No. 04-473

In The
Supreme Court of the United States

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

Petitioners,

vs.

RICHARD CEBALLOS,

Respondent.

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

PETITIONERS' REPLY BRIEF

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Respondent touts the Ninth Circuit's approach which requires First Amendment protection for *all* public employee speech regarding matters of public concern, with no consideration of whether the speech was expressed strictly pursuant to job duties. This proposition is premised on the fundamentally flawed notion that the First Amendment "presumptively" protects all such speech expressed in an employment capacity. Resp. Br. 1. Respondent offers no persuasive explanation, however, of why this Court has repeatedly used the phrase "as a citizen" in describing the applicable rule for almost 40 years. *See*, Resp. Br. 20 (implausibly suggesting the Court had something different in mind because it "set[ ] off . . . 'as a citizen' with commas").

A close examination of respondent's discussion of the purported implications of this Court's prior opinions reveals critical deficiencies that undermine his primary contention that the disposition memorandum he prepared "expressing concern about the veracity of the officers in the case *pursuant to his duties as a prosecutor*"[1] (J.A. 396) is entitled to First Amendment protection simply because it addressed a matter of public concern. First, respondent cannot cite to any case law precedent that holds, let alone suggests, that *all public employee speech on a matter of*

[1] There is no merit to respondent's and the Association of Deputy District Attorney's ("ADDA") latent attempt to re-characterize the speech at issue as being "far from routine" and "extraordinary" by suggesting that evaluating the credibility of witnesses in a pending criminal case is not part of a prosecutor's duties if those witnesses happen to be police officers. Resp. Br. 4, ADDA Br. 24. Indeed, when asked whether in preparing the March 2 memo it was his intent to make accusations about any of the detectives involved in the *Cuskey* case, respondent replied: "My intent was to explain the reason for the dismissal or the request for a dismissal." J.A. 41. Moreover, at the time of his deposition, respondent certainly did not characterize other similar occasions where a prosecutor raised an issue of police misconduct as extraordinary, but rather, that it "happens quite a bit." J.A. 81.

public concern is constitutionally protected, even if it is expressed pursuant to job duties. Second, respondent has presented no meaningful rebuttal to this Court's recognition in *Pickering, Connick* and *NTEU* that speech "as a citizen" and First Amendment protection are inextricably linked. Third, respondent fails to demonstrate what core First Amendment interests are served by public employee speech expressed pursuant to job duties. Fourth, respondent makes no attempt to explain why it would be sensible for much, if not most, of what every public employee says or writes in carrying out his job duties to be presumptively protected by the First Amendment, such that the burden is on the employer to justify virtually every employment decision made thereafter.[2] Indeed, to do so would undermine both the historical evolution of the rights of public employees and the common sense realization that government offices could not function if every employment decision became a constitutional matter.

In the absence of any legal or historical justification for treating the key words "as a citizen" as surplusage, respondent contends that if public employees are not afforded First Amendment protection for *all* speech on matters of public concern, governmental whistleblowers will be silenced. This purported justification is unfounded because (1) whistleblower speech (expressed pursuant to routine job duties) makes up a microscopic percentage of the massive stream of public employee speech regarding matters of public concern; (2) First Amendment protection for whistleblowers whose speech is expressed *outside* the scope of their job duties (which is very often the case) would be triggered if the "as a citizen" threshold is

[2] According to respondent, his claim that "anything or almost anything [his supervisors] did was a form of retaliation because of [his] conduct in the *Cuskey* case" (J.A. 17) is sufficient to require his employer to justify every employment decision that, in respondent's view, was undesirable.

maintained; and (3) contrary to respondent's unsubstantiated assertions, whistleblowers enjoy ample federal and state statutory protection as well as civil service remedies[3] for retaliatory acts taken against them for whistleblowing activities – whether they occur within or outside the course and scope of employment.

The net effect of all of these deficiencies is a wholesale failure by respondent and his amici to provide any compelling case law support for their heretofore un-adopted proposition that public employees have an actionable First Amendment interest in all speech regarding matters of public concern, regardless of the role of the speaker at the time of the speech. Such case law support cannot be presented because it does not exist. This Court has consistently tied First Amendment protection to commentary, as citizens, on matters of public concern, and there is no viable reason for abandoning this construct.

I. RESPONDENT'S CONTENTION THAT ALL PUBLIC EMPLOYEE SPEECH ON MATTERS OF PUBLIC CONCERN SHOULD BE CONSTITUTIONALLY PROTECTED CANNOT BE RECONCILED WITH THE EVOLUTION OF PUBLIC EMPLOYEES' FIRST AMENDMENT RIGHTS.

Adherence to the most basic First Amendment principles and maintaining the vitality of this Court's emphasis on speech expressed "as a citizen" cannot be reconciled with what respondent proposes – requiring First Amendment protection for *all public employee speech on matters*

[3] Indeed, prior to filing the lawsuit, respondent pursued his civil service remedies through a formal grievance, and contrary to his suggestions, he communicated what he perceived to be retaliatory action by his supervisors externally to the Mexican American Bar Association hoping to gain support for his pending personal grievance. J.A. 144, 403.

of public concern.[4] The adoption of this simplistic litmus test will result in the wholesale deconstruction of the First Amendment analysis introduced in *Pickering v. Board of Education*, 391 U.S. 63 (1968) and further developed by its progeny. Respondent would have this Court essentially vanquish all references to the words "as a citizen" repeated in this Court's opinions for nearly four decades, thereby stripping away any hint of the underlying rationale for affording public employees protection under the Free Speech Clause.

A. Respondent Fails To Reconcile His Call For Sweeping First Amendment Protection With The Carefully Crafted Language In *Pickering*.

Respondent's contention that *all* public employee speech regarding matters of public concern should be constitutionally protected is irreconcilable with this Court's pronouncement in *Pickering* that the First Amendment is triggered only when public employees comment "as citizens" on matters of public concern. *Id.* at 568. Respondent attempts to deflate the meaning and effect of this key language by purporting to know what this Court intended to imply by placing commas around the words "as a citizen". Resp. Br. 20.[5] The focus on this

[4] Respondent concedes that the Ninth Circuit "went too far" in its expansive definition of what constitutes a "matter of public concern". At the same time, while recognizing that matters of public concern must be of "'general interest and of value and concern to the public'", respondent implausibly suggests that the only reason for this threshold "is to eliminate internal workplace grievances from judicial scrutiny". Resp. Br. 41, quoting from *City of San Diego v. Roe*, 125 S.Ct. 521, 525-26 (2004).

[5] At the same time, respondent does not address the fact that this Court *did not* set off the words "as citizens" with commas earlier on the same page. Indeed, this grammatical exercise is speculative and unpersuasive, especially since the language on its face is wholly unambiguous.

grammatical minutiae also underlines respondent's failure to address the implications of this critical passage which respondent quotes in bits and pieces. This passage clearly demonstrates that purely job-required speech does not implicate the fundamental First Amendment concerns that served as both the foundation and framework for the analysis and holding in *Pickering*:

> To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights *they would otherwise enjoy as citizens to comment on matters of public interest* . . . it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court. [Citations.] At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a *balance between the interests of the teacher, as a citizen*, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Id. at 568 (emphasis added). Respondent provides no concrete rationale for adopting a rule that would render this emphasis on citizen speech completely meaningless. Indeed, the core considerations in *Pickering* do not lend any support to respondent's contention that all public employee speech on matters of public concern must be constitutionally protected.[6]

[6] Respondent also does not and cannot explain how job-required speech, such as assessing and expressing the weaknesses of a pending criminal case (including the credibility of witnesses) in the disposition memorandum he prepared, advances the "core values" of the Free

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B. Respondent's Limited Case Law Analysis Disregards The Nexus Between Citizen Speech And First Amendment Protection.

The holdings, analysis, and key language in this Court's opinions cannot be reconciled with the Ninth Circuit's conclusion that all public employee speech regarding matters of public concern is presumptively protected under the First Amendment. This constitutional question has never been boiled down to this single factor, with no regard to the role of the speaker as an employee or a citizen. If this were true, this Court's repeated emphasis of the fundamental purposes of the Free Speech Clause and public employees' entitlement to express themselves "as citizens" would be wholly superfluous. Respondent does not dispute that these important considerations were integral to this Court's analysis throughout these opinions – opinions that do not logically give rise to his proposed First Amendment standard.

In addition to presenting no meaningful analysis of the key language in *Pickering*, respondent fails to address the true significance of *Connick v. Myers*, 461 U.S. 138 (1983), and in fact, distorts its holding. Respondent contends that this Court held that when public employees speak as *employees*, their speech is protected "so long as the employee is speaking on a matter of public concern" and the balance of competing interests weighs in their favor. Resp. Br. 24-25. In other words, if this were the case, *Connick* has already answered the precise question

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Speech Clause or otherwise serves the fundamental purposes of the First Amendment. In fact, throughout the course of the litigation below, respondent maintained that "in an effort to fulfill his duties as a district attorney, [he] conducted an investigation of the matter and concluded there were serious problems with the warrant by which certain 'evidence' was obtained against one of the *People v. Cuskey* defendants." J.A. 386. Respondent also argued that granting the motion for summary judgment "would chill deputy district attorneys from performing their prosecutorial functions." J.A. 396.

presented for review in the instant petition, i.e., whether job-required speech on a matter of public concern is constitutionally protected. Clearly, this is not the case, regardless of respondent's mischaracterization of the holding in *Connick*.

Not surprisingly, respondent does not support this bold pronouncement with any follow-up analysis. Instead, respondent contends that the questionnaire that Myers circulated constituted "employee" speech because it was distributed to her colleagues "during office hours". Resp. Br. 27. The fact that the questionnaire was circulated in the workplace is not germane to the instant analysis; what is relevant is that the questionnaire was not expressed in Myers' capacity as an employee in that it was unquestionably *neither job-required nor circulated during the course and scope of her employment duties*. Thus, the fact that this Court found that one question in the questionnaire potentially gave rise to a First Amendment claim does not validate respondent's contention that all public employee speech, including job-required speech, is constitutionally protected just as long as it touches on a matter of public concern.[7]

Furthermore, respondent's cursory one-paragraph discussion of *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) ("*NTEU*") illustrates respondent's failure to reconcile his proposed standard with the continued vitality of the "as a citizen" element in this

[7] The National Treasury Employees Union's ("NTEU") discussion of *Connick* is equally misguided. At the conclusion of a confusing effort to explain away the reference to speech expressed "as a citizen", NTEU contends that whenever the subject speech relates to a "major issue of broad import", it should be characterized as "citizen speech". NTEU Br. 15. This contention – which is not supported by any authority – is nonsensical because it would render the words "as a citizen" (repeated in this Court's opinions since *Connick*) wholly meaningless. Furthermore, NTEU does not explain how any and all speech relating to matters of public concern, is by definition, citizen speech.

Court's First Amendment analysis. Resp. Br. 28. Present throughout the majority and concurring opinions in *NTEU* are repeated references to and discussions of the significance of speech engaged in "as citizens". These instructive comments cannot be reconciled with respondent's proposal which would make any inquiry along these lines irrelevant.

In *NTEU*, a federal statute prohibited federal employees from receiving compensation for any series of speeches or articles if they "directly related to the individual's official duties" and compensation for all individual speeches or articles even if they had "no nexus to Government employment." *Id.* at 473-74. The constitutionality of this honoraria ban was challenged by two unions and several career civil servants ("plaintiffs"). *Id.* at 461. The court of appeals affirmed the district court's granting the plaintiffs summary judgment, finding that the Government had not justified the burden imposed by the ban, in light of the "absence of evidence of either corruption or the appearance of corruption among lower level federal employees receiving honoraria *with no connection to their employment*". *Id.* at 463 (emphasis added).

This Court found that the challenged statute violated the First Amendment, and in doing so, reiterated fundamental First Amendment principles especially evocative of the analysis in *Pickering*. In fact, Justice Stevens began the substantive analysis of the majority opinion by remarking that "[f]ederal employees who write for publication in their spare time have made *significant contributions to the marketplace of ideas*." *Id.* at 464 (emphasis added). Justice Stevens further explained that the plaintiffs sought "compensation for their expressive activities in their *capacities as citizens*, not as Government employees"; that their "expressive activities . . . fall within the protected category of *citizen comment on matters of public concern* rather than employee comment on matters related to personal status in the workplace"; and their activities "were addressed to a public audience, were made outside

the workplace, and involved content largely *unrelated to their government employment*." *Id.* at 464-66 (emphasis added).

These compelling comments unquestionably demonstrate the continued vitality of the "citizen speech" element of this First Amendment equation – powerful sentiments that were echoed by Justice O'Connor in her concurring opinion. Justice O'Connor explained that "the impact of the honoraria ban upon this class of employees' interests in *speaking out as citizens, rather than as employees, cannot be gainsaid*." *Id.* at 482 (emphasis added). Thus, *NTEU* demonstrates that the question of whether the subject speech was expressed "as a citizen" is one that must still be answered in conducting this First Amendment analysis. Under respondent's approach, however, there is no need to either ask or answer this fundamental question.[8]

Having failed to demonstrate how *Pickering, Connick* and *NTEU*, either individually or collectively, contain analysis that validates his proposed rule on any meaningful level, respondent relies, in misguided fashion, on the purported implications of the facts and holding in *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410 (1979), another case involving a public school teacher. Respondent asserts that *Givhan* "clearly demonstrated" the "First Amendment's prohibition on retaliation against

[8] The constitutional boundaries drawn in *NTEU* are analogous to the lines that should separate job-required speech from citizen speech and those that have been drawn for government-subsidized speech. In these settings, this Court has recognized that the protections of the First Amendment are inextricably tied to private expression. *See*, *Rust v. Sullivan*, 500 U.S. 173, 198-99 (1991) ("The regulations, which govern solely the scope of the Title X project's activities, *do not in any way restrict the activities of those persons acting as private individuals*.") (emphasis added). Just as the First Amendment does not entitle those employed at a federally-subsidized family planning project to ignore the restrictions upon which the funding is based, the First Amendment should not protect public employee speech necessitated by the duties of public employment.

employees for speaking *on the job* on matters of public concern". Resp. Br. 22 (emphasis added). This assertion is misleading because (1) the subject speech was not expressed pursuant to Givhan's job duties; and (2) this Court's analysis and holding did not come close to intimating that the First Amendment protected "on the job" speech related to matters of public concern.[9]

The question resolved in *Givhan* was that a public employee enjoys First Amendment protection even if the subject speech is expressed in a private conversation. This holding made sense because speech expressed "as a citizen" does not necessarily have to be communicated in a public forum. First Amendment protection should not be lost where employees choose to express themselves as citizens away from the public's eye. Moreover, in examining Givhan's speech, this Court commented that "[w]e are unable to agree that private expression of one's views is beyond constitutional protection" and that a public employee enjoys constitutional protection "if he decides to express his views privately rather than publicly." *Id.* at 413. This language, especially the use of the word "views", certainly suggests that Givhan was not performing her job duties when she engaged in the subject speech. In fact, contrary to respondent's suggestion that Givhan's speech was found to be constitutionally protected "employee" speech, this Court explained in *Connick* that Givhan "[spoke] out *as a citizen* on a matter of public concern, not tied to a personal employment dispute. . . . " *Connick*, 461 U.S. at 148 n. 8 (emphasis added).

[9] The NTEU contends that there is a "long-standing framework under which both work-related and work-required speech on matters of public concern are weighed under the *Pickering* balance." NTEU Br. 4. The NTEU, however, provides no explanation as to where "work-required speech" has been found to be constitutionally protected by this Court (and therefore subject to *Pickering* balancing) and how work-required speech can be characterized as speech expressed "as a citizen".

Thus, respondent's limited analysis of this Court's prior opinions fails to demonstrate even a semblance of the legal foundation necessary to justify his contention that *all public employee speech* regarding matters of public concern should be presumptively protected, thereby automatically shifting the evidentiary burden to the employer to justify any subsequent employment decision that an employee perceives as being retaliation. In pressing for this truncated First Amendment standard, respondent either ignores or dismisses at-hand the significance in this calculus of public employee speech expressed "as citizens" and the direct relationship between the scope of First Amendment protection and the fundamental purposes of the Free Speech Clause. Indeed, the overall guidance and analysis provided by this Court in the last 40 years will be rendered toothless if the standard is reduced to what respondent seeks. This Court's efforts should not be allowed to fall victim to such a drastically revisionist and unjustifiable overhaul.[10]

II. EXAGGERATED CONCERNS ABOUT SILENCING WHISTLEBLOWERS DO NOT JUSTIFY DRAPING ALL JOB-REQUIRED SPEECH ON MATTERS OF PUBLIC CONCERN WITH FIRST AMENDMENT PROTECTION.

Respondent attempts to justify his proposed First Amendment standard of protecting all public employee

[10] The ever-growing diversity of forums in which public employees may comment, as citizens, on matters of public concern demonstrates that this Court's analysis is as relevant as ever. From personalized webpages to podcasting to blogging to more traditional forums of expression, public employees certainly have a myriad of avenues to exercise their rights, as citizens, to contribute to the free marketplace of ideas. The First Amendment, which first and foremost, protects speech in those forums, should not be manipulated to "constitutionalize" speech necessitated by job duties and unmotivated by the desire to express oneself as a citizen.

speech touching on matters of public concern with the purported need to provide constitutional protection to public employees who "discover, disclose, and correct abuses of power" and communicate "information about abuses of authority, violations of law, or gross mismanagement by the government. . . . " Resp. Br. 12, 13. The Government Accountability Project ("GAP") and the NTEU raise arguments in the same vein, asserting that without First Amendment protection, government workers will not expose misconduct and corruption, even if such exposure is required by their regular job duties. Their effort to justify the lowering of the threshold for First Amendment protection with dire predictions about the suppression of governmental whistleblowers is fundamentally flawed in many respects.

First, in focusing on this very narrow part of the public employee speech spectrum, respondent and amici neglect to address the indisputable fact that under their proposed standard, *all* public employee speech regarding matters of public concern will be constitutionally protected, not just speech that exposes misconduct and corruption. Their speculative concerns about protecting this very small portion of public employee speech do not justify the adoption of a standard that could constitutionally protect all job-required speech that happens to touch on matters of public concern. Indeed, job-required speech with no whistleblowing aspects makes up the overwhelming majority of the immense and continuous stream of public employee speech.

Second, and conversely, respondent and amici cannot dispute that the whistleblower speech about which they are so concerned constitutes a miniscule fraction of all public employee speech relating to matters of public concern. Indeed, out of this country's 21 million public employees, relatively very few are employed to investigate and expose governmental misconduct, let alone misconduct of any kind. When these employees expose misconduct, pursuant to their job duties, they cannot and should

not be viewed as having done so "as citizens". On the other hand, public employees who expose misconduct, through either internal or external channels and *outside* the scope of their job duties, should be entitled to First Amendment protection subject to the *Pickering* balancing.[11]

Third, respondent and amici base their warnings about the suppression of job-required whistleblowing speech on a disturbing and unsubstantiated assumption – that public employees who are tasked with the duty of investigating and exposing misconduct will not do so absent First Amendment protection. For instance, NTEU argues that "public employees, armed with their specialized expertise and data or other insights resulting from their work, have served the public interest by exposing wrongdoing or waste of government funds . . . in contexts that involve the performance of their duties . . . ", with the implication being that without First Amendment protection, these duties will not be performed. NTEU Br. 3. This contention is echoed by the GAP which contends that without First Amendment protection, government workers will do nothing when they discover misconduct while "carrying out their job duties." GAP Br. 13-14.

[11] For example, although not part of his normal job duties, an emergency room doctor at a county hospital complains about systemic inefficiencies to a supervising administrator and is subsequently discharged. This doctor would have a viable First Amendment claim subject to the *Pickering* balancing if he claims his termination was due to his speech. Compare this example with others that demonstrate that public employees who uncover misconduct, pursuant to their job duties, do not express themselves as "concerned citizens": (1) an SEC investigator reports that a major corporation misreported its earnings; (2) a state investigator reports that a nursing home does not comply with various health code regulations; and (3) an EPA investigator reports that an oil refinery has not met recently enacted anti-pollution requirements. Nevertheless, under respondent's proposed approach, each of these scenarios (none of which implicates the core values of the First Amendment) involves constitutionally protected speech.

Their assumption that government workers will forego their job obligations, absent First Amendment protection, is counter-intuitive and unfounded, as demonstrated by their own example: the Rampart police corruption scandal involving a group of Los Angeles Police Department officers and the ensuing criminal prosecution. Notwithstanding their suggestion that the "Rampart scandal may never have come to light" but for the "persistence and willingness to speak out about this misconduct" (ADDA Br. 11), the fact of the matter is that several police officers were prosecuted, and it is inconceivable that the prosecutors involved, when carrying out their job duties in good faith, were somehow comforted by the knowledge that all of their speech in connection to their investigation was protected by the First Amendment. Indeed, the fact that the prosecutors were tasked with investigating and prosecuting police officers in a highly-politicized climate, and performed their obligations, undercuts respondent and amici's contention that without First Amendment protection for such job-required speech, such speech will be silenced. Thus, respondent's doomsday-like warning that government workers will not investigate and expose misconduct, despite being required to do so by their job duties unless given First Amendment protection, should be rejected outright.

Finally, governmental whistleblowers, regardless of whether they expose misconduct within or outside the scope of their employment duties, have remedies available for employment actions they perceive as being retaliatory, not only under state and federal whistleblowing statutes but also common law torts as well as civil service procedures. Respondent and amici summarily characterize the whistleblowing statutes as being completely ineffectual but offer no persuasive explanation of why these laws,

which reflect legislative views on the best way to protect on-the-job speech that exposes government wrongdoing or waste, are not adequate to the task. *See*, *e.g.*, Resp. Br. 49 (relying on statement in book written 35 years ago that public employees have "few" statutory protections).[12] Painting these statutes with such broad and inaccurate strokes cannot be justified, and neither can the manipulation of the threshold for First Amendment protection to constitutionalize speech with no nexus to the core values of the Free Speech Clause. Indeed, protecting all public employee speech regarding matters of public concern – including job-required speech with no element of citizen speech – would result in an unjustifiable trivialization of the true meaning and scope of the First Amendment.[13]

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[12] Indeed, their criticisms about the purported inefficacy of whistleblowing statutes inappropriately downplay their significance, while also ignoring the fact that these laws *do protect* government employees who expose misconduct, either pursuant to or outside the scope of their job duties. Furthermore, legislatures throughout this country enacted these statutes after extensive debate and deliberation by their respective members. This Court should allow any purported statutory deficiencies to be addressed by the appropriate legislative body, as opposed to rendering these statutes effectively obsolete by adopting respondent's all-inclusive approach of constitutionally protecting *all* public employee speech regarding matters of public concern.

[13] In *City of San Diego v. Roe*, this Court rejected the Ninth Circuit's similarly open-ended approach used to find that a police officer's sales and marketing of "sexually explicit videos for profit" on the internet "fell within the protected category of citizen commentary on matters of public concern." *Roe*, 125 S.Ct. at 523. This Court found that "Roe's expression does not qualify as a matter of public concern under any view of the public concern test", and therefore, the balancing under *Pickering* was not required. *Id.* at 526. Just as the Ninth Circuit's definition in *Roe* of what constituted a matter of public concern trivialized the true meaning and scope of the First Amendment, so does the Ninth Circuit's position that *all* public employee speech regarding matters of public concern be constitutionally protected.

III. RESPONDENT HAS NOT AND CANNOT SET FORTH ANY SOUND POLICY RATIONALE FOR REQUIRING PUBLIC EMPLOYERS TO SHOULDER THE HEAVY BURDEN OF JUSTIFYING EMPLOYMENT DECISIONS MADE FOLLOWING JOB-REQUIRED SPEECH ON MATTERS OF PUBLIC CONCERN.

While respondent exaggerates the concerns about the silencing impact that precluding First Amendment protection for job-required speech would have on whistleblowers, he trivializes the crippling effect on the public employer's ability to provide public services if all employee speech is cloaked with First Amendment protection. Respondent maintains that since First Amendment-based retaliation claims are by their very nature fact-intensive, cases are "rarely resolved before the summary judgment stage." Resp. Br. 47. Respondent's acknowledgment of this litigational reality actually reinforces petitioners' contention that triggering First Amendment protection only upon an allegation that the speech related to a matter of public concern would dramatically increase the volume of First Amendment cases – none of which can be dismissed prior to summary judgment. This will undoubtedly have a substantial impact on the operation and efficiency of government employers throughout this country as employment-based civil rights actions brought by public employees are burdensome to defend, disruptive to the working environment and often associated with large jury awards.

Public employers need some certainty and predictability with regard to employment decisions if they are to efficiently and effectively perform public services through their employees. Respondent's proposed standard undermines these practical realities by subjecting public employers to the constant fear of protracted First Amendment litigation. Indeed, the rule advocated by respondent would, to a large degree, effect an across-the-board constitutionalization of the relationship between

public employees and their employers. Because employment actions are routinely taken in response to something the employee has said or written, and because a very large proportion of what public employees say and write in carrying out their jobs touches on matters of public concern, an untold number of employment disputes will turn into constitutional cases filed in federal court if respondent's view prevails.

It may well be, as respondent and amici suggest, that the employer would be able to prevail under the *Pickering* balancing test in most cases, but the cases would nevertheless have to be vigorously defended. Litigating suits in federal court takes time and money, which would otherwise be spent on doing the things that government agencies exist to do (namely, serving the public). *Pickering* and *Connick* contemplated First Amendment litigation in the relatively rare circumstances where an employment action was taken on the basis of extracurricular speech. Under respondent's view, First Amendment litigation would be the rule, not the exception.

Moreover, the *Pickering* balancing provides little consolation to the government employer defending against meritless claims that cannot be dismissed at the summary judgment stage, as in this case.[14] A finding of a triable

[14] While the district court in this case did not address the merits of the other grounds for granting petitioners' summary judgment motion (P.A. 66 n. 6), the Ninth Circuit nevertheless rejected petitioners' evidence of non-retaliatory reasons and concluded that there was no suggestion of "disruption or inefficiency in the workings of the District Attorney's Office" (P.A. 22) even though the record demonstrated that the disposition memorandum (1) was directed to supervisors to whom he normally had contact with; (2) affected his working relationship with his coworkers in that, according to respondent, deputy district attorneys would not talk to him anymore or "deal with [him]" (J.A. 95, 122-23) and there was a noticeable source of friction between respondent and his supervisors due to the stance respondent took in the *Cuskey* case (J.A. 122-23, 414); and (3) called into question respondent's fitness to prosecute cases involving the sheriff's station that employed

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issue on a single material fact will prevent the summary dismissal of an action. The probability of such a result in any given case is magnified by the numerous evidentiary and legal vagaries that accompany summary judgment motions, and, as respondent recognizes, the factually intensive nature of First Amendment-based retaliation claims in general. Furthermore, cases will often not end with the granting of summary judgment since plaintiffs can and will exercise their right to appeal, thereby invariably causing further significant financial and operational burdens.

Not only is the *Pickering* balancing anything but a sure-fire method of defeating meritless First Amendment claims prior to trial, under the Ninth Circuit's view, it will hardly be available, if at all, when job-required speech is involved. *See* P.A. 22 ("It is difficult to imagine how the performance of one's duties in this manner could be disruptive or inefficient. . . . "). According to the Ninth Circuit, therefore, when an employee engages in speech pursuant to his job duties, the employer would have a harder time justifying its employment decisions to prevail under *Pickering*. Even respondent recognizes the fallacy of

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the deputies respondent accused of misconduct in his memorandum. (According to respondent, after the new administration came into office about the first week of December 2000, the new head deputy in Pomona who replaced Sundstedt was of the view that respondent should not go back to Pomona because he did not think law enforcement would approve it and that respondent should not file any cases involving that particular sheriff's station.) J.A. 94. Moreover, unlike in *Pickering*, the employee-employer relationship in this case required personal loyalty and confidence for its proper functioning. However, as far as respondent was concerned, he lacked confidence that the district attorney's office, and in particular, his supervisor Sundstedt, would comply with *Brady* and as such, respondent "took it upon [him]self" to fax a copy of his memos to another defense attorney on another case and advised him that there had been prior allegations involving the same deputies. J.A. 89-90, 439.

the Ninth Circuit's reasoning, acknowledging that if the fact of employment is only tangentially involved in the subject matter of the speech, the balancing favors the employee (Resp. Br. 21); conversely, "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." Resp. Br. 46. This dichotomy makes sense since the employer's interests are heightened vis-à-vis the employee when the employee engages in job-required speech, and the employee's interests are heightened vis-à-vis the employer when the employee engages in citizen speech. Adopting the Ninth Circuit's approach will therefore engender an additional incongruous effect – precluding public employers in most cases involving job-required speech from prevailing under the *Pickering* balancing test.[15]

Thus, constitutionally protecting all public employee speech touching on matters of public concern will have a series of deleterious effects, both in the courtroom and in the workplace. The inevitable increase in the volume of First Amendment-based retaliation claims, combined with the unpredictable nature of the results of the *Pickering* analysis conducted at the summary judgment stage, will cause a tremendous drain on limited government and judicial resources. Moreover, the increased possibility of First Amendment litigation in every government office and all the attendant considerations will weigh heavily on personnel-related employment decisions that must be

[15] For this reason, if this Court were to find that the First Amendment protects all public employee speech regarding matters of public concern, this case should be remanded to allow a proper *Pickering* balancing analysis to be conducted – one in which the balancing is weighed in favor of petitioners since respondent's speech was expressed pursuant to his job duties.

made to maintain and improve the efficiency of the services provided to the public. In many instances, necessary employment actions may be delayed or not be taken altogether due to these considerations. These unwelcome consequences should be avoided especially since the Ninth Circuit's approach does nothing to promote the fundamental purposes of the Free Speech Clause or to limit First Amendment claims to those based on speech expressed "as a citizen" on matters of public concern.

CONCLUSION

For the reasons stated above and in petitioners' opening brief, the judgment of the court of appeals should be reversed.

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Respectfully submitted,

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