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

REPLY BRIEF FOR PETITIONERS

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Respondent David Eng ("Eng") makes four arguments for denying the petition, three on the "official duties" issue presented by the holding in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), and one regarding the scope of a public employee's First Amendment interest in his or her attorney's interview by the press. None withstand scrutiny.

First, Eng denies there is a circuit conflict on whether the determination of whether a public employee's speech was pursuant to job duties is a question of law for the court, or a mixed question of law and fact requiring initial determination by a jury. But the Ninth Circuit itself expressly recognized the split among circuits in *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1127 (9th Cir. 2008) ("[o]ur sister circuits are split over the resolution of this question").

Second, Eng contends the decision below is correct because, among other things, the inquiry into the scope of an employee's professional duties is "a practical one," according to this Court's instruction in *Garcetti*, and thus must be one for the jury. However, courts are not beyond engaging in practical inquiries that require factual analysis. Significantly, Eng omits any explanation as to how the factual analysis on scope of employment differs in nature from the factual analysis in which courts engage to determine whether speech is a matter of public concern or whether the employee's interests are outweighed by

the employer's. And if the decision below is correct, as Eng contends, all the more reason to grant the petition, because a majority of circuits are depriving plaintiffs of their Seventh Amendment right to a jury trial on issues of fact by concluding the *Garcetti* inquiry presents a question of law.

Third, Eng denies any guidance is needed to resolve disagreements as to the factors to be considered in determining whether an employee was speaking as an employee or as a citizen, because he denies there are any disagreements. However, saying does not make it so. This Court recognized in *Garcetti* that an occasion would arise for it "to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." *Garcetti*, 547 U.S. at 424. This case, in which the parties debate whether Eng's comments were within his official duties, is such an occasion.

Finally, Eng perceives no problem of a possible end-run around *Garcetti* under the Ninth Circuit's broadly-stated rule that a public employee has a personal First Amendment interest in what his or her attorney says to the press, contending the *Garcetti* inquiry remains the same whoever is speaking. But *Garcetti* posits limits on a public employee's speech rights, whereas, according to the Ninth Circuit, advocacy, even before the press, must be unfettered. Rather than being consistent with *Garcetti*, the Ninth Circuit's rule preempts it.

As petitioners explain below, Eng has provided no sound argument to deny the petition.

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

For more than twenty-five years, the question of the protected status of a public employee's speech has been one of law for the court to decide. *Connick v. Meyers*, 461 U.S. 138, 148 n.7 (1983). The Ninth Circuit has changed the rule, purportedly compelled by *Garcetti*. *See* Petition for Certiorari ("Pet.") 12-13. It has concluded that the question of the protected status of an employee's speech is no longer one that can be decided at summary judgment as a matter of law; a subpart of the question pertaining to the scope and content of a plaintiff's job responsibilities is one of fact and requires an initial determination by the jury. *Posey*, 546 F.3d at 1123-30; Appendix ("App.") 20. If the employee asserts that the particular speech at issue was not part of his or her job and the employer asserts that it was, the jury resolves the issue, even in the absence of any conflict in the evidence about what was said, or where or when it was said.

Eng contends that the Ninth Circuit's new rule is not in conflict with other circuits. He simply ignores the fact that the Ninth Circuit itself in *Posey* recognized the split in the circuits, citing to some of the very cases Eng attempts to show are not in conflict. For example, Eng says of the Fifth Circuit decision in *Charles v. Grief*, 522 F.3d 508 (5th Cir. 2008), that the court stated only that the ultimate question of whether speech is entitled to protection is a matter of law, without mentioning any material dispute over the scope and conduct of the plaintiff's job responsibilities and without addressing whether it would have resolved such a dispute, if it existed, at summary judgment. Opposition ("Opp.") 9-10. However, as the *Posey* court pointed out in addressing *Charles v. Grief* (546 F.3d at 1127), there was such a dispute at summary judgment, and the magistrate judge had concluded the question whether the plaintiff's statements were made as a citizen or as an employee presented a genuine issue of material fact requiring trial. *Charles v. Grief*, 522 F.3d at 513 n.17. The Fifth Circuit reversed, concluding that "even though analyzing whether *Garcetti* applies involves the consideration of factual circumstances surrounding the speech at issue, the question whether Charles' speech is entitled to protection is a legal conclusion properly decided at summary judgment." *Id.*

Citing to the recent case, *Huppert v. City of Pittsburg*, 574 F.3d 696, 698, 703-06 (9th Cir. 2009), Eng contends that in any event, when there is no dispute about the scope of an employee's duties, the

Ninth Circuit does decide the issue of whether a plaintiff spoke as a citizen or as an employee as a matter of law. Opp. 11. In *Huppert*, the district court dismissed the plaintiffs' First Amendment claims on summary judgment after concluding the statements at issue were unprotected because they were not made by the employees acting as private citizens. 574 F.3d at 701. The reviewing court affirmed the district court over a dissent. *Id.* at 710. The dissent took issue with the majority's purported failure to follow binding precedent set in the instant case, among others; if the employee states his speech was not part of his official duties, a jury must decide the scope of his or her employment. *Id.* at 718-19, 722 (Fletcher, J., dissenting). The only occasion permitting a court to determine the scope of employment issue as a matter of law, according to the dissent, is one in which an employee concedes the particular speech at issue was part of explicitly assigned duties. *Id.* at 712, 719 (Huppert conceded he was selected by District Attorney to investigate corruption at public works yard).

In *Huppert*, as in this case, there was no dispute about underlying facts as to what had occurred.[1]

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[1] Eng purports to have discovered a conflict in the underlying facts in this case, stating the parties disagree "whether members of the task force were expected to share concerns" with superiors about "aspects of the investigation outside their assignment areas." Opp. 13. This is simply the *Garcetti* debate – job responsibility or not – stated in terms of the specific context of the case.

Huppert illustrates that the undeniable split evident among the circuits over whether the protected status of speech remains an issue of law for a court to decide, exists as well within the Ninth Circuit, underscoring the need for this Court to address and resolve this important issue.

Citing to *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), a product disparagement case, Eng asserts that the decision below was correct because an issue with a factual component cannot be determined as a matter of law; the inquiry is "a practical one." Opp. 12 & n.1. However, an issue with a factual component is not off-limits to a court. As this Court explained in *Connick*, in light of its obligations under the Constitution,

> [W]e are compelled to examine for ourselves the statements in issue and the circumstances under which they are made to see whether or not they . . . are of a character which the principles of the First Amendment . . . protect. Because of this obligation, we cannot avoid making an independent constitutional judgment on the facts of the case. 461 U.S. at 150 n.10 (internal quotations and citations omitted).

Eng does not explain why the factual analysis of circumstances required for a determination of scope of employment for First Amendment purposes is any different from that which is engaged in by courts to determine whether, for example, a particular speech touches on a matter of public concern. *See* Pet. 18-22.

Moreover, in the employee speech context, the analysis of "the statements in issue and the circumstances under which they are made" has heretofore occurred at the threshold, to determine if the statements are protected; if so, the jury then determines whether, in fact, protected speech motivated the employer to act against the employee in some manner. Eng does not explain why the citizen-or-employee subpart of the protected status analysis must now be kept from the court until after a jury has made an initial determination, as in *Bose*. There is a compelling reason for the *Garcetti* inquiry not to be delayed, which does not pertain in *Bose* – qualified immunity. *See* Pet. 22-25. When the Ninth Circuit imported the *Bose* analysis into the context of public employee speech rights (*see Posey*, 546 F.3d at 1129), it eviscerated the qualified immunity defense. When, as here, an employee contends it was not part of his job to make a particular statement, the question of whether or not it was must now be put to the jury, thereby precluding qualified immunity, as well as interlocutory review of its denial. App. 10; *Johnson v. Jones*, 515 U.S. 304, 307, 319-20 (1995).

Eng takes the position that qualified immunity would not apply in any event: since the *Garcetti* inquiry focuses on what the employee "was employed to do," supervisors, as supervisors, would naturally know what the employee's duties are and would not need a court to tell them. Opp. 13; *Garcetti*, 547 U.S. at 421. This contention at best indicates some confusion about standards for determining the scope of

employment issue (*see* § II, *infra*), but it certainly is not an adequate answer to the fact that the Ninth Circuit has undermined the important interest that qualified immunity is designed to advance. This unacceptable consequence to the qualified immunity defense, which stems from deeming the question whether an employee spoke as an employee or a citizen to be a mixed question of law and fact, is an important reason in itself to grant the petition.

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

Petitioners have demonstrated that the framework it was unnecessary to provide in *Garcetti* for determining if a public employee's speech was part of the job is now needed in light of apparent disagreement about what factors are significant to the analysis. Pet. 25-32. Eng denies that any guidance is necessary, even presumably for a jury if indeed this issue is one of fact. He appears to assert that no courts have held particular factors to be dispositive, no courts have made the mistake of holding speech outside the scope of a job is unprotected, and hence there is no sign of disagreement as to the role various factors should play in the analysis to warrant review. Opp. 15.

But there is disagreement, and it is occurring even among judges in the Ninth Circuit, as is evident, for example, in the recent decision in *Huppert*, 574 F.3d 696. The *Huppert* majority found a police officer's grand jury testimony on a criminal matter owed its existence to his professional responsibilities under California law, and so was unprotected. 574 F.3d at 707-09. In so doing, the court declined to follow the Third Circuit's decision in *Reilly v. Atlantic City*, 532 F.3d 216 (3d Cir. 2008), in which a police officer's trial testimony in a criminal matter was deemed to be protected. *Id.* at 708. The dissent in *Huppert* would have followed *Reilly* and asserted that a public employee has a duty as a citizen to testify before a grand jury independent of any duty he or she might have as an employee, and so such testimony is protected speech by nature. *Id.* at 720-22 (Fletcher, J., dissenting).

Moreover, Eng's assertion on what he sees as the non-problem of qualified immunity is based on an assumption that appears to conflict with this Court's own views. Eng states that supervisors do not need to have a court tell them what duties the employee was expected to perform because "[t]hey would have been the ones actually to expect them to perform those duties." Opp. 13. The underlying assumption is that an employee is always speaking as a citizen *unless* the employer or supervisor has actually assigned the employee the task of making the particular speech or the particular speech was actually part of the employee's official duties. *See Alaska v. EEOC*, 564

F.3d 1062, 1070-71 (9th Cir. 2009) (employee's "official duties didn't require her to complain about the conditions of [another employee's] employment or to bring the alleged sexual harassment to the public's attention"). This assumption is in apparent conflict with this Court's admonition that an official job description (or assignment) is not dispositive for distinguishing between public and private speech. *Garcetti*, 547 U.S. at 424-25.

Eng also asserts that in each case cited by petitioners, "whether the employee spoke pursuant to his official duties [is] the controlling factor[.]" Opp. 16. But whether the employee spoke pursuant to his official duties is not a factor controlling the analysis, but the legal conclusion to be reached at the end of the analysis; it is the "fact-based, common-sense inquiry" (*id.*) to reach that legal conclusion which needs the analytical framework that in *Garcetti* it was unnecessary to provide. To say, in essence as Eng does, that every case is different on the facts, only proves the need for guidance without which employees and supervisors face the uncertain prospect of litigation each time they decide to take corrective action for something said.

III. REVIEW IS NECESSARY TO DETERMINE THE SCOPE OF THE FIRST AMENDMENT INTEREST A PUBLIC EMPLOYEE MAY HAVE IN AN INTERVIEW GIVEN BY HIS OR HER ATTORNEY TO THE PRESS.

On the issue of a client's First Amendment interest in his or her attorney's statement to the press, Eng states that review is unwarranted because the Ninth Circuit did not hold that employee speech has greater protection when transmitted through an attorney than it would were the employee speaking directly. Opp. 17. Not in so many words, perhaps, but that is the real risk of its holding. The court reasoned that the client has a First Amendment right to retain counsel and that it follows that the client has a First Amendment interest in what counsel says, wherever counsel says it – in court or to the press. App. 14-16. In other words, it is in the advocacy of the attorney that the client's First Amendment interest lies, regardless of whether what is said would or would not be protected if spoken directly by the client.

Eng asserts, "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?" Opp. 17. But the Ninth Circuit's broad rule that a client has a protected First Amendment right in what counsel says on his or her behalf *preempts* the *Garcetti* inquiry. The *Garcetti* inquiry involves the possibility of limits on a public employee's First Amendment rights. In contrast, any First Amendment interest in advocacy must be

"unfettered" lest advocacy be chilled. App. 16. If the client's message, regardless of content or context, delivered through his attorney is protected as "a natural corollary of the long-recognized First Amendment right to hire and consult an attorney" (App. 15), then it may well be that an employee's statements otherwise unprotected under *Garcetti*, or even under *Connick*, become protected merely by virtue of having been reported to the press by the employee's attorney.

Qualified immunity was denied on Eng's retaliation claim based on his attorney's press interview on the basis of a purported standard of "common sense," rather than on the basis of the traditional "clearly established law" standard. App. 33. The Court should grant the petition on this issue to reject the Ninth Circuit's common sense standard for qualified immunity and to make clear that retaining an attorney to speak to the press does not necessarily cause speech that might otherwise be unprotected by the First Amendment to become protected.

CONCLUSION

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

DATED: December 3, 2009

Respectfully submitted,

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