No. 08-1571

IN THE
Supreme Court of the United States

STEVE COOLEY, STEVEN SOWDERS, CURT LIVESAY, ANTHONY PATCHETT, AND CURTIS HAZELL,
Petitioners,

v.

DAVID ENG,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

D. JAY RITT
TIFFANY W. TAI
Bensinger, Ritt, Tai & Thvedt, LLP
65 North Raymond Ave
Suite 320
Pasadena, California 91103
(626) 685-2550

ADINA H. ROSENBAUM
Counsel of Record
ALLISON M. ZIEVE
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Respondent

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QUESTIONS PRESENTED

1. Under the First Amendment analysis in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), should a district court decide material disputes over the scope and content of a public employee's job duties as a matter of law on summary judgment?

2. In determining whether a public employee was speaking pursuant to his official duties, exactly how much weight should be given to facts related to "the person addressed," the "time and place" of the speech, and "specialized knowledge and access to information"?

3. Does an individual have a First Amendment interest in his attorney's speech to the press on his behalf?

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INTRODUCTION

In *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006), this Court held that speech made by public employees "pursuant to their official duties" does not receive First Amendment protection. The Court made clear that the inquiry into the scope of an employee's job duties is a "practical one" that requires looking at "the duties an employee actually is expected to perform." *Id.* at 424-25.

Below, the court of appeals held that, in applying *Garcetti*, "the question of the scope and content of a plaintiff's job responsibilities is a question of fact," while "the ultimate constitutional significance of the facts as found is a question of law." Pet. App. 20 (internal quotation marks and citation omitted). The court denied qualified immunity to supervisors accused of retaliating against Deputy District Attorney David Eng for his speech, explaining that the district court had found a genuine factual dispute over whether Eng's speech was made as part of his professional duties, that the district court's determination was not reviewable on interlocutory appeal, and that Eng's version of the facts plausibly indicated that he had no official duty to engage in the speech at issue. *Id.* at 25.

Petitioners seek review of this fact-bound determination, claiming a circuit split over whether the "*Garcetti* inquiry" is a question of law. But although some of the cases cited by Petitioners hold that the *ultimate question* of whether an employee was speaking as an employee or as a citizen is a question of law, none of the cases resolve underlying genuine disputes about "the scope and content of a plaintiff's job responsibilities" at summary judgment. The court below correctly held that such disputes are factual in nature, and Petitioners'

disagreement with the district court about whether the evidence presents genuine issues of material fact is not reviewable on interlocutory appeal.

Petitioners also claim that this Court should grant review to provide guidance on the factors to be considered in deciding whether an employee is speaking pursuant to his job duties, including on factors that they do not even attempt to argue are relevant here. However, Petitioners demonstrate no inconsistency between the decision below and decisions of other circuits on the factors they identify. Nor should review be granted "to make clear that public employee speech has no greater protection when transmitted through an attorney than it would were the employee speaking directly." Pet. 9. The court below did not hold to the contrary. The decision below is correct, and the petition should be denied.

STATEMENT OF THE CASE

A. Factual Background

David Eng has been a Deputy District Attorney in Los Angeles County since 1984. In January 2001, Eng was assigned to a task force charged with determining whether crimes were committed in connection with construction of the Los Angeles Unified School District's Belmont Learning Complex. Pet. App. 36. The task force also included members of the public. Appellant's Excerpts of Record in the Ninth Circuit (Ct. App. ER) 783. The task force was established by then newly-elected District Attorney (D.A.) Steve Cooley, who had campaigned on a promise to reform the Belmont Project, and was headed by Anthony Patchett, one of Cooley's key campaign advisors, who informed task force members that it would be a "slam

dunk" to indict prominent people involved in the project. Pet App. 36-37.

Eng, who had spent years prosecuting environmental crimes, Ct. App. ER 779, was brought on to the task force to investigate potential violations of environmental laws in connection with the Belmont Project. Pet. App. 36, 57. After an extensive investigation, Eng concluded that no environmental crimes had been committed. Eng reported this conclusion at a meeting with the task force, D.A. Cooley, and Cooley's staff. *Id.* at 4.

At that same meeting, the task force discussed a *Los Angeles Times* article reporting that certain lease-purchase agreements used to finance the purchase of the Belmont land were being canceled and that the school district would have to refinance the project at a much higher interest rate. The agreements allegedly were being cancelled because Patchett and another investigator had informed the IRS that the school district had committed fraud in purchasing the Belmont property. Although Eng had not been directed to look at any issues concerning the propriety of bonds used to finance the Belmont construction, Eng stated his opinion at the meeting that the agreements had been legal, that the alleged reporting of the information to the IRS had been improper, and that Cooley had a responsibility to rectify the situation. Cooley became angry and told Eng to "shut up." *Id.* at 4-5.

After the meeting, Cooley and members of his staff met frequently to discuss "a method of forcing David Eng out of the District Attorney's office." *Id.* at 5. First, the office investigated Eng for allegedly improperly accessing the D.A.'s computer system, and it continued the investigation

even after another Deputy D.A stated that it was he, and not Eng, who had accessed the system. Ct. App. ER 733-35, 799-805. Then, the office investigated Eng for allegedly sexually harassing a law clerk with whom he had a brief, consensual relationship, and it continued the investigation even after the law clerk denied that she had been harassed. Pet. App. 5. Next, in what was a clear demotion for a Deputy D.A. with Eng's experience, Cooley transferred him to the Pomona Juvenile Division, where he had served much earlier in his career. *Id.* at 5-6.

In September 2002, Eng was suspended with pay and told not to return to work until further notice. He was not told the reasons for his suspension. The next month, he was informed that misdemeanor charges stemming from his alleged misuse of the D.A.'s computer system the previous year had been filed against him. He was subsequently suspended without pay or benefits. Although the charges were dismissed when the case went to trial, Eng was not allowed to return to work. *Id.* at 6. In February 2003, Eng appeared before the Civil Service Commission, which ordered that he be reinstated with pay and that his lost pay and benefits be restored. The D.A.'s office failed to comply, extending the suspension for another 30 days. *Id.* at 42.

A few weeks later, the *Los Angeles Times* published a long article about Eng's trial titled "Cooley is Accused of Payback Prosecution." *Id.* The article detailed Eng's allegations that he was the subject of retaliation and included an interview with Mark Geragos, Eng's attorney, who was quoted as saying, for example, that Eng's prosecution was "one of the most contrived prosecutions I've ever seen." Ct. App. ER 1015.

Soon after the article was published, Head Deputy Steven Sowders informed Eng and Geragos that Eng would never be allowed to come back to the D.A.'s office and that they would come up with additional things with which to charge him so that he would remain on suspension or be terminated. Pet App. 7. A few weeks later, Eng was served with a new Notice of Intent to Suspend, which realleged facts from his earlier suspension and raised new allegations based on events that had purportedly occurred years before. *Id.* Upon giving him the notice, Sowders asked Eng why he allowed Geragos to make "those comments" to the *Los Angeles Times*. *Id.* at 43. In a later meeting, Sowders and Chief Deputy D.A. Curt Livesay said they would resolve matters if Eng agreed to tell the *Los Angeles Times* that Geragos's statements were unauthorized and inaccurate and publicly apologize to Cooley. Eng refused to retract Geragos's statements. *Id.* at 43-44.

On April 14, 2003, Eng returned to work in the Juvenile Division. Within two weeks, however, the D.A.'s office served him with a new Notice of Suspension Without Pay that stated that it would run concurrently with the suspension based on the criminal charges, ignoring that the Civil Service Commission had resolved those charges and ordered him reinstated. *Id.* at 44. The Civil Service Commission held hearings on the new suspension in December and January and found in Eng's favor on the major claims, including the sexual harassment charges. *Id.* After Eng returned to work, he learned his life insurance benefits had been reduced. *Id.* In 2005, he was denied a promotion, in part because of the sexual harassment

allegations that had been resolved in his favor. *Id.* at 28-29.

B. Opinions Below

Eng brought this action against Cooley and other officials in the D.A.'s office, asserting that defendants retaliated against him for his statements about the Belmont Project and IRS reporting, and for his lawyer's statements to the *Los Angeles Times*. The defendants moved for summary judgment, arguing that the statements on which Eng's First Amendment claims were based were unprotected and that they were entitled to qualified immunity.

Quoting *Garcetti v. Ceballos*, 547 U.S. at 421, the district court explained that "to determine whether certain speech is protected by the First Amendment, it must be determined whether the speech in question was made when the individual was acting as an employee or as a private citizen," and that the controlling factor for whether speech was made as an employee was whether it was "'part of what . . . [the employee] was employed to do.'" Pet. App. 47. The Court found that it was clear that Eng's "duties included the investigation of environmental violations of the Belmont project," and that, therefore, he was "merely fulfilling his job duties" when he made his presentation to the task force recommending that no criminal charges should be filed. *Id.* at 48. Accordingly, the district court concluded that Eng's task force presentation was not protected under the First Amendment. *Id.*

However, the Court found that there was a genuine factual dispute about whether Eng's statement about how Cooley should rectify the leak to the IRS was made "as part of his Task Force duties." *Id.* at 49. In their

statements of material fact, the parties had disagreed, for example, over whether task force members were expected to share concerns with the D.A.'s office about aspects of the investigation outside of their assignment areas. Ct. App. ER 675-76. Because there was a genuine factual dispute, the district court denied summary judgment as to the statement involving the IRS leak. In addition, the Court decided that Eng had third-party standing to assert a claim based in part on the violation of Geragos's First Amendment rights. Pet. App. 49-50. Having "established that Eng has legitimate First Amendment claims with regard to his protected speech," and because "First Amendment protection is a clearly established constitutional right," the district court denied the defendants qualified immunity. *Id.* at 50.

The court of appeals affirmed. First, the court explained that interlocutory review of a denial of qualified immunity is limited to questions of law, and that a "district court's determination that the parties' evidence presents genuine issues of material fact is categorically unreviewable on interlocutory appeal." *Id.* at 10. It then turned to whether Eng could assert a claim based on Geragos's statement, holding that it did not have jurisdiction to determine whether Eng had standing to assert a claim on Geragos's behalf, but that, in any event, it did not need to resolve that question because Eng had his own "first person constitutional interest in Geragos's speech." *Id.* at 14. The court explained that in *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 542 (2001), this Court reasoned that an "'attorney speaks on the behalf of the client' and is the client's 'speaker.'" App. 15. It noted that "the district court concluded that when Geragos spoke

to the press about Eng's First Amendment retaliation case, Geragos 'made the statements on Eng's behalf, in his role as counsel,'" and concluded, therefore, that "his words were Eng's words as far as the First Amendment is concerned." *Id.* at 17.

The court then addressed whether Eng had alleged a violation of his First Amendment rights. It explained that in determining whether speech was pursuant to an employee's official duties, "'the question of the scope and content of a plaintiff's job responsibilities is a question of fact,'" while "the 'ultimate constitutional significance of the facts as found' is a question of law." *Id.* at 20 (quoting *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1129-30 (9th Cir. 2008)). It noted that the district court had determined that there was a genuine issue of material fact over whether Eng's speech about the IRS leak was made as part of his duties on the Belmont task force and reiterated that it did not have jurisdiction to review the "district court's determination that the parties' evidence presents genuine issues of material fact." *Id.* at 25. It explained that it had to view all facts in Eng's favor and concluded that "there can be no doubt that Eng's version of the facts plausibly indicates he had no official duty to complain about any leak to the IRS or to authorize Geragos to speak to the press about the retaliation being taken against him." *Id.*

Finally, the court determined that it was clearly established that a public employee's speech was protected when he commented on matters of public concern that were not part of his job duties. *Id.* at 30. With regard to Geragos's speech, the court concluded that this case involved "mere application of settled law to a new factual

permutation," *id.* at 33 (citation omitted), and that "Eng's personal First Amendment interest in Geragos's speech was clearly established by 2003." *Id.* Accordingly, the court affirmed the district court's partial denial of qualified immunity.

The defendants filed a petition for rehearing and rehearing en banc, which was denied without any member of the court of appeals requesting a vote. *Id.* at 55.

REASONS FOR DENYING THE WRIT

I. There Is No Circuit Split Over Whether the Question of the Scope and Content of a Plaintiff's Job Duties Is a Question of Law or of Fact.

Petitioners' primary argument for review is that the decision below, which held that "the question of the scope and content of a plaintiff's job responsibilities is a question of fact," App. 20 (citation omitted), conflicts with decisions in other circuits that hold that the "*Garcetti* inquiry is a question of law for the court." Pet. 16. But although some courts describe the *ultimate question* of whether a public employee is speaking as a citizen or as an employee pursuant to his job duties as a matter of law and some courts describe it as a mixed matter of law and fact, none of the cases cited by Petitioner holds that where there is a subsidiary dispute over "the scope and content of a plaintiff's job responsibilities," that dispute should be resolved by the court.

For example, Petitioners contend that the decision below is in conflict with the Fifth Circuit's decision in *Charles v. Grief*, 522 F.3d 508 (5th Cir. 2008). In *Charles*,

however, the court stated that the *ultimate question* of whether "speech is entitled to protection" is a matter of law. *Id.* at 513 n.17. The court did not mention any material dispute over the scope and content of Charles's job responsibilities—it found that Charles was not speaking as an employee under any "conceivable job duties" he might have, *id.* at 514—and it did not address whether it would have resolved such a dispute at summary judgment if one had existed. Tellingly, when the Fifth Circuit found the plaintiff's official job duties unclear in a later case, *Williams v. Riley*, 275 Fed. Appx. 385 (5th Cir. 2008), the court denied summary judgment.

Similarly, although the court in *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192 (10th Cir. 2007), stated that the question whether an employee is speaking pursuant to his official duties is a question for the court, it did not indicate that there were material disputed questions over the scope of those job duties. Indeed, the court summarized cases following *Garcetti* as making "clear that speech relating to tasks within an employee's *uncontested* employment responsibilities is not protected from regulation." *Id.* at 1203 (emphasis added). Likewise, although the First Circuit stated in *Curran v. Cousins*, 509 F.3d 36, 45 (1st Cir. 2007), that "whether the speech is by an employee acting as a citizen on a matter of public concern" is a question of law, it did not indicate that there were any material disputes over the scope of the employee's job duties. And in the D.C. Circuit case on which petitioners rely, *Wilburn v. Robinson*, 480 F.3d 1140, 1150 (D.C. Cir. 2007), the court did not need to resolve disputes over the scope of the employee's job duties because it determined that the speech fell within the

employee's job responsibilities as she herself described them. Finally, none of the Eleventh Circuit cases cited by Petitioners resolves underlying genuine disputes over the employee's job duties as a matter of law. *See, e.g.*, *Battle v. Bd. of Regents*, 468 F.3d 755, 762 n.6 (11th Cir. 2006) (deciding that plaintiff's reports about fraud were pursuant to her employment duties where it was an "uncontroverted fact" that once plaintiff discovered fraud, "she had a clear duty to report" it).

In short, Petitioners have not demonstrated that the courts that describe the ultimate question as being a "matter of law" would resolve cases at summary judgment where there are underlying disputes about what duties an employee actually is expected to perform. And the court below agreed that, after the factual disputes about the scope and content of the employee's job duties are resolved, the "'ultimate constitutional significance of the facts as found' is a question of law." App. 20 (citation omitted). Indeed, when there are no material disputed issues about the scope of the employee's job duties, the Ninth Circuit decides the ultimate issue of whether a plaintiff spoke as a citizen or as an employee as a matter of law. *See, e.g.*, *Huppert v. City of Pittsburg*, 574 F.3d 696, 698, 703-706 (9th Cir. 2009) (citing the decision below and affirming summary judgment because "the speech at issue was given pursuant to [the employees'] job duties"); *Freitag v. Ayers*, 468 F.3d 528, 546 (9th Cir. 2006) (holding as a matter of law that some of plaintiff's speech was pursuant to job duties, but remanding for factual determinations about scope of job duties to determine whether other speech was pursuant to those duties). The Third Circuit, which the petition places on the Ninth

Circuit's side of the purported split, does the same. *See, e.g., Gorum v. Sessons*, 561 F.3d 179, 186 (3d Cir. 2009) (stating, in affirming summary judgment, that plaintiff's actions "came within the scope of his official duties"). There is no meaningful conflict here.

II. The Decision Below Is Correct.

1. In *Garcetti*, this Court made clear that the inquiry into the scope of an employee's professional duties is "a practical one" that focuses on "the duties an employee actually is expected to perform." 547 U.S. at 424-25. Questions about what duties a public employee actually is expected to perform involve precisely the "application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 n.17 (1984).[1]

Nonetheless, Petitioners argue that the "*Garcetti* inquiry" should be purely legal because it involves "the same sort of qualitative analysis of content and context that [courts] do in resolving whether the speech at issue is of public or private concern and whether the balancing of interests under *Pickering* [*v. Board of Education*, 391 U.S. 563 (1968)] favors employee or employer." Pet. 19. Not all evaluations of "content and context" are legal questions,

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[1]Indeed, Petitioners' statement of material facts before the district court included twelve paragraphs under the heading "Plaintiff's statements . . . were expressed pursuant to his official duties as a deputy district attorney," Ct. App. ER 674-78, demonstrating that Petitioners originally recognized that the *Garcetti* inquiry has an underlying factual component.

however; juries, too, often evaluate content and context to decide issues of fact. In any event, the court below agreed with Petitioners that the "private citizen inquiry" is similar to the *Pickering* analysis, characterizing both as "legal question[s] . . . [whose] resolution often entails underlying factual disputes." Pet. App. 21.

Petitioners also claim that the decision below causes particular "mischief" in the qualified immunity context, claiming that they should have been granted summary judgment because "even assuming a violation, there was no clearly established law that would have put them on notice that Eng's statements" were not within his job responsibilities. Pet. 23. But, as noted above, the *Garcetti* inquiry is a practical one, focusing on what the employee "was employed to do." *Garcetti*, 547 U.S. at 421. As his supervisors, defendants did not need to await a court ruling to know what duties he "actually [was] expected to perform." *Id.* at 424-25. They would have been the ones actually to expect him to perform those duties.

Finally, Petitioners repeatedly assert that the "key evidentiary facts regarding context and content" are undisputed. Pet. 20. But the facts regarding the scope of Eng's duties are *not* undisputed. The parties disagree, for example, about whether members of the task force were expected to share concerns about "any aspect of the investigation" with each other and their superiors, particularly about whether they were expected to share any concerns they might have related to aspects of the investigation outside of their assignment areas. Ct. App. ER 676. In any event, to the extent that Petitioners' claims are just a disagreement with the district court over whether the parties' evidence in fact demonstrated a

genuine issue of material fact, that issue is not the proper subject of an interlocutory appeal. Defendants in a qualified immunity case "may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995).

2. Even if the scope and content of Eng's professional duties were a question of law, the lower courts would have been correct to deny defendants' motion. *Garcetti* held that a public employee's speech is not protected if it was part of his employment duties, i.e. the work he "was paid to perform." 547 U.S. at 422. Here, Eng's professional responsibilities were to investigate potential environmental law violations, make recommendations pertinent to the prosecutorial decision-making process with respect to his investigation, and contribute his written analysis to the final report. The comments for which he was retaliated against, however, related to alleged misconduct by other task force members in allegedly leaking false information to the IRS, and to the retaliation that took place against him after he spoke out about those allegations. Those comments were not part of the work that Eng "was employed to do." *Id.* at 421. Accordingly, his speech is not unprotected under *Garcetti*.

III. Petitioners Have Demonstrated No "Divergent Approaches" to the Factors That Courts Consider to Determine Whether Speech Is Employee Speech.

Petitioners also claim that this Court should grant review because "this case suggests at least implicitly," Pet.

26, that courts disagree as to the role that facts concerning "the person addressed," "time and place," and "specialized knowledge and access to information," play in determining whether speech was made as an employee. *Id.* at 26-29.[2] But Petitioners demonstrate no such disagreement —implicit or otherwise—between the decision below and other courts: None of the cases they cite on these factors holds them to be dispositive, and none holds speech to be unprotected employee speech where it does not relate to the employee's job responsibilities. *Cf. Garcetti*, 547 U.S. at 420-21 (noting that the facts that the plaintiff "expressed his views inside his office" and that his memo concerned "the subject matter of [his] employment" were not dispositive in determining whether he was speaking as a citizen or as an employee, but rather that the "controlling factor" was that his speech was made pursuant to his official job duties).

For example, Petitioners imply that the decision below is inconsistent with *Haynes v. City of Circleville*, 474 F.3d 357 (6th Cir. 2007), and *Davis v. McKinney*, 518 F.3d 304 (5th Cir. 2008), because those cases "held that where the employee directed the speech to supervisors or others within the chain of command, the particular communication falls within the employee's official duties," Pet. 26, whereas the lower court did not hold that Eng's speech in front of

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[2]Petitioners also claim a lack of clarity over the role of "regulation[s], polic[ies], or statute[s] requiring employee's speech" in determining whether an employee spoke pursuant to his official duties. Pet. at 29-31. Given that there is no allegation here that Eng's speech was required by a regulation, policy, or statute, review in this case would not provide the guidance that Petitioners believe is lacking on that issue.

Cooley necessarily was made pursuant to his official duties. But although both *Haynes* and *Davis* ultimately concluded that speech that had been directed at supervisors was employee speech, neither case found that *all* speech directed at a supervisor is employee speech. In *Davis*, for instance, the court concluded that while some of Davis's speech to her supervisor was made as an employee, other speech was made as a citizen. The decisive factor was not the person addressed, but whether the speech was about her job duties. *See id.* at 313 ("[W]hen a public employee raises complaints or concerns up the chain of command at his workplace *about his job duties*, that speech is undertaken in the course of performing his job.") (emphasis added); *see also id.* at 313 n.3 ("We recognize that it is not dispositive that a public employee's statements are made internally."). Similarly, there is no inconsistency between the decision below and the cases Petitioners cite on "time and place" and "specialized knowledge," none of which holds, or even implies, that *all* speech made at a work-related function or based on information acquired while at work is made pursuant to official duties. *See, e.g.*, *Brammer-Hoelter*, 492 F.3d at 1204 ("[N]ot all speech that occurs at work is made pursuant to an employee's official duties.").

Each case that Petitioners cite conducts a fact-based, common-sense inquiry into whether a public employee is speaking as an employee or as a citizen. Each considers whether the employee spoke pursuant to his official duties to be the controlling factor, and each looks at facts related to the speech and to the person's employment responsibilities to determine whether the speech was pursuant to those duties. None holds that any one of the

factors identified by Petitioners is dispositive, and none concludes that speech that does not relate to the employee's job responsibilities is unprotected as employee speech. To be sure, courts have not specified which facts will be most significant in each conceivable factual context that might arise, but supervisors are not entitled to qualified immunity every time a court has not ruled on the particular set of facts before it. Petitioners have shown no "divergent approaches" among courts, Pet. 31—let alone that all "supervisory personnel should surely be entitled to qualified immunity," *id.* at 25—and the petition should be denied.

IV. This Court Should Not Grant Review to Determine Whether a Public Employee Has a First Amendment Interest in His Attorney's Speech on His Behalf.

In their fourth question presented, Petitioners ask this Court to grant review "to make clear that public employee speech has no greater protection when transmitted through an attorney than it would were the employee speaking directly." Pet. 9. But the court below did not hold that employee speech has greater protection when transmitted through an attorney than if the employee were speaking directly: It held that Geragos's "words were Eng's words as far as the First Amendment is concerned," Pet. App. 17, and analyzed Geragos's speech under the test used for employee speech. *See, e.g.*, *id.* at 24 (noting that Geragos's statements addressed matters of public concern). In other words, whether the speech is made by the employee himself or by his attorney, the *Garcetti* inquiry remains the same: Was the speech made pursuant to the employee's official job duties? *See id.* at 25

(explaining that there was no doubt that facts could indicate that Eng "had no official duty . . . to authorize Geragos to speak to the press about the retaliation being taken against him").

In any event, the court below was correct in holding that employees have a First Amendment interest in their attorneys' speech on their behalf. As the court explained, "[i]t is well settled that when a lawyer speaks on behalf of a client, the lawyer's right to speak 'is almost always grounded in the rights of the client, rather than any independent rights of the attorney.'" *Id.* at 14 (quoting *Mezibov v. Allen*, 411 F.3d 712, 718, 720 (6th Cir. 2005)) (citation omitted). And even if the court below were not correct that Eng had a personal interest in Geragos's speech, granting review would not resolve Eng's claims based on Geragos's speech, because the district court also held that Eng could assert third-party standing to vindicate Geragos's interests, and the court of appeals lacked jurisdiction to consider that issue. *See id.* at 12-13.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ADINA H. ROSENBAUM
Counsel of Record
ALLISON M. ZIEVE
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

D. JAY RITT
TIFFANY W. TAI
Bensinger, Ritt, Tai
& Thvedt, LLP
65 North Raymond Ave
Suite 320
Pasadena, California 91103
(626) 685-2550

Counsel for Respondent

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