did precisely that.

3. Nothing in the Court's public employee cases since *Connick* even hints that the Court has adopted a per se exclusion of constitutional protection for expression pursuant to a public employee's job duties. In its most recent decision in *Roe,* in which the Court held that a police officer's sexually explicit acts did not involve a matter of public concern, the Court expressly recognized that its public employee cases fell into two basic categories—one in which the speech relates to public employees' jobs and concerns issues on which they "are

uniquely qualified to comment," and one in which government employees "speak or write on their own time on topics unrelated to their employment." 125 S. Ct. at 523-24. Although petitioners and the United States would exclude from constitutional protection a great deal of expression arising in the first category, the Court recognized that *both* categories are protected absent a strong governmental justification. *Id.*

The petitioners' and the United States' reliance on *United States v. National Treasury Employees Union,* 513 U.S. 454 (1995) ("*NTEU*"), is misplaced. *See* U.S. Br. 17; Pet. Br. 27. In that case, the Court struck down a federal statute that broadly barred federal employees from accepting payment for their speeches and articles, regardless of whether the employee's expression or the group paying for it had any connection to the employee's official duties. The Court discussed the lack of "relevance to their employment" of most employee speech barred by the statute and the fact that plaintiffs could not even obtain compensation for their expressive activities "in their capacity as citizens, not as Government employees"—in the context of explaining why the government's interest in the ban was so weak. *NTEU,* 513 U.S. at 465. Because the barred speech generally had "nothing to do with their jobs" and did not "have any adverse impact on the efficiency of the offices in which they work," *id.,* the Court concluded that the government could not justify the sweeping prohibition "on the grounds of immediate workplace disruption asserted in *Pickering* and the cases that followed it." *Id.* at 470. The lack of a nexus between the speech and the workplace simply made the analysis easy. The Court never remotely suggested that *if* the ban had been limited to job-related expression, such speech *per se* would have failed the *Connick* threshold (though a more tailored ban likely would have been sustained for other reasons).

4. The briefs by petitioners, the United States, and petitioners' amici give the impression that the court of appeals' ruling rejecting a per se exclusion of constitutional protection for public employee statements made in the course of

performing job duties is an outlier, a decision out of the mainstream. Far from it. Taking their cue from this Court, virtually all of the circuits have held over the past 20 years, in accord with the Ninth Circuit, that speech by public employees on matters of public concern expressed as part of their jobs is constitutionally protected, subject to balancing under *Pickering*. Several of the circuits have issued multiple such decisions.[8]

Even in circuits tending to focus on whether a public employee spoke *primarily* as "a citizen" or as "an employee"—an inquiry that suggests the matter is not an either/or proposition—the courts have found that the employee spoke primarily as "a citizen" when she expressed views on a matter of public concern, whether or not as part of her job. *Bonds,* 207 F.3d at 980; *see, e.g., Kennedy,* 224 F.3d at 375-76; *Robinson v. Balog,* 160 F.3d 183, 188-89 (4th Cir. 1998); *Wilson,* 973 F.2d at 1269. Not even the Fourth Circuit, which has come closest to adopting the proposed per se rule, *see Urofsky v. Gilmore,* 216 F.3d 401 (4th Cir. 2000) (en banc), has consistently held that public employee expression that is part of the job is excluded from constitutional protection. *E.g., Love-Lane,* 355 F.3d at 771, 776-78; *Robinson,* 160 F.3d at 188-89 (public employees' required testimony before board on alleged misuse of public funds addressed matter of public concern).

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[8] A sampling includes *Fox v. District of Columbia,* 83 F.3d 1491, 1494 (D.C. Cir. 1996); *Baldassare v. New Jersey,* 250 F.3d 188, 196-97 (3d Cir. 2001); *Salge v. Edna Indep. Sch. Dist.,* 411 F.3d 178, 191 (5th Cir. 2005); *Kennedy v. Tangipahoa Parish Library Bd. of Control,* 224 F.3d 359, 367-75 (5th Cir. 2000); *Wilson v. UT Health Ctr.,* 973 F.2d 1263, 1269 (5th Cir. 1992); *Taylor v. Keith,* 338 F.3d 639, 644-45 (6th Cir. 2003); *Cockrel v. Shelby County Sch. Dist.,* 270 F.3d 1036, 1052 (6th Cir. 2001); *Delgado v. Jones,* 282 F.3d 511, 518-19 (7th Cir. 2002); *Bonds v. Milwaukee County,* 207 F.3d 969, 979-80 (7th Cir. 2000); *Kincade v. City of Blue Springs,* 64 F.3d 389, 396-97 (8th Cir. 1995); *Curtis v. Oklahoma City Public Sch. Bd. of Educ.,* 147 F.3d 1200, 1212 (10th Cir. 1998); *Oladeinde,* 230 F.3d at 1292 (11th Cir.); *see also* Br. in Opp. 11-18.

II. THERE IS NO REASON TO EXCLUDE PUBLIC EMPLOYEE SPEECH FROM FIRST AMENDMENT PROTECTION SIMPLY BECAUSE IT IS EXPRESSED AS PART OF THE EMPLOYEE'S JOB.

Petitioners and the United States offer two primary justifications for the drastic curtailment of fundamental and well-established First Amendment liberties they seek. First, they maintain that all speech by public employees when they are doing their jobs is "government speech" and thus without First Amendment protection. Pet. Br. 31-35; U.S. Br. 19-21. Second, they argue that recognizing constitutional protection for public employees' speech during the performance of their employment duties will hamstring public agencies in running their operations. Pet. Br. 35-40; U.S. Br. 21-23. Both rationales are untenable and would stifle a large quantity of speech on matters of public importance.

A. Richard Ceballos's Statements To His Supervisors Reporting Governmental Misconduct Were Not "Government Speech."

Relying on Judge O'Scannlain's analysis, the United States maintains 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,' and their speech is not *private* expression." U.S. Br. 19 (quoting Pet. App. 41). "Instead, their speech, 'in actuality,' is 'the State's.'" *Id.* (same). This assumption leads the United States to claim that public employee expression is akin to government-funded speech "because it is the government's message that is being conveyed and the government has in effect 'purchased' the speech." *Id.* at 20 (quoting *Urofsky,* 216 F.3d at 408 n.6); *see also* Pet. Br. 31-35. Apart from the fact that the First Amendment is concerned with more than protecting the personal interest of the speaker, *see* Part I.A., *supra,* the United

States' argument is wrong on its own terms.

1. Public employees comprise a vast group about whom few categorical generalizations are possible. Yet it is obvious that many such employees (teachers, professors, prosecutors, judges, and scientists, to name a few) have a personal stake in their speech even though it occurs within parameters established by their employers or other superior authorities, such as under the terms of a research contract, pursuant to the curriculum set by the school board, in accordance with precedential case law or controlling ethical rules, etc.

The Court's recognition of public employees' broad discretion to think and speak their personal views has been most explicit in the academic freedom setting involving public university professors. *See, e.g., Sweezy v. State of New Hampshire,* 354 U.S. 234, 250 (1957) (plurality opinion) ("Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."); *Wieman v. Updegraff,* 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring) ("[U]nwarranted inhibition upon the free spirit of teachers . . . has an unmistakeable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice . . . ."). Although the government sets curricula, teaching standards, and other requirements, it does not dictate the exact direction in which its employees' spirit of exploration may roam. Teachers and professors have discretion in the manner in which they meet their employment requirements. Far from merely doing the government's bidding, the task of a university professor, for instance, is conceived primarily as one of disseminating his or her own personally developed views without interference from government. *See* Emerson, *supra,* at 594. If publicly employed teachers and professors had no personal interest in their speech, then they would have no constitutional basis for objecting to a requirement that they begin each class by praising the President of the United States.

That judges have a personal stake in their viewpoints is

equally evident. According to the United States' logic, the Justices of this Court have no personal interest in the speech in the memoranda they write one another, their comments at oral argument, or their weekly conferences because these are all routine facets of their employment responsibilities and thus constitute the government's own speech. To state the point is to refute it. As Professor Chafee put it: "The government pays judges, but it does not tell them how to decide." Zechariah Chafee, *The Blessings of Liberty* 241 (1956).

The same is no less true of prosecutors. For starters, a prosecutor has a tangible personal interest in what he says pursuant to his job duties because, "perhaps unique, among officials whose acts could deprive persons of constitutional rights," a prosecutor is "amenab[le] to professional discipline by an association of his peers." *Imbler v. Pachtman,* 424 U.S. 409, 429 (1976). It is not the DA's Office that is subject to discipline by the Bar, but the individual prosecutor himself. Moreover, "[t]he prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions." American Bar Association Standards for Criminal Justice, Prosecution Function, Standard 3-1.2(b) (3d ed. 1993); *see also Berger v. United States,* 295 U.S. 78, 88 (1935); *In re Ferguson,* 96 Cal. Rptr. 594, 598 (Cal. 1971). That a prosecutor is a public servant who prosecutes cases on behalf of "the People" of California, and not merely an agent of the DA's Office, makes his wise exercise of discretion that much more vital.

This Court has recognized that, far from performing a job consisting of a series of ministerial tasks, a prosecutor has broad discretion in carrying out his employment duties, that those duties "must be administered with courage and independence," and that a prosecutor "is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court." *Imbler,* 424 U.S. at 423, 424; *see also Gentile,* 501 U.S. at 1036 (plurality opinion) ("Our system grants prosecutors vast discretion at all stages of the criminal

process . . . ."); *Morrison v. Olson,* 487 U.S. 654, 727 (1988) (Scalia, J., dissenting) (discussing "the vast power and the immense discretion that are placed in the hands of a prosecutor"). The United States argues, however, that a prosecutor such as Ceballos is just doing his job when he steps forward and reports police misconduct. Accordingly, it essentially contends that Ceballos's speech has been dictated and compelled by his employment duties and hence is not susceptible to being chilled by the specter of employer retaliation. *See* U.S. Br. 25. Yet the very performance of the prosecutor's job entails so much discretion—much of it dependent on the individual prosecutor's personal views and judgment—that there is no guarantee that he will not be constrained by the risk of retaliation if he sticks his neck out and conveys an important message that may not be well received (such as suspicions that a police officer falsified an affidavit).

For precisely this reason, this Court has held that prosecutors are entitled to absolute immunity from liability in carrying out prosecutorial functions. *See, e.g., Imbler,* 424 U.S. at 424-25, 427 n.25 (explaining that a prosecutor could feel "constrained in making every decision" by the risk of personal liability and that such risk "also could dampen the prosecutor's exercise of his duty to bring to the attention of the court or of proper officials all significant evidence suggestive of innocence or mitigation"); *see also Barr v. Matteo,* 360 U.S. 564, 571 (1959) (conferring absolute immunity against defamation on acting agency head because the threat of damage suits "might appreciably inhibit the fearless, vigorous, and effective administration of policies of government"). It seems odd, to say the least, for LA County and the United States to argue in most § 1983 and *Bivens* actions that government officials must have broad immunity so that they are not chilled in the exercise of their job functions, while maintaining here that public employees have no need for First Amendment protection for expressing their views on matters of public importance because they have no personal stake in their speech, but are merely

doing their jobs.

"[T]he threat of dismissal from public employment is . . . a potent means of inhibiting speech," *Pickering,* 391 U.S. at 574, at least as potent as the threat of a damages suit. Just because a prosecutor *should* step forward when he suspects police misconduct (whether or not it is *his job*, as the United States claims, to expose governmental misconduct, U.S. Br. 25) does not necessarily mean that he will. As this Court recently recognized: "Without protection from retaliation, individuals who witness discrimination would likely not report it, indifference claims would be short-circuited, and the underlying discrimination would go unremedied." *Jackson,* 125 S. Ct. at 1508.[9] The importance of the truth-seeking function of the criminal process was recently underscored in Southern California by the Rampart scandal. *See* Pet. App. 62 ("the code word 'Rampart' says it all"). Yet truthful speech is deterred by the threat of reprisals. Professor Chafee aptly observed: "[T]he governmental attack on the loud-mouthed few frightens a multitude of cautious and sensitive men . . . . We cannot know what is lost through the effect of repression on them, because it is not prosecuted but simply left unsaid." Chafee, *supra,* at 113. Prosecutors' very real fears "of being blackballed or labeled by officers and superiors who challenge their assessments," Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal,* 34 Loy. L.A. L. Rev. 545, 638 (2001), reflect the powerful institutional pressures that deter prosecutors from doing exactly what Ceballos did here. Such speech—unlike

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[9] *See also Umbehr,* 518 U.S. at 674 (threat of losing relationship with government "may chill speech on matters of public concern"); *Keyishian v. Board of Regents,* 385 U.S. 589, 683 (1967) ("It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living . . . ."); *cf. Rutan v. Republican Party of Illinois,* 497 U.S. 62, 73 (1990) (employees suffering adverse employment actions because of their political backgrounds "will feel a daily pressure" to join the prevailing political party).

commercial speech—is fragile, not "hardy," *Dun & Bradstreet,* 472 U.S. at 762, and is easily chilled by the risk of retaliation.

2. The special concurrence, the petitioners, and the United States maintain, nonetheless, that the government can control the content of its employees' speech because it has effectively "purchased" it, much as if the government had set the terms of a grant program. *See Rust v. Sullivan,* 500 U.S. 173 (1991). That the government pays the salary of the speaker does not necessarily mean, however, that every statement the speaker utters is "government speech." *See, e.g., Legal Servs. Corp. v. Velazquez,* 531 U.S. 533, 542-49 (2001) (speech by legal aid lawyers not "government speech" even though they are government-funded); *cf. People for the Ethical Treatment of Animals, Inc. v. Gittens,* --- F.3d ---, 2005 WL 1560336, at *3 (D.C. Cir. 2005) ("the thoughts contained in the books of a city's library" are not government speech even though "the library owns the books"). If all such speech were "government speech," many of this Court's public employee free speech decisions would have been easy victories for the agencies because the employees spoke on their employers' premises, usually during work hours. *See, e.g., Waters,* 511 U.S. at 664; *Rankin,* 483 U.S. at 381; *Connick,* 461 U.S. at 153 & n.13; *Givhan,* 439 U.S. at 412.

It is no answer for petitioners and the United States to argue, circularly, that only expression communicated "as part of the job" counts as the government's own speech because their theory—that the government owns its employees' speech because it pays their salaries—contains no such limiting principle. If the government speech argument had any force, it should be just as true that the government has "purchased" all employee speech that occurs on the premises and during work hours as that it has purchased speech communicated as part of the employee's job. The United States does not explain why the fact that employee speech is expressed as part of the job would trump the time and place of its delivery. If Ceballos had written his memorandum at home, at 11:00 p.m., on his own computer,

for instance, it is difficult to see why it would been more akin to "government speech" than Myers's distribution of her questionnaire in *Connick* at the office during work hours.

Likewise, the linkage to an express recommendation of a particular course of governmental action should not convert Ceballos's speech into that of the government. If Ceballos had changed the form of his memorandum so that, instead of recommending a disposition in one of his cases, he had simply reported suspected police misconduct to his superior (*e.g.,* "I am writing to inform you of the following police misconduct . . . ."), it would not be entitled to greater protection simply because it was a free-standing disclosure divorced from a proposed governmental response. In neither variation would the employee merely be expressing *the government's* message. *See Sons of Confederate Veterans, Inc. v. Commissioner of Va. Dep't of Motor Vehicles,* 305 F.3d 241, 245 (4th Cir. 2002) (opinion of Luttig, J.) (recognizing that "speech in fact can be, at once, that of a private individual and the government"); *Latino Officers Ass'n v. City of New York,* 196 F.3d 458, 468 (2d Cir. 1999) (observing that the *Pickering* and *NTEU* line of cases "makes plain [that] not all speech by a government agent is 'government speech' subject to such lenient analysis"). Although petitioners and the United States pay lip service to this Court's responsibility to "ensure that citizens are not deprived of fundamental rights by virtue of working for the government," U.S. Br. 14 (quoting *Connick,* 461 U.S. at 147); Pet. Br. 24 (same), their all-encompassing "government speech" argument would deny First Amendment protection to public employee speech on matters of public importance for no reason *other* than that the expression occurred as part of the employee's job.

The fundamental flaw in the United States' and the concurrence's analysis is that the scope of a public employee's employment is much broader than those instances in which he is acting as a spokesperson for the government. That the government generally has the right to control the message communicated by its agents to the public has little bearing on

the communication of information *within* a prosecutor's office, from a subordinate prosecutor to his supervisor. Similarly, Judge O'Scannlain's citation to *Giglio v. United States,* 405 U.S. 150, 154 (1972), is inapt. Pet. App. 43. A prosecutor can bind the government in its dealings with third parties, as in *Giglio,* because the prosecutor is acting as a spokesman for the government. *See* Restatement (2d) of Agency § 272 (1958) ("[T]he liability of a principal is affected by the knowledge of an agent concerning a matter *as to which he acts within his power to bind the principal* . . . .") (emphasis added).

For that reason, the hypotheticals in the United States' brief (at 22) in which a prosecutor refuses to make a statement to the press directed by his employer or sabotages his employer's brief are easy. There, the public employee is actually speaking for his employer, *see, e.g., Kilgore v. Younger,* 180 Cal. Rptr. 657, 662 (Cal. 1982) (attorney general discharged an "official duty" when he called a press conference in his capacity as attorney general), and is being insubordinate in refusing to carry out his employer's instructions about how to perform his job function. In such a situation, the employer's interest in controlling its message, so as to perform its public services in the manner it sees fit and to maintain discipline, is nearly absolute.[10] An employer also could discipline an employee for violating office policy or a superior's directives regarding internal office communications. *See* U.S. Br. 23 n.11. Even the *Connick*

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[10] That authority is "nearly" absolute because a public employee would have a First Amendment interest in refusing to carry out an unlawful or otherwise invalid instruction. *See, e.g., Hensley v. Horne,* 297 F.3d 344, 346-48 (4th Cir. 2002) (city employee had free speech right to disobey instruction of his supervisor, then under investigation for sexual harassment, not to say anything negative to investigators); *Dill v. City of Edmond,* 155 F.3d 1193, 1200-02 (10th Cir. 1998) (police officer had First Amendment right not to falsify facts in police report); *see also O'Brien v. Town of Caledonia,* 748 F.2d 403, 406 (7th Cir. 1984) (holding police department policies prohibiting all criticism of the department overbroad and unconstitutional on their face).

dissent agreed that a public employee's refusal to perform a lawful task within the scope of his duties was "[p]erhaps the simplest example of a statement by a public employee that would not be protected by the First Amendment." 461 U.S. at 163 n.3 (Brennan, J., dissenting). The circuits have easily disposed of such cases under existing law.[11]

Petitioners' hypothetical First Amendment case brought by the White House press secretary fares no better. Pet. Br. 36. It is difficult to imagine a case in which the press secretary would have First Amendment protection for statements he made at his official press conferences. Not only is the press secretary speaking *for the President* when he holds press conferences, but as a high-level employee who enjoys a close, highly confidential relationship with the President, he can be fired at will for making statements that undermine that relationship. *See Waters,* 511 U.S. at 672 (plurality opinion); *Branti v. Finkel,* 445 U.S. 507, 517-18 (1980); *Pickering,* 391 U.S. at 570 & n.3.

By contrast, Ceballos did not speak for the government and was not insubordinate when he conveyed to his supervisor his personal assessment that police misconduct had occurred, recommended a particular course of action, and then awaited an answer—much as the teacher in *Givhan* conveyed her "personal opinions" regarding the school district's allegedly discriminatory practices. Pet. Br. 27. Contrary to the United States' view, U.S. Br. 21 n.10, that Ceballos developed his opinion in the course of doing his job does not make it any less his personal opinion. *See, e.g., Kincade,* 64 F.3d at 393, 397 (plaintiff gave oral report to city officials in his capacity as city engineer and that report represented "his own personal

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[11] *See, e.g., Wagner v. City of Holyoke,* 404 F.3d 504, 508 (1st Cir. 2005); *Lewis v. Cowen,* 165 F.3d 154, 164-65 (2d Cir. 1999); *Porter v. Dawson Educ. Serv. Coop.,* 150 F.3d 887, 894 (8th Cir. 1998); *Campbell v. Towse,* 99 F.3d 820, 829-30 (7th Cir. 1996); *Nelson v. Pima Cmty. Coll.,* 83 F.3d 1075, 1081 (9th Cir. 1996); *Wright v. Illinois Dep't of Children & Family Servs.,* 40 F.3d 1492, 1503-04 (7th Cir. 1994); *Berry v. Bailey,* 726 F.2d 670, 676 (11th Cir. 1984).

opinion"). Under the United States' theory, Ceballos's recommendation and Sundstedt's refusal would *both* be government speech. In fact, if a room full of prosecutors debated what should be done, *all* of their speech would be government speech, even if a multitude of inconsistent opinions were expressed and "the government" had not yet decided on its ultimate message.[12]

The petitioners' and United States' effort to peg Ceballos's statements as government speech ultimately fails because there was both no prescribed governmental message and no manner in which Ceballos's expression deviated from a governmental script. In government subsidy cases in which this Court has held that the government was entitled to control or influence the recipients' speech, the Court found that the government had made a particular "value judgment" and "chosen to fund one activity to the exclusion of the other." *Rust,* 500 U.S. at 192-93; *see also Regan v. Taxation with Representation of Wash.,* 461 U.S. 540, 544-45, 548-49 (1983). The Fourth Circuit's decision in *Urofsky* fits that same mold in holding that Virginia was entitled to set conditions on its employees' use of state computers. *Urofsky,* 216 F.3d at 404-05. As the Court explained in *Rosenberger v. Rector & Visitors of University of Virginia*: "When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." 515 U.S. 819, 833 (1995); *accord Velazquez,* 531 U.S. at 541; *Board of Regents of Univ. Wis. Sys. v. Southworth,* 529 U.S. 217, 229 (2000).

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[12] The Court's recent decision in *Johanns v. Livestock Marketing Ass'n,* 125 S. Ct. 2055 (2005), is distinguishable in this respect because there, the Court held that the government's beef promotions were compatible with its overall message of moderate consumption. *Id.* at 2063 n.5. Moreover, the challenged promotions were part of "the implementation of a 'coordinated program' of promotion, 'including paid advertising, to advance the image and desirability of beef and beef products.'" *Id.* at 2062-63. As discussed in text, there is no such programmatic governmental message here.

Here, no one has identified a government message that Ceballos contradicted or failed to promote, or, at a higher level of generality, what message *any* DA's Office might adopt that would be inconsistent with speech by a prosecutor trying to rectify what he perceived to be a material falsehood to a court in a criminal case. Would the message be that all criminal defendants are guilty? That police officers never lie? The true governmental message for a prosecutor would presumably be the motto inscribed on the U.S. Justice Department building: "The Government Wins When Justice is Done." Much like lawyers who work in a legal aid office, *see Velazquez,* 531 U.S. at 542-43, prosecutors are also hired to call them as they see them; rather than work from a government script, they make independent assessments of how to respond to the infinite variety of situations that might arise during the prosecution of a criminal case. No "programmatic message" is involved here any more than in *Velazquez*, *id.* at 548, and if there were such a message (*e.g.,* that prosecutors should keep their suspicions of police misconduct to themselves), it would subvert the functioning of the criminal justice system itself. *See id.* at 545.

Finally, this Court has relied on the notion that when the government speaks, whether to promote its own policies or advance a particular idea, "it is, in the end, accountable to the electorate and the political process for its advocacy." If the citizenry objects, it can elect new officials later to espouse a different position. *Southworth,* 529 U.S. at 235; *accord Velazquez,* 531 U.S. at 541-42. But when a public employer retaliates against its employee for exposing governmental misconduct, the political process breaks down. Indeed, it is not uncommon for agencies to fire or demote employees *before* they come out with their controversial reports to prevent the speech or discredit the speaker. *E.g., Campbell v. Arkansas Dep't of Corr.,* 155 F.3d 950, 954 (8th Cir. 1998); *Feldman,* 43 F.3d at 830. Neither the public nor the government itself can hold officials accountable for abuse unless public employees can disclose government misconduct without fear of reprisals.

B. Protecting Public Employees' Speech On Matters Of Public Concern Communicated As Part Of The Job Will Not Hamstring Public Agencies In Performing Their Public Missions.

Judge O'Scannlain's concurrence expressed the concern, echoed by petitioners and their amici, Pet. Br. 35-40; U.S. Br. 21-23; Nat'l School Bds. Ass'n ("NSBA") Br. 19, that if speech by public employees communicated as part of their jobs were not categorically excluded from constitutional protection, it would "'plant[] the seed of a constitutional case' in every task that every public employee ever performs." Pet. App. 43 (citation omitted). Two decades of actual experience by the lower courts presumptively protecting such speech should allay this fear. Both the *Connick* requirement that public employee speech address a matter of public concern and the *Pickering* balance work together to ensure that not every task can lead to a First Amendment case.

First, under *Connick,* whether speech is on a matter of public concern is not based solely on its content, but also on its form and context. 461 U.S. at 147-48. Ceballos agrees that the court of appeals went too far when it stated that "[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." Pet. App. 10 (citation omitted). *Connick* foreclosed such an expansive conception of the "public concern" threshold. 461 U.S. at 148-49. Rather, "public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication." *Roe,* 125 S. Ct. at 525-26. The reason for the threshold requirement is to eliminate internal workplace grievances from judicial scrutiny because "government offices could not function if every employment decision became a constitutional matter." *Connick,* 461 U.S. at 143. This Court need not

approve the Ninth Circuit's formulation for Ceballos to prevail.

Moreover, although the court of appeals and a number of other courts—correctly, in our view—have stated that "content" is the most important of the three factors, *see, e.g.,* Pet. App. 8; *Baron v. Suffolk County Sheriff's Dep't,* 402 F.3d 225, 233-34 (1st Cir. 2005); *Yoggerst v. Hedges,* 739 F.2d 293, 296 (7th Cir. 1984); *cf. Connick,* 461 U.S. at 148 n.8 (race discrimination is "a matter *inherently* of public concern") (emphasis added), it does not necessarily follow that every statement by a public employee about government wrongdoing would meet the public concern threshold. For example, the context of the speech might demonstrate, as in *Connick,* that, taken as a whole, the employee's expression was intended more to provide further ammunition in a battle between employee and employer over some personal grievance than to address a matter of public concern. No such consideration is present here, however. Ceballos's reports of suspected police perjury lie at the core of First Amendment protection; his speech did not involve internal office affairs or the employment relationship itself; and petitioners do not dispute that his speech was on a topic of public concern, apart from his capacity in speaking. Thus, this case provides no occasion for this Court to refine the "public concern" analysis—even assuming that refinement were needed.

Liberally sprinkling the adjective "routine" throughout in characterizing Ceballos's expression does not heighten the government's interest in categorically barring from constitutional protection public employee speech that occurs as part of the job. *E.g.,* Pet. Br. 31, 32; Pet. App. 46. For starters, Ceballos's statements were far from routine. *See supra* pages 4-5 & n.1. More importantly, the term "routine" is unhelpful in drawing lines between protected and unprotected public employee speech. The frequency or regularity with which an employee performs a task—viewed at a high level of generality, such as "writing a disposition report"—says nothing about whether the employee is mouthing the "government's message" in performing the task and nothing about whether the employee

is speaking on a matter of public concern. As the court of appeals observed, "a report that would ordinarily be considered routine by virtue of its form may well become non-routine by virtue of its content, such as when it contains serious charges of official wrongdoing." Pet. App. 17. Suppose, for example, that a Capitol Police officer patrols the Capitol daily, looking for suspicious unattended packages, and every day she files a report with her findings. One day, the officer discovers a package containing a bomb; furthermore, after an investigation, she learns that a fellow police officer planted it. She reports her findings and is discharged. Similarly, imagine that a U.S. Customs Service employee learns that some of his colleagues have been accepting bribes from a foreign entity, known to have ties to terrorist organizations, to ignore certain shipments when they arrive at U.S. ports. He reports his discovery and is fired. In neither instance is there anything "routine" about the employees' reports, and it would be perverse to protect speech of such public significance *less* because the person *best* situated to alert his agency to the danger was the one who spoke.

As these examples highlight, the petitioners' invocation of the war on terrorism is unpersuasive. The government's efforts to prevent terrorism are *served,* not hindered, by protecting public employee free speech. *Contra* Pet. Br. 36-37. If the public employees in the best position to prevent an attack are chilled from coming forward with information for fear of reprisal, then the government's fight against terrorism will have been dealt a significant blow. Protecting such speech does not remotely "undermine[] the democratic process, by hindering the ability of politically accountable officials to run their agencies" or "encroach[] on the authority of the Executive Branch." U.S. Br. 22.[13] Rather, "when an employee exposes unscrupulous

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[13] In addition, the rights of federal employees to bring First Amendment claims under *Bivens* are already seriously circumscribed, *see Bush v. Lucas,* 462 U.S. 367 (1983)—even more so when national security is involved. *See, e.g., Edmonds v. DOJ,* 323 F. Supp. 2d 65 (D.D.C. 2004), *aff'd,* No. 04-5286

behavior in the workplace, his interests are co-extensive with those of his employer; both want the organization to function in a proper manner." *Marohnic v. Walker,* 800 F.2d 613, 616 (6th Cir. 1986). It is not in any government agency's best interest "to fly blind" because its employees are afraid to report corruption or abuse. Unfortunately, however, officeholders sometimes act against the government's own genuine interests by retaliating against the bearers of bad news.

The United States contends, however, that to hold that a public employee has a presumptive right under the First Amendment to speak on matters of public concern in performing his job "is tantamount to holding that he has, at least in some circumstances, a federal constitutional right to perform his job as he sees fit." U.S. Br. 19; *see also* Int'l Muni. Lawyers Ass'n Br. 18. Its fears and those of other amici are vastly overblown. When employees refuse to follow their employers' lawful directives or otherwise fail to carry out their job responsibilities, their employers can discipline them; employers will continue to win those First Amendment cases when they are brought. *See supra* pages 37-38 & n.11.[14] Thus, if Ceballos had dismissed the *Cuskey* case despite Sundstedt's instruction to the contrary, his employer could have fired him. So, too, if Najera had forbidden Ceballos to turn over his memoranda to the *Cuskey* defense, and Ceballos defied that directive, his employer could have discharged him. In neither instance would Ceballos have had a meritorious constitutional claim. A Justice Department lawyer, directed to write a brief defending the constitutionality of school vouchers cannot write a brief opposing their validity—regardless of what he personally believes. In none of these instances would the employee have

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(D.C. Cir. 2005).

[14] Likewise, a publicly employed teacher or professor disciplined for refusing to follow the prescribed curriculum generally has no First Amendment claim. *See, e.g., Edwards v. California Univ. of Pa.,* 156 F.3d 488, 491 (3d Cir. 1998).

a First Amendment right "to perform his job as he sees fit."

Selectively quoting from the court of appeals' opinion, the United States further argues that protecting a public employee in Ceballos's position will accord him preferential treatment vis-à-vis public employees who speak outside their employment capacity, precisely because "the speech was required by his job, since, in the view of the court of appeals, '[i]t is difficult to imagine how the [good-faith] performance of one's duties * * * could be disruptive or inefficient.'" U.S. Br. 24 n.12 (quoting Pet. App. 22). The United States' view is overly simplistic. Whether or not speech is "required" by one's job (as opposed to merely "part" of or "related" to one's job) is not so straightforward. Although Ceballos does not dispute that most of his statements were made as he performed his employment duties, *but see supra* n.5, it is not at all clear that anything he said was "required" by his job, especially given his broad discretion "to make sure the cases are handled appropriately," J.A. 100, and the absence of an office policy addressing his obligations in assessing whether police misconduct occurred. But more importantly, the United States omitted the key words "in this manner" from its quotation of the court of appeals' opinion. The court made no blanket assertion that the good-faith performance of one's duty could never be disruptive or inefficient. Its reasoning was entirely fact-driven and based on the optimal manner in which Ceballos presented his information to his supervisors and the absence of any suggestion that he had caused "disruption or inefficiency in the workings of the District Attorney's Office." Pet. App. 22.

Furthermore, Ceballos does not maintain that whenever an employee speaks on a matter of public concern in the course of performing his job duties, his speech automatically would survive a balancing test under *Pickering*. The United States is knocking down a strawman. The employee's assessment that misconduct had taken place might be recklessly false or so off-base as to call into question his judgment and fitness to perform his duties. *See Pickering,* 391 U.S. at 572-73 & n.5, 574-75;

Koch v. City of Hutchinson, 847 F.2d 1436, 1450-51 (10th Cir. 1988) (en banc). Moreover, as this Court has said, "the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose." *Rankin,* 483 U.S. at 388; *accord Connick,* 461 U.S. at 152-53. It is not the presumptive protection of on-the-job speech that would distort the balancing under *Pickering,* but the per se exclusion urged by petitioners and the United States. In balancing the employee's and employer's competing interests, a court is to consider "the responsibilities of the employee within the agency," *Rankin,* 483 U.S. at 390, and whether the speech "impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Id.* at 388. That the impact of the speech on the employee's job obligations is evaluated under the *Pickering* balance *presupposes* that such expression will often be closely related to those obligations. Thus, if Ceballos had contacted the Sheriff himself or gone directly to the court or to defense counsel without first pursuing internal channels in the DA's Office, if he had ignored his supervisors' directives about how to proceed with the case, or if he had accused the Sheriff's Department of perjury in an open meeting, he would have been speaking on a matter of public concern within the scope of his job duties. In these variations, however, his employer would have a stronger argument that his speech was disruptive to the operations of the DA's Office, violated office policy regarding the chain of command, and/or undermined the DA's Office's working relationship with the Sheriff's Department. That Ceballos might still believe that he was engaged in "the good-faith performance of [his] duties" probably would not help him.

With that said, Ceballos agrees with the United States' contention that it may often be easier for a public employer to justify an adverse employment action in response to speech expressed in the performance of its employee's job duties. U.S. Br. 28-29. That is so not because a public employee carrying out his job duties has a lesser degree of First Amendment protection than other public employees, but simply because, as

the United States notes, if the employee were "performing his duties inadequately or inappropriately, that showing should be sufficient to defeat the constitutional claim." *Id.* at 28. Petitioners have not even attempted such a showing here.[15]

Finally, petitioners and the NSBA protest that if the Court recognizes First Amendment protection for speech pursuant to a public employee's job duties, public agencies will rarely be able to dispose of First Amendment claims at the pleadings stage, but will have to wait until at least summary judgment. Pet. Br. 36; NSBA Br. 21-22. There is certainly no contesting the proposition that denying constitutional protection for virtually all public employee speech will make it easier for public employers to dispense with such claims. The easy dismissal of First Amendment claims at the pleadings stage, however, has never been a goal to which this Court has aspired. Moreover, First Amendment retaliation cases are so fact-bound that they are rarely resolved before the summary judgment stage. This is true even in the Fourth Circuit, which has come closest to adopting the per se rule petitioners seek. *See, e.g., Birt v. Dorchester County,* 86 Fed. Appx. 593 (4th Cir. 2004) (affirming grant of summary judgment against public employee on ground that speech directly related to his duties); *Echtenkamp v. Loudon County Public Sch.,* 263 F. Supp. 2d 1043, 1058 n.11 (E.D. Va. 2003) (assessment whether speech was made as a "citizen" or as an "employee" "is highly factual

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[15] Inexplicably, the United States proposes that, if the Court recognizes that Ceballos's speech is not per se unprotected, it should vacate the court of appeals' judgment and remand to give petitioners the chance to develop a rationale under *Pickering* for retaliating against Ceballos for his speech. U.S. Br. 29-30. Although Ceballos agrees that a remand, as the court of appeals ordered, is appropriate to permit petitioners the opportunity to demonstrate that they did not retaliate against Ceballos for his speech, Pet. App. 26 & n.10, petitioners have forfeited the right to make a new argument under *Pickering* that their interest in disciplining Ceballos outweighed his interest in his expression—as the United States itself seems to concede. U.S. Br. 30. Even *petitioners* do not seek such a remand.

and contextual" and "must await a more complete record, either on summary judgment or at trial").

C. A Per Se Exclusion Will Create Perverse Incentives And Subject First Amendment Rights To Easy Manipulation By Public Employers.

Not only would a per se rule stripping constitutional protection from speech communicated pursuant to a public employee's employment duties curtail much expression by the individuals best situated to expose governmental misconduct and corruption, but it would create perverse incentives that could potentially be debilitating for public employers and employees alike. As the court of appeals and many other circuits have recognized, faced with a ruling that public employees enjoy First Amendment protection for their speech only if they speak outside their job responsibilities, many employees will feel compelled to take every accusation of wrongdoing directly to the press (whether overtly or through "leaks") instead of discreetly pursuing internal channels. Pet. App. 14; *see* Br. in Opp. 20-21 (citing cases). The disruption of government business by premature press involvement and the resulting scandals will be far greater than if employees felt free to report information to their supervisors without fear of reprisal, enabling problems to be more quickly and quietly resolved within the workplace.

The United States contends that the Court need not worry about creating an incentive for public employees to "go public," because employees are often prohibited from speaking to the press without their employers' permission. U.S. Br. 26. Why the United States believes this fact would be reassuring is unclear; if it violates office policy for the employee to go to the press, and he is afraid of retaliation if he reports misconduct internally, the end result may well be that "public employees [are deprived] of the ability to expose wrongdoing," *id.* at 24, *in any manner*. A ruling adopting a per se exclusion creates a trap for the public employee from which there is no escape: If he

reports government misconduct to his supervisor as part of his job, he lacks constitutional protection if his employer decides to retaliate; if he discloses the misconduct to the press, he faces discipline for evading internal channels of communication. *Lee v. Nicholl,* 197 F.3d 1291, 1296 n.1 (10th Cir. 1999); s*ee, e.g., Barnard v. Jackson County,* 43 F.3d 1218, 1223-25 (8th Cir. 1995); *Bartlett v. Fisher,* 972 F.2d 911, 917 (8th Cir. 1992); *Jurgensen v. Fairfax County,* 745 F.2d 868, 883-84 (4th Cir. 1984). The United States' position leaves the Court with nothing more than the vain hope that by some happenstance, a member of the general public or the press will stumble upon the important information and make it known.

The United States also attempts to reassure the Court that denying public employees constitutional protection for speech in the course of their job duties will not have devastating consequences because "there will likely be some statutory remedy" available to the employee who has appropriately performed his duties. U.S. Br. 25. This unsupported assertion is reminiscent of the long-discredited Holmesian conception that public employees have no First Amendment right to be free from retaliation. As a result of that view, "the government employee had few substantive or procedural protections, other than those accorded him by grace of the government in the civil service laws." Emerson, *supra,* at 564. The United States' argument is akin to saying that employees should have no equal protection claim when their state employer discriminates against them on the basis of race because they have a claim under Title VII or that the First Amendment is not necessary because state constitutions also protect freedom of speech. This Court has rightly refused to condition the availability of sacrosanct constitutional rights "on the vagaries of state or federal law." *Umbehr,* 518 U.S. at 680 (citation omitted).

Finally, a per se exclusion of constitutional protection for speech communicated as part of the public employee's job will invite manipulation by public employers to avoid liability. There is no doubt that employers would broaden their immunity

by the simple expedient of adding to their employees' reporting duties. *Wilson,* 973 F.2d at 1269; *accord Kennedy,* 224 F.3d at 370. The United States asserts, without support, that "it is likely" that public employers would simultaneously be broadening their exposure to other forms of liability, such as under civil service laws. U.S. Br. 26. But it is already the case that the federal government requires its employees to "disclose waste, fraud, abuse, and corruption to appropriate authorities." 5 C.F.R. § 2635.101(b)(11). Thus, under petitioners' and the United States' proposed per se rule, all federal employees are without constitutional protection when they report government misconduct "to appropriate authorities." Similar laws exist for some state and local government employees, *e.g.,* D.C. Code §§ 1-615.58(7) & 1-615.52(a)(6); Ga. Code Ann. § 45-10-1; NYC Charter, 9 RCNY § 1-03(a)(vi); Roseville (Cal.) Muni. Code § 3.15.040(B); Salt Lake County Code of Ordinances § 2.80.110(D), and more will surely follow if the Court adopts a blanket exclusion for speech uttered pursuant to job duties.

This Court refused to adopt a rigid rule excluding speech by independent contractors from constitutional protection in part to avoid leaving "First Amendment rights unduly dependent on . . . state law labels." *Umbehr,* 518 U.S. at 679. "Determining constitutional claims on the basis of such formal distinctions, which can be manipulated largely at the will of the government agencies concerned, . . . is an enterprise that we have consistently eschewed." *Id.* (citation omitted); *accord O'Hare Truck Serv., Inc. v. City of Northlake,* 518 U.S. 712, 722 (1996). This Court should decline to draw an equally formalistic distinction here.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed and the case remanded for further proceedings.

Respectfully submitted,

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