RUTGERS LAW RECORD

The Internet Journal of Rutgers School of Law | Newark

www.lawrecord.com

Volume 37 **Emerging First Amendment Issues** **Spring 2010**

Garcetti v. Ceballos: Swapping the First Amendment Rights of Public Employees for Greater Government Control

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In *Garcetti v. Ceballos*, the United States Supreme Court considered the question of whether the First Amendment[2] protects government employees from discipline based on speech made pursuant to the employees' official duties.[3] The Court held that when public employees make statements pursuant to their official duties, the employees are not speaking as "citizens," and thus the First Amendment does not insulate their speech from employer discipline.[4] In so holding, the Court departed from its past propensity to engage in a balancing of the interests of *both* the employer and employee when determining whether a public employee's speech is protected, and instead created a bright-line rule that weakens the interests of public employees in favor of government employers.[5] The Court's rule further dilutes the societal interest in speech undertaken by public employees since the lack of First Amendment protection may deter employees from engaging in socially valuable speech.[6] Lastly, the majority's decision is inconsistent with cases involving government-funded or state-sponsored speech, where First Amendment protection has been extended to the speech of funding grantees depending upon the objectives of the funding program.[7] Accordingly, it is evident that if the *Garcetti* Court had engaged in its typical balancing analysis instead of creating a bright-line rule, it could have decided effectively the question presented in *Garcetti* without infringing upon the interests of public employees and society in receiving constitutional protection for potentially valuable speech.[8]

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[2] The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging 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." U.S. CONST. amend. I.

[3] Garcetti v. Ceballos, 547 U.S. 410, 413 (2006).

[4] *Garcetti*, 547 U.S. at 421-22.

[5] *See infra* Part IV.A.

[6] *See infra* Part IV.B.

[7] *See infra* Part IV.C.

[8] *See Garcetti*, 547 U.S. at 434 (Souter, J., dissenting); *Id.* at 446 (Breyer, J., dissenting).

I. THE CASE

In February 2000, while Richard Ceballos was serving as a "calendar deputy" for the Los Angeles District Attorney's office, he was asked to review a pending criminal matter in which it was suspected that an arresting deputy had misrepresented certain facts in an affidavit used to obtain a critical search warrant.[9] Upon reviewing the affidavit, personally visiting the crime scene, and discussing the inaccuracies with the warrant affiant, Ceballos reached the conclusion that the deputy had grossly misrepresented the truth in the affidavit.[10] He relayed these findings to his supervisor, Carol Najera, and head deputy district attorney, Frank Sunstedt, and then followed up on the matter by preparing a disposition memorandum which summarized his investigation and recommended that the case be dismissed.[11] A meeting was thereafter held which included Ceballos, Sunstedt, Najera, the warrant affiant, and other members of the sheriff's department to discuss the affidavit.[12] At the conclusion of this meeting, Sunstedt no longer felt that the case should be dismissed and decided to simply allow the defense attorney to proceed with the motion to traverse he had filed.[13] During the hearing for this motion to traverse, Ceballos testified for the defense regarding the inaccuracies he uncovered in the warrant, believing that he was compelled to do so to fulfill the prosecutorial obligations instilled in him under *Brady v. Maryland*.[14]

Following the trial, Ceballos was removed from the prosecution team as a result of having testified for the defense.[15] He also claimed to be the subject of numerous retaliatory employment actions, which prompted him to file two claims against his superiors and the County of Los Angeles in the United States District Court for the Central District of California: (1) a section 1983 claim based on violations of the First and Fourteenth Amendments for the retaliatory employment actions, and (2) a state law claim for intentional infliction of emotional distress.[16] The defendants filed a motion for

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[9] Ceballos v. Garcetti, 361 F.3d 1168, 1170-71 (9th Cir. 2004). Ceballos served as a deputy district attorney since 1989. *Id.* In 1997 or 1998, he was assigned to the district attorney's office in Pomona, California, where, one year later, he was promoted to a calendar deputy. *Id.* In this capacity, he exercised certain supervisory responsibilities over two-to-three deputy district attorneys as a part of his prosecutorial duties. *Id.*

[10] *Garcetti*, 547 U.S. at. 413.

[11] *Id.*

[12] *Id.* at 414.

[13] *Id.* A "motion to traverse" essentially refers a motion "to challenge" the validity of the warrant in question. *See id.* at 413-14.

[14] *Ceballos*, 361 F.3d at 1171. *See generally* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution). The *Brady* decision made a significant impact on criminal litigation by illuminating the constitutional and ethical obligations of prosecutors in assuring that defendants receive fair trials. Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 686 (2006). Despite this, some argue that *Brady*'s promise of transforming criminal trials to a genuine search for the truth has not been kept since judicial enforcement of the provisions has been inconsistent and new rules regarding what constitutes "materiality" have given prosecutors greater ability to circumvent the rule and exercise greater discretion to suppress favorable evidence without violating due process. *Id.* at 687, 689, 714.

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

[16] Ceballos v. Garcetti, No. CV 00-11106 AHM (AJWx), 2002 U.S. Dist. LEXIS 28039, at *5-8 (C.D. Cal. January 30, 2002). Specifically, according to Ceballos, the retaliatory employment actions included: (1) reassignment from his position as calendar deputy to a trial deputy position; (2) no further assignments to murder cases; (3) denial of a promotion; and (4) the unappealing option of either remaining in the Pomona branch to carry out the typically low-level task of filing misdemeanors or transferring to another branch. *Ceballos*, 361 F.3d at 1171-72. This latter option was described by Ceballos as "Freeway Therapy," a practice of punishing deputy district attorneys by assigning them to a branch that requires them to commute a long way to work. *Id.* at 1171 n.2.

summary judgment, asserting that Ceballos' speech was not protected by the First Amendment, and even if it was, the right violated was not "clearly established" so as to prevent the defendants from successfully asserting "qualified immunity" in defense to his claims.[17]

The district court granted the defendants' motion for summary judgment as to Ceballos' section 1983 claim and dismissed the remaining state law claim, holding that Ceballos' speech was not protected by the First Amendment since the memorandum was written as a part of his duties as a prosecutor.[18] On appeal, the United States Court of Appeals for the Ninth Circuit reversed the lower court's ruling, finding that Ceballos' speech warranted First Amendment protection since it addressed a matter of public concern and because his interest in the speech outweighed the government's interest in efficiently managing its operations.[19] Using circuit precedent to guide its reasoning,[20] the court found no support for the contention that an employee's speech is deprived of protection whenever the views are expressed pursuant to a work responsibility.[21] Justice O'Scannlain specially concurred, claiming that although the court's decision was controlled by circuit precedent, the precedent should be overturned since it ignored the distinction established by the United States Supreme Court between speech undertaken as a "citizen" and speech undertaken as an "employee."[22]

The defendants appealed the decision of the United States Court of Appeals for the Ninth Circuit and the United States Supreme Court granted certiorari to decide whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties.[23]

II. LEGAL BACKGROUND

The United States Supreme Court has recognized continuously that the government may not deny a benefit to an individual on a basis that infringes upon that individual's constitutionally protected interests, particularly when it comes to freedom of speech.[24] At the same time, the Court has also

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[17] Ceballos v. Garcetti, No. CV 00-11106 AHM (AJWx), 2002 U.S. Dist. LEXIS 28039, at *11-12 (C.D. Cal. January 30, 2002). To determine whether a public official is shielded from liability for a violation of statutory or constitutional rights through qualified immunity, one must discern first whether a constitutional violation occurred, whether the right was clearly established at the time of the improper act, and if so, whether the conduct was a reasonable mistake of law or fact. Ceballos v. Garcetti, No. CV 00-11106 AHM (AJWx), 2002 U.S. Dist. LEXIS 28039, at *11-12 (C.D. Cal. January 30, 2002) (citing Saucier v. Katz, 533 U.S. 194 (2001)).

[18] Ceballos v. Garcetti, No. CV 00-11106 AHM (AJWx), 2002 U.S. Dist. LEXIS 28039, at *22-23 (C.D. Cal. January 30, 2002). Furthermore, even if the speech *was* protected, the district court reasoned that such a right was not "clearly established" for qualified immunity purposes since a reasonable official may have believed that the speech was not protected by the First Amendment. *Id.* at 20.

[19] Ceballos v. Garcetti, 361 F.3d 1168, 1185 (9th Cir. 2004).

[20] *See id.* at 1174-75. The United States Court of Appeals for the Ninth Circuit relied heavily on its past decision in *Roth v. Veteran's Administration of the United States*, 856 F.2d 1401 (9th Cir. 1988), where it held that an employee who was terminated after exposing his employer's corruption in reports prepared as a part of his job responsibilities could not be denied First Amendment protection merely because his speech occurred pursuant to his duties. *Id.* at 1175.

[21] *Id.* at 1174-75. The court also proceeded to list numerous decisions by courts in others circuits which agreed with its contention that an employee's speech can still warrant First Amendment protection when undertaken pursuant to employment duties. *Id.* at 1176-77.

[22] *Id.* at 1186-87 (O'Scannlain, J., specially concurring).

[23] *Garcetti*, 547 U.S. at 417.

[24] Perry v. Sindermann, 408 U.S. 593, 598 (1972) (holding that a college professor's public criticism of the college's Board of Regents was a constitutionally protected matter of public concern and thus could not serve as a ground for

recognized that when the government acts as an employer as opposed to a sovereign, the need for it to achieve its goals as effectively and efficiently as possible warrants greater control in regulating the speech of its employees.[25] As a result of these opposing interests, the United States Supreme Court has employed a balancing analysis which enables it to weigh the interests of both the public employee and the government employer in determining whether the First Amendment protects the speech of a public employee.[26] The Court's reasoning in these cases further reflects a continued emphasis on the societal value inherent in the speech of public employees, as well as a commitment to maintaining an informed citizenry.[27] Lastly, the Court's treatment of cases involving speech in government-funded programs, which have informed its handling of cases involving government employees, has shifted to a focus on whether or not the government is using the funding to convey its own message, in turn giving the Court a freer hand in extending First Amendment protection to funding grantees.[28]

A. *The United States Supreme Court Uses the Pickering Balancing Test to Balance Both the Interests of the Employee and the Government Employer in Determining whether Speech is Protected*

The test for determining whether a government employee's speech is protected by the First Amendment originated in *Pickering v. Board of Education of Township High School District 205*, where a public school teacher was dismissed from his position after criticizing the school board in a local newspaper.[29] The test set forth by the United States Supreme Court involved a balancing of the interests of the public employee, as a citizen, in commenting upon matters of public concern, and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[30]

The *Pickering* balancing test was further defined in *Connick v. Myers*, where an employee was dismissed from her position at a district attorney's office after circulating a questionnaire throughout the office that addressed such things as office morale and transfer policies.[31] Finding that the use of the distinction set forth in *Pickering* between speech as an "employee" and speech as a "citizen" both served

professor's termination). *See also* Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 605-606 (1967) ("[T]he theory that public employment may be subject to any conditions has been uniformly rejected.").

[25] Waters v. Churchill, 511 U.S. 661, 677-78 (1994) (plurality opinion) (finding that when there is question as to what a public employee said, and where a reasonable supervisor would realize that there is a substantial likelihood that what was actually said was protected speech, the employer must exercise the care that a reasonable manager would use in making employment decisions).

[26] *See, e.g.*, Bd. of County Comm'rs, Wabaunesee County, Kan. v. Umbehr, 518 U.S. 668 (1996); Rankin v. McPherson, 483 U.S. 387 (1987); Connick v. Myers, 461 U.S. 138 (1983); *Perry*, 408 U.S. 593; Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will County, Ill., 391 U.S. 563 (1968).

[27] *See, e.g.*, City of San Diego, Cal. v. Roe, 543 U.S. 77 (2004); United States v. Nat'l Treasury Employees Union, 513 U.S. 454 (1995); *Pickering*, 391 U.S. at 572.

[28] *See* Legal Serv. Corp. v. Velazquez, 531 U.S. 533 (2001); Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819 (1995); Rust v. Sullivan, 500 U.S. 173 (1991).

[29] *Pickering*, 391 U.S. at 566. The teacher attacked the school board's handling of its past proposals to raise revenue, particularly the ways in which it allocated the funds between athletic and educational programs. *Id.*.

[30] *Id.* at 568. The Court used four factors as a means to assure that the interests of the public employee and the government employer were properly balanced: (1) whether the statements were directed to persons with whom the speaker would normally be in contact with in the course of his daily work; (2) whether the statements had an adverse effect on discipline by immediate superiors or harmony among co-workers; (3) whether the employment relationship in question was the kind for which it can be claimed that personal loyalty and confidence were necessary for proper functioning; and (4) whether the statements in any way impeded upon the employee's proper performance of his duties or interfered with the regular operation of the office. *See id.* at 569-70, 572-574.

[31] *Connick*, 461 U.S. at 141. The employee engaged in this act after being informed that she was going to be transferred to another division against her wishes. *Id.* at 140. Frustrated, the employee claimed that she told her supervisors that she was going to research whether her concerns were shared by others in the office. *Id.* at 141.

as a limitation on the speech that could be protected by the First Amendment, as well as a reflection of the fact that government offices cannot function if every employment decision became a constitutional matter,[32] the United States Supreme Court reformulated the *Pickering* rule into a two-part inquiry.[33] The threshold question became whether or not the employee was speaking as a citizen on a matter of public concern and *not* as an employee on matters of personal interest.[34] Upon a finding that a statement *is* a matter of public concern, a judge must then engage in the *Pickering* balancing test to weigh the interests of both the public employee and government employer in determining whether the employee's speech should be protected.[35]

B. *The United States Supreme Court's Reasoning Emphasizes the Societal Interest in Protecting the Speech of Public Employees*

The United States Supreme Court has for a long time emphasized the significance of society's interest in the speech of government employees.[36] Beginning with *Pickering v. Board of Education*, the Court stressed the importance of free and open debate in achieving informed decision making.[37] Indeed, because public employees are often in the best position to have definite and informed opinions on subject matter relating to their jobs, the Court reasoned that these employees require First Amendment protection so that they may speak freely without fears of retaliation.[38]

The Court again described the importance of society's interest in the speech of public employees in *United States v. National Treasury Employees Union*, where federal employees contested a federal law prohibiting all federal employees from accepting honorarium for making speeches or writing articles.[39] Finding the legislation to be unconstitutional,[40] the Court pointed to the significant burden that the legislation placed on the public's right to read and hear what the government employees would otherwise

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[32] *Connick*, 461 U.S. at 143.

[33] *Id.* at 146.

[34] *Id.* at 146. To determine whether a given statement is of public concern, courts can look to the content, form, and context of the statement, as revealed by the whole record. *Id.* at 147-48. Furthermore, public concern does not equate to a requirement that the speech be undertaken in public. *See* Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 695-96 (1979) (holding that a public employee does not forfeit his protection against freedom of speech even if he decides to express his views privately instead of publicly).

[35] *Id.* at 149. When it comes to a balancing analysis, the state's burden in justifying a particular employment action varies depending on whether the employee's speech more substantially involves a matter of public concern. *Id.* at 150, 152. *See also* Rankin v. McPherson, 483 U.S. 387 (1987). In *Rankin*, the United States Supreme Court applied the balancing test in a case where an employee working in the county constable's office was dismissed after she was overheard telling a co-worker that she hoped an attempt on the President's life would be successful. *Id.* at 381-82. The Court held that the speech was of public concern due to the context in which it was spoken, and that, given the employee's position in the office and the nature of her statement, the interest of the government employer did not outweigh the employee's interest in First Amendment protection. *Id.* at 387, 392.

[36] *See, e.g.*, City of San Diego, Cal. v. Roe, 543 U.S. 77, 82-83 (2004); United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 470 (1995); Pickering v. Bd. of Educ. Of Twp. High Sch. Dist. 205, Will County, Ill., 391 U.S. 563, 571-72 (1968).

[37] *Pickering*, 391 U.S. at 571-72.

[38] *Id.* at 572.

[39] *Nat'l Treasury Employees Union*, 513 U.S. at 470.

[40] *Id.* at 477. The Court held that the speeches and articles given by federal employees who worked in lower level government positions were considered to be of public concern since the speech was addressed to a public audience, took place outside of the workplace, and involved content largely unrelated to their government employment. *Id.* at 466. Furthermore, because of the large number of public speakers affected by the legislation, as well as the fact that the law at issue was chilling speech before it even occurred, the government faced a heavier burden in showing that its interests outweighed the plaintiffs' First Amendment rights for purposes of the *Pickering* balancing analysis. *Id.* at 468.

have written and said.[41] The fact that the legislation created a risk that employees would be prevented from making significant contributions to American culture such as a "Melville or Hawthorne" led the Court to view the honoraria ban as the type of burden that typically constitutes an infringement of speech in violation of the First Amendment.[42]

Lastly, the United States Supreme Court recently reiterated the significance of the speech of public employees in *City of San Diego v. Roe*,[43] where it explained that the *Pickering* analysis reflects the Court's recognition that government employees have informed opinions on public matters, and thus to deny the employees First Amendment protection would deprive society of informed opinions on public issues.[44] In fact, the Court noted that "[t]he interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it."[45]

C. *The United States Supreme Court Extends First Amendment Protection to Cases Involving Government-Funded or State-Sponsored Speech*

The United States Supreme Court's treatment of cases involving government subsidies or state-sponsored speech, which influences its handling of government employment cases,[46] has shifted to a focus on whether or not the funding is a means of conveying governmental speech,[47] and has thereby given the Court greater leeway in protecting the speech of funding grantees.[48] In *Rust v. Sullivan*, the Court rejected challenges to a government-funded program,[49] holding that the government can selectively fund a program it believes to be in the public interest without funding alternative programs, and is entitled to define the limits of the programs to which it decides to appropriate funds.[50]

Rust was later explained in terms of governmental speech[51] in *Rosenberger v. Rector and Visitors of University of Virginia*, where the Court held that the university's denial of funding to a Christian-focused

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[41] *Id.* at 470.
[42] *Id.*
[43] City of San Diego, Cal. v. Roe, 543 U.S. 77 (2004) (holding that the City of San Diego was not barred by the First Amendment from terminating the employment of a police officer who was discovered selling pornography on the internet since the officer's activities did nothing to contribute to the informed decision making of the public and thus could not qualify as a matter of public concern).
[44] *Id.* at 82-83.
[45] *Id.*
[46] *See* Bd. of County Comm'rs, Wabaunesee County, Kan. v. Umbehr, 518 U.S. 668, 680 (1996) ("Our unconstitutional conditions precedents span a spectrum from government employees . . . [to] recipients of small government subsidies . . . ."); Ceballos v. Garcetti, 361 F.3d 1168, 1191 (9th Cir. 2004) (O'Scannlain, J., specially concurring) (explaining that the circuit precedent which holds that the First Amendment protects speech offered by a public employee in the scope of one's duties creates a "schism" between case law addressing speech by public employees and speech that is government-funded).
[47] *See* Legal Serv. Corp. v. Velazquez, 531 U.S. 533 (2001); Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819 (1995); Rust v. Sullivan, 500 U.S. 173 (1991).
[48] *See Legal Serv. Corp.*, 531 U.S. at 541-42; *Rosenberger*, 515 U.S. at 833-34.
[49] *Rust*, 500 U.S. at 193-94. The legislation challenged was Title X of the Public Health Services Act, which provided federal funding for family-planning services. *Id.* The Act provided that none of the funds could be used in programs where abortion was a method of family planning. *Id.* The plaintiffs included Title X grantees and doctors who supervised Title X funds, who alleged that the statute constituted an infringement of speech as a form of viewpoint discrimination. *Id.* at 181.
[50] *Id.* at 193-94.
[51] *Legal Serv. Corp.*, 531 U.S. at 541; *Rosenberger*, 515 U.S. at 833.

student newspaper constituted impermissible viewpoint discrimination[52] in violation of the First Amendment.[53] The Court distinguished between the circumstances of the case at hand and *Rust*, explaining that the government can regulate the content of what is or is not expressed when the state is the speaker, or when it enlists private entities to convey its own message.[54] Where, however, the government expends funds to encourage views from private speakers, these private citizens are conveying their own messages, and thus the government cannot use funding to discriminate against this speech based on viewpoint.[55]

The United States Supreme Court expanded upon this approach to government funding cases in *Legal Services Corporation v. Velasquez*, where it invalidated a government funding program which prevented lawyers working for funding grantees from challenging any state or federal welfare laws.[56] Applying the reasoning utilized in *Rosenberger*, the Court explained that the program was meant to facilitate private speech, not to promote a governmental message, and thus the speech between lawyers and clients and lawyers and judges warranted First Amendment protection.[57]

III. THE COURT'S REASONING

In *Garcetti v. Ceballos*, the United States Supreme Court reversed the judgment of the United States Court of Appeals for the Ninth Circuit, holding that the First Amendment does not protect the expressions of an employee made pursuant to official responsibilities from managerial discipline.[58] Writing for the majority, Justice Kennedy began his opinion with a recitation of the general principle that the First Amendment protects a public employee's right to speak as a citizen on a matter of public concern, and further explained how *Pickering* and its progeny have typically guided determinations of whether the speech of public employees is protected by the First Amendment.[59] Thereafter, the Court noted that its past decisions have sought to promote the needs of government employers and the interests of employees and society.[60]

The Court explained that the "controlling factor" in the case at hand was the fact that Ceballos'

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[52] *Rosenberger*, 515 U.S. at 832. Viewpoint discrimination is a form of content discrimination, the difference being that in viewpoint discrimination, one is not just discriminating against the content of the speech itself, but the views behind the speech. *Id.* at 829.

[53] *Id.* at 837. The plaintiffs were editors of a student newspaper called "Wide Awake Productions," which was denied funding for printing costs due to a university policy that prohibited the allocation of funds for "religious activity." *Id.* at 825-27.

[54] *Id.* at 833-34.

[55] *Id.* at 834.

[56] Legal Serv. Corp. v. Velazquez, 531 U.S. 533, 549 (2001). The legislation challenged was the Legal Services Corporation Act, which established the Legal Services Corporation (LSC) as a non-profit corporation that would distribute funds appropriated by Congress to eligible grantee organizations for the purpose of providing financial support for legal assistance to those who could not afford it. *Id.* at 536. The grantee organizations receiving the funds also hired and supervised lawyers who assisted indigent clients. *Id.* These lawyers were prevented from challenging or giving advice to clients that suggested a challenge to state or federal welfare laws as a condition of receiving funding. *Id.* at 537.

[57] *Id.* at 542. The Court further reasoned that even in cases where the government creates a limited forum for speech or has imposed conditions on government subsidies, it still cannot prohibit speech in a way that undermines the traditional and inherent functioning of the participants in the program. *Id.* at 543-44.

[58] *Garcetti*, 547 U.S. at 423.

[59] *Id.* at 417-18.

[60] *Id.* at 419-20.

expressions were carried out pursuant to his duties as a deputy district attorney.[61] In other words, because Ceballos' memo was not the result of his own volition, but an act completed because it was what he was employed to do, the Court found this case to be distinguishable from other government employment cases typically analyzed according to a *Pickering* balancing test.[62] As a result of this distinction, the Court created a new rule which stated that when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and thus their speech is not protected by the First Amendment.[63] The Court justified its creation of this rule, contending that because public employees do not speak as citizens when engaged in speech pursuant to employment duties, restrictions on this kind of speech do not infringe upon the liberties that individuals might enjoy as private citizens.[64]

Justice Stevens dissented, arguing that the Court's finding that speech pursuant to one's duties is never protected is too absolute.[65] Justice Stevens further expressed misgivings with respect to the impact of the new rule in giving employees an incentive to voice concerns publicly before first discussing such matters with their superiors.[66]

In a separate dissent, Justice Souter criticized the majority as having little justification for its creation of a bright-line rule since the rule fails to take into account the fact that citizens may place a high value on speech when spoken pursuant to one's duties.[67] In addition, Justice Souter argued that the *Pickering* balancing test would have been appropriate in this case, since it adequately accounts for the interests of both the government employer and employee.[68]

Justice Breyer also separately dissented, noting that there are times when there is a "special demand" for constitutional protection of speech, where the government's interest in restricting speech is limited, and where administrable standards are available in adjudicating such cases.[69] In these circumstances, Justice Breyer asserted, courts should apply the *Pickering* balancing test even though the speech is undertaken pursuant to employment duties.[70]

IV. ANALYSIS

In *Garcetti v. Ceballos*, the United States Supreme Court held that when public employees speak pursuant to their official duties, the First Amendment does not shield the speech from employer discipline.[71] Thus, even though the *Garcetti* Court acknowledged both the *Pickering* balancing test as well

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[61] *Id.* at 421. The Court explained that the fact that Ceballos expressed the views at issue in his office rather than in public, as well as that fact that the topic of the memorandum dealt with the subject of Ceballos' employment, was not dispositive in determining whether or not the speech was protected. *Id.* at 420-21.
[62] *Id.* at 1960.
[63] *Id.*
[64] *Id.*
[65] *Id.* at 426 (Stevens, J., dissenting).
[66] *Id.* at 427 (Stevens, J., dissenting).
[67] *Id.* at 430 (Souter, J., dissenting).
[68] *Id.* at 434 (Souter, J., dissenting).
[69] *Id.* at 446 (Breyer, J., dissenting).
[70] *Id.* at 447 (Breyer, J., dissenting). Justice Breyer opined that Ceballos' case presented this "special demand" for constitutional protection because the speech at issue was professional speech, subject to the regulations of the legal profession, and secondly because Ceballos, as a prosecutor, had constitutional obligation to convey certain evidence to the defense. *Id.* at 446-47.
[71] *Id.* at 422-23

as the interests at stake when determining whether or not speech is protected,[72] the Court still proceeded to devise a bright-line rule that dilutes the interests of public employees in favor of government employers.[73] Secondly, the Court's rule undercuts its previous recognition of the societal interest in speech undertaken by public employees, which further undermines its past efforts to maintain an informed citizenry.[74] Thirdly, the majority's decision is inconsistent with the recent developments in government funding cases, where exceptions have arisen for protected speech depending upon whether the funding is used to convey a governmental message.[75] If the Court had abided by precedent in applying the *Pickering* balancing test instead of creating a bright-line rule, it could have determined effectively the question of whether a public employee's speech is protected when undertaken in the scope of one's duties without having to infringe upon the valuable interests of public employees and society in protected speech.[76]

A. *The* Garcetti *Court's Departure from the Pickering Balancing Test to a Bright-Line Rule Undermines the Interests of Public Employees in Favor of Governmental Control*

The *Garcetti* Court's application of a bright-line rule to determine whether a public employee's speech should be protected substantially diminishes the value of employee speech in favor of governmental control.[77] Indeed, the Court's bright-line rule completely removes from protection any speech carried out in the course of one's duties, regardless of its value to the individual.[78] That one's speech can be characterized as "routine" in carrying out one's employment duties, however, does not necessarily mean that the content of the speech is any less valuable to the employee.[79] The Court's bright-line rule erroneously disregards the fact that an employee can speak as a citizen when completing work in the course of his or her duties, and that in fact, many citizens intentionally pursue certain employment positions because they value the subject matter handled in that position.[80]

Moreover, the majority's ruling further undermines the interests of public employees in protected speech by placing them in a position where they are fearful of the repercussions that may result from reporting incidences of wrongdoing or incompetence.[81] As indicated by Justice Souter in his

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[72] *Id.* at 416-20
[73] *See infra* Part IV.A.
[74] *See infra* Part IV.B.
[75] *See infra* Part IV.C.
[76] *See Garcetti*, 547 U.S. at 434 (Souter, J., dissenting).
[77] *See id.* at 431 (Souter, J., dissenting) (explaining that an individual's value in his speech is no less when speaking pursuant to employment duties, yet the majority's rule enables individuals to be without First Amendment recourse for unfavorable employment actions based on speech). *See also* Bd. of County Comm'rs, Wabaunesee County, Kan. v. Umbehr, 518 U.S. 668, 678-79 (1996) (holding that the use of a bright-line rule to distinguish employees from independent contractors when determining whether speech is protected would diminish the interest of independent contractors by giving the government "carte blanche" to terminate them for exercising First Amendment rights, and thus the balancing analysis is preferable).
[78] *See Garcetti*, 547 U.S. at 421; *id.* at 427 (Stevens, J., dissenting).
[79] *See id.* at 431-32 (Souter, J., dissenting) (noting that the value an employee places on one's speech is no less, and may even be greater, when that employee speaks pursuant to assigned duties); Ceballos v. Garcetti, 361 F.3d 1168, 1177 (9th Cir. 2004).
[80] *See Garcetti*, 547 U.S. at 432 (Souter, J., dissenting) ("[T]he very idea of categorically separating the citizen's interest from the employee's interest ignores the fact that the ranks of public service include those . . . whose civic interest rises highest when they speak pursuant to their duties . . . ."); Waters v. Churchill, 511 U.S. 661, 674 (1994) (plurality opinion) ("[A] government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters.").
[81] *See* Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589 (1967) (invalidating statutes that required the termination of public employees for treasonable or seditious speech since it would make professors fearful

dissent, the effect of the Court's holding is that an "anomaly" is created between the treatment of those who complain about the actions of their employer on subjects *related* to their job duties, and those whose jobs *require* them to report on subjects that may bring them face-to-face with wrongdoing and incompetence.[82] Because the *Garcetti* Court now establishes that the speech of the latter employee is unprotected, there is little incentive for these employees to discuss such instances of wrongdoing with government employers due to fears of retaliation.[83]

Furthermore, there is little justification for the line drawn by the majority in light of the fact that the weighing of interests undertaken in the *Pickering* balancing test already captures the concerns expressed by the Court as the basis for adopting its bright-line rule.[84] Among the reasons cited by the Court in support of its creation of the rule was its concern of having an intrusive judiciary and the need for government employers to have sufficient discretion in managing operations.[85] While these factors are legitimate concerns, they are already accounted for in the *Pickering* balance test, which contemplates specifically whether an employee's speech has impeded upon the operation of the employer's office, and which has consistently involved the avoidance of an intrusive judiciary.[86] Thus, given the fact that the *Pickering* balancing test already recognizes the interests of both the government employer and the employee without completely eliminating from protection the potentially valuable speech of government employees, there is little justification for the *Garcetti* Court's adoption of a bright-line rule.

B. *The Garcetti Court's Bright-Line Rule Undercuts the Court's Previous Emphasis on Society's Interest in the Speech of Public Employees*

Next, the *Garcetti* Court's bright-line rule undermines the Court's previous efforts to uphold society's interests in the speech of public employees by removing *any* possibility of First Amendment protection from speech carried out in the course of one's duties, even when the speech is politically or socially valuable.[87] This result is at odds with the Court's continued recognition of the fact that government employees are often in the best position to report on the problematic aspects of the agencies for which they work, and thus fails to account for the fact that speech in the scope of one's duties can be extremely valuable to society.[88]

The Court's bright-line rule also leaves without constitutional protection those employees whose work brings them face-to-face with government wrongdoing, thereby discouraging these employees from reporting incidences of wrongdoing or incompetence for fear that the speech would negatively impact their employment status.[89] Without the informed opinions of these government employees, citizens will lack the knowledge and information necessary to carry on meaningful debates on important

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of retaliation and stifle speech in an academic setting); Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will County, Ill., 391 U.S. 563, 574 (1968) ("[T]he threat of dismissal from public employment is nonetheless a potent means of inhibiting speech.").

[82] *Garcetti*, 547 U.S. at 431 (Souter, J., dissenting).

[83] *See id.* at 427 (Stevens, J., dissenting) (explaining that the majority's bright-line rule results in incentives for employees to voice concerns publicly before speaking with superiors due to the lack of First Amendment protection).

[84] *Id.* at 431, 434 (Souter, J., dissenting).

[85] *Id.* at 422-23.

[86] *See, e.g.*, Bd. of County Comm'rs, Wabaunesee County, Kan. v. Umbehr, 518 U.S. 668, 681 (1996); Connick v. Myers, 461 U.S. 138, 143 (1983); Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will County, Ill., 391 U.S. 563, 572 (1968).

[87] *See Garcetti*, 547 U.S. at 432 (Souter, J., dissenting).

[88] *See id.* at 1432 (Souter, J., dissenting); City of San Diego, Cal. v. Roe, 543 U.S. 77, 82 (2004); *Pickering*, 391 U.S. at 572.

[89] *See Garcetti*, 547 U.S. at 433 (Souter, J., dissenting); *see supra* note 81.

public issues.[90] This in turn not only impedes upon the soundness of the public's decision making, but also undercuts the notion of an informed citizenry, the value of which has been so often recognized by the Court.[91] Thus, while government employers certainly have a legitimate and important interest at stake when restricting speech of employees, this interest does not necessitate the enactment of a rule which completely removes the possibility of protection for such speech, and which is inconsistent with the Court's continued emphasis on the value of debate and an informed citizenry.[92]

C. *The Garcetti Court's Bright-Line Rule is Inconsistent with the Exceptions Created for Protected Speech in Government Funding Cases*

Lastly, the rule articulated in *Garcetti* is inconsistent with case law addressing government-funded speech, where exceptions have been created for First Amendment protection depending on whether the funding is meant to impart a governmental message.[93] The *Garcetti* Court mistakenly supports its bright-line rule with the premise that government employers should be able to regulate speech that occurs within the scope of an employee's duties in the same way that the government, as provider of funds, can dictate the content of speech within a funding program.[94] This contention, however, disregards the United States Supreme Court's recent recognition of the fact that not every funding grantee is required to convey a governmental message, and thus grantees are not entirely without First Amendment protection for their speech.[95] Similarly, there exist certain government employment positions which do not require the espousal of substantive views on behalf of the government, and which thus do not require the same level of governmental control over speech.[96] Surely, if the government's control over the content of speech in government-funding cases is not absolute, then it is inconsistent to hold absolutely that all speech pursuant to government employment duties is without First Amendment protection from employer discipline.[97] Accordingly, it is at odds with United States Supreme Court precedent for the *Garcetti* Court to create a bright-line rule preventing all speech in the scope of one's duties from protection, while at the same time recognizing exceptions to governmental control over speech in government funding cases.

V. CONCLUSION

By creating a bright-line rule that removes all speech pursuant to a public employee's duties from

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[90] *See City of San Diego*, 543 U.S. at 82; *Pickering*, 391 U.S. at 572 (noting that free and open debate is necessary for informed decision making and thus public employees must be able to speak without fears of retaliatory dismissal). *See also* Waters v. Churchill, 511 U.S. 661, 672 (1994) (plurality opinion) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)) ("The First Amendment reflects the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'").

[91] *See, e.g.*, *City of San Diego*, 543 U.S. at 82; United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 470 (1995); *Pickering*, 391 U.S. at 572.

[92] *See Garcetti*, 547 U.S. at 434 (Souter, J., dissenting).

[93] *See id.* at 438 (Souter, J., dissenting).

[94] *Id.* at 421-22

[95] *See* Legal Serv. Corp. v. Velazquez, 531 U.S. 533, 542 (2001) (finding that a federally-funded program was designed to promote private speech between attorneys and clients and not a governmental message, and thus the speech could be protected by the First Amendment); Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 833-34 (1995) (explaining that First Amendment protection may be extended where the government expends funds to encourage views from private speakers).

[96] *Garcetti,* 547 U.S. at 438 (Souter, J., dissenting).

[97] *See id.* at 437-38 (finding no authority in government funding cases for the notion that government may exercise plenary control over every comment made by a public employee in doing his job).

First Amendment protection, the *Garcetti* court has unjustifiably diminished the interests of both public employees and society in favor of governmental control.[98] The majority's rule also results in an inconsistency between its treatment of speech in government employment cases and cases involving government-funded and state-sponsored speech.[99] If the *Garcetti* Court had followed precedent by using the *Pickering* balancing analysis to weigh *both* the interests of the public employee and government employer, the Court could have decided effectively the issue at hand in *Garcetti* without infringing upon the valuable First Amendment rights of public employees.[100]

[98] *See supra* Part IV.A.
[99] *See supra* Part IV.B.
[100] *See supra* Part IV.C.