No. 08-1462

DEC 4 - 2009

In The Supreme Court of the United States

MARGARET YORK, WILLIAM NASH and VICTOR TURNER,

Petitioners,

v.

RICHARD ROBINSON,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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SUMMARY

• There is an express, acknowledged conflict among the circuits on the question of whether under *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the determination of whether a public employee's speech was pursuant to job duties is a question of law for the court, or a mixed question of law and fact requiring initial determination by a jury. The Ninth Circuit itself expressly recognized the split among circuits in *Posey v. Lake Pend Oreille School District No. 84*, 546 F.3d 1121, 1127 (9th Cir. 2008) ("[o]ur sister circuits are split over the resolution of this question").

• It is vital that the Court resolve the conflict at this time. Respondent does not, and cannot dispute that First Amendment employment cases are ubiquitous in the federal courts. As noted in the petition, and utterly ignored by respondent, the Ninth Circuit's transformation of an issue of law into a mixed question of law and fact eviscerates qualified immunity as a meaningful defense since, under the Ninth Circuit's view, a plaintiff can create a material issue of fact simply by disputing what duties he or she actually performed. Moreover, even assuming that the Ninth Circuit is somehow correct and the issue of citizen/employee speech is one of fact for the jury, then plaintiffs are being deprived of their rights to a jury trial under the Seventh Amendment on a wholesale basis in five circuits. One way or another,

scores of cases are proceeding with built-in fundamental error.

- It is necessary for this Court to establish that the citizen/employee speech determination is an issue of law for the court in the first instance, in order to further the principles recognized in *Garcetti*, *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983). The Court has recognized that core issues of public employee speech, i.e., whether speech addresses a matter of public or private concern, and the ultimate balancing of public interest against First Amendment interest, require the sort of qualitative evaluation that falls within the province of courts, even though that evaluation may be informed by particular facts. As *Garcetti* recognized, while the citizen/employee speech issue inquiry is a "practical one," 547 U.S. at 424, the ultimate question of what speech a public entity can or cannot require of its employees, and hence regulate, is ultimately a question of law for the courts, since a public entity cannot simply define away an employee's First Amendment rights through overly broad job descriptions.

- It is essential that this Court grant review to set down clear guidelines on the factors to be considered in determining whether an employee speaks as a citizen or as an employee. As noted in the petition, and essentially conceded by respondent, district courts and circuit courts are picking and choosing on an ad hoc basis from a number of factors

to determine whether particular speech is or is not part of an employee's official duty. Understanding what factors may or may not subject a public entity to liability is fundamental to the ability of governments to formulate personnel rules, regulations and policies. Public employers must know, for example, whether law enforcement officers like respondent may be required to report incidents of internal misconduct by other officers, even if the particular officer is not specifically charged with the everyday task of investigating misconduct. Similarly, it is important to know whether all employees can be charged with the responsibility to report invidious discrimination, even if their day-to-day work does not involve investigation of such matters. Because uncertainty in this area of the law directly and adversely impacts the basic operations of governments at every level throughout the country, review is warranted.

I. THERE IS AN UNDENIABLE CONFLICT BETWEEN CIRCUITS, RECOGNIZED BY EVEN THE NINTH CIRCUIT, ABOUT THE NATURE OF THE *GARCETTI* INQUIRY – WHETHER IT PRESENTS A QUESTION OF LAW FOR THE COURTS OR A MIXED QUESTION OF LAW AND FACT REQUIRING INITIAL DETERMINATION BY A JURY.

For more than twenty-five years, the question of the protected status of a public employee's speech has been one of law for the court to decide. *Connick*, 461

U.S. at 148 n.7. The Ninth Circuit has changed the rule, purportedly compelled by *Garcetti*. (*See* Petition for Certiorari ("Pet.") 16-18.) It has concluded that the question of the protected status of an employee's speech is no longer one that can be decided at summary judgment as a matter of law; a subpart of the question pertaining to the scope and content of a plaintiff's job responsibilities is one of fact and requires an initial determination by the jury. *Posey*, 546 F.3d at 1123-30. If the employee asserts that the particular speech at issue was not part of his or her job and the employer asserts that it was, the jury resolves the issue, even in the absence of any conflict in the evidence about what was said, or where or when it was said.

Robinson contends that the Ninth Circuit's new rule is not in conflict with other circuits. He simply ignores the fact that the Ninth Circuit itself in *Posey* recognized the split in the circuits, citing some of the very cases Robinson attempts to show are not in conflict. For example, Robinson says of the Fifth Circuit decision in *Charles v. Grief*, 522 F.3d 508 (5th Cir. 2008), that the court stated only that the ultimate question of whether speech is entitled to protection is a matter of law, without mentioning any material dispute over the scope and conduct of the plaintiff's job responsibilities and without addressing whether it would have resolved such a dispute, if it existed, at summary judgment. (Opposition ("Opp.") 8.) However, as the *Posey* court pointed out in addressing *Charles*, (546 F.3d at 1127), there *was*

such a dispute at summary judgment, and the magistrate judge had concluded the question whether the plaintiff's statements were made as a citizen or as an employee presented a genuine issue of material fact requiring trial. *Charles*, 522 F.3d at 513 n.17. The Fifth Circuit reversed, concluding that "even though analyzing whether *Garcetti* applies involves the consideration of factual circumstances surrounding the speech at issue, the question whether Charles's speech is entitled to protection is a legal conclusion properly decided at summary judgment." *Id.*

At bottom, respondent attempts to skirt the clear and acknowledged conflict among the circuits by characterizing the cited First, Fifth, Tenth and Eleventh Circuit cases as doing nothing more than restating the general proposition that courts may decide an issue as a matter of law based on undisputed facts at the summary judgment stage. (Opp. 8-9.) Yet, as noted in the petition (Pet. 19-21), and as review of the cited cases reveals, the courts find the citizen/employee speech question to be one of law in the context of including it along with the *Pickering/Connick* factors in determining the threshold question of whether employee speech is protected. There is no suggestion in the cited cases that the issue is one of law because the facts are purportedly not in dispute for purposes of summary judgment.[1]

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[1] Respondent cites *Williams v. Riley*, 275 F. App'x 385 (5th Cir. 2008) for the proposition that notwithstanding *Charles v.*

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The lack of clarity in the law has created uncertainty even within the Ninth Circuit. In *Huppert v. City of Pittsburg*, 574 F.3d 696, 698, 701, 703-06 (9th Cir. 2009), the district court dismissed the plaintiffs' First Amendment claims on summary judgment after concluding the statements at issue were unprotected because they were not made by the employees acting as private citizens. The Ninth Circuit affirmed the district court over a dissent. *Id.* at 710. The dissent took issue with the majority's purported failure to follow binding precedent set in the instant case, among others; if the employee states his speech was not part of his official duties, a jury must decide the scope of his or her employment. *Id.* at 718-19, 722 (Fletcher, J., dissenting). The only occasion permitting a court to determine the scope of employment issue as a matter of law, according to the

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Grief, 522 F.3d 508, the Fifth Circuit nonetheless denies summary judgment based upon disputed facts as to whether particular speech fell within an employee's official job duties. (Opp. 8.) As a threshold matter, in *Williams*, the district court had granted a motion to dismiss pursuant to rule 12(b)(6), Federal Rules of Civil Procedure, and in so doing considered extrinsic evidence – official policies – to determine that the plaintiff's speech fell within his official duties. The Fifth Circuit reversed, holding that the consideration of extrinsic evidence effectively transformed the matter into a summary judgment, and remanded for the trial court to allow plaintiffs to "amend" to present additional evidence pertinent to the issue. *Id.* at 388-90. Moreover, to the extent *Williams* is inconsistent with *Charles*'s clear holding that the citizen/employee inquiry is one of law, it simply underscores the confusion in this area and the need for this Court to provide clear guidance.

dissent, is one in which an employee concedes the particular speech at issue was part of explicitly assigned duties. *Id.* at 712, 719 (Huppert conceded he was selected by District Attorney to investigate corruption at public works yard).

In *Huppert*, as in this case, there was no dispute about underlying facts as to what had occurred. *Huppert* illustrates that the undeniable split evident among the circuits over whether the protected status of speech remains an issue of law for a court to decide, exists as well within the Ninth Circuit, underscoring the need for this Court to address and resolve this important issue.

Citing to *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), a product disparagement case, Robinson asserts that the decision below was correct because an issue with a factual component cannot be determined as a matter of law; the inquiry is "a practical one." (Opp. 11.) However, an issue with a factual component is not off-limits to a court. As this Court explained in *Connick*, in light of its obligations under the Constitution,

> [W]e are compelled to examine for ourselves the statements in issue and the circumstances under which they are made to see whether or not they . . . are of a character which the principles of the First Amendment . . . protect. Because of this obligation, we cannot avoid making an independent constitutional judgment on the facts of the

> case. 461 U.S. at 150 n.10 (internal quotations and citations omitted).

Robinson does not explain why the factual analysis of circumstances required to determine scope of employment for First Amendment purposes is any different from that employed by courts to determine whether, for example, particular speech touches on a matter of public concern. (*See* Pet. 22-27.)

Moreover, in the employee speech context, the analysis of "the statements in issue and the circumstances under which they are made" has heretofore occurred at the threshold, to determine if the speech is protected. If it is protected, then the jury determines whether, in fact, protected speech motivated the employer to act against the employee. Robinson does not explain why the citizen-or-employee subpart of the protected status analysis must now be kept from the court until after a jury has made an initial determination, as in *Bose*. And, there is a compelling reason for the *Garcetti* inquiry *not* to be delayed – qualified immunity. (*See* Pet. 27-31.) When the Ninth Circuit imported the *Bose* analysis into the context of public employee speech rights, *see Posey*, 546 F.3d at 1129, it eviscerated the qualified immunity defense. Where, as here, an employee contends it was not part of his job to make a particular statement, the question of whether or not it was must now be put to the jury, thereby precluding qualified immunity, as well as interlocutory review of its denial. (App. 10; *Johnson v. Jones*, 515 U.S. 304, 307, 319-20 (1995.))

Conspicuously, respondent does not address, let alone deny, that application of the Ninth Circuit's erroneous standard for determining citizen/employee speech strips individual defendants of any meaningful ability to raise qualified immunity either at the trial or appellate stage. As discussed in the petition, this undermines the basic purposes of qualified immunity. (Pet. 29.)

II. COURTS AND EMPLOYERS NEED THE GUIDANCE OF THIS COURT ON THE FACTORS TO BE CONSIDERED IN DETERMINING WHETHER PUBLIC EMPLOYEE SPEECH FALLS WITHIN "OFFICIAL DUTIES" UNDER *GARCETTI*.

Petitioners have demonstrated that the framework it was unnecessary to provide in *Garcetti* for determining if a public employee's speech was part of the job is now needed in light of apparent disagreement about what factors are significant to the analysis. (Pet. 31-41.) Robinson denies that any guidance is necessary, even presumably for a jury if indeed this issue is one of fact. He asserts that in the cited decisions the courts "simply weighed the evidence and reached different results." (Opp. 13.) He further contends that the cited cases do not involve application of factors at issue in this case. (Opp. 12-14.)

Respondent's first argument is little more than the assertion that every case is different on its facts. That may be true, but as review of the cited cases

reveals, the problem is that courts are selectively picking and choosing the factors to be applied to the differing facts on essentially an ad hoc basis. This makes it virtually impossible to predict in a given case what "weight" a court, or under respondent's view, a jury may or must give to particular factors.

Moreover, as noted in the petition (Pet. 37-39), in fact the district court here concluded there was an issue of fact concerning whether respondent spoke as an employee based on analysis that has been expressly rejected by the Sixth Circuit. The district court found that since plaintiff was disciplined for his speech, there was necessarily an issue of fact as to whether it was part of his job duties, concluding that an employer would not discipline an employee for doing his or her job. (Pet. 37.) Yet, in *Weisbarth v. Geauga Park District*, 499 F.3d 538, 545 (6th Cir. 2007), the court expressly found that whether an employee was disciplined for particular speech was irrelevant to determining whether or not the speech was made as part of official duties. (Pet. 38-39.)

As noted in the petition, and flatly ignored by respondent, the absence of clear guidelines for determining when particular speech falls within an employee's official duties hamstrings public entities in day-to-day operations. Uncertainty in how courts view the scope of particular regulations, or general employment duties, makes it difficult, indeed impossible, for public entities to enact, implement, and enforce regulations governing employee speech.

Public employers have a clear and substantial interest in requiring employees to report workplace discrimination. However, there is no way to predict whether such reporting requirements will be deemed to be part of an employee's duties for purposes of allowing discipline or other job related consequences based on the employee's failure to report, or improper reporting under such regulations.

Similarly, law enforcement agencies must assure that officers do not commit acts of excessive force or other acts of misconduct. Regulations requiring officers to report such misconduct directly serve the public interest and safety. However, as illustrated by this case, even such specific regulations may not suffice, in the view of some courts, to create a job related duty for purposes of allowing a public employer to enact or enforce such regulations without inviting litigation. Without a clear framework from this Court defining "official" speech under *Garcetti*, public entities and their supervisors may hesitate to enact or enforce regulations that advance core public interests. It is therefore essential that this Court grant review.

CONCLUSION

For the foregoing reasons and those stated in the petition, petitioners urge that the petition for a writ of certiorari be granted.

Respectfully submitted,

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