

RECENT DEVELOPMENTS

A PRINCIPLED LIMITATION ON JUDICIAL INTERFERENCE: *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006)

Restrictions on the free speech rights of public employees were not thought to present constitutional concerns for much of American history. This traditional view was summarized by Justice Holmes, then on the Massachusetts Supreme Court: “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”¹ During the last third of the twentieth century, however, the Supreme Court revisited this absolutist position and concluded that some speech by public employees could receive First Amendment protection. The Court articulated a two-part test in *Connick v. Myers*,² which set a threshold requirement that a public employee’s speech must be made “as a citizen upon matters of public concern” in order to qualify for First Amendment protection from workplace discipline. If a plaintiff meets that requirement, courts must balance, under *Pickering v. Board of Education*,³ “the interests of the [employee], 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.”⁴ Lower courts, however, have struggled with how to treat speech made pursuant to a public employee’s official duties ever since.⁵ Last

1. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

2. 461 U.S. 138, 147 (1983).

3. 391 U.S. 563 (1968).

4. *Id.* at 568.

5. Compare *Ceballos v. Garcetti*, 361 F.3d 1168, 1174–78 (9th Cir. 2004) (holding that *Pickering* and *Connick* apply to speech made by public officials speaking as citizens on matters of public concern), with *Gonzalez v. City of Chicago*, 239 F.3d 939, 942 (7th Cir. 2001) (“[T]here are still limits in public employment as to what can be fairly characterized as speech ‘as a citizen’ on a matter of public concern. Speech exercised by a public employee in the course of his employment will rarely fit the mold of private speech by a citizen.”); see also *Urofsky v. Gilmore*, 216 F.3d 401, 407 (4th Cir. 2000) (en banc) (“[C]ritical to a determination of whether employee speech is entitled to First Amendment protection is whether the speech is ‘made primarily in the [employee’s] role as citizen or primarily in his role as employee.’”) (citation omitted); *Buazard v. Meridith*, 172 F.3d 546, 548–49

Term, in *Garcetti v. Ceballos*,⁶ the Supreme Court held that when public employees speak pursuant to their official duties, they are not entitled to First Amendment protection from workplace retaliation for the contents of that false speech. The decision was a prudent exercise of judicial restraint that avoids the specter of judicial micromanagement of governmental affairs. The Court's limited holding should also have few, if any, deleterious consequences for public discourse.

In February 2000, Richard Ceballos was working as a calendar deputy for the Los Angeles County District Attorney's office, supervising the work of other attorneys.⁷ An attorney for a defendant being prosecuted by Ceballos's office informed Ceballos that he believed a deputy sheriff had lied in a search warrant affidavit.⁸ Ceballos investigated the allegations and concluded that the affidavit contained "serious misrepresentations."⁹ He then presented his findings to two of his supervisors, Carol Najera and Frank Sundstedt, and prepared a memorandum that recommended dismissal of the case.¹⁰ Ceballos's statement resulted in a meeting with his supervisors and officials from the sheriff's office where one lieutenant allegedly criticized Ceballos's work.¹¹

Despite Ceballos's recommendation, Sundstedt decided to continue the prosecution.¹² Ceballos informed the defense attorney that he agreed that the affidavit contained false statements, and he was subpoenaed to testify for the defense at a hearing on the affidavit.¹³ He also told Najera of his view that, under *Brady v. Maryland*,¹⁴ he was required to give the defense a copy of the memorandum he had prepared on the search

(8th Cir. 1999) ("Unless the employee is speaking as a concerned citizen, and not just as an employee, the speech does not fall under the protection of the First Amendment. . . . [T]here is no indication that [the plaintiff], in making, or refusing to change, his statements, was taking any action as a concerned citizen, rather than simply as an employee following orders or refusing to follow them."); *Thomson v. Scheid*, 977 F.2d 1017, 1020 (6th Cir. 1992) ("First Amendment protection extends to a public employee's speech when he speaks as a citizen on a matter of public concern, but does not extend to speech made in the course of acting as a public employee.").

6. 126 S. Ct. 1951, 1955 (2006).

7. *Id.*

8. *Ceballos*, 361 F.3d at 1170–71.

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

10. *Id.* at 1955–56.

11. *Id.* at 1955.

12. *Id.*

13. *Ceballos*, 361 F.3d at 1171.

14. 373 U.S. 83 (1963).

warrant.¹⁵ Ceballos later alleged that Najera ordered him to amend his work product and to limit his testimony at the hearing.¹⁶ Ceballos testified at the hearing, but the trial court rejected the challenge to the warrant.¹⁷

Ceballos claimed his superiors retaliated by demoting him and prohibiting him from handling any further murder cases, among other actions.¹⁸ He filed an employment grievance action, but the grievance was denied upon a finding that he had not suffered any retaliation.¹⁹ Ceballos subsequently filed suit against Najera, Sundstedt, and then-District Attorney Gil Garcetti in the United States District Court for the Central District of California, alleging retaliation in violation of his First and Fourteenth Amendment rights. The District Court granted the defendants' motion for summary judgment, concluding that because Ceballos wrote his memorandum "pursuant to his employment duties," he was "not entitled to First Amendment protection for the memo's contents."²⁰

The Court of Appeals for the Ninth Circuit reversed, holding that the contents of Ceballos's memorandum were protected by the First Amendment.²¹ First, the court held that Ceballos's allegations of governmental wrongdoing clearly satisfied the threshold requirement elucidated in *Connick*—that the public employee speak "as a citizen upon matters of public concern" as opposed to speaking "as an employee upon matters only of personal interest."²² The Ninth Circuit did not address the issue

15. *Ceballos*, 361 F.3d at 1171.

16. *Id.*

17. *Garcetti*, 126 S. Ct. at 1956. The trial court sustained several objections to the questions defense counsel posed to Ceballos. As a result, Ceballos later claimed he was unable to explain his opinions and reasoning regarding the warrant's accuracy to the court. See *Ceballos*, 361 F.3d at 1171.

18. *Ceballos*, 361 F.3d at 1171.

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

20. *Id.* The county also responded that Ceballos's claimed retaliation was not in fact retaliatory but was rather a response to staffing needs and other legitimate reasons; the district court did not address this defense. *Id.*

21. *Ceballos*, 361 F.3d at 1185. Judge O'Scannlain specially concurred. He conceded that *Roth v. Veteran's Administration of the United States*, 856 F.2d 1401 (9th Cir. 1988), controlled, but suggested that *Roth* be overruled to reflect the "distinction 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." *Ceballos*, 361 F.3d at 1185, 1186–87 (O'Scannlain, J., concurring specially).

22. *Ceballos*, 361 F.3d at 1173 (quoting *Connick v. Myers*, 461 U.S. 138, 147 (1983)).

of whether Ceballos's speech was made as a citizen and instead relied on Ninth Circuit precedent that held that a public employee's speech is not necessarily deprived of First Amendment protection when made pursuant to official duties.²³ The court followed the Supreme Court's instructions in *Pickering* and balanced Ceballos's interest in engaging in the speech against his supervisors' interest in reacting to it.²⁴ Finding the balance in Ceballos's favor, the court concluded that the defendants offered no evidence that Ceballos's speech caused any serious harm.²⁵

The United States Supreme Court reversed and remanded. Writing for the Court, Justice Kennedy²⁶ summarized the Court's public employee speech jurisprudence and noted that, when public employees speak out, they can "impair the proper performance of governmental functions."²⁷ The majority also emphasized, however, "that a citizen who works for the government is nonetheless a citizen" and that both individual employees and the public at large benefit from "receiving the well-informed views of public employees engaging in civic discussion."²⁸ To that end, the Court declared neither that Ceballos expressed his views inside the office nor that the memo "concerned the subject matter of [his] employment" was enough to deprive his speech of First Amendment protection.²⁹ The Court did find dispositive, however, that Ceballos's memo was "made pursuant to his duties as a calendar deputy."³⁰ The Court held that when public employees engage in speech pursuant to employment responsibilities, they do not speak as citizens, and therefore the First Amendment provides no protection against workplace discipline resulting from that speech.³¹

23. *Id.* at 1174–75 (citing *Roth*, 856 F.2d at 1401).

24. *Id.* at 1178 (citing *Pickering v. Bd. of Educ.* 391 U.S. 563, 571 (1968)).

25. *Id.* at 1179.

26. Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined Justice Kennedy's opinion.

27. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1958 (2006).

28. *Id.*

29. *Id.* at 1959. On the first point, the Court noted that because "[m]any citizens do much of their talking inside their respective workplaces," it would be inconsistent with the goal of treating them like normal citizens to withdraw First Amendment protection on this basis. *Id.* On the second point, the Court invoked the *Pickering* Court's notion that public employees are often the citizens most well-informed on the issue in question and silencing them could thus bring quite negative consequences to the public discourse. *Id.* (quoting *Pickering*, 391 U.S. at 572).

30. *Id.* at 1959–60.

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

In explaining its holding, the Court noted that restricting speech that arises out of an employment responsibility does not force the employee to give up any right he might enjoy as a private citizen.³² Nor does restricting such speech prevent the public at large from hearing the perspectives of those employed by the government; the Court explained that its decision does not prevent employees from “participating in public debate” in their private lives but instead merely gives public employers discretion to determine how public employees’ jobs are performed.³³ That discretion, the Court noted, is important. The official communications of public employees can have serious consequences for the proper maintenance of governmental operations.³⁴ To subject “managerial discretion” of public employee performance to *Pickering* balancing would necessitate an overly intrusive judicial role in the day-to-day functioning of the government.³⁵ It would also require an unjustified shift from the Court’s recognition of First Amendment protection only for employee activity that “is the kind . . . engaged in by citizens who do not work for the government” because public employees’ speech uttered pursuant to their employment responsibilities has no such “relevant [private] analogue.”³⁶

The Court closed with two qualifications. First, it cautioned, in response to Justice Souter’s claim that employers might restrict employee rights through “excessively broad job descriptions,” that courts should conduct a “practical” inquiry, rather than merely accepting a formal job description as conclusive.³⁷ Second, the Court acknowledged that academic scholarship and similar expression might be supported by additional constitutional interests and declined to say whether its analysis would apply in cases implicating those interests as well.³⁸

Justice Stevens dissented.³⁹ He argued that the answer to the question whether the First Amendment protects speech made pursuant to employment duties should be “[s]ometimes,” not “never.”⁴⁰ Justice Stevens pointed to *Givhan v. Western Line*

32. *Id.*

33. *Id.*

34. *See id.* at 1960–61.

35. *Id.*

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

37. *Id.* at 1961–62.

38. *Id.* at 1962.

39. *Id.* at 1962–63 (Stevens, J., dissenting).

40. *Id.*

Consolidated School District,⁴¹ where a unanimous Court concluded that a public employee did not forfeit her free speech rights when she voiced her views privately rather than publicly. He noted that the *Givhan* Court made no effort to determine whether the speech was made pursuant to the employee's job duties, suggesting that the Court viewed this question as "immaterial."⁴²

Justice Souter wrote the principal dissent.⁴³ He acknowledged that a public employee's speech protection must be qualified in order to avoid "thwart[ing] the implementation of legitimate policy."⁴⁴ Justice Souter contended, however, that *Pickering* balancing provided the appropriate means of accommodating that interest and that the majority's decision to locate the outer bounds of First Amendment protection at speech uttered pursuant to a public employee's job responsibilities was unjustified.⁴⁵ He asserted that the majority's concerns about governmental administration could be accommodated by setting a threshold requirement that an employee demonstrate that he spoke on matters of unusual importance and did so in a responsible manner.⁴⁶ Public employees, Justice Souter opined, may claim a personal interest in matters falling within their job duties, and the community has a legitimate interest in receiving these informed opinions.⁴⁷ Finally, Justice Souter attacked the majority's claim that whistleblowing statutes could cabin *Garcetti's* impact, arguing that such laws likely would not protect someone like Ceballos who addressed his concerns within the agency rather than to an outsider.⁴⁸

Justice Breyer also wrote a brief dissent, attempting to carve out a middle ground between the majority and the three other dissenters.⁴⁹ While claiming that the majority view was "too absolute," Justice Breyer expressed concern that the standard set out by Justice Souter gave insufficient weight to the government's organizational concerns, especially considering that government administration involves many matters of public

41. 439 U.S. 410 (1979).

42. *Garcetti*, 126 S. Ct. at 1963 (Stevens, J., dissenting).

43. See *id.* at 1963–73 (Souter, J., dissenting). Justices Stevens and Ginsburg joined Justice Souter's dissent.

44. *Id.* at 1964.

45. *Id.* at 1965.

46. *Id.* at 1967.

47. *Garcetti*, 126 S. Ct. at 1965–66 (Souter, J., dissenting).

48. See *id.* at 1970.

49. See *id.* at 1974–76 (Breyer, J., dissenting).

concern.⁵⁰ He then articulated a standard by which a government employee's speech uttered pursuant to employment responsibilities would be protected where there is an "augmented need for constitutional protection and diminished risk of undue judicial interference" with governmental affairs.⁵¹ Justice Breyer explained that this standard would be satisfied where, as here, an employee has professional and constitutional obligations to engage in the speech in question.⁵²

Although prior cases did not mandate the majority's holding in *Garcetti*,⁵³ one possible reading of these cases suggests that their protections were not ever intended to extend to speech that is actually part of the public employee's job. *Pickering* noted, and *Connick* reiterated, that courts should balance the interests of "of the [employee], as a citizen" against those of the state.⁵⁴ The inclusion of the phrase "as a citizen" was not intended to be superfluous. In *Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*,⁵⁵ the Court considered the case of a schoolteacher speaking at a public school board meeting and declared that the teacher "addressed the school board not merely as one of its employees but also as a concerned citizen."⁵⁶ Of course, "public employees are still citizens while they are in the office,"⁵⁷ but the obviousness of this proposition only underscores that the Court would not have consistently included such language unless there was a difference between speaking in one's capacity as a citizen and speaking merely as a public employee. Once this distinction is recog-

50. *Id.* at 1974–75.

51. *Id.* at 1976.

52. *Garcetti*, 126 S. Ct. at 1974–75.

53. The *Garcetti* Court confronted an issue that precedent did not definitively resolve. Justice Stevens referred to the Court's methodology in *Givhan* in his dissent, see *supra* text accompanying note 39, but the *Givhan* majority did not address whether the plaintiff's speech was made pursuant to her employment duties. No inference should be drawn from this fact because no reasonable claim could have been made that complaining of racist hiring practices was part of the job that Givhan (an English teacher) was hired to do. Additionally, both *Connick*, which involved an assistant district attorney who was terminated after circulating a questionnaire to her colleagues on office morale and other issues, *Connick v. Myers*, 461 U.S. 138 (1982), and *Pickering*, which concerned a teacher who wrote and published a letter in a local newspaper, *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), did not implicate the precise issue in *Garcetti*.

54. *Connick*, 461 U.S. at 142 (quoting *Pickering*, 391 U.S. at 568) (emphasis added).

55. 429 U.S. 167 (1976).

56. *Id.* at 174–75.

57. *Garcetti*, 126 S. Ct. at 1963 (Stevens, J., dissenting).

nized, its most natural import is that expressed by the *Garcetti* majority, namely that a person should be seen as a citizen for First Amendment purposes when he is engaged in speech activities of the general *citizenry*, and as a public employee when he engages in speech only because it is part of his job.⁵⁸

Extending *Pickering*'s protections to speech made pursuant to official duties would not be consistent with the reasoning of pre-*Garcetti* cases in another important sense. The pre-*Garcetti* cases followed the logic of the unconstitutional conditions doctrine, which generally forbids the government from demanding that a citizen give up a constitutional right to receive a discretionary benefit provided by the government. Those cases, including a case decided just two Terms before *Garcetti*,⁵⁹ consistently described the justification for limiting the government's ability to restrict employee speech as stemming from a desire to avoid forcing government employees to "relinquish the First Amendment rights they would otherwise enjoy as citizens" simply because of their employment status.⁶⁰ Applying the doctrine is logical because one does not want citizens who contemplate entering public service to feel that they must surrender certain rights, such as speech, to do so.

In order for the unconstitutional conditions doctrine to apply in any coherent sense to government employment, the employee must have to give up some right, to 'relinquish' *something*. But as the *Garcetti* majority notes, a public employee precluded from making certain statements when taking action within the scope of their employment is in no sense being deprived of rights previously enjoyed.⁶¹ The Court's rule obviously constrains what future assistant district attorneys in Ce-

58. Justice Souter argued in response that an employee's interest cannot be "categorically separate[d]" from those of the citizen. *Id.* at 1966 (Souter, J., dissenting). Indeed, Justice Souter would appear to regard a public employee's speech as that of a citizen wherever such a "citizen servant" places a "value" on his right to speak. *See id.* The problem with this definition is that its requirements would generally be met *whenever* a public employee speaks. A public employee would not stake out a position on a required memorandum or some other medium of job-related expression unless he believed it. The "value" to the employee of expressing his view would surely be demonstrated merely by the act of filing suit to vindicate his right to do so. Essentially, the net result of this test would be that a public employee is *always* speaking both as a citizen and an employee. This approach, though perhaps a reasonable one, simply cannot be sustained without making the "citizen" language of pre-*Garcetti* cases a pointless nullity.

59. *See San Diego v. Roe*, 543 U.S. 77, 80 (2004).

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

61. *See Garcetti*, 126 S. Ct. at 1960.

ballos's position can say in job-related memoranda but, from an individual rights standpoint, the response to this might well be "[s]o what?"⁶² because non-employed citizens have no right or opportunity to write such memoranda in the first place.

In addition to being the most plausible extension of existing case law, the Court's holding in *Garcetti* makes good sense as a policy matter in terms of democratic governmental administration. Justice Souter implicitly acknowledged this point by noting that an "employee who speaks out on matters subject to comment in doing his own work" can create workplace problems.⁶³ But the line between commenting on policy and actually setting policy is a gray one, and the Court's decision in *Garcetti* was necessary to protect interference with the latter. One could imagine, for example, an ADA who riles his colleagues by recommending very lenient sentences to the court in all matters to which he was assigned. Under the principal dissent's approach, the ADA's superiors could only channel cases away from him if a court was willing to say that the interest in carrying out "tough on crime" principles supported by the public outweighed the ADA's interest in speaking his mind about appropriate sentences. The people's right to see policies with majority support carried into effect surely must rest on stronger foundations than this.

Relying on the *Pickering* balancing test alone would not provide enough assurance that policy goals could be carried out. Courts may reach the "right"⁶⁴ result and meritless suits may be regularly disposed of in summary judgment through utilization of the *Pickering* balancing test. Nonetheless, channeling employment expression into the *Pickering* balancing test would

62. Cf. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 556 (2001) (Scalia, J., dissenting) (asking "[s]o what?" in response to a First Amendment challenge to a subsidy program in which funds could not be spent on certain legal challenges, because Congress had no obligation to offer the subsidies in the first place).

63. See *Garcetti*, 126 S. Ct. at 1967 (Souter, J., dissenting).

64. To even speak of a "right" result in such cases is to invite judicial value judgments. When a court considers the effect of a statement that is not part of an employee's job, it can do so using neutral principles that are not necessarily bound up in substantive determinations of the merits of the employee's criticism. When the *Pickering* Court analyzed the effect of the statements made by the employee in that case, it noted that the teacher's statements did not "in any way either impede[] the teacher's proper performance of his daily duties . . . or . . . interfere[] with the regular operation of the schools generally." *Pickering*, 391 U.S. at 572–73. Where the disputed statements *are* part of the employee's "daily duties," one wonders how a court could analyze either the employee's or the employer's interests without injecting into the decision-making process its own opinion about the substantive merits of the policy.

require judicial supervision of myriad decisions made by governmental agencies, and employers could never be entirely certain in individual cases about the propriety of demanding that jobs be performed in a certain way.

Such extensive judicial supervision would be both unprecedented and unwarranted. Speech mandated by a public employee's job fits comfortably inside what Professor Robert Post has called "managerial domains," the necessity of which stems from the government's need "to regulate speech . . . so as to achieve explicit governmental objectives."⁶⁵ The Court seemed animated by similar principles in *Rust v. Sullivan*,⁶⁶ where it held that Congress could constitutionally withhold government funds from recipients who counseled abortion as a method of family planning.⁶⁷ Justice Souter attempted to distinguish *Rust* by noting that the restriction in that case was "prescribed by the government in advance" whereas Ceballos was not hired to advocate any particular substantive position.⁶⁸ This distinction does not identify an important difference between the cases. It would be a strange rule of law that held that otherwise unconstitutional restraints on public employee speech would be made permissible simply by stating them at the outset of the employment relationship. Rather, *Rust's* relevance, which *Garcetti* reaffirmed in only a slightly different context, is that the public has the right to expect its government to work toward ends that have been "democratically agreed upon."⁶⁹

Garcetti's holding should also have minimal impact on public discourse. The Court's argument in *San Diego v. Roe* that public employees are "the members of a community most likely to have informed and definite opinions" on the subject of their employment is certainly something to consider.⁷⁰ *Garcetti*, however, does not withdraw protection from all statements concerning the subject matter of public employment. Had Ceballos chosen to write an op-ed in the local paper, the statement would not have been made pursuant to his employment, and therefore his employer's actions would not have been entitled to protection under the *Garcetti* rule. The same would likely be

65. Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 164 (1996).

66. 500 U.S. 173 (1991).

67. *Id.* at 177-78.

68. *Garcetti*, 126 S. Ct. at 1969 (Souter, J., dissenting).

69. See Post, *supra* note 65, at 164.

70. See *San Diego v. Roe*, 543 U.S. 77, 82 (2004).

true had Ceballos chosen to report misconduct to an inspector general or some other independent oversight agency.⁷¹ Justice Stevens nonetheless argued that the *Garcetti* rule was misguided because it “provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors.”⁷² Even this claim exaggerates the scope of the Court’s holding because speech made to a superior will not trigger *Garcetti* unless such speech is part of the employee’s job. Rather, the decision merely encourages government employees to do their jobs as they are directed and voice any concerns outside the scope of their official acts as employees.

Finally, it is worth considering Justice Souter’s claim that the Court’s holding incentivizes public employers to broadly define the responsibilities of their employees in order to invoke the *Garcetti* rule.⁷³ This is not a trivial concern; a public employer could conceivably define employee responsibilities so as to include commenting on all affairs of the office or agency, thus bringing Justice Souter’s fear to bear. But the majority’s response—that lower courts should conduct a “practical inquiry” to determine if making a particular statement is really an essential part of the employee’s duties⁷⁴—seems to adequately allay this concern. Though *Garcetti* is just beginning to make ripples in lower courts, there is already evidence that courts are quite capable of seeing through such specious claims by employers.⁷⁵

71. See *Freitag v. Ayers*, 468 F.3d 528, 545 (9th Cir. 2006) (holding that a public employee was not engaged in speech “pursuant to . . . official duties” where she contacted a state senator and the Inspector General about sexual harassment at her workplace).

72. *Garcetti*, 126 S. Ct. at 1963 (Stevens, J., dissenting).

73. See *id.* at 1965 n.2 (Souter, J., dissenting).

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

75. See, e.g., *Barclay v. Michalsky*, 451 F. Supp. 2d 386, 395 (D. Conn. 2006) (“Notwithstanding that Work Rule #30 requires employees to report any rule violations to their supervisors, as *Garcetti* instructed the inquiry is a practical one, and material issues of fact exist as to whether plaintiff’s complaints were made in the context of her job responsibilities.”); *Walters v. County of Maricopa*, No. CV 04-1920-PHX-NVW, 2006 WL 2456173, at *14 (D. Ariz. Aug. 22, 2006) (“Any attempt to inflate Walters’ job description so as to include blowing the whistle on other officers would likely exceed the ‘practical inquiry’ suggested by the Supreme Court.”); cf. *Hare v. Zitek*, No. 02 C 3973, 2006 WL 2088427, at *3 (N.D. Ill. July 24, 2006) (“The defendants apparently argue that, because he was working so closely with the State’s Attorney’s Office . . . he ‘spoke’ as an employee of that office and in furtherance of the job he was ‘hired’ to do. Although inventive, this argument is absurd.”). There are two possible reasons why such a “practical” test might not allay all concerns. The first objection is the one made by Justice Souter, namely that this simply shifts the focus of litigation to equally disputable ques-

It is easy to sympathize with an employee like Ceballos, who may well have done nothing more than render a responsible criticism of duplicitous law enforcement practices. But the Court's previous decisions—which concerned speech made by public employees outside the scope of their official duties—simply did not support any judicial attempt to directly regulate the workings of government employers. Ultimately, the Court's ruling in *Garcetti* leaves untouched the public discourse necessary for an informed citizenry, while guaranteeing that governmental officials will ultimately be held accountable to their constituents, rather than to the judiciary.

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tions of whether speech was made pursuant to job duties. See *Garcetti*, 126 S. Ct. at 1965 n.2 (Souter, J., dissenting). But even if some cases do entail resolving genuine disputes, it seems clear that many cases involving required reports, memoranda, and the like will obviously fall within an employee's responsibilities; thus, the test is still an improvement because it gives employers reassurance in most cases about their freedom to act. A second possible objection is that the cases cited *supra* may prove unrepresentative, as some courts might be overly willing to accept employer representations in the future. If this is true, however, *Garcetti* likely would not change the outcome of those cases. Before *Garcetti*, courts could uphold employer discipline merely by finding that the employer's interest in regulating the speech in question outweighed the employee's right, as a citizen, to offer it. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). A court that is determined to accept implausible employer assertions about the scope of job-related duties is regrettably failing to discharge its judicial duties responsibly; such employer-friendly courts, however, would probably have just used *Pickering* balancing to achieve the same result anyway.