No. _____

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

PETITION FOR WRIT OF CERTIORARI

TIMOTHY T. COATES, ESQ.
Counsel of Record
ALISON M. TURNER, ESQ.
MICHAEL A. BROWN, ESQ.
GREINES, MARTIN, STEIN
& RICHLAND LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261

MANUEL A. VALENZUELA, JR.
Acting Assistant County Counsel
COUNTY OF LOS ANGELES
OFFICE OF THE COUNTY COUNSEL
648 Kenneth Hahn Hall
of Administration
500 West Temple Street
Los Angeles, California 90012
Telephone: (213) 974-1926
Facsimile: (213) 626-5578

Counsel for Petitioners
Margaret York, William Nash and Victor Turner

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OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. In a First Amendment retaliation case, is the issue of whether a public employee spoke pursuant to "official duties" under *Garcetti v. Ceballos*, 547 U.S. 410 (2006), a question of law for the court, as determined by the First, Fifth, Tenth, Eleventh, and D.C. Circuits, or a mixed question of law and fact to be first submitted to a trier of fact as determined by the Ninth and Third Circuits?

2. What criteria are to be applied in determining whether a public employee's communication occurred pursuant to "official duties" under *Garcetti*?

3. Given that the court in *Garcetti* expressly declined to provide specific criteria for determining when public employee speech is pursuant to an "official duty," are individual defendants shielded by qualified immunity for allegedly mistakenly determining that employment regulations requiring employees to report acts of discrimination, misconduct or excessive force could subject an employee to adverse employment action based upon a failure to adhere to the proper chain of command for reporting such violations?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

- Richard Robinson, plaintiff, appellee below, and respondent here;
- Margaret York, William Nash, and Victor Turner, defendants, appellants below, and petitioners here.

In addition, the County of Los Angeles is a defendant in the underlying action, and was a nominal appellant below, though no appellate argument was presented on its behalf.

There are no corporations involved in this proceeding.

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The opinion of the United States Court of Appeals for the Ninth Circuit (Appendix, "App." 1-17) was filed on April 27, 2009, has not yet been assigned an official publication citation in the Federal Reporter, but can be found at 2009 WL 1109534 (9th Cir. 2009). The Ninth Circuit's order granting a stay of mandate pending disposition of a petition for writ certiorari was not reported and is found in the Appendix at page 31. The decision of the district court denying petitioners' motion for summary judgment based on qualified immunity was not reported, and is found in the Appendix at pages 32-48.

BASIS FOR JURISDICTION IN THIS COURT

The Court of Appeals initially filed its Memorandum disposition and judgment in this case on January 8, 2009. (App. 18.) On March 24, 2009, this Court granted petitioners' request to extend the time within which to file a petition for writ of certiorari, to and including May 26, 2009. (Application No. 08A842.) On April 27, 2009, pursuant to the request of respondent, the Ninth Circuit withdrew its prior memorandum and issued a published opinion. 28 U.S.C. section 1254(1) confers jurisdiction on this Court to review on writ of certiorari the opinion and judgment of the Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The underlying action was brought by the respondent pursuant to 42 U.S.C. section 1983, which reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. 42 U.S.C. § 1983.

The respondent alleges that the petitioners violated his rights under the First and Fourteenth Amendments to the United States Constitution, the relevant parts of which read as follows:

> ***First Amendment:*** Congress shall make no law respecting an establishment of religion,

or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment (Section I): All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On April 20, 2006, respondent Richard Robinson filed a complaint for violation of civil rights under 42 U.S.C. section 1983, naming as defendants, among others, Margaret York, William Nash, and Victor Turner.[1] (Appellants' Excerpts of Record – "AER" – Vol. 2 at 10.) The central allegation of the complaint was that Robinson, who is employed by the County of Los Angeles as a law enforcement officer in the Office

[1] Also named as defendants were the County of Los Angeles and the Los Angeles County Office of Public Safety.

of Public Safety ("OPS"), had not been promoted from sergeant to lieutenant by petitioners York, Nash, and Turner, because respondent had purportedly reported too many incidents of misconduct by fellow officers and command staff within the OPS. (2 AER 14-17.) He also asserted that he had been subjected to an internal affairs investigation for having researched and investigated possible misconduct by another employee (2 AER 17), and that this investigation was in retaliation for his having reported various acts of misconduct.

Specifically, respondent alleged the following actions that purportedly prompted retaliation by defendants:

- Respondent had testified concerning misconduct and corruption in the OPS in a lawsuit against the County of Los Angeles, and that testimony resulted in an adverse decision against the County. (2 AER 13, para. 9.)
- In March 2003, respondent reported what he believed to be corruption and misconduct by a fellow officer who may have been working for an outside employer while "on the clock" and working for OPS. (2 AER 13, para. 10.)
- In September 2003, respondent discovered various high-ranking OPS officials drinking in a private establishment while on duty and respondent immediately contacted the on-call internal

affairs officer to request a command officer to report to the location before the intoxicated personnel could leave the location. (2 AER 13, para. 11.)

- In December 2003, respondent had not been contacted or interviewed by internal affairs with respect to either the March or September 2003 incidents reported above and thus respondent forwarded an email to the officer in charge of internal affairs asking when he could expect to be contacted for an interview. (2 AER 13, para. 12.)

- In December 2003 and February 2004, respondent spoke with petitioner Nash, who was interim Chief of Police, and Chief of Staff Lamar LaFave to review the details of his prior complaints. (2 AER 14, para. 13.)

- In May 2004, Robinson reported a possible battery committed by an officer on a police explorer and requested an investigation because he felt that officers were trying to "sweep it under the rug." (2 AER 14, para. 14.)

- In October 2004, Robinson filed an official complaint with internal affairs on behalf of another officer who had been experiencing racial and ethnic discrimination and harassment. (2 AER 14, para. 14.)

- In October 2004, Robinson notified Chief of Staff Lamar LaFave about a possible use of force incident where a suspect had been detained by another OPS officer and had been knocked to the ground and suffered a large contusion on his head, but the sergeant who responded to the scene did not conduct a necessary use of force investigation nor provided medical treatment for this suspect. (2 AER 14, para. 14.)
- In January 2005, Robinson initiated a complaint against a lieutenant who had verbally abused him in front of numerous OPS employees, but despite bringing these matters to the attention of his superiors, the matters were not investigated and no corrective action was taken. (2 AER 14, para. 14.)

In the course of discovery, respondent asserted an additional claim of retaliation based on having reported to superiors that various members of the OPS training unit had tattoos associated with a rogue group of Sheriff's deputies that had a reputation for committing unlawful and racist acts. (2 AER 43; App. 35, para. 5.)

Petitioners York, Nash, and Turner moved for summary judgment. Petitioners contended that all of respondent's claimed communications, save for his trial testimony and another squarely personal matter, fell within his duties as a public safety officer and indeed were required by regulations specifically

directing employees to report incidents of discrimination, excessive force, or other misconduct. (2 AER 38-39.)[2] Citing *Garcetti v. Ceballos*, 547 U.S. 410 (2006), petitioners argued that respondent's communication was required by the duties of his job, and hence could not form the basis of a First Amendment claim. (2 AER 37-39.) Petitioners further contended that under the two-part inquiry set forth in *Saucier v. Katz*, 533 U.S. 194 (2001), overruled in part, *Pearson v. Callahan*, 550 U.S. ___, 129 S. Ct. 808 (2009), they were also entitled to summary judgment based on qualified immunity because respondent could not establish a First Amendment claim in the first instance, and in any event the lack of any clearly established law providing guidelines for determining

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[2] These OPS policies and regulations included a requirement that a "member shall promptly report to his immediate supervisor any information or incident coming to his attention that might indicate the need for Office of Public Safety actions." (2 AER 80, fact 77.) The "duties of all sworn personnel" were defined to "include protecting employees and property of the County of Los Angeles. . . ." (2 AER 92-93, fact 91.) OPS policy specifically stated that any "employee or prospective employee, Reserve, volunteer, or Explorer Scout with a complaint of discrimination, or any member with information of possible discrimination, should report the matter to the immediate supervisor of the person who is the subject of the allegation." (2 AER 86, fact 86.) While OPS regulations directed officers not to interfere in investigations or other matters that are the responsibility of another member or another unit of the OPS, "[s]worn personnel learning of information pertinent to such investigations will notify their Captain and report the information to the concerned member, Office of Public Safety Unit, or law enforcement agency in a timely manner." (2 AER 85-86, fact 85.)

when public employees engage in "official" as opposed to "personal" speech, defendants were shielded from liability. (2 AER 52-54.)

In opposing the motion, respondent did not dispute the existence of the OPS policies and regulations concerning the reporting of use of force, discrimination or other misconduct. Instead, Robinson simply objected that the documents "speak for themselves," were irrelevant, and "[d]isputed" in that "[p]laintiff was not hired to report internal misconduct." (4 AER 460, fact 77; 461, 467, fact 86; 469, fact 88; 470-471, fact 89.)

Respondent contended that *Garcetti* did not apply, or at the very least there was an issue of fact, because he was not specifically hired to report misconduct and he had never been subject to investigation or inquiry for purportedly having failed to properly report any allegation of purported misconduct. (4 AER 415-417.)

On August 7, 2007, the district court denied petitioners' motion for summary judgment. With respect to whether respondent's speech activities occurred when he was "acting within the course and scope of his duties" under *Garcetti*, the district court held that there was a material issue of fact. (App. 38-39.) The court held that a general policy of requiring employees to report to supervisors any information or incident coming to the attention of an officer that might indicate the need for "Officer of Public Safety actions" was too general a policy to establish a

particular duty to report misconduct. (*Ibid.*) The court further concluded that petitioners' purported complaints that respondent reported too much misconduct, created an issue of fact as to whether respondent, as a matter of official duty, was required to report the incidents of misconduct and discrimination in question. (*Ibid.*) The district court denied qualified immunity, with respect to the "clearly established law" prong of *Saucier*, finding

> the law has been clear for almost 40 years that public employees have First Amendment rights, that speaking out on matters of public concern is protected speech, and that they cannot suffer an adverse employment action for speaking out on matters of public concern so long as their conduct does not disrupt the employment relationship.

(App. 45.)

Petitioners appealed the denial of qualified immunity. On January 8, 2009, the Ninth Circuit issued a memorandum affirming the judgment. (App. 18.) Citing *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1130 (9th Cir. 2008), the court held that the question of whether respondent's reports were made in conjunction with his official job duties and hence not protected under the First Amendment under *Garcetti*, was a mixed question of fact and law, and the district court's finding of a triable issue of fact barred review under *Johnson v. Jones*, 515 U.S. 304, 319-320. (App. 19, 27.)

Upon application of respondent seeking publication of the court's opinion, on April 27, 2009, the Ninth Circuit withdrew its memorandum disposition of the case and issued a published opinion. (App. 1.) The court again declined to reach the issue of whether respondent's speech fell within his official duties under *Garcetti*, on the grounds that it was a mixed question of law and fact, and the district court had identified a factual conflict on the issue. (App. 10.)

REASONS TO GRANT THE PETITION

In *Garcetti v. Ceballos*, the court held that when public employees speak as part of their official duties, the speech is not subject to First Amendment protection. The court noted that it is only when a public employee speaks as a citizen that courts must then determine, as a matter of law, whether under *Connick v. Meyers*, 461 U.S. 138 (1983) and *Pickering v. Bd. of Ed. Of Tp. High Sch. Dist. 205*, 391 U.S. 563 (1968), the employee spoke on an issue of public concern, and if so whether the interest of the employee, as a citizen, in commenting upon matters of public concern, outweighs the interest of the state as employer in promoting the efficiency of its operations.

In so holding, the court declined to articulate specific standards for determining when an employee's speech fell within his or her official duties, noting only that the inquiry was a "practical one." 547

U.S. at 424. Three years after *Garcetti*, the federal appellate courts are explicitly divided on the most fundamental nature of the inquiry itself – whether it is a question of law for the court, or a mixed question of law and fact requiring initial submission to a trier of fact. At the same time, federal trial and appellate courts have, on ad hoc basis, applied varying and sometimes inconsistent criteria in determining precisely when an employee's speech falls within his or her official duties. The resulting uncertainty and confusion create a burden on the judicial system, public entities and public employees that demands intervention by this Court.

Here, the Ninth Circuit rejected petitioners' claim of qualified immunity, finding that under the Ninth Circuit's decision in *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121 (2008), the issue whether respondent spoke as a citizen or employee was a mixed question of law and fact, and given a purported factual conflict was not subject to review on appeal. In so holding, the Ninth Circuit acknowledged that while its ruling was consistent with the decisions of the Third and purportedly the Seventh Circuit, it was in direct conflict with the decisions of at least three other circuits – the Fifth, Tenth and D.C. Circuits – which had expressly held that the question of whether an employee spoke as a private citizen or as an employee was one of law for the courts. In fact, the Ninth Circuit understated the variance among the Circuit courts, as both the First

and Eleventh Circuits have also held that the *Garcetti* inquiry is an issue of law for the courts.

It is vital that this Court address and resolve this express conflict among the circuits. As reflected by the court's decision in *Garcetti*, lawsuits arising from public employee speech are significant both in number and in impact. Absent this Court's intervention, cases are necessarily proceeding one way or the other with fundamental reversible error. If the plaintiff's role as speaker – employee or citizen – is an issue of fact, then the First, Fifth, Tenth, Eleventh and D.C. Circuits are depriving plaintiffs of a fundamental right to a jury trial on issues of fact under the Seventh Amendment.

Conversely, if the issue is one of law for the courts – as petitioners contend here – public employers and supervisory personnel are being subjected to prolonged and unnecessary litigation of issues that should properly be determined by a court, not a jury. Indeed, as occurred in this case and in other Ninth Circuit decisions, defendants are effectively stripped of the protection of qualified immunity as trial courts defer to the finder of fact as to whether an employee spoke as part of official duties or as a citizen, and the appellate courts then decline review based on the purported factual conflicts.

The uncertainty as to the nature of the issue, i.e., factual or legal, as well as the absence of express guidance from this Court concerning the specific factors to be taken into account in making the "practical" inquiry as to the scope of an employee's duties,

directly and adversely impacts the day-to-day operations of public entities throughout the country. Public employers must know whether an employee may be disciplined for speaking, or even failing to speak, as required by a specific regulation, even though the subject of the regulation is not part of his or her everyday duties. Police officers such as respondent, may not be hired specifically to investigate employment discrimination or misconduct by fellow officers, yet by regulation be required to report such incidents under pain of discipline or adverse employment consequences in order to advance the fundamental public interest. Uncertainty hamstrings a public entity in taking basic steps to guard against invidious discrimination and such things as the "code of silence" that may plague a police department and cloak excessive force. Public entities, officials and supervisors would be hesitant to impose, let alone enforce, such important yet ancillary regulations if the price to be paid for "guessing wrong" is entanglement in litigation, or even worse, civil liability under section 1983.

I. REVIEW IS NECESSARY TO RESOLVE THE EXPLICIT CONFLICT BETWEEN THE CIRCUITS ON THE IMPORTANT AND RECURRING ISSUE OF WHETHER DETERMINATION OF "OFFICIAL" OR "JOB REQUIRED" SPEECH UNDER *GARCETTI* IS A QUESTION OF LAW FOR THE COURTS, OR A MIXED QUESTION OF LAW AND FACT REQUIRING INITIAL DETERMINATION BY A FINDER OF FACT.

A. *Garcetti* Establishes That When Public Employees Speak Not As Citizens But As Employees As Part Of Their Official Responsibilities, There Is No First Amendment Interest At Issue.

In *Garcetti v. Ceballos*, 547 U.S. 410, the court held that a deputy district attorney who had purportedly been subjected to adverse employment action because of a memorandum he had written as part of his basic job duties could not assert a claim under the First Amendment. *Id.* at 420-423. As the court observed:

> The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy. [Citation.] That consideration – the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case – distinguishes Ceballos' case from those in which the First Amendment provides

> protection against discipline. We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. *Id.* at 421.

As the court emphasized, "[t]o hold otherwise would be to demand permanent judicial intervention in the conduct of government operations to a degree inconsistent with sound principles of federalism and the separation of powers." *Id.* at 423.

The court noted that because the parties did not dispute "that Ceballos wrote his disposition memo pursuant to his employment duties," it had "no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." 547 U.S. at 424. Instead, the court simply stated that the "proper inquiry is a practical one." *Ibid.*

As we discuss, the fundamental nature of that inquiry, i.e., whether it is a question of law or a mixed question of law and fact, is hotly disputed among the circuits and requires resolution by this Court.

B. There Is An Explicit Conflict Between The Decisions Of The Ninth And Third Circuits Holding That The *Garcetti* Inquiry Is A Mixed Question Of Fact And Law, And The Decisions Of The First, Fifth, Tenth, Eleventh And D.C. Circuits Holding That The Issue Is A Question Of Law For The Court.

1. The Ninth and Third Circuits hold that the *Garcetti* inquiry is a mixed question of fact and law, requiring that any factual conflict as to the scope of employment be first determined by a finder of fact.

In *Posey v. Lake Pend Oreille Sch. District No. 84*, 546 F.3d 1121, the Ninth Circuit reversed summary judgment against a school "security specialist" who asserted his First Amendment rights had been violated when school officials took adverse action against him after he wrote a letter to them complaining about inadequate school security. 546 F.3d at 1124. The court acknowledged that a threshold requirement in any First Amendment claim was that the employee establish that he or she engaged in constitutionally protected speech. *Ibid.* This, in turn, required a determination of whether the speech at issue touched upon a matter of public concern, and if so whether the interest of the employee, as a citizen, in commenting upon the matters of public concern, outweighed the interest of the state. 546 F.3d at 1126.

Citing *Connick*, the court acknowledged that this inquiry into the "'protected status of speech is one of law, not fact.'" *Ibid.*

The court concluded, however, that *Garcetti* had added a "third stage" to the initial determination as to whether speech was protected under the First Amendment, "requiring a determination whether the plaintiff spoke as a public employee or instead a private citizen." *Ibid.* The court noted that while in *Garcetti* there had been no dispute as to the official nature of the communication at issue, in the case before it, there was a factual dispute as to the scope of the plaintiff's duties with respect to student safety. 546 F.3d at 1127. In light of the factual dispute, the court therefore reversed summary judgment, concluding that the inquiry into the protected status of speech was no longer "one purely of law as stated in *Connick*," but rather, "*Garcetti* has transformed it into a mixed question of fact and law." *Id.* at 1127, 1129.

The Ninth Circuit has since expressly reaffirmed *Posey* in two published decisions. As noted, here the court declined to address the issue of qualified immunity based upon the purported existence of a factual dispute concerning the scope of respondent's duties. In *Eng v. Cooley*, 552 F.3d 1062 (9th Cir. 2009), the court similarly rejected inquiry

into qualified immunity based upon the existence of an alleged factual dispute as to the scope of duties.[3]

The *Posey* court correctly observed that its determination that the *Garcetti* issue involved a mixed question of law and fact was consistent with the Third Circuit's resolution of the issue. *See, Foraker v. Chaffinch*, 501 F.3d 231, 240 (3d Cir. 2007), and *Reilly v. City of Atlantic City*, 532 F.3d 216, 227 (3d Cir. 2008) ("'[W]hether a particular instance of speech is made within a particular plaintiff's job duties is a mixed question of fact and law.'").

Although the *Posey* court also asserted its decision was consistent with case law in the Seventh and Eighth Circuits, review of the cited decisions belies that characterization. The Eighth Circuit has not expressly held that the *Garcetti* inquiry involves a mixed question of fact and law. Indeed, the two Eighth Circuit cases cited by *Posey* both pre-date *Garcetti*. *See,* 546 F.3d 1128, citing *Casey v. City of Cabool*, 12 F.3d 799 (8th Cir. 1993); *Shands v. City of Kennet*, 993 F.2d 1337 (8th Cir. 1993).

Moreover, it is certainly true that the Seventh Circuit affirmed summary judgment based on

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[3] The Ninth Circuit also applied *Posey* in reversing summary judgment in favor of a public entity and various police department supervisory personnel in the unpublished decision *Densmore v. City of Maywood, et al.*, No. 07-56707 (9th Cir. 2008), 2008 WL 5077582. The court held there was an issue of fact as to the scope of a probationary officer's duties to report misconduct by fellow officers.

Garcetti in *Davis v. Cook County*, 534 F.3d 650 (7th Cir. 2008), observing that "no rational trier of fact could find" other than the plaintiff acted in accordance with her official duties. *Id.* at 653. However, in addressing the plaintiff's contention that authoring the communication at issue was not part of her official duties, the court expressly cited *Connick* and reiterated that "'[t]he inquiry into the protected status of speech is one of law, not of fact.' [Citation.] Raising a First Amendment claim, without more, does not guarantee that a jury is necessary." *Ibid.*

As we discuss, and as *Posey* acknowledged, other circuits squarely disagree with the Ninth and Third Circuits on the *Garcetti* inquiry.

2. The First, Fifth, Tenth, Eleventh and D.C. Circuits hold that the *Garcetti* inquiry is a question of law for the court.

The Ninth Circuit acknowledged in *Posey* that at least three circuits have taken an opposing view on the *Garcetti* question and expressly held that the issue of whether an employee spoke as a public employee or as a citizen is a question of law for the court. 546 F.3d at 1127-1128. The Ninth Circuit understated the conflict. The First, Fifth, Tenth, Eleventh and D.C. Circuits have all found the issue to be one of law.

In *Wilburn v. Robinson*, 480 F.3d 1140 (D.C. Cir. 2007), the court affirmed summary judgment for the

defendants in a First Amendment retaliation case, finding that the speech at issue fell within the plaintiff's job responsibilities under *Garcetti*. 480 F.3d at 1150-1151. Citing *Garcetti* and *Pickering*, the court found that the question of whether the plaintiff spoke as an employee or citizen was one of the threshold "'questions of law for the court to resolve. . . .'" *Id.* at 1149.

In *Charles v. Grief*, 522 F.3d 508 (5th Cir. 2008), the court rejected the trial court's conclusion that whether the employee's statements were made as a citizen or an employee was an issue of fact, holding instead that it was a question of law for the court:

> [W]e acknowledge that, even though analyzing whether *Garcetti* applies involves the consideration of factual circumstances surrounding the speech at issue, the question whether Charles' speech is entitled to protection is a legal conclusion properly decided at summary judgment. 522 F.3d at 513 n.17.

In *Brammer-Hoelter, et al. v. Twin Peaks Charter Academy*, 492 F.3d 1192 (10th Cir. 2007), the court construed *Garcetti* as adding a fifth step to the "'*Pickering*' analysis of freedom of speech retaliation claims . . . " (492 F.3d at 1202) requiring a court to "determine whether the employee speaks 'pursuant to [his] official duties. . . .'" *Id.* at 1203.

Both the First and Eleventh Circuits have also recognized that the *Garcetti* inquiry is one of law for

the court. *Curran v. Cousins*, 509 F.3d 36, 45 (1st Cir. 2007) ("[I]t is the judge who decides as a matter of law the issues in the two steps *Garcetti* identifies. *See, Connick*, 461 U.S. at 148 n.7, 103 S. Ct. 1684 ('The inquiry into the protected status of speech is one of law, not fact.'); *Lewis v. City of Boston*, 321 F.3d 207, 219 (1st Cir. 2003). The court must first determine whether the speech involved is entitled to any First Amendment protection – that is, whether the speech is by an employee acting as a citizen on a matter of public concern"). *Boyce v. Andrew*, 510 F.3d 1333, 1343 (11th Cir. 2007) ("A court must . . . discern the purpose of the employee's speech."); *Battle v. Bd. of Regents for the St. of Ga.*, 468 F.3d 755, 760 (11th Cir. 2006) (per curiam) (whether the employee spoke as a citizen on a matter of public concern is a threshold legal question); *Morris v. Crow,* 117 F.3d 449, 455 (11th Cir. 1997) (per curiam). *See also, Burton v. City of Ormond Beach, Fla.*, 301 F.Appx. 848, 852 (11th Cir. 2008) (citing *Boyce*, *Battle* and *Morris* for the proposition that "[w]hether an employee spoke as a citizen is a question of law for the court"); *Schuster v. Henry County Ga.*, 281 F.Appx. 868, 870 (11th Cir. 2008) ("[W]hether the subject speech was made by the public employee speaking as a citizen or as part of the employee's job responsibilities is a question of law that the court decides.").

Even in the relatively short three-year time period since this Court issued *Garcetti*, the appellate courts are squarely at odds concerning the fundamental issue of whether the *Garcetti* inquiry itself

is a question of law requiring resolution by a court, or it is a mixed question of fact and law requiring initial determination by a finder of fact. This conflict necessitates review by this Court at this time.

C. It Is Essential That The Court Grant Review To Resolve The Circuit Conflict By Confirming That The *Garcetti* Inquiry Is A Question Of Law For The Courts In Order To Further The Principles Recognized In *Garcetti*, *Pickering* And *Connick* And Avoid Undermining Legitimate Claims Of Qualified Immunity.

1. Determining whether an employee's speech falls within an employee's professional responsibilities requires the same qualitative evaluation of speech content and context, as well as a balancing of public interest that courts, and only courts, perform in evaluating whether speech is subject to First Amendment protection under *Connick* and *Pickering*.

A majority of circuits have concluded that the *Garcetti* inquiry is a question of law for the court. They have done so based largely on the conclusion that *Garcetti* simply created a threshold inquiry on the general question of whether particular employee speech is subject to First Amendment protection, a question that, prior to *Garcetti*, had been clearly

established as a question of law for the court. *Connick*, 461 U.S. at 148 n.7. Both implicitly and explicitly, the circuits holding that the *Garcetti* inquiry is one of law have recognized that resolution of the issue invariably requires courts to perform the same sort of qualitative evaluation of the speech and analysis of both context and content that they do in resolving such issues as whether particular speech is of public or private concern, or whether the balancing of interests under the First Amendment favors the employee or the employer.

In *Garcetti*, the court emphasized that the inquiry into whether an employee's speech falls within the job responsibilities is a "practical" one. 547 U.S. at 424. Seizing on this, the Ninth Circuit in *Posey* declared the issue to be a mixed question of law and fact, adding its own flourish that an inquiry into the scope of employment is necessarily "*concrete* and practical." 546 F.3d at 1129, emphasis added. Even putting aside *Posey*'s questionable assumption that juries are somehow superior to courts in performing inquiries that are both "concrete and practical," the reality is that determining the scope of an employee's official responsibilities under *Garcetti* necessarily requires precisely the sort of abstract, qualitative evaluation that falls uniquely within the province of courts.

The *Garcetti* court's statement that the inquiry was necessarily a "practical one" was in direct response to the concern voiced by a dissent that public employers could use overbroad job descriptions and requirements to improperly restrict expression by

public employees. 547 U.S. at 424. It is for the same the reason that the court cautioned that over-general job descriptions would not suffice to pull otherwise unrelated expression into the ambit of job-related speech. *Ibid.*

But determining what sort of employee speech an employer may define and regulate as an official duty requires precisely the sort of First Amendment balancing and linedrawing that the court routinely performs in *Pickering* balancing. It pre-supposes that there is certain speech that a public employer cannot require as an "official duty" because it is simply too tangential, not simply to the particular day-to-day job duties performed by the employee in question, but to the basic public services we expect public entities to provide, or fundamental public interests we expect them to protect.

This case presents a perfect example in an all too common scenario. Petitioners established that there were specific Los Angeles County OPS regulations requiring the respondent to report acts of discrimination, excessive force, and other misconduct. The only factual "dispute" plaintiff raised with respect to these regulations was that he was not specifically hired to report or investigate discrimination or misconduct. According to respondent, since he was not an internal affairs division ("IAD") officer, his only job duty related to general law enforcement functions. Implicit in respondent's argument, and in the district court and Ninth Circuit's assumption that this somehow created a relevant issue of fact, is that these specific

reporting regulations, however much they may advance the public entity's interest in preventing either discrimination or excessive force, cannot be imposed on the respondent as part of his job responsibilities.

At bottom, the Ninth Circuit here is willing to let a jury decide, at least in the first instance, the question of whether respondent's job duties could properly extend beyond the specific day-to-day law enforcement function he performed. Yet, inevitably, as this Court indicated in *Garcetti*, the question of what speech an employer may require is, fundamentally, a legal inquiry. A public entity cannot, through generalized job descriptions, overly regulate employee expression, but as *Garcetti* recognized, it can surely require public employees to speak on particular matters, in a particular manner, in order to advance the interest of the public entity and the public it serves.

Plainly, regulations requiring employees to report discrimination, and police officers in particular to report incidents of excessive force, advance the public interest. Such reporting requirements may properly be imposed on public employees as part of their general duties in service of the public entity, even if the speech required by these regulations is not something a particular employee does on a day-to-day basis. In fact, these kinds of policies and procedures are precisely the sort of effective action public entities must take in order to avoid subjecting themselves to liability under *Monell v. New York City Dept. of Social*

Services, 436 U.S. 658 (1978). Nor can it be discerned how a public entity may guard against the pernicious danger of a "code of silence" with respect to excessive force by police officers without requiring officers, as part of their duties, to report acts of excessive force or other misconduct.

As the majority of circuits have concluded, the *Garcetti* inquiry necessarily overlaps the fundamental inquiry courts make in determining whether a particular speech is protected by the First Amendment under *Pickering* and *Connick*. As the Eleventh Circuit observed in *Boyce v. Andrews*, 510 F.3d 1333, 1343: "[W]e initially must decide whether . . . [the employees'] spoke as government employees or as citizens. Deciding whether a government employee's speech relates to his or her job as opposed to an issue of public concern 'must be determined by the content, form, and context of a given statement, as revealed by the whole record.'" *See also, Haynes v. City of Circleville*, 474 F.3d 357 (6th Cir. 2007) (reviewing the context and content of employee memo in concluding that it was written pursuant to official duties); *Wesibarth v. Geauga Park Dist.*, 499 F.3d 538, 545 (6th Cir. 2007) (affirming grant of motion to dismiss under rule 12(b)(6), Federal Rules of Civil Procedure, under *Garcetti* "[t]he pursuant-to-official-duty inquiry ultimately cannot be completely divorced from the content of the speech" and "the analysis in . . . *Garcetti* suggests that the content of an employee's speech – though not determinative – will inform the

threshold inquiry of whether the speech was, in fact, made pursuant to the employee's official duties.").

Because the inquiry as to the scope of employment responsibilities is intimately tied to the same sort of analysis and evaluation of content and context of employee speech that the court performs in making a legal determination under *Connick* and *Pickering*, the court should grant review to reaffirm the legal nature of this inquiry.

2. It is necessary to grant review to confirm that the *Garcetti* inquiry is an issue of law in order to assure meaningful application of qualified immunity in the numerous cases arising from public employee speech.

Over the past three decades, this Court has repeatedly found it necessary to define the standards to be employed in carefully balancing a public employee's constitutional right to free expression, and the needs of public employers to assure the efficient performance of the public's business. *See*, *e.g.*, *Pickering*, 391 U.S. 563; *Connick*, 461 U.S. 138; *Garcetti*, 547 U.S. 410; *Perry v. Sindermann*, 408 U.S. 593 (1972); *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410 (1979). The court's frequent intervention in this area underscores the importance of setting clear standards in the context of public entity regulation of public employee speech. The sheer amount of speech, of both public and private concern

that arises in public employment, necessarily creates an environment that will spawn conflict and resulting litigation.

By virtue of their positions, public officials and supervisory personnel are particularly exposed to potential liability arising from their regulation of public employee speech. Nonetheless, in holding that the threshold *Garcetti* inquiry is a mixed question of fact and law, the Ninth Circuit has substantially reduced, if not wholly eliminated the protections of qualified immunity for public officials and supervisors in the context of regulating employee speech.

By asserting here, as in other cases,[4] that an employee's bare statement that a particular task fell outside his or her daily responsibilities is sufficient to create an issue of fact, the Ninth Circuit has essentially foreclosed successful assertion of qualified immunity both in the district court and at the appellate level. At the trial level, a district court judge faced with a contention that a general regulation may have required reporting of discrimination or excessive force would, in the face of the employee's contention that it was not included in his day-to-day tasks, require the matter to go to the jury. And, in a one-two punch, the defendants are effectively deprived of appellate review of the district court's decision in that regard, because as the Ninth Circuit held here, it is

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[4] *See, Eng v. Cooley*, 552 F.3d 1062, 1073; *Densmore v. City of Maywood, et al.*, 2008 WL 5077582.

purportedly foreclosed from reviewing such "factual disputes" under *Johnson v. Jones*, 515 U.S. 304. *See,* App. 10; *see also, Eng v. Cooley*, 552 F.3d at 1073; *Densmore v. City of Maywood, et al.,* 2008 WL 5077582. As discussed above, however, such disputes are not really factual in nature at all, but instead involve the sort of qualitative and normative judgments that courts, and only courts, can make in resolving issues of law.

Again, while the Ninth Circuit in *Posey* asserts that even in regard to mixed questions of fact and law, a court has the final say as to whether the facts establish a claim, particularly a First Amendment claim, such belated review is too little and too late to meaningfully protect the important interests that qualified immunity was designed to advance. As this court has repeatedly emphasized, qualified immunity is a defense not simply to the underlying claim but to involvement in litigation at all, and should be raised and determined at the earliest opportunity. *Ashcroft v. Iqbal*, No. 07-1015, ___ U.S. ___, slip opinion, pp. 7-8 (U.S. May 18, 2009) ("a district-court order denying qualified immunity 'conclusively determine[s]' " that the defendant must bear the burdens of discovery; is "conceptual distinct from the merits of the plaintiff's claim' " and would prove "effectively unreviewable on appeal from a final judgment"); *Mitchell v. Forsyth*, 472 U.S. 511, 526-528 (1985); *Saucier*, 533 U.S. at 200-201.

The mischief caused by mischaracterizing a question of law as one of fact and hence insulating the qualified immunity determination from review is

underscored here. Petitioners were entitled to summary judgment based on both prongs of qualified immunity – the absence of any First Amendment violation, and, even assuming any violation, the absence of any clearly established law that would have put them on notice that respondent's speech could not constitute employee's speech under *Garcetti*. *Saucier*, 533 U.S. 194; *Pearson v. Callahan*, 550 U.S. ___, 129 S. Ct. 808 (2009).

For example, specific regulations requiring employees to report acts of workplace discrimination as well as other regulations requiring law enforcement personnel to report acts of excessive force, must legitimately form part of a public employee's job responsibilities under *Garcetti*, regardless of whether the employee, as here, contends that his specific job did not require him to investigate misconduct. Employees can surely be required to "speak" of such events, and be subjected to adverse action if they fail to do so, or, as contended here, fail to do so in a proper manner by going outside the chain of command.

More significantly, even if it is debatable whether such regulations are "trumped" by a plaintiff's contention that his or her day-to-day duties did not require the performance of such tasks, it cannot be said, given the state of the law, that defendants should have known that such speech could not reasonably be viewed as "employee speech." Indeed, given that the court in *Garcetti* expressly declined to provide a precise framework for making such determinations, it does violence to the very notion of

"clearly established law" under qualified immunity to conclude that defendants, pre-*Garcetti* should have somehow known what speech would fall outside an employee's job responsibilities.

Absent intervention by this Court, public officials and supervisors will be subjected to needless entanglement in litigation as both trial and appellate courts, at least within the Ninth and Third Circuits, defer to the finders of fact before even purporting to address issues that are, in reality, issues of law that should be determined promptly in the litigation. For this reason too, review is warranted.

II. REVIEW IS NECESSARY TO PROVIDE GUIDANCE ON THE FACTORS TO BE CONSIDERED IN DETERMINING WHETHER PUBLIC EMPLOYEE SPEECH FALLS WITHIN "OFFICIAL DUTIES" UNDER *GARCETTI*.

A. In The Absence Of Guidance From This Court, The Circuits Have Applied Varying, And Sometimes Inconsistent Factors In Determining Whether A Public Employee's Speech Falls Within Official Responsibilities And Hence Is Not Protected By The First Amendment.

In *Garcetti,* it was undisputed that the employee speech at issue was made in the course of the employee's official duties. 547 U.S. at 424. As a result, the court declined to provide a specific framework for

determining, in disputed cases, whether particular speech falls within an employee's official responsibilities. *Ibid.*

In the three years since *Garcetti*, the federal courts have applied varying criteria in determining whether an employee's speech has been made pursuant to the employee's job-related responsibilities. The more common factors fall within several broad categories. Yet, as we discuss, even within these categories the courts are in disagreement, giving different weight to seemingly similar factors and engaging in the sort of ad hoc decision-making that provides neither consistency nor predictability in the law.

1. The person addressed.

Several courts have held that whether the employee directed the speech to supervisors or others within the chain of command determines whether the particular communication falls with the employee's official duties. For example, in *Thomas v. City of Blanchard*, 548 F.3d 1317, 1325 (10th Cir. 2008), the court found that the plaintiff's complaints were made outside the scope of his duties, since he sent them outside his office to a state agency. Conversely, in *Haynes v. City of Circleville*, 474 F.3d at 364, the court found that the "fact that [the employee] communicated solely to his superior also indicates that he was speaking in his capacity as a public employee. . . ."

Even where an employee has unsuccessfully attempted to report misconduct up the direct chain of command and has bypassed immediate supervisors, the speech may still fall within job related duties so long as it was directed to someone within the organization. *See*, *Davis v. McKinney*, 518 F.3d 304, 313, 315-316 (5th Cir. 2008) (plaintiff complained to immediate supervisor, and after inadequate response, complained to University Chancellor: "when 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").

In contrast, here, the district court rejected petitioners' contention that respondent's various complaints of misconduct fell within his job related duties, even though it was undisputed that he directed them to officials within the OPS, albeit without complying with the specified chain of command.

2. Regulation, policy or statute requiring employee's speech.

Courts have also considered whether particular internal regulations and policies, or even statutes of state or nationwide application require an employee in the plaintiff's position to speak. In *Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007), a police officer claimed he was demoted in part for reporting to the district attorney his suspicions that the police chief

and deputy chief illegally harbored the deputy chief's brother, who was wanted on two felony warrants. *Id.* at 592-595. The court held that this speech was within Morales's job related duties under *Garcetti*, both because it was within his general duties as a law enforcement officer and because the police department had a specific policy requiring officers to report all potential crimes. *Id.* at 598.

In *Casey v. West Las Vegas Independent Sch. Dist.*, 473 F.3d 1323 (10th Cir. 2007), the court rejected a retaliation claim by a local school employee premised on the employee having reported misconduct to federal Head Start officials. The court held that this speech was unprotected under *Garcetti* because it was "pursuant to, or in compliance with, certain federal regulations" governing Head Start. *Id.* at 1330.

Similarly, in *Battle v. Board of Regents*, a financial aid officer alleged retaliation for speaking out about her supervisor's allegedly fraudulent handling of federal financial aid funds. 468 F.3d at 758. The court held that her speech was within the scope of her duties because, among other factors, federal Department of Education guidelines required all financial aid workers to report suspected fraud. *Id.* at 761.

In contrast, the Seventh Circuit found reporting requirements similar to those at issue in *Casey* and *Battle* to be insufficient to establish job-related requirements under *Garcetti*. In *Chaklos v. Stevens*, 560 F.3d 705, 712 (7th Cir. 2009) and *Trigillo v. Snyder*,

547 F.3d 826, 829 (7th Cir. 2008), the provision at issue was Illinois Procurement Code, 30 Ill. Comp. Stat. 500/50-40, which required state employees to report to the state's Attorney General suspicions of anticompetitive practices in procurement decisions. In both cases the Seventh Circuit held that the statute did not create responsibilities specific enough to the employee's actual job functions to make reports pursuant to the statute fall within the scope of the employee's duties for purposes of the First Amendment analysis under *Garcetti*. *See*, *Trigillo*, 547 F.3d at 829; *Chaklos*, 560 F.3d at 712.

These decisions illustrate the widely divergent approaches federal courts have taken in addressing even this single factor. They differ on such basic questions as the level of generality permissible for a statute or regulation to be deemed directed at an employee for purposes of establishing particular job duties. Is a state statute directed at a particular category of employee sufficient to create job duties? Are internal regulations directed at all of a public entity's employees on a particular issue – discrimination for example – sufficient to create a duty on all employees to report such conduct, or must regulations be directed to particular departments, job classifications or even specific employees? Current case law provides little or no guidance for predicting the outcome with any certainty in any particular case.

3. Specialized knowledge and access to information.

Several courts have held that an employee's speech is made pursuant to official duties where that speech addresses or is based on special knowledge, experience, or facts acquired in the course of performing the employee's job.

In *Williams v. Dallas Independent Sch. Dist.*, 480 F.3d 689 (5th Cir. 2007), a high school athletic director and football coach alleged that he was improperly fired for two memos expressing concern about possible mismanagement of gate receipts and other athletic funds. *Id.* at 690-691. The court found the memos were made pursuant to the employee's official duties because the suspicions detailed in them were based upon special knowledge about the amount of funds that should have been in the school's athletic funds and standard operating procedures for athletic departments. *Id.* at 694.

The Third Circuit employed a similar analysis, in *Gorum v. Sessoms*, 561 F.3d 179, 185 (3d Cir. 2009). There, the court held that a professor's actions in advising and advocating for a student in disciplinary proceedings, fell within his professional duties. This was because the professor's position as department chair and his "special knowledge of, and experience with, the DSU disciplinary code" put him in the position of de facto advisor to DSU students facing disciplinary proceedings. *Id.* at 186.

Yet, as the present case indicates, for some federal courts the source and nature of the employee's knowledge appears irrelevant. Respondent's various complaints of misconduct were derived from his special access to, and special knowledge of, OPS facilities, regulations and procedures. Reports concerning whether other employees were engaged in on the job misconduct such as drinking while on duty, holding other jobs, using excessive force or engaging in discriminatory conduct necessarily reflect respondent's specialized, and squarely job related, expertise and access. This remains true even if respondent may have witnessed some of the misconduct while off duty, or declined to report on the job misconduct to superiors until he was off duty. Nonetheless, these factors played no part in either the district court's or Ninth Circuit's analysis of the case.

4. Employer reaction to the speech.

In denying summary judgment the district court here found a triable issue of fact as to whether respondent's duties included reporting misconduct. The court noted that Robinson testified he was told he had not been promoted because he was reporting misconduct. The court found that this was evidence that reporting such misconduct was not part of Robinson's duties, "unless one is to believe that certain duties must not be performed. . . ." (App. 39.) In its initial Memorandum affirming the judgment, the Ninth Circuit repeated the district court's statement in finding an issue of fact as to respondent's

official duties under *Garcetti*. (App. 27-28.) The Ninth Circuit, however, deleted the reference after granting the respondent's request for publication and issuing its published opinion, holding only that the existence of factual issues barred appellate review. (App. 10.)

But the approach taken by the district court here is squarely at odds with *Garcetti*. The fact that a supervisor may discipline an employee for engaging in particular speech does not mean the speech was not made in the course of official duties.

Citing *Garcetti*, the Sixth Circuit has expressly rejected the analysis employed by the district court here. In *Wesibarth v. Geauga Park Dist.*, 499 F.3d 538, the plaintiff asserted she had been fired in violation of the First Amendment for complaining about poor management to an outside consultant retained by her employer. *Id.* at 540. The Sixth Circuit affirmed dismissal of the complaint, holding that the remarks made to the consultant were in the course of plaintiff's employment duties. *Id.* at 544-545. As the court emphasized, even assuming the employer acted improperly, redress could be found only in state whistle blower statutes or labor code provisions, not in any First Amendment retaliation claim:

Although firing [plaintiff] based on her assessment of department morale and performance may seem highly illogical or unfair, the relevant question is whether the firing violated her free-speech rights

under the First Amendment. *Garcetti* informs us that it did not. *Id.* at 545.

It is difficult to reconcile the district court's reasoning here with the Sixth Circuit's analysis in *Wesibarth*. Yet such inconsistency in approach is an inevitable product of the absence of clear standards governing determination of employment duties under *Garcetti*.

B. Review Is Necessary To Provide A Framework For Determining When Employee Speech Falls Within Official Duties, In Order To Provide Public Employers And Supervisors With Guidance In Formulating, Implementing And Enforcing Policies And Regulations Concerning Employee Speech.

As noted, petitioners submit that the *Garcetti* scope of employment issue is one of law for the court. But, even if it is a mixed question of fact and law, the need for clarification and uniformity of the standards to be applied in making the determination is manifest. The varying factors considered by courts in determining whether particular speech falls within an employee's "official" duties, and even the different weight courts give to the same factors, make it difficult to predict how any particular court will resolve any given case.

The rulings of the district court and Ninth Circuit here underscore the mischief wrought by the absence of a specific framework for resolving the issue. With no clear standards courts are free to pick and choose among various criteria or even invent their own.

Thus here, the district court found it relevant that plaintiff was allegedly disciplined for performing the tasks defendants asserted were part of his duties, which it concluded undercut the contention that this was part of his duties at all. While the district court found one regulation too general to impose a duty on plaintiff to make the reports in question, it flatly ignored other highly specific regulations directly encompassing a duty to report discrimination and excessive force, as well as specific duties imposed on the plaintiff as a law enforcement officer. Yet, as discussed above, other courts have found precisely such regulations and duties not simply relevant, but conclusive in establishing job related speech.

The danger of such an ad hoc approach to resolving the *Garcetti* inquiry, goes well beyond the inability to predict the outcome in a particular case. Uncertainty in how courts view the scope of particular regulations, or general employment duties, makes it difficult, if not impossible for public entities to enact, implement and enforce regulations governing employee speech. Public employers plainly have a substantial interest in requiring employees to report workplace discrimination. However, there is no means to predict whether such reporting requirements will be

deemed to be part of an employee's duties for purpose of allowing discipline or other job related consequences based on an employee's failure to report, or improper reporting under such regulations.

Similarly, law enforcement agencies have a plain need to 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 this case indicates, 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 facing the prospect of litigation.

The absence of clear guidelines from this court on this important issue directly impacts the day-to-day decision making of public employers and supervisors throughout the country. Unless and until the court provides a framework for defining "official" speech under *Garcetti*, public entities and their supervisors may hesitate to enact or enforce regulations that advance core public interests, to the detriment of the public at large.

CONCLUSION

For the foregoing reasons, petitioners urge that the petition be granted.

Respectfully submitted,

TIMOTHY T. COATES, ESQ.
Counsel of Record
ALISON M. TURNER, ESQ.
MICHAEL A. BROWN, ESQ.
GREINES, MARTIN, STEIN
& RICHLAND LLP
5900 Wilshire Boulevard,
12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261

MANUEL A. VALENZUELA, JR.
Acting Assistant County Counsel
COUNTY OF LOS ANGELES
OFFICE OF THE COUNTY COUNSEL
648 Kenneth Hahn Hall
of Administration
500 West Temple Street
Los Angeles, California 90012
Telephone: (213) 974-1926
Facsimile: (213) 626-5578

Counsel for Petitioners
Margaret York, William Nash
and Victor Turner