No. 081571 JUN 19 2009

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the inquiry into whether a public employee's speech was within the scope of his or her "official duties" under *Garcetti v. Ceballos*, 547 U.S. 410 (2006) present a pure question of law for the court, as determined by a majority of circuits, or a mixed question of fact and law to be submitted in the first instance to a jury, as determined by the Ninth Circuit?

2. What criteria must be applied in determining whether a public employee's speech was within the scope of his or her official duties?

3. Absent specific criteria for determining when public employee speech is pursuant to an official duty, are supervisors shielded by qualified immunity for allegedly concluding they could discipline a deputy district attorney for comments made during a meeting with the District Attorney and his executive staff on matters relating to a task force investigation of which he was a part, although the comments were not within the scope of his particular assignment?

4. What is the scope of the First Amendment interest a public employee may have, if any, in an interview given by his or her attorney to the press about the public employee's dispute with his employer?

PARTIES TO THE PROCEEDINGS

Petitioners (defendants and appellants below):

STEVE COOLEY, STEVEN SOWDERS, CURT LIVESAY, ANTHONY PATCHETT, and CURTIS HAZELL

Respondent (plaintiff and appellee below):

DAVID ENG

In addition, the County of Los Angeles is a defendant in the underlying action and was a nominal appellant below, although no appellate argument was presented on its behalf. David Torres was a defendant below, but was not a party to the appeal.

There are no corporations involved in this proceeding.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Steve Cooley, Steven Sowders, Curt Livesay, Anthony Patchett, and Curtis Hazell respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 552 F.3d 1062 (9th Cir. 2009) and is reprinted in the Appendix to this petition ("App.") at 1-34. The court's order denying rehearing and rehearing en banc is unreported. App. 54-55. The order of the United States District Court for the Central District of California denying petitioners' motion for summary judgment is unreported. App. 35-53.

JURISDICTION

The Ninth Circuit issued its decision on January 14, 2009. App. 1. Petitioners were granted an extension of time to February 4, 2009 to file a petition for rehearing. Their petition for rehearing and rehearing en banc was denied on March 26, 2009. App. 54-55. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

42 U.S.C. § 1983:

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.

U.S. Const. amend. I:

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.

STATEMENT OF THE CASE

On April 12, 2005, respondent David Eng ("Eng") filed a complaint alleging, *inter alia*, a violation of his civil rights under 42 U.S.C. § 1983 and naming as defendants Los Angeles County District Attorney Steve Cooley and a number of then current and former supervisory employees in the District Attorney's Office, Steven Sowders, Curt Livesay, Anthony Patchett, and Curtis Hazell, among others. The operative second amended complaint, filed July 5, 2006, alleged that Eng, a deputy district attorney, had been demoted, suspended without pay, subjected to criminal prosecution, and upon return to work, passed over for promotion. These acts were allegedly in retaliation for Eng's exercise of his right to free speech under the First Amendment. Specific instances of speech for which Eng claimed protection under the First Amendment were as follows:

- As a member of a Task Force investigating the planning and construction of the Los Angeles Unified School District's Belmont Learning Complex ("Belmont"), Eng had recommended no criminal charges for violations of environmental laws be filed against anyone associated with Belmont;
- During a meeting with the District Attorney and his executive staff at which Eng had presented his recommendation, he had been critical of leaks to the Internal Revenue Service ("IRS") by another Task Force member to the

effect that the use of Certificates of Participation for financing the purchase of the Belmont property was fraudulent, with the effect that the school district would lose its tax-exempt status, when in Eng's view the use of these Certificates of Participation was legal; he had argued too that the District Attorney should remedy the damage the improper leak to the IRS had caused;

- Eng's attorney had been interviewed by the *Los Angeles Times*, which thereafter published an article entitled, "Cooley is Accused of Payback Prosecution" in which the attorney alleged Eng had been set up for prosecution as retaliation for his conclusion that no crimes had been committed with respect to Belmont, and for criticizing the improper involvement of the IRS in the investigation of Belmont.

Petitioners moved for summary judgment. Citing *Garcetti v. Ceballos*, 547 U.S. 410 (2006), they contended that Eng's recommendation against criminal charges and his comments about the leaks to the IRS fell within the scope of his duties, and thus were not protected by the First Amendment. Petitioners further contended they were entitled to qualified immunity because of the absence of clearly established law as to whether Eng's on-the-job speech was protected.

As to the attorney's statements to the *Los Angeles Times*, petitioners contended they were entitled to qualified immunity because of the absence of clearly established law as to whether Eng could assert a First Amendment claim with regard to the speech of his attorney. Earlier in the litigation, the district court, Judge Margaret M. Morrow, had ruled that Eng had third-party standing to assert a claim for violation of his attorney's First Amendment rights. *See* App. 49.

In opposing the summary judgment motion, Eng focused primarily on his comments about the leak to the IRS, contending that although members of the Task Force were not prohibited from working on any aspect of the Belmont investigation, he was not "duty-bound" to report on misconduct by fellow members of the Task Force, since the focus of his assignment had been environmental crimes. He did not address the issue of qualified immunity either in relation to his comments about the leak or his attorney's statements to the press.

The district court, Judge Otis D. Wright, II, denied petitioners' motion for the most part. It determined that Eng's recommendation against filing criminal charges for environmental crime was part of his job and hence not protected. App. 48. However, it ruled there was a genuine issue of fact as to whether the statements Eng made regarding the leak to the IRS were part of his job or whether he was speaking as a private citizen on a matter of public concern. App. 49. Further, Judge Wright agreed with Judge

Morrow that Eng could assert a third-party claim based on the violation of his attorney's right to free speech. App. 49-50. The court denied qualified immunity, stating simply, "First Amendment protection is a clearly established constitutional right." App. 50.

Petitioners appealed the denial of qualified immunity. On January 14, 2009, the Ninth Circuit affirmed. Citing *Posey v. Lake Pend Oreille School Dist. No. 84*, 546 F.3d 1121, 1129-30 (9th Cir. 2008), the court held that for purposes of analyzing whether an employee's speech is protected, the question of whether a statement falls within an employee's job duties presents a mixed question of fact and law. App. 20 ("While 'the question of the scope and content of a plaintiff's job responsibilities is a question of fact,' the 'ultimate constitutional significance of the facts as found is a question of law'"). The district court's finding of a genuine issue of fact was not reviewable on interlocutory appeal, nor was its denial of qualified immunity because there was a genuine issue of fact as to whether the criticism of the leaks to the IRS was part of Eng's job; the court stated only that Eng had clearly established rights to speak as a citizen on a matter of public concern, assuming his version of the facts to be true. App. 10, 25, 31.

As to the *Los Angeles Times* interview, the court concluded Eng had a first-person constitutional interest in his attorney's speech to the press as a "natural corollary of the long-recognized First Amendment right to hire and consult an attorney." App. 14-15. The court affirmed the denial of qualified

immunity because it concluded this case merely called for the application of settled law to a "'new factual permutation,'" and petitioners were sufficiently on notice the government could not retaliate against a public employee for speech spoken by the employee's lawyer on the employee's behalf. App. 33.

On March 26, 2009, the court denied the petition for rehearing and for rehearing en banc. App. 54.

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. 547 U.S. at 421. Because it was undisputed in *Garcetti* that the public employee's speech was part of his job, the court declined to articulate specific standards for determining when an employee's speech falls within his or her official duties, noting only that the inquiry was a "practical one." 547 U.S. at 424. Three years after *Garcetti*, federal appellate courts are divided on the 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.

The Ninth Circuit, relying on its decision in *Posey*, in this case held that the issue of whether Eng spoke as a citizen or employee was a mixed question of law and fact. App. 20. Its ruling is consistent with

decisions of the Third Circuit, but in direct conflict with decisions of the First, Fifth, Tenth, Eleventh, and District of Columbia Circuits which have expressly held that the question of whether an employee spoke as a private citizen or as an employee is one of law for the courts.

It is vital that this Court address and resolve this 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. In some circuits cases are necessarily proceeding with built-in reversible error: if the plaintiff's role as speaker – employee or citizen – is an issue of fact, then the First, Fifth, Tenth, Eleventh and District of Columbia Circuits are depriving plaintiffs of their Seventh Amendment right to a jury trial on issues of fact; conversely, if the issue is one of law for the courts – as petitioners contend here – public employers and supervisory personnel are being subjected to the prolonged and unnecessary litigation of issues that should properly be determined by a court. Indeed, as occurred in this case and others before the Ninth Circuit, defendants are being effectively stripped of the protection of qualified immunity: district courts defer to the finder of fact on the question of whether an employee spoke as part of his or her duties or as a citizen – where the only dispute between the parties is that very question, not the evidence underlying it – and the appellate courts then decline review of the purported factual conflict,

and decline to decide the issue of qualified immunity because of that purported factual conflict.

Whether the issue is one of law for the court or of fact in the first instance for a jury, it is also vital that the Court now provide the framework it was unnecessary to provide in *Garcetti* for determining if a public employee's speech was part of the job, so that supervisors will be able to determine whether they can lawfully discipline an employee for speech.

As to a client's First Amendment interest in his or her attorney's speech, the Ninth Circuit has announced a broad rule with the potential for undermining *Garcetti*. Based on the First Amendment right to retain counsel to be one's advocate in court, the Ninth Circuit held that a public employee has a personal First Amendment interest in what his or her attorney says to the press, and denied qualified immunity on the basis of "common sense." App. 14, 17, 33. Under the Ninth Circuit's rule, a statement which may be unprotected because it falls within the scope of an employee's job responsibilities, when transmitted through an attorney to the press, becomes protected, because advocacy is not limited to the courtroom. *See* App. 15 n.3. Review should be granted to reject the Ninth Circuit's substitution of a common sense standard for qualified immunity for the "clearly established law" standard and to make clear that public employee speech has no greater protection when transmitted through an attorney than it would were the employee speaking directly.

I. THERE IS AN URGENT NEED TO RESOLVE THE CONFLICT BETWEEN CIRCUITS ABOUT WHETHER THE DETERMINATION OF WHETHER A PUBLIC EMPLOYEE'S SPEECH WAS PURSUANT TO JOB DUTIES IS A QUESTION OF LAW FOR THE COURTS OR A MIXED QUESTION OF LAW AND FACT REQUIRING INITIAL DETERMINATION BY A JURY.

A. Under *Garcetti*, Employee Speech That Is Part Of The Job Is Not Protected By The First Amendment.

In *Garcetti,* 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. 547 U.S. at 420-23. 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.

In *Garcetti*, the parties did not dispute that Ceballos wrote his memo pursuant to employment duties, so the court 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." *Id.* at 424. Instead, the court simply stated that the "proper inquiry is a practical one." *Id.*

Practical it may be, but whether that means the inquiry is a question of law or a mixed question of law and fact is disputed among the circuits. The court's intervention to resolve this fundamental issue is urgently needed.

B. The Circuits Disagree On Whether The *Garcetti* Inquiry Presents A Mixed Question Of Fact And Law, Or A Question Of Law For The Court.

Under this Court's employee-speech jurisprudence, the threshold issue for a First Amendment claim is whether the particular speech is protected. Before *Garcetti*, the answer turned on whether the employee spoke on an issue of public concern, and if so, whether the interest of the employee, as a citizen

commenting on matters of public concern, outweighed the interest of the government, as employer, in promoting the efficiencies of its operations. *Connick v. Meyers*, 461 U.S. 138, 147-48 (1983); *Pickering v. Board of Ed. Of Township High School Dist. 205*, 391 U.S. 563, 568 (1968). As this Court made plain, "[T]he inquiry into the protected status of speech is one of law, not fact." *Connick*, 461 U.S. at 148 n.7.

But the Ninth Circuit, followed by the Third Circuit, has concluded that *Garcetti* altered the nature of the inquiry into the protected status of speech by requiring an additional determination of whether or not the speech at issue was part of the employee's job; this issue, it concluded, presents a question of fact that must go to the jury, postponing the resolution of whether speech is protected until the end of the district court litigation. In so concluding, it has set up a conflict with the majority of circuits which have addressed the issue post-*Garcetti*.

1. The Ninth and Third Circuits hold that the *Garcetti* inquiry is a mixed question of fact and law, requiring any dispute about the scope of employment to be first resolved by a jury.

In *Posey v. Lake Pend Oreille School District No. 84*, the Ninth Circuit reversed summary judgment against a school "security specialist" who asserted his First Amendment rights had been violated when school officials allegedly retaliated against him after

he wrote a letter to them complaining about inadequate school security. 546 F.3d at 1124. The court acknowledged that an employee must establish that he or she engaged in constitutionally protected speech, as a threshold requirement in any First Amendment claim. *Id.* at 1126. 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 government employer. *Id.* Citing *Connick*, the court acknowledged that this two-stage inquiry into the "'protected status of speech is one of law, not fact.'" *Id.*

The court concluded, however, that *Garcetti* had added a "third stage" to the initial determination whether speech was protected under the First Amendment, "requiring a determination whether the plaintiff spoke as a public employee or instead a private citizen." *Id.* The court explained that while in *Garcetti* there had been no dispute that the memorandum at issue had been written in execution of the employee's official duties, in the case before it, there was a factual dispute as to the scope of the plaintiff's duties with respect to student safety. *Id.* at 1127. In light of the factual dispute, the court 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 1123, 1127, 1129.

The Ninth Circuit has since expressly reaffirmed *Posey* in two published decisions. As noted, in this case the court declined to address the issue of qualified immunity based upon the purported existence of a factual dispute concerning the scope of Eng's duties. In *Robinson v. York*, No. 07-56312, 2009 WL 1109534 (9th Cir. Apr. 27, 2009) (petition for certiorari pending, 08-1462), the court similarly rejected inquiry into qualified immunity based upon the existence of an alleged factual dispute as to the scope of duties.[1]

The *Posey* court observed that its conclusion 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) ("'whether a particular instance of speech is made within a particular plaintiff's job duties is a mixed question of fact and law'"); *but see Gorum v. Sessoms*, 561 F.3d 179, 184 (3d Cir. 2009) (whether speech is protected is a question of law, whether protected

[1] 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. 07-5670, 2008 WL 5077582 (9th Cir. Nov. 24, 2008) (petition for certiorari pending, 08-1082). 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.

speech was a substantial factor in alleged retaliatory action is a question of fact).

The *Posey* court also asserted its decision was consistent with case law in the Seventh and Eighth Circuits, but 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; the two Eighth Circuit cases cited by *Posey* pre-date *Garcetti*. *See Posey*, 546 F.3d at 1128 (citing *Casey v. City of Cabool*, 12 F.3d 799 (8th Cir. 1993); *Shands v. City of Kennett*, 993 F.2d 1337 (8th Cir. 1993)). The Seventh Circuit affirmed summary judgment based on *Garcetti* in *Davis v. Cook County*, 534 F.3d 650 (7th Cir. 2008). The plaintiff had argued a jury should decide whether she acted in accordance with her official duties and the court commented that "no rational trier of fact could find" for her on the issue. *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." *Id.*; *see also Bryant v. Gardner*, 587 F. Supp. 2d 951, 962 (N.D.Ill. 2008) (citing *Davis* for the proposition that the status of speech is a question of law).

2. The First, Fifth, Tenth, Eleventh, and District of Columbia 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 to hold that the issue of whether an employee spoke as an employee or as a citizen is a question of law for the court. 546 F.3d at 1127-28. The Ninth Circuit understated the conflict. At least five circuits – the First, Fifth, Tenth, Eleventh and District of Columbia Circuits (and possibly six, if the Seventh Circuit is included) – have all found the issue to be one of law.

In *Wilburn v. Robinson*, 480 F.3d 1140 (D.C. Cir. 2007), 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:

> [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. *Id.* at 513 n.17.

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

Both the First and Eleventh Circuits have also recognized that the *Garcetti* inquiry is one of law for the court. For example, in *Curran v. Cousins*, 509 F.3d 36 (1st Cir. 2007), the court stated:

> [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. If so, the court then decides whether the public employer "had an adequate justification. . . ." *Id.* at 45.

The Eleventh Circuit has reached a similar conclusion post-*Garcetti*. *See Boyce v. Andrews*, 510 F.3d 1333, 1343 (11th Cir. 2007) (agreeing with the Seventh Circuit that the court decides whether the plaintiff was speaking as a citizen "'or as part of her public job.'"); *Battle v. Bd. of Regents,* 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); *Burton v. City of Ormond Beach, Fla.*, 301 Fed. Appx. 848, 852 (11th Cir. 2008) ("[w]hether an employee spoke as a citizen is a question of law for the court."); *Schuster v. Henry County Ga.*, 281 Fed. 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.").

In sum, the appellate courts are squarely at odds concerning the fundamental issue of whether the *Garcetti* inquiry is a question of law requiring resolution by a court, or a mixed question of fact and law requiring initial determination by a finder of fact. This conflict clearly needs resolution by this Court at this time.

C. Review Is Necessary To Resolve The Circuit Conflict By Confirming That The *Garcetti* Inquiry Presents A Question Of Law And To Avoid Undermining Legitimate Claims Of Qualified Immunity.

1. The *Garcetti* inquiry requires the same type of qualitative evaluation of speech content and context and the same balancing of interests that courts perform under *Connick* and *Pickering*.

Employee-speech jurisprudence has stemmed from this Court's recognition that "[w]hen a citizen

enters government service, the citizen by necessity must accept certain limitations on his or her freedom," and at the same time from its concern that public employees by virtue of their employment not be entirely divested of First Amendment rights, but rather restricted only so far as is "necessary for their employers to operate efficiently and effectively." *Garcetti*, 547 U.S. at 418-19. The nuanced balancing and line-drawing required to determine the scope of First Amendment protection under particular circumstances has wisely been assigned to courts (*Connick*, 461 U.S. at 148 n.7), leaving to juries the determination of whether, in fact, protected speech motivated the employer to act against the employee in some manner that caused the employee harm.

As noted, a majority of circuits have concluded that the *Garcetti* inquiry presents a question of law, based largely on the realization that *Garcetti* simply identified another factor to be considered during the threshold inquiry of whether a particular employee communication is subject to First Amendment protection. *See*, *e.g.*, *Curran v. Cousins,* 509 F.3d at 45 (whether employee speaks as employee or citizen is a "subpart" of initial inquiry whether employee speaks as a citizen on a matter of public concern). Both implicitly and explicitly, the circuits have recognized that resolution of the issue requires courts to perform the same sort of qualitative analysis of content and context that they do in resolving whether the speech at issue is of public or private concern and whether the balancing of interests under *Pickering* favors employee or employer. For example, the Eleventh

Circuit observed in *Boyce v. Andrews*, 510 F.3d at 1343: "We 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 . . . 'must be determined by the content, form, and context of a given statement, as revealed by the whole record.' *Connick*, 461 U.S. at 147-148." *See also Haynes v. City of Circleville*, 474 F.3d 357 (6th Cir. 2007) (reviewing the context and content of employee memo to conclude it was written pursuant to official duties); *see Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 545 (6th Cir. 2007) ("the 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.").

In this case, the key evidentiary facts regarding context and content are undisputed. Eng was a member of the District Attorney's Task Force investigating Belmont; his specific assignment focused on potential environmental crimes while two colleagues were assigned to investigate allegations of contractor fraud. App. 57. When Eng became aware that Anthony Patchett, also on the Task Force, and an investigator planned to report to the IRS that the school district had committed fraud by purchasing the Belmont property with Certificates of

Participation and would lose its tax-exempt status, Eng performed legal research and warned against such disclosure, having concluded Certificates of Participation were legal and disclosure could expose the District Attorney's office to liability for any damages incurred by the school district as a result of the IRS investigation. App. 58-59. Subsequently, at the executive staff meeting regarding the Task Force investigation, Eng was highly critical of the disclosure to the IRS. App. 59. Eng implicitly acknowledged that members of the Task Force were not prohibited from working on, assisting in, or commenting on any aspect of the investigation, but he contended that he was not "duty-bound" to speak out on the disclosure to the IRS because that involved a matter outside of his specific assignment. His bare assertion, according to the district court and the Ninth Circuit, creates an issue of fact for the jury.

Implicit in Eng's argument, and the assumption that his assertion that he was not duty-bound to criticize the leak to the IRS presents an issue of fact, is the notion that however much the criticism or advice of an attorney employed by a public entity may advance the public entity's interest by preventing or remediating a legal misstep by the team on which he serves, that advice and criticism cannot be deemed part of his professional responsibilities, unless he was specifically assigned to give it. Or at least a jury gets to make that call.

Because the inquiry as to the scope of employment responsibilities is so intimately tied to

the same sort of analysis and evaluation of content and context of employee speech that a court performs in making a legal determination under *Connick* and *Pickering*, this Court should grant review to reaffirm the legal nature of this inquiry.

2. Determining that the *Garcetti* inquiry presents a mixed question of fact and law undermines legitimate claims of qualified immunity in the First Amendment context.

This Court has repeatedly emphasized that qualified immunity is a defense not simply to the underlying claim but to involvement in the litigation at all, and should therefore be raised and determined at the earliest opportunity. *See, e.g., Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (qualified immunity is "an *immunity from suit* rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial."); *Saucier v. Katz*, 533 U.S. 194, 200 (2001) (qualified immunity determination "should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive.").

By holding here, as in other cases, that an issue of fact as to whether a statement is protected arises upon an employee's bare assertion that a given statement fell outside his or her job responsibility, the Ninth Circuit has essentially foreclosed qualified immunity for public officials and supervisors in this

context. Faced with disagreement between the parties as to whether the statement falls within the employee's job duties, the district court requires the question to be put to the jury, even though the underlying evidence is not disputed. Defendants who claim that at least they are entitled to qualified immunity then assert their right to interlocutory appeal but are effectively deprived of appellate review because, as the Ninth Circuit held here, it cannot review such factual disputes. App. 10; *see Johnson v. Jones*, 515 U.S. 304, 307, 319-20 (1995). Even though on a mixed question of fact and law, a court has the final say, belated review after the jury has returned a verdict is too little too late to meaningfully protect the important interest that qualified immunity is designed to advance.

The mischief caused by mischaracterizing a question of law as one of fact, and hence insulating the denial of qualified immunity from review is evident in this case. Petitioners contend they were entitled to summary judgment on the claim based on Eng's criticisms of the IRS leak, because there was no First Amendment violation in the first instance under *Garcetti*. At the least, even assuming a violation, there was no clearly established law that would have put them on notice that Eng's statements did not constitute employee speech under *Garcetti*. This Court has recognized that where the requirements of the law are at least debatable, officials deserve the benefit of the doubt. "[Qualified immunity] provides ample protection to all but the plainly incompetent or

those who knowingly violate the law. . . . [I]f officers of reasonable competence could disagree [about whether specific action was constitutional], immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *see also Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("[T]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.").

Surely a reasonable supervisor would *not* understand that Eng's criticisms – made to the District Attorney and his executive staff during a Task Force meeting, based on legal research he had performed within the scope of the Task Force investigation, if not within the scope of his specific assignment, and advocating remediation of conduct that might possibly expose the District Attorney's Office to liability – were being made as a citizen rather than as an employee. Given the undisputed facts of what Eng said, why and where he said it, reasonable supervisors would have every reason to believe he was doing what he was paid to do, however much they may have disagreed with him. Yet, under the Ninth Circuit rule, since the question of scope of duties must go to the jury, the denial of qualified immunity is unreviewable.

Thus, absent intervention by this Court, public officials and supervisors will be subjected to needless involvement in litigation, as both trial and appellate courts, at least in the Ninth and Third Circuits, defer to the finders of fact before addressing an issue that

is a pure issue of law and that should be determined "at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam). For this reason too, review is warranted.

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*.

The Ninth Circuit in this case commented that if Eng's statements about disclosures to the IRS are determined to fall outside the scope of his job responsibilities, then he spoke as a private citizen on a matter of public concern, and it has "long been the law of the land" that such speech is protected. App. 31. However, the court failed to address, at least explicitly, what a jury should consider to make the initial determination. More fundamentally, what factors should supervisory personnel consider in making the call as to which side of the line a particular statement falls? In *Garcetti*, the court expressly declined to provide a "comprehensive framework" for determining when a given statement cannot be viewed as employee speech. 547 U.S. at 424. Until such a framework is in place, supervisory personnel should surely be entitled to qualified immunity in the event they make the wrong call.

A. The Circuits Have Applied Varying Factors To Determine Whether A Public Employee's Speech Is Unprotected For Being Part Of The Job, But They Do Not Always Appear To Agree As To What Those Factors Should Be.

In the three years since *Garcetti*, federal courts have applied varying criteria in determining whether an employee's speech was within the employee's job-related responsibilities. The more common factors fall within several broad categories. Yet, even within these categories, as this case suggests at least implicitly, courts sometimes disagree, 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 where the employee directed the speech to supervisors or others within the chain of command, the particular communication falls within the employee's official duties. *See, e.g., Haynes v. City of Circleville*, 474 F.3d at 364 ("that [the employee] communicated solely to his superior also indicates that he was speaking in '[h]is capacity as a public employee . . . '"); *see Davis v. McKinney*, 518 F.3d 304, 313, 315-16 (5th Cir. 2008) ("[W]hen a public employee raises complaints or concerns up the chain of command at his workplace about his job duties, that speech is undertaken in the course of performing his job."). Here, Eng directed his

complaint about the leak to the IRS to his supervisors, the District Attorney and his executive staff; yet the case seems to illustrate that in the Ninth Circuit the fact that the complaint was directed to supervisors may not be relevant, much less dispositive, because a jury could presumably find in Eng's favor simply on the basis of the limited nature of Eng's particular assignment on the Task Force. *See* App. 25 ("Eng's version of the facts plausibly indicates he had no official duty to complain about any leak to the IRS").

2. Time and place.

In *Mills v. City of Evansville,* 452 F.3d 646 (7th Cir. 2006), a police sergeant was allegedly disciplined for speaking out against the police chief's plan to reduce the number of crime prevention officers under her supervision. *Id.* at 647. Concluding she spoke "as a public employee contributing to the formation and execution of official policy," the court found dispositive the facts that she "was on duty, in uniform, and engaged in discussion with her supervisors" on department premises, having just emerged from the meeting where the plans were announced. *Id.* at 648.

In contrast, in *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192, the Tenth Circuit found that charter school teachers who participated in off-campus, after-hours meetings where they discussed a wide array of concerns about the school's

operation were speaking as citizens, in part because of the time and place of these discussions. *Id.* at 1205.

On the basis of time and place factors, this case is substantially more aligned with *Mills* than with *Brammer-Hoelter* insofar as Eng's comments took place in a meeting of his superiors to discuss the Task Force investigation, yet it is implicit in the Ninth Circuit's opinion that time and place factors can be ignored.

3. Specialized knowledge and access to information.

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

For example, in *Williams v. Independent School 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 690-91. The Fifth Circuit held the memos were made pursuant to the employee's job 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, where the court held that a professor's actions in advising and advocating for a student in disciplinary proceedings fell within his professional duties; 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 may be irrelevant. Eng's complaint about the leak to the IRS was derived from his position on the Task Force, his special access to the work of and discussions with his colleagues, and his own legal research. His complaints at the meeting of the District Attorney's executive staff reflect this specialized job-related expertise and access. Nonetheless, this case suggests these factors could presumably be ignored in favor of the single factor of Eng's specific assignment within the Task Force, even though an employee's official job description is not dispositive. *Garcetti*, 547 U.S. at 424-25.

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

Courts have also considered whether particular internal regulations and policies, or even statutes of state or nation-wide application require an employee in the plaintiff's position to speak, and so make the

speech part of his or her job. *See, e.g., Morales v. Jones*, 494 F.3d 590, 598 (7th Cir. 2007) (police officer's report to district attorney regarding illegal acts of police chief was part of the duties of a law enforcement officer and pursuant to department policy); *see Casey v. West Las Vegas Independent School Dist.*, 473 F.3d 1323, 1330 (10th Cir. 2007) (reporting misconduct to federal Head Start officials was not protected because it was "pursuant to, or in compliance with, certain federal regulations" governing Head Start); *see Battle v. Bd. of Regents*, 468 F.3d at 761-62 (report of financial aid officer about fraudulent handling of federal financial aid funds was within the scope of duties because report was required by federal Department of Education guidelines.).

In contrast, the Seventh Circuit found reporting requirements similar to those at issue in *Casey* and *Battle* to be insufficient to establish job-related responsibilities 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 an Illinois statute that 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 regarding reporting requirements underscore the wider problem created by the divergent approaches federal courts are free to take in addressing the scope-of-duties issue: current case law provides little or no guidance for predicting the outcome with any certainty in any particular case.

B. Review Is Necessary To Provide A Framework For The *Garcetti* Inquiry Which Will Guide Public Employers And Supervisors In Determining Whether They May Discipline An Employee For His Or Her Speech Without Violating The First Amendment.

Whether the *Garcetti* inquiry is one of law for the court or a mixed question of fact and law, the need for clarification and a uniform approach in making the determination is manifest. For example, if the Ninth Circuit is correct that the jury makes the initial determination regarding scope of employment, how is it to be instructed? What factors may it consider? This information is equally essential to supervisors who must determine whether they can lawfully discipline an employee for speech. On the other hand, if the *Garcetti* inquiry is one of law for the courts, without clear standards, courts are free to pick and choose among various criteria, or even invent their own, and so it is difficult to predict how any

particular court will resolve the issue in any given case.

In this case, both the district and appellate courts have temporarily avoided the issue of what factors should be considered, and how much weight should be given them, by deferring the scope-of-duties analysis to a future trial. Meanwhile, the absence of clear guidelines from this Court directly impacts the day-to-day decision-making of public employers and supervisors. The uncertain prospect of litigation can only hamper the effective operation of the government agency in its attempt to provide necessary public services.

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.

Eng alleges that petitioners retaliated against him for what his attorney said during an interview with the *Los Angeles Times*. The attorney had referenced, among other things, Eng's conclusion that no environmental crimes had been committed and his criticism of conduct that had sparked an IRS investigation. App. 61. Neither the parties below, nor two district judges perceived that discipline on the basis of an attorney's statements to the press might violate the client's free speech rights; rather all assumed that any violation that occurred was of the

attorney's right to free speech, and that the only question was whether Eng had third-party standing to assert that right. *See* App. 49-50. The district court concluded he did, and petitioners unsuccessfully contended they were entitled to qualified immunity because the law was not clearly established on that point.

In affirming the denial of qualified immunity, the Ninth Circuit altered the analysis to hold that Eng had a direct personal First Amendment interest in his attorney's comments to the press. App. 14. The court acknowledged that it had not previously addressed the issue of a client's First Amendment interest in his or her attorney's statements to the press, nor did it cite to decisions on the subject in other circuits. App. 33. Instead, on the basis of cases that recognized a First Amendment interest in the right to retain counsel and that held an attorney's free speech interest when advocating on behalf of a client in the courtroom was grounded on the free speech rights of the client, it concluded that "this case involved 'mere application of settled law to a new factual permutation.'" App. 14-15, 33. Thus, petitioners were "on notice of the common sense conclusion that the government may not retaliate against a public employee for speech spoken by the employee's lawyer on the employee's behalf." App. 33. The underlying notion is one of broad-based advocacy: "[W]e see no reason to limit recognition of a client's constitutional interest in an attorney's representation to in-court speech only. There can be little doubt that zealous

representation extends far beyond the confines of brief-writing, examination of witnesses, and oral argument." App. 15 n.3.

However, it takes a leap to span the distance between a protected interest in the right to retain an attorney and to an attorney's representation in court, on the one hand (the First Amendment rights of association and to petition for redress), and on the other, a protected interest in whatever the attorney says, regardless of content or context.

Moreover, the Ninth Circuit has couched this rule so broadly that employee statements that might not otherwise be protected become protected merely by virtue of having been reported to the press by the employee's attorney. Here, for example, the district court determined Eng's conclusion that no environmental crimes were committed was unprotected under *Garcetti* because it was part of his job; transmitted through his attorney, it becomes protected under the Ninth Circuit rule because the attorney is advocating for his client. The result would be the same with respect to Eng's critical remarks during the executive staff meeting about leaks to the IRS, assuming, as petitioners contend, they were part of his job.

Indeed, statements that may not qualify as matters of public concern or that were made in a context where the *Pickering* balance would weigh in favor of the government employer, if transmitted

through an attorney, become protected as a "natural corollary" of the right to retain counsel. App. 15.

Qualified immunity shields a government official from liability for action which may result in a unconstitutional deprivation of rights, so long as the official, at the time the action was taken, would not reasonably know that it violated the employee's "clearly established" constitutional rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The law is not clearly established here, and the Ninth Circuit's "common sense" standard should not be imposed as a substitute. Review is necessary to clarify the law in this area, and to establish that employee speech otherwise unprotected by the First Amendment does not necessarily become protected simply by virtue of having been transmitted to the press by the employee's attorney.

CONCLUSION

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

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Respectfully submitted,

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