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NOTES

CIRCUIT COURT INTERPRETATIONS OF *GARCETTI V. CEBALLOS* AND THE DEVELOPMENT OF PUBLIC EMPLOYEE SPEECH

*Thomas Keenan**

INTRODUCTION

The Supreme Court has firmly established that the First Amendment's ambit covers the speech of public employees,[1] but the extent of that coverage is subject to certain constraints. One such restriction, as pronounced in *Garcetti v. Ceballos*,[2] consists of a categorical denial of the Constitution's protection for speech made "pursuant to [an employee's] official duties."[3] Unfortunately, the Court in *Garcetti* explicitly refused to provide a definite framework for delineating the scope of employment.[4] Instead, the Court merely stated that "[t]he proper inquiry is a practical one."[5]

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1 *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (recognizing that the First Amendment protects the speech of public employees to some extent).

2 547 U.S. 410 (2006).

3 *Id.* at 421.

4 *Id.* at 424 ("First, as indicated above, the parties in this case do not dispute that Ceballos wrote his disposition memo pursuant to his employment duties. We thus have 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.").

5 *Id.*

Though many have characterized *Garcetti* as a hallmark of formalism in its adoption of an absolute prophylactic rule,[6] the decision "has provided considerable room for the circuit courts to carve out . . . their unique and circuit-specific determinations of the [case's] import."[7] For these courts, concluding that an employee's speech falls within or without his or her official duties has become an indeterminate affair. Though the circuits do share a number of tests, *Garcetti*'s nebulous language has allowed great leeway for courts to adopt their own unique approaches. As a result, the process of resolving a public employee's scope of employment for First Amendment purposes often varies with the jurisprudence of the individual circuits. More importantly, even where a court can plainly ascertain the scope of employment, *Garcetti*'s categorical holding provides no leeway for speech of such public importance that it may deserve constitutional protection despite the fact that it exists because of the employee's official duties.

This Note aims to shed light on the similarities and discrepancies that exist among the federal circuit courts[8] in defining the scope of official duties according to *Garcetti*'s mandate, as well as to propose a new take on the public employee speech analysis. Part I begins with a very brief history of the development of the First Amendment jurisprudence regarding public employee speech, including an analysis of the Supreme Court's holding in *Garcetti*. Part II delves into the vast array of circuit court constructions of *Garcetti*. This includes an examination of the factors that the circuits share as well as those that are distinctive to certain courts. Finally, Part III examines circuit decisions that seemingly take an expansive view of the scope of employment. The Part also addresses certain defenses and criticisms of *Garcetti* and its subsequent implementation by the courts of appeals, ending with a proposal for the future of the First Amendment's application to public employee speech. Specifically, the law should return to a balancing standard in resolving these types of cases, where the

6 *See, e.g.*, Charles W. "Rocky" Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173, 1191 (2007) ("But what is disputable is whether these interests required an absolute prophylactic rule or could instead be accommodated by the balancing standard employed by the lower courts before *Garcetti*. . . . The majority indicated that its rule was preferable under federalism and separation of powers principles.").

7 JoNel Newman, *Will Teachers Shed Their First Amendment Rights at the Schoolhouse Gate? The Eleventh Circuit's Post-*Garcetti *Jurisprudence*, 63 U. MIAMI L. REV. 761, 786 (2009).

8 The scope of this Note is limited to an examination of the federal circuit courts and their treatment of *Garcetti*.

initial "scope of employment" inquiry is settled by a contextual analysis that focuses on those duties either plainly required by employers or so intertwined as to be nearly inseparable.

I. The Evolution of Public Employee Speech Jurisprudence

Until the latter half of the twentieth century, courts did not accept the notion that the First Amendment might protect public employee speech. Yet the last sixty years have yielded an intricate jurisprudence extending the First Amendment to public employees in limited circumstances. This Part presents a succinct history of the Supreme Court's treatment of public employee speech, focusing especially on the Court's decision in *Garcetti.*

A. *The Pre-*Garcetti *Era*

Constitutional recognition of public employee speech rights is a relatively recent phenomenon. Until the middle part of the twentieth century, public employees "enjoyed no recognized constitutional protection from conditions placed upon their employment, including those that restricted constitutional rights, such as free speech."[9]

This all changed, however, in the 1950s and 1960s as the Supreme Court began to acknowledge a place within the First Amendment for such speech. Most prominently, the Court in *Pickering v. Board of Education*[10] repudiated the position that "public employment . . . may be subjected to any conditions, regardless of how unreasonable."[11] At the same time, the Court could not deny the government's "interests as an employer in regulating the speech of its employees," interests that "differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."[12] To resolve these competing concerns, the Court instituted a standard that balanced the employee's interest in speaking on "matters of public concern" against the government's interest in operational efficiency.[13]

The Court further refined this balancing approach in *Connick v. Myers*[14] by limiting recourse for employees who do not speak on mat-

9 Benjamin M. Smith, Note, *Transforming the Public Employee Speech Standard in* Posey v. Lake Pend Oreille*: More than Meets the Eye*, 2010 BYU L. Rev. 285, 287.

10 391 U.S. 563 (1968).

11 *Id.* at 568 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 605–06 (1967)).

12 *Id.*

13 *Id.*

14 461 U.S. 138 (1983).

ters of public concern.[15] Though it did not completely rule out constitutional safeguards for this type of speech, the Court did not deem it appropriate for federal courts to intervene in personnel decisions where public employees speak "not as . . . citizen[s] upon matters of public concern, but instead . . . upon matters only of personal interest."[16] Accordingly, the initial question for courts became whether the employee was speaking on an issue of public concern, or rather simply on a matter of personal significance. This inquiry was "one of law, not fact"[17] and had to "be determined by the content, form, and context of a given statement, as revealed by the whole record."[18] Only if the speech entailed a matter of public relevance could a court then proceed to *Pickering*'s balancing standard.

B. Garcetti v. Ceballos

The Supreme Court's most recent pronouncement on public employee speech came in 2006 with the decision in *Garcetti v. Ceballos*.[19] At issue were the statements of Richard Ceballos, a deputy district attorney who discovered misrepresentations in an affidavit supporting a search warrant.[20] Mr. Ceballos informed his superiors about the inaccuracies and recommended that the case be dismissed.[21] Additionally, he testified about his misgivings during a judicial hearing on a motion challenging the search warrant.[22] Thereafter, Mr. Ceballos claimed that his employer subjected him to a number of retaliatory actions.[23]

Adding to the foundation established by *Pickering* and *Connick*, the Supreme Court held 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."[24] Because Mr. Ceballos made his statements "as a prosecutor fulfilling a responsibility," his speech did not warrant constitutional protection.[25] However, the majority was quick to note that neither the location of

15 *See id.* at 147.
16 *Id.*
17 *Id.* at 148 n.7.
18 *Id.* at 147–48.
19 547 U.S. 410 (2006).
20 *Id.* at 413–14.
21 *Id.* at 414.
22 *Id.* at 414–15.
23 *Id.* at 415.
24 *Id.* at 421.
25 *Id.*

the speech nor its subject matter was dispositive.[26] Instead, the controlling issue in adjudicating future cases must be whether an employee spoke pursuant to his or her official duties because, in such instances, "there is no relevant analogue to speech by citizens who are not government employees."[27] Limiting speech that "owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."[28]

Motivating this decision was the government's "heightened interest[ ]" in controlling employee speech to preserve "substantive consistency and clarity" in communications that have official consequences.[29] The mere potential for constitutional protection in speaking on matters of public concern does not grant employees license to perform their jobs as they see fit.[30] What is more, the majority wished to avoid "permanent judicial intervention in the conduct of governmental operations," thereby averting any conflict with "sound principles of federalism and the separation of powers."[31]

Yet, because neither party in *Garcetti* contested the classification of Mr. Ceballos's speech, the Court declined to establish a functional test for determining the scope of employment for public employees.[32] Instead, it simply noted that the proper inquiry must be "a practical one."[33] The Court also discounted any notion that employers could "restrict employees' rights by creating excessively broad job descriptions,"[34] asserting that formal job descriptions are "neither necessary nor sufficient to demonstrate" that an employee's speech fell within his or her official duties.[35] Lastly, the Court addressed the concern that its ruling would discourage employees from exposing governmental misconduct, arguing instead that current whistleblower statutes and other applicable laws, as well as those internal mechanisms that government employers choose to install, provide sufficient safeguards for those who seek to reveal such activity.[36]

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26 *See id.* at 420–21.

27 *Id.* at 424.

28 *Id.* at 421–22.

29 *Id.* at 422.

30 *See id.*

31 *Id.* at 423.

32 *See id.* at 424.

33 *Id.*

34 *Id.*

35 *Id.* at 425.

36 *See id.* at 425–26.

The majority's reasoning provoked a number of spirited dissents, most notably from Justice David Souter. Principally, Justice Souter argued that the presence of a government paycheck does "nothing to eliminate the value to an individual of speaking on public matters," particularly government wrongdoing.[37] As he pointed out, *Pickering*'s balancing test rests on the "recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public."[38] By categorically redefining this test in relation to an employee's scope of employment, Justice Souter maintained that the majority unreasonably deprived the public of informed opinions on important public issues.[39]

Beyond this, Justice Souter believed that the Court's judgment would have serious ramifications for future suits. In particular, this supposed "practical" inquiry would not deter employers from defining duties comprehensively; in fact it would actually stimulate fact-bound litigation over the exact parameters of official duties.[40] Moreover, Justice Souter condemned the majority's faith in existing law, predicting that certain speech claims addressing government misconduct would fall outside current statutory definitions of whistleblowing.[41] The combination of federal and state statutes would inevitably result in a patchwork of statutory protection depending upon the jurisdiction.[42]

To resolve this matter, Justice Souter encouraged a continued reliance on the *Pickering* approach.[43] This standard, he reasoned, as opposed to a categorical rule, is feasible for two reasons. First, courts could account for the government's efficiency interest by instituting "a minimum heft" for speech that would not allow an employee to prevail unless he or she was speaking "on a matter of unusual importance and satisfie[d] high standards of responsibility in the way he [or she did] it."[44] Second, the experience of courts, having dealt with similar cases for several years, would facilitate the analysis's perpetuation.[45]

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37 *Id.* at 428 (Souter, J., dissenting).

38 *Id.* at 433 (quoting City of San Diego v. Roe, 543 U.S. 77, 82 (2004) (per curiam)).

39 *See id.*

40 *See id.* at 436.

41 *See id.* at 440.

42 *See id.* at 440–41.

43 *See id.* at 434–35.

44 *Id.* at 435.

45 *See id.* at 435–36.

In spite of these arguments, the current analysis in the wake of *Garcetti* requires courts to make three inquiries. First, the court must analyze a public employee's speech to determine if it was made pursuant to his or her official duties.[46] If not, the court may then proceed to ask whether the speech constitutes a matter of public concern.[47] If it is a matter of public concern, then the court may perform the *Pickering* balancing standard to establish which of the two interests holds more weight, the employee's desire for free speech or the government's concern for operational efficiency.[48] If the employee's interest prevails, only then does the speech merit First Amendment protection.

II. *GARCETTI* AND THE CIRCUITS

As soon as the Court handed down the *Garcetti* decision, the circuits faced a trial by fire as new retaliation claims filled their dockets. Naturally, these courts turned to those limited instances in the *Garcetti* opinion that presented some guidance as to the proper manner in which they should determine scope of employment. This Part analyzes how the circuits have utilized the *Garcetti* opinion to craft a workable procedure for dealing with public employee speech claims, exploring methods shared among the circuits as well as those unique to particular courts.

A. *Circuit Interpretations of* Garcetti *'s Language*

Following from the Court's prescription for a "practical" inquiry,[49] a number of circuits have explicitly engaged in contextual examinations, focusing especially on audience and the location of an employee's speech in relation to the official chain of command.[50] Additionally, a few courts have paid special attention to formal job descriptions,[51] though acknowledging *Garcetti*'s instruction that such listings are "neither necessary nor sufficient."[52] The majority of circuits[53] have also relied extensively on the Supreme Court's restriction of speech that "owes its existence to a public employee's professional

46 *See id.* at 421 (majority opinion).

47 *See* Connick v. Myers, 461 U.S. 138, 147 (1983).

48 *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

49 *See Garcetti*, 547 U.S. at 424.

50 *See infra* Part II.A.1.

51 *See infra* Part II.A.2.

52 *Garcetti*, 547 U.S. at 425.

53 *See infra* Part II.A.3.

responsibilities"[54] and consequently has "no relevant analogue to speech by citizens who are not government employees."[55]

1. Audience

As one commentator has contended, *Garcetti* "requires courts to undertake a case-by-case analysis of the nature of an employee's duties and of the context of the employee's speech."[56] Citing *Garcetti*'s practical inquiry language, several circuits have followed suit by structuring their approaches as fact-bound examinations. Though conceding that neither the location nor the subject matter of an employee's statements can be dispositive,[57] these courts in certain instances have resorted to a "more commonsense, contextual analysis of the role the public employee assumed in making the speech at issue in the case."[58] The Eleventh Circuit, for example, concluded that two social workers who complained about their caseload did so pursuant to their official duties based on "the content, form, and context of [their] given statement[s], as revealed by the whole record."[59] Using this rubric, the court maintained that the form and content of the workers' com-

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54 *Garcetti*, 547 U.S. at 421.

55 *Id.* at 424.

56 Elizabeth Dale, *Employee Speech & Management Rights: A Counterintuitive Reading of* Garcetti v. Ceballos, 29 BERKELEY J. EMP. & LAB. L. 175, 209 (2008) (footnote omitted).

57 *See, e.g.*, Anthoine v. N. Cent. Cntys. Consortium, 605 F.3d 740, 749 (9th Cir. 2010) ("Statements do not lose First Amendment protection simply because they concern 'the subject matter of [the plaintiff's] employment.'" (alteration in original) (quoting Freitag v. Ayers, 468 F.3d 528, 545 (9th Cir. 2006))); Rohrbough v. Univ. of Colo. Hosp. Auth., 596 F.3d 741, 746 (10th Cir. 2010) ("[N]ot all speech 'about the subject matter of an employee's work [is] necessarily made pursuant to the employee's official duties.'" (second alteration in original) (quoting Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1204 (10th Cir. 2007))); Callahan v. Fermon, 526 F.3d 1040, 1044 (7th Cir. 2008) (holding neither location, audience, nor subject matter to be determinative); Foraker v. Chaffinch, 501 F.3d 231, 241 n.7 (3d Cir. 2007) ("[T]he fact that an employee speaks privately is not conclusive . . . ."), *abrogated by* Borough of Duryea v. Guarnieri, 131 S. Ct. 2488 (2011) (abrogating *Foraker*'s distinction between the protections afforded by the Speech and Petition Clauses of the First Amendment); D'Angelo v. Sch. Bd., 497 F.3d 1203, 1211 (11th Cir. 2007) (discounting reliance on the location or the subject matter of the speech); Williams v. Dall. Indep. Sch. Dist., 480 F.3d 689, 692 (5th Cir. 2007) (per curiam) ("[W]e do know that a formal job description is not dispositive, nor is speaking on the subject matter of one's employment." (citation omitted) (citing *Garcetti*, 547 U.S. at 421, 424–25)).

58 Ogden v. Atterholt, 606 F.3d 355, 360 n.2 (7th Cir. 2010).

59 Boyce v. Andrew, 510 F.3d 1333, 1343 (11th Cir. 2007) (per curiam) (quoting Connick v. Myers, 461 U.S. 138, 147–48 (1983)).

ments were "indicative of the fact that they intended to address only matters connected with their jobs."[60] The Sixth Circuit likewise determined that the memo of a police officer protesting unit cutbacks lacked First Amendment protection because "[t]he context of the memo as a whole [was] best characterized as that of a disgruntled employee upset that his professional suggestions were not followed as they had been in the past."[61] The First,[62] Seventh,[63] and Tenth Circuits[64] offer further instances of this paradigm.

In implementing this overarching approach, one issue arises frequently: audience. Specifically, the process of speaking to one's employer seems to indicate that an employee's speech falls within his or her official duties. In *Davis v. McKinney*,[65] the Fifth Circuit denied an audit manager a constitutional defense for an investigative report that she had filed to her superiors because of the report's place within the formal chain of command.[66] Though the court refused to adopt an absolute rule for internal employee speech, it held that an "employee's communications that relate to his own job function up the chain of command, at least within his own department or division, fall within his official duties and are not entitled to First Amendment protection."[67]

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60 *Id.*

61 Haynes v. City of Circleville, 474 F.3d 357, 364 (6th Cir. 2007); *see also* Weisbarth v. Geauga Park Dist., 499 F.3d 538, 545 (6th Cir. 2007) ("[T]he content of an employee's speech—though not determinative—will inform the threshold inquiry . . . .").

62 *See* Decotiis v. Whittemore, 635 F.3d 22, 32 (1st Cir. 2011) ("To determine whether such speech was made pursuant to official responsibilities, the Court must take a hard look at the context of the speech."); Mercado-Berrios v. Cancel-Alegría, 611 F.3d 18, 26 (1st Cir. 2010) ("The relevant inquiry under *Garcetti* thus has two basic components—(1) what are the employee's official responsibilities? and (2) was the speech at issue made pursuant to those responsibilities?—both of which are highly context-sensitive."); Foley v. Town of Randolph, 598 F.3d 1, 7 (1st Cir. 2010) ("More critical to our analysis is the context of Foley's speech.").

63 *See* Abcarian v. McDonald, 617 F.3d 931, 937 (7th Cir. 2010) ("When determining whether a plaintiff spoke as an employee or as a citizen, we take a practical view of the facts alleged in the complaint, looking to the employee's level of responsibility and the context in which the statements were made."); *Ogden*, 606 F.3d at 360 n.2.

64 *See* Rohrbough v. Univ. of Colo. Hosp. Auth., 596 F.3d 741, 746 (10th Cir. 2010) ("[T]he Tenth Circuit has taken a case-by-case approach, looking both to the content of the speech, as well as the employee's chosen audience, to determine whether the speech is made pursuant to an employee's official duties.").

65 518 F.3d 304 (5th Cir. 2008).

66 *See id.* at 316.

67 *Id.* at 313 n.3.

The Seventh Circuit has also employed the "chain of command" test, principally in a case involving an Illinois State Police officer who voiced his alarm about the safety of a firing range to a superior officer.[68] For the court, it was "clear that the complaints about lead contamination that [the officer] made directly up the chain of command to his supervisors [were] not protected by the First Amendment," though it did not resolve whether the exact same speech made through "a different, yet still entirely internal, channel" would find shelter within the First Amendment.[69] The Second,[70] Third,[71] Sixth,[72] Tenth,[73] Eleventh,[74] and District of Columbia[75] Circuits have rendered decisions using similar rationales.

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68 *See* Bivens v. Trent, 591 F.3d 555, 557 (7th Cir. 2010); *see also* Tamayo v. Blagojevich, 526 F.3d 1074, 1091 (7th Cir. 2008) ("[O]ther courts have determined that reports by government employees to their superiors concerning alleged wrongdoing in their government office were within the scope of their job duties, and, therefore, the employees were not speaking as private citizens."); Mills v. City of Evansville, 452 F.3d 646, 648 (7th Cir. 2006) ("Mills was on duty, in uniform, and engaged in discussion with her superiors, all of whom had just emerged from Chief Gulledge's briefing. She spoke in her capacity as a public employee contributing to the formation and execution of official policy.").

69 *Bivens*, 591 F.3d at 560.

70 *See* Huth v. Haslun, 598 F.3d 70, 74 (2d Cir. 2010) (holding that because an employee relayed complaints to the head of her division, it had "no difficulty concluding that such speech was made not as a 'citizen' but, rather, pursuant to [her] official duties").

71 *See* Foraker v. Chaffinch, 501 F.3d 231, 241 (3d Cir. 2007) ("[T]he controlling fact in the case at bar is that Price and Warren were expected, pursuant to their job duties, to report problems concerning the operations at the range up the chain of command."), *abrogated by* Borough of Duryea v. Guarnieri, 131 S. Ct. 2488 (2011) (abrogating *Foraker*'s distinction between the protections afforded by the Speech and Petition Clauses of the First Amendment).

72 *See* Fox v. Traverse City Area Pub. Sch. Bd. of Educ., 605 F.3d 345, 350 (6th Cir. 2010) ("Of more immediate pertinence to Fox's claim is the Fifth Circuit's observation that '[c]ases from other circuits are consistent in holding that when a public employee raises complaints or concerns up the chain of command at his workplace about his job duties, that speech is undertaken in the course of performing his job.'" (alteration in original) (quoting *Davis*, 518 F.3d at 313)); Haynes v. City of Circleville, 474 F.3d 357, 364 (6th Cir. 2007) ("The fact that Haynes communicated solely to his superior also indicates that he was speaking 'in [his] capacity as a public employee contributing to the formation and execution of official policy' . . . ." (alteration in original) (quoting *Mills*, 452 F.3d at 648)).

73 *See* Rohrbough v. Univ. of Colo. Hosp. Auth., 596 F.3d 741, 747 (10th Cir. 2010) ("[S]peech directed at an individual or entity within an employee's chain of command is often found to be pursuant to that employee's official duties . . . .").

74 *See* Abdur-Rahman v. Walker, 567 F.3d 1278, 1284 (11th Cir. 2009) (noting that the choice of public works inspectors to submit their concerns about county com-

Conversely, a few circuits have reasoned that *external* speech may fall outside *Garcetti*'s reach if the employee's official duties did not otherwise require such communications. At the same time that it handed down its ruling in *Davis* excluding certain speech within the chain of command from the ambit of the Constitution, the Fifth Circuit stated that if "a public employee takes his job concerns to persons outside the work place in addition to raising them up the chain of command at his workplace, then those external communications are ordinarily not made as an employee, but as a citizen."[76]

The Ninth Circuit made a similar distinction for external communications in a case involving a correctional officer who objected to the inability of officials to control the sexual impropriety of inmates.[77] In this case, the officer filed statements internally as well as to a state senator and the California Inspector General.[78] The court subsequently explained that the officer's grievances to the senator and the Inspector General constituted protected speech because "[i]t was certainly not part of her official tasks to complain to the Senator or the [Inspector General] about the state's failure to perform its duties properly . . . ."[79] Yet, for the internal statements, the court either reached the opposite result or did not enter a decision.[80]

The Tenth Circuit acted in like manner in *Thomas v. City of Blanchard*,[81] placing a building inspector's threat to report illegal behavior to the Oklahoma State Bureau of Investigation outside the realm of *Garcetti*.[82] When the inspector "went beyond complaining to his supervisors and instead threatened to report to the [Bureau], an agency outside his chain of command, his speech ceased to be merely

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pliance with the Clean Water Act to their supervisor suggested that they may have believed such a course of action was within their own professional duties).

75 *See* Thompson v. District of Columbia, 530 F.3d 914, 916 (D.C. Cir. 2008) ("Ordinarily, employees who make recommendations to their supervisors on subjects directly related to their jobs are carrying out their official duties . . . .").

76 *Davis*, 518 F.3d at 313; *see also* Charles v. Grief, 522 F.3d 508, 514 (5th Cir. 2008) (deciding that *Garcetti* did not apply to a lottery employee who sent allegations of racial discrimination to the Texas Legislature because "[h]is decision to ignore the normal chain of command in identifying problems with Commission operations [was] a significant distinction").

77 *See* Freitag v. Ayers, 468 F.3d 528, 532 (9th Cir. 2006).

78 *See id.* at 534–35.

79 *Id.* at 545.

80 *See id.* at 546.

81 548 F.3d 1317 (10th Cir. 2008).

82 *See id.* at 1325.

'pursuant to his official duties' and became the speech of a concerned citizen."[83]

This is not to say that the external/internal divide has become a uniform standard among the circuits. Indeed, courts will not apply the protections of the First Amendment where the employee's official duties included speaking outside the chain of command.[84] For example, though the Sixth Circuit has indicated that the "chain of command" may suggest speech pursuant to an employee's official duties,[85] the court has been careful to explain that "the determinative factor . . . [is] not where the person to whom the employee communicated fit within the employer's chain of command, but rather whether the employee communicated pursuant to his or her official duties."[86] The District of Columbia Circuit has also issued a decisive opinion on the subject, maintaining that a "public employee speaks without First Amendment protection when he reports conduct that interferes with his job responsibilities, even if the report is made outside his chain of command."[87]

2. Formal Job Descriptions

To combat concerns that employers would construct overly broad job descriptions in order to restrict their employees' ability to speak without fear of reprisal, the Supreme Court discouraged any reliance on these descriptions as a determinative factor.[88] The courts have

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83 *Id.*

84 *See, e.g.*, Sarkar v. McCallin, 636 F.3d 572, 575–76 (10th Cir. 2011) (concluding that a Colorado Community College System information officer's official duties included speaking outside the chain of command as a representative of the System); Anemone v. Metro. Transp. Auth., 629 F.3d 97, 116–17 (2d Cir. 2011) (holding that an employee's referral of a corruption investigation to the District Attorney's office deserved no First Amendment protection as it fell within his duties as Director of Security); Bonn v. City of Omaha, 623 F.3d 587, 593 (8th Cir. 2010) (concluding that an auditor's report criticizing the Omaha Police Department and subsequent discussion with media outlets about that report did not constitute protected speech because her official duties included speaking to the media about her work as an auditor).

85 *See* Haynes v. City of Circleville, 474 F.3d 357, 364 (6th Cir. 2007) ("The fact that Haynes communicated solely to his superior also indicates that he was speaking 'in [his] capacity as a public employee contributing to the formation and execution of official policy' . . . ." (alteration in original) (quoting Mills v. City of Evansville, 452 F.3d 646, 648 (7th Cir. 2006))).

86 Weisbarth v. Geauga Park Dist., 499 F.3d 538, 545 (6th Cir. 2007).

87 Winder v. Erste, 566 F.3d 209, 215 (D.C. Cir. 2009).

88 *See* Garcetti v. Ceballos, 547 U.S. 410, 424–25 (2006). As one commentator has observed, this proscription may be a significant cause of the ongoing struggle circuit courts have had in applying *Garcetti*. *See* Sarah F. Suma, Note, *Uncertainty and Loss in the Free Speech Rights of Public Employees Under* Garcetti v. Ceballos, 83 CHI.-KENT L. REV.

thus not hesitated to reiterate the Supreme Court's position that such descriptions are neither necessary nor sufficient for reaching a conclusion.[89]

Nevertheless, a few circuits have used formal job descriptions extensively as part of their contextual analysis, putting plaintiffs "on notice that their own descriptions of their jobs, whether within or outside of the litigation, will inform the court about whether the speech was within their official responsibilities."[90] In one instance, the Ninth Circuit looked to an engineer's training manual to clarify the scope of his job duties.[91] Although the manual was not dispositive, it was informative enough to aid the court in holding that the engineer's complaints about managerial misconduct fell outside these duties.[92] The Seventh Circuit similarly considered a county jail's General Orders in ruling that the protests by guards over the maltreatment of prisoners were not covered by the First Amendment because the Orders required the exposure of such misconduct.[93] And the

369, 380 (2008) ("One reason that courts will struggle with finding the scope of an employee's job duties is that the most concrete, simple indicators are not determinative of a job duty . . . that job descriptions are neither necessary nor sufficient to establish a job duty.").

89 *See* Abdur-Rahman v. Walker, 567 F.3d 1278, 1283 (11th Cir. 2009) ("Formal job descriptions do not control the inquiry . . . ."); Chaklos v. Stevens, 560 F.3d 705, 712 (7th Cir. 2009); Gorum v. Sessoms, 561 F.3d 179, 185 (3d Cir. 2009); Thomas v. City of Blanchard, 548 F.3d 1317, 1323 (10th Cir. 2008) ("[A] court cannot simply read off an employee's duties from a job description . . . ."); Houskins v. Sheahan, 549 F.3d 480, 490 (7th Cir. 2008) ("Determining the official duties of a public employee . . . is not limited to the formal job description." (citing Vose v. Kliment, 506 F.3d 565, 569 (7th Cir. 2007))); Williams v. Dall. Indep. Sch. Dist., 480 F.3d 689, 692 (5th Cir. 2007) (per curiam) ("[W]e do know that a formal job description is not dispositive . . . ." (citing *Garcetti*, 547 U.S. at 424–25)); McGee v. Pub. Water Supply, Dist. No. 2, 471 F.3d 918, 921 (8th Cir. 2006) ("The Court noted that determining the scope of an employee's official duties for these purposes is a practical inquiry that focuses on 'the duties an employee actually is expected to perform,' rather than his formal job description." (quoting *Garcetti*, 547 U.S. at 424–25)).

90 Erin Daly, *Garcetti in Delaware: New Limits on Public Employees' Speech*, 11 DEL. L. REV. 23, 32 (2009).

91 *See* Marable v. Nitchman, 511 F.3d 924, 933 (9th Cir. 2007).

92 *See id.*

93 *See* Fairley v. Andrews, 578 F.3d 518, 522 (7th Cir. 2009); *see also* Hernandez v. Cook Cnty. Sheriff's Office, 634 F.3d 906, 915 (7th Cir. 2011) (holding that employees of the Sheriff's Office lacked a First Amendment claim for their complaints about prison conditions because those complaints were filed pursuant to the Office's General Orders); Callahan v. Fermon, 526 F.3d 1040, 1045 (7th Cir. 2008) (holding that an Illinois State Police officer's comments on the misconduct of fellow officers were not protected under the First Amendment partly because Illinois State Police rules required all officers to report misconduct).

Tenth Circuit did the same in the case of a transplant coordinator who cried foul over her hospital's continuing exercise of substandard care, finding no application of the First Amendment for the statements because hospital policies instructed employees to report instances of unsafe conduct.[94]

3. The "Existence" Principle

Another point of reference from *Garcetti* that circuits use in tandem with each other follows from the Supreme Court's observation that speech pursuant to official duties "owes its existence to a public employee's professional responsibilities."[95] Accordingly, the Sixth Circuit in *Fox v. Traverse City Area Public Schools Board of Education*[96] ruled that a special education teacher's formal job duties included her complaint about her class size because it "'owe[d] its existence to' her responsibilities as a special education teacher."[97] Comparably, the Seventh Circuit reached the same constitutional result for a social worker who reported a fight she had with a correctional officer.[98] As explained by the court, because the worker's internal report owed its existence to her employment, it would require "mental gymnastics" to claim that it was *not* made pursuant to her official duties.[99] Other courts using this language as a template include the Eighth,[100] Ninth,[101] Eleventh,[102] and District of Columbia Circuits.[103]

94 *See* Rohrbough v. Univ. of Colo. Hosp. Auth., 596 F.3d 741, 748 (10th Cir. 2010).

95 Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

96 605 F.3d 345 (6th Cir. 2010).

97 *Id.* at 349 (quoting Weisbarth v. Geauga Park Dist., 499 F.3d 538, 544 (6th Cir. 2007)); *see also Weisbarth*, 499 F.3d at 545 (6th Cir. 2007) ("Moreover, Weisbarth's speech indisputably 'owes its existence to [her] professional responsibilities,' as did Garcetti's." (alteration in original) (quoting *Garcetti*, 547 U.S. at 421)).

98 *See* Houskins v. Sheahan, 549 F.3d 480, 483 (7th Cir. 2008).

99 *Id.* at 491; *see also* Callahan v. Fermon, 526 F.3d 1040, 1044 (7th Cir. 2008) ("The controlling factor in the *Garcetti* inquiry is whether the speech 'owes its existence to a public employee's professional responsibilities.'" (quoting *Garcetti*, 547 U.S. at 421)).

100 *See* Bradley v. James, 479 F.3d 536, 538 (8th Cir. 2007); McGee v. Pub. Water Supply, Dist. No. 2, 471 F.3d 918, 921 (8th Cir. 2006) ("A public employee's speech is not protected by the First Amendment if it 'owes its existence' to his professional responsibilities." (quoting *Garcetti*, 547 U.S. at 421)).

101 *See* Anthoine v. N. Cent. Cntys. Consortium, 605 F.3d 740, 749 (9th Cir. 2010); Huppert v. City of Pittsburg, 574 F.3d 696, 704 (9th Cir. 2009).

102 *See* Abdur-Rahman v. Walker, 567 F.3d 1278, 1283 (11th Cir. 2009) ("The Court defined speech made pursuant to an employee's job duties as 'speech that owes its existence to a public employee's professional responsibilities,' and a product that

Proceeding from this "existence" principle, many circuits have evaluated the context of the speech at issue in light of its potential for an applicable citizen equivalent. As the Eleventh Circuit has pointed out, "Speech that owes its existence to the official duties of public employees is not citizen speech . . . . In that context, '[t]here is no relevant analogue to speech by citizens who are not government employees,' and the speech is unprotected."[104] Thus, the First Circuit in *Foley v. Town of Randolph*[105] judged a fire chief's statements to the media, which included critical remarks on budgetary and staffing issues, to be part of his official duties.[106] Because the chief spoke while on duty, in uniform, and at the scene of a fire, he would have been perceived as bearing the imprimatur of the fire department for which there was no relevant citizen analogue.[107]

Similarly, the Second Circuit supported the dismissal of a claim brought by a grade school teacher who filed a union complaint largely on the basis that the teacher's "speech ultimately took the form of an employee grievance, for which there [was] no relevant citizen analogue."[108] Though not determinative, it was highly indicative that the teacher, "[r]ather than voicing his grievance through channels available to citizens generally, . . . made an internal communication pursuant to an existing dispute-resolution policy established by his employer, the Board of Education."[109] More recently, the court in *Jackler v. Byrne*[110] declined to apply *Garcetti* to a probationary officer's refusal to withdraw a truthful report and file a false one in its place because that "refusal to comply with orders . . . [had] a clear civilian analogue."[111] As the court stated, "the *First Amendment* protects the rights of a citizen to refuse to retract a report to the police that he

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'the employer itself has commissioned or created.'" (citations omitted) (quoting *Garcetti*, 547 U.S. at 421, 422)).

103 *See* Winder v. Erste, 566 F.3d 209, 215 (D.C. Cir. 2009).

104 *Abdur-Rahman*, 567 F.3d at 1285–86 (alteration in original) (citation omitted) (quoting *Garcetti*, 547 U.S. at 424).

105 598 F.3d 1 (1st Cir. 2010).

106 *See id.* at 7.

107 *See id.* at 7–8; *see also* Decotiis v. Whittemore, 635 F.3d 22, 34 (1st Cir. 2011) (concluding that *Garcetti* might not reach the speech of a Child Development Services employee who voiced concerns about her employer's compliance with state regulations because "her speech appear[ed] to have been sufficiently analogous to the speech of other citizens in the community troubled by the new regulation and policy").

108 Weintraub v. Bd. of Educ., 593 F.3d 196, 203 (2d Cir. 2010).

109 *Id.* at 204.

110 No. 10-0859-cv, 2011 U.S. App. LEXIS 15265 (2d Cir. July 22, 2011).

111 *See id.* at *39.

believes is true, to refuse to make a statement that he believes is false, and to refuse to engage in unlawful conduct by filing a false report with the police."[112] The Fifth,[113] Sixth,[114] Seventh,[115] Ninth,[116] Tenth,[117] and Eleventh Circuits[118] have all employed this search for appropriate citizen parallels as well. Yet exclusive reliance on the citizen analogue approach has also drawn censure from the District of Columbia Circuit. Criticizing the Second Circuit's analysis in *Jackler* as "get[ting] *Garcetti* backwards," the court stressed that "[t]he critical question under *Garcetti* is not whether the speech at issue has a civilian analogue, but whether it was performed 'pursuant to . . . official duties.'"[119] Any "test that allows a *First Amendment* retaliation claim to proceed whenever the government employee can identify a civilian analogue for his speech is about as useful as a mosquito net made of chicken wire: All official speech, viewed at a sufficient level of abstraction, has a civilian analogue."[120]

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112 *Id.* at *38–39.

113 *See* Nixon v. City of Houston, 511 F.3d 494, 498 (5th Cir. 2007) (holding that a police officer's criticisms of the Houston Police Department made to the media were not protected by the First Amendment because there was no relevant citizen analogue for the speech made on duty, in uniform, and at the scene of an accident).

114 *See* Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 340–41 (6th Cir. 2010) (holding that a teacher's attempt to control her class's curriculum did not constitute protected speech because "'[n]o relevant analogue' exist[ed] between her in-class curricular speech and speech by private citizens" (quoting Garcetti v. Ceballos, 547 U.S. 410, 424 (2006))).

115 *See* Houskins v. Sheahan, 549 F.3d 480, 491 (7th Cir. 2008) (distinguishing an employee's unprotected internal report of a fight from the police report she filed because her "statements to the police were not made pursuant to her job, as the report was not generated in the normal course of her duties and most likely was similar to reports filed by citizens every day").

116 *See* Huppert v. City of Pittsburg, 574 F.3d 696, 704 (9th Cir. 2009) ("Speech which has 'no official significance' and bears 'similarities to [actions taken] by numerous citizens everyday' falls outside the ambit of an employee's job duties and would be protected by the First Amendment." (alteration in original) (quoting *Garcetti*, 547 U.S. at 422)).

117 *See* Rohrbough v. Univ. of Colo. Hosp. Auth., 596 F.3d 741, 746 (10th Cir. 2010).

118 *See* Abdur-Rahman v. Walker, 567 F.3d 1278, 1285–86 (11th Cir. 2009); Boyce v. Andrew, 510 F.3d 1333, 1345 (11th Cir. 2007) (per curiam).

119 Bowie v. Maddox, No. 08-5111, 2011 U.S. App. LEXIS 18158, at *8 (D.C. Cir. Aug. 31, 2011) (quoting *Garcetti*, 547 U.S. at 421).

120 *Id.* at *8.

B. Unique Circuit Approaches

Although circuit opinions applying *Garcetti* are rife with citations to the Supreme Court's language, a few courts have put their own twists on the analysis. Evaluated as a whole, these novel approaches do not seem to stray too far from *Garcetti*'s mandate. However, their significance lies in their demonstration of how some courts are currently translating the hazy inquiry set out by the Supreme Court into a workable methodology.

The Fifth Circuit has tailored its own approach by actually defining "official duties," identifying them as those "activities undertaken in the course of performing one's job."[121] In *Nixon v. City of Houston*,[122] the court reviewed the case of a police officer who made disparaging remarks about his department to the media while on duty and in uniform.[123] The court determined that the officer's statements lacked a constitutional safeguard because they were made "pursuant to his official duties and during the course of performing his job."[124] In the same manner, the court held in *Williams v. Dallas Independent School District*[125] that a high school athletic director's memorandum questioning the school's handling of funds was "made in the course of performing his employment" because he was responsible for consulting with his superiors about his office's budget.[126] As a result, the director spoke pursuant to his official duties.[127]

Citing language in the Fifth Circuit, the Third Circuit formulated its own characterization of the *Garcetti* inquiry by concluding that "speech might be considered part of [a public employee's] official duties if it relates to 'special knowledge' or 'experience' acquired through his job."[128] For example, the court decided that a university professor's assistance of a student was not protected freedom of association because his "special knowledge of, and experience with, the

121 Williams v. Dall. Indep. Sch. Dist., 480 F.3d 689, 693 (5th Cir. 2007) (per curiam).

122 511 F.3d 494 (5th Cir. 2007).

123 *See id.* at 496–97.

124 *Id.* at 498.

125 480 F.3d 689 (5th Cir. 2007) (per curiam).

126 *Id.* at 694.

127 *See id.*

128 Gorum v. Sessoms, 561 F.3d 179, 185 (3d Cir. 2009) (quoting Foraker v. Chaffinch, 501 F.3d 231, 240 (3d Cir. 2007), *abrogated by* Borough of Duryea v. Guarnieri, 131 S. Ct. 2488 (2011) (abrogating *Foraker*'s distinction between the protections afforded by the Speech and Petition Clauses of the First Amendment)). *Foraker* was in turn quoting language from *Williams*, 480 F.3d at 694. Recently, the First Circuit has also indicated its willingness to use the "special knowledge" paradigm, citing *Williams* in the process. *See* Decotiis v. Whittemore, 635 F.3d 22, 34 (1st Cir. 2011).

[university's] disciplinary code . . . made him *de facto* advisor to all . . . students with disciplinary problems."[129] Likewise, in *Foraker v. Chaffinch*,[130] the court declined to extend the First Amendment to Delaware State Police officers who exposed deteriorating conditions at a firing range.[131] The officers' "special knowledge and experience" with the range "demonstrated their responsibility for ensuring its functionality by reporting problems to their superiors."[132]

As the Ninth Circuit has opined, "[s]tatements are made in the speaker's capacity as citizen if the speaker had no official duty to make the questioned statements, or if the speech was not the product of performing the tasks the employee was paid to perform."[133] Drawn from language in two previous opinions,[134] the court's approach precludes constitutional protection from those statements either made directly pursuant to official duties or resulting from tasks closely intertwined with them. However, the Ninth Circuit has not had much occasion to assess this test's viability. In two cases where it has come up, the court heard summary judgment appeals and did not have a chance to fully implement an examination of the speech in question.[135]

The Tenth Circuit has espoused a number of adaptations of *Garcetti*, but its most recent approach parallels the Ninth Circuit's by focusing the classification on "whether the speech activity 'stemmed from and [was of] the type . . . that [the employee] was paid to do.'"[136] Indeed, the court initially stepped in this direction in one of its first post-*Garcetti* cases, *Green v. Board of County Commissioners*,[137]

129 *Gorum*, 561 F.3d at 186 (internal quotation marks omitted).

130 501 F.3d 231 (3d Cir. 2007), *abrogated by* Borough of Duryea v. Guarnieri, 131 S. Ct. 2488 (2011) (abrogating *Foraker*'s distinction between the protections afforded by the Speech and Petition Clauses of the First Amendment).

131 *See id.* at 240.

132 *Id.*

133 *See* Anthoine v. N. Cent. Cntys. Consortium, 605 F.3d 740, 749 (9th Cir. 2010) (quoting Eng v. Cooley, 552 F.3d 1062, 1071 (9th Cir. 2009)).

134 In *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1127 n.2 (9th Cir. 2008), the court synthesized the opinions of two prior cases, holding that "statements are made in the speaker's capacity as citizen if the speaker 'had no official duty' to make the questioned statements, or if the speech was not the product of 'perform[ing] the tasks [the employee] was paid to perform.'" *Id.* (alterations in original) (citations omitted) (quoting Marable v. Nitchman, 511 F.3d 924, 932–33 (9th Cir. 2007), and Freitag v. Ayers, 468 F.3d 528, 544 (9th Cir. 2006)).

135 *See Anthoine*, 605 F.3d at 750; *Eng*, 552 F.3d at 1073.

136 Rohrbough v. Univ. of Colo. Hosp. Auth., 596 F.3d 741, 746 (10th Cir. 2010) (alterations in original) (quoting Green v. Bd. of Cnty. Comm'rs, 472 F.3d 794, 801 (10th Cir. 2007)).

137 472 F.3d 794 (10th Cir. 2007).

which involved a drug-lab technician who raised concerns about her facility's testing policies. "[E]ven if not explicitly required as part of her day-to-day job responsibilities," the technician's "activities stemmed from and were the type of activities that she was paid to do" and thus fell within her official duties.[138]

The court subsequently altered the language a few months later in *Brammer-Hoelter v. Twin Peaks Charter Academy*,[139] stating that an employee speaks pursuant to official duties when the "employee engages in speech during the course of performing an official duty and the speech reasonably contributes to or facilitates the employee's performance of the official duty."[140] The court also took notice that *Garcetti* "made clear that speech relating to tasks within an employee's uncontested employment responsibilities is not protected from regulation."[141] Although the *Brammer-Hoelter* version has since appeared in Tenth Circuit case law,[142] the court recently reasserted the *Green* variant when it affirmed that a transplant coordinator's complaints about her hospital's practices were not protected statements.[143] Her "reporting about the conditions affecting her ability to fulfill her duties as Transplant Coordinator at the Hospital undoubtedly was an activity that 'stemmed from and [was of] the type . . . that she was paid to do.'"[144]

The Seventh Circuit has taken a somewhat comprehensive view of the scope of employment, expanding the analysis to look beyond "core job functions."[145] Noting that a focus on these functions is "too narrow after *Garcetti*, which asked only whether an 'employee's expressions [were] made pursuant to official responsibilities,'"[146] the court has applied this viewpoint to rebuff the retaliation claim of a police officer who complained about the misbehavior of officers in another

138 *Id.* at 800–01.

139 492 F.3d 1192 (10th Cir. 2007).

140 *Id.* at 1203. The court in *Brammer-Hoelter* interpreted *Green* as stating that "that speech is made pursuant to official duties if it is generally consistent with 'the type of activities [the employee] was paid to do.'" *Id.* (alteration in original) (quoting *Green*, 472 F.3d at 801).

141 *Id.*

142 *See* Thomas v. City of Blanchard, 548 F.3d 1317, 1324 (10th Cir. 2008).

143 *See* Rohrbough v. Univ. of Colo. Hosp. Auth., 596 F.3d 741, 748 (10th Cir. 2010).

144 *Id.* (alterations in original) (quoting *Green*, 472 F.3d at 801).

145 *See, e.g.*, Spiegla v. Hull, 481 F.3d 961, 966 (7th Cir. 2007) (stating that a "focus on 'core' job functions is too narrow").

146 *Id.* (alteration in original) (quoting Garcetti v. Ceballos, 547 U.S. 410, 424 (2006)).

unit.[147] Though the officer "may have gone above and beyond his routine duties by investigating and reporting suspected misconduct in another police unit," he commented on a matter that could have affected his own unit and therefore spoke pursuant to his official duties.[148] In contrast to the Ninth Circuit, the Seventh Circuit has had some time to develop this rubric, using it to bar the First Amendment from applying to a nurse who wrote a memorandum about unpleasant encounters with hospital personnel,[149] a professor who objected to his university's use of grant funds,[150] and a state insurance employee who criticized his superior's management style.[151]

III. THE EVOLUTION OF THE "SCOPE OF EMPLOYMENT" INQUIRY AND THE FUTURE OF *GARCETTI*

As the circuits entrench themselves more firmly in their approaches to the application of *Garcetti*, their opinions seem to indicate a comprehensive reading of what constitutes speech made pursuant to official duties. This Part addresses this expansive interpretation of *Garcetti* and concludes with an assessment of the future implications for public employee speech. It argues that the law should continue to embrace a defined contextual approach for determining the scope of employment, but should return to a modified *Pickering/ Connick* balancing standard for applying the First Amendment to public employees who speak pursuant to their official duties.

A. Expansive Views of Scope of Employment

Due to *Garcetti*'s lack of a distinct standard for measuring the scope of employment, it is impossible to positively assert that any individual circuit's position on the range of official duties is too broad or too narrow according to the Supreme Court's mandate. However, in light of the various methods adopted by the circuits, some legal academics like Professor Elizabeth Dale have insisted that the courts have "demonstrate[d] a tendency to read [*Garcetti*] as a broad restriction on [a] public employee's First Amendment rights."[152]

Certain cases seem to bear this out, especially where the circuits reach those activities considered to be outside an employee's conventional duties. Because the majority in *Garcetti* feared employers creat-

147 *See* Vose v. Kliment, 506 F.3d 565, 570 (7th Cir. 2007).
148 *Id.*
149 *See* Davis v. Cook Cnty., 534 F.3d 650, 653 (7th Cir. 2008).
150 *See* Renken v. Gregory, 541 F.3d 769, 773–74 (7th Cir. 2008).
151 *See* Ogden v. Atterholt, 606 F.3d 355, 360 n.2 (7th Cir. 2010).
152 Dale, *supra* note 56, at 207.

ing broad job descriptions in order to cover their legal bases, the Court rejected any binding relationship between such descriptions and what constitutes official duties.[153] Using this absence of a determinative correlation, the circuit courts have occasionally gone beyond formal job descriptions in classifying the scope of employment. In the Fifth Circuit's *Nixon* decision, the court did not find it dispositive that "[the officer's] statement was unauthorized by [the department] and that speaking to the press was not part of his regular job duties."[154] Similarly, the Eleventh Circuit in *Phillips v. City of Dawsonville*[155] deemed a city clerk's attempts to expose mayoral misconduct, including allegations of misuse of city property, misappropriation of funds, and sexual harassment, to be within the confines of her official duties, though they were not clearly part of her recognized job responsibilities.[156] Proceeding from the fact that the clerk's formally prescribed tasks included "keeping the Mayor and the Council informed of the financial condition of the city," the court concluded that the allegations fit within her official duties because they all touched "on a misuse of City resources . . . or on potential city liability or both."[157] Consequently, "[a]lthough her enumerated duties did not specify reporting misconduct by the Mayor, it was within her official duties to inquire about and make statements on the potentially inappropriate use of the City resources."[158] The Second,[159] Third,[160] Sixth,[161] Sev-

153 *See* Garcetti v. Ceballos, 547 U.S. 410, 424–25 (2006).

154 Nixon v. City of Houston, 511 F.3d 494, 498–99 (5th Cir. 2007). For another example in the Fifth Circuit, see Williams v. Dall. Indep. Sch. Dist., 480 F.3d 689, 694 (5th Cir. 2007) (per curiam) ("Simply because Williams wrote memoranda, which were not demanded of him, does not mean he was not acting within the course of performing his job.").

155 499 F.3d 1239 (11th Cir. 2007) (per curiam).

156 *See id.* at 1243.

157 *Id.* at 1242.

158 *Id.*

159 *See* Weintraub v. Bd. of Educ., 593 F.3d 196, 203 (2d Cir. 2010) ("[S]peech can be 'pursuant to' a public employee's official job duties even though it is not required by, or included in, the employee's job description, or in response to a request by the employer.").

160 *See* Foraker v. Chaffinch, 501 F.3d 231, 242 (3d Cir. 2007) ("[T]he fact that [an officer] may have exceeded the expectations of his formal job description as a firearms instructor [did] not mean that they were not within the scope of his duties."), *abrogated by* Borough of Duryea v. Guarnieri, 131 S. Ct. 2488 (2011) (abrogating *Foraker*'s distinction between the protections afforded by the Speech and Petition Clauses of the First Amendment).

161 *See* Fox v. Traverse City Area Pub. Sch. Bd. of Educ., 605 F.3d 345, 348 (6th Cir. 2010) ("Speech by a public employee made pursuant to *ad hoc* or *de facto* duties not appearing in any written job description is nevertheless not protected if it 'owes its

enth,[162] Ninth,[163] and Tenth Circuits[164] have all also indicated that the inquiry extends to activities outside a public employee's formal job responsibilities.

This interpretation raises an interesting question. In *Garcetti*, the majority repudiated a conclusive link between formal job descriptions and official duties in response to the suggestion that "employers [could] restrict employees' rights by creating excessively broad job descriptions."[165] The majority thus was permitting a court to recognize that an employee's statement, although made in the course of performing an activity listed on his or her job description, was not part of his or her official duties. The Court, at least explicitly, did not speak to a move in the other direction—namely that because formal job descriptions are no longer determinative, courts can now define official duties to include activities *beyond* those descriptions. Nevertheless, it is reasonable to presume that a "practical" evaluation of a public employee's official responsibilities may from time to time include those external activities. Regardless, it is relatively clear at present that the circuits have interpreted *Garcetti* to permit such an examination. The pertinent issue now concerns how far courts are going to go. Currently, the circuits are occasionally embracing sizeable amounts of speech within the purview of official duties.

A slight expansion to the scope of employment may also be evident in some of the unique approaches exhibited by certain courts of appeals.[166] The Fifth Circuit in *Williams* used its particular delineation of official duties, "activities undertaken in the course of perform-

existence to [the speaker's] professional responsibilities.'" (alteration in original) (quoting Weisbarth v. Geauga Park Dist., 499 F.3d 538, 544 (6th Cir. 2007))).

162 *See* Hernandez v. Cook Cnty. Sheriff's Office, 634 F.3d 906, 915 n.11 (7th Cir. 2011) ("*Garcetti* clarified that 'official duties' encompass even unusual communications outside an employee's 'core' job functions. Thus, since *Spiegla I*, the definition of non-protected speech has been broadened." (citations omitted) (citing Spiegla v. Hull, 481 F.3d 961, 966 (7th Cir. 2007))).

163 *See* Huppert v. City of Pittsburg, 574 F.3d 696, 704 (9th Cir. 2009) ("Our inquiry should be practical and look beyond the job description to the duties the employee actually performs.").

164 *See* Rohrbough v. Univ. of Colo. Hosp. Auth., 596 F.3d 741, 747 (10th Cir. 2010) ("In addition, the court has not foreclosed unauthorized speech or speech 'not explicitly required as part of [an employee's] day-to-day job' from being within the scope of that employee's official duties." (alteration in original) (quoting Green v. Bd. of Cnty. Comm'rs, 472 F.3d 794, 800–01 (10th Cir. 2007))); Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1203 (10th Cir. 2007) (noting that speech may not be protected even if it "concerns an unusual aspect of an employee's job that is not part of his everyday functions").

165 Garcetti v. Ceballos, 547 U.S. 410, 424 (2006).

166 *See supra* Part II.B.

ing one's job,"[167] to bar the First Amendment from applying to the athletic director's memorandum, even though it admittedly was not demanded of him.[168] In fact, the Second Circuit cited this decision as support for the proposition that "speech can be 'pursuant to' a public employee's official job duties even though it is not required by, or included in, the employee's job description, or in response to a request by the employer."[169] In the Third Circuit's treatment of *Foraker*, "the fact that [an officer] may have exceeded the expectations of his formal job description as a firearms instructor [did] not mean that they were not within the scope of his duties."[170] Rather, the officer's "special knowledge and experience . . . demonstrated [his] responsibility for ensuring [the firing range's] functionality by reporting problems to their superiors."[171]

The evolution of the Tenth Circuit's own methodology is a lucid reflection of this phenomenon. The court has insisted in the past that an employee's speech may be constitutionally defenseless "even if it deals with activities that the employee is not expressly required to perform."[172] Its initial pronouncement in *Green*, that the inquiry should focus on whether the speech "activities stemmed from and were the type of activities that [the employee] was paid to do,"[173] allowed the court to restrict speech that had a relation to those tasks that the employee was paid to do. By "denying First Amendment protection for employees' speech that either fell within their *portfolio* of duties or was *generally consistent* with the type of duties they were hired to do," the Tenth Circuit in *Green* "interpreted *Garcetti*'s 'speech pursuant to official duties' bar broadly."[174]

Qualifying this approach in *Brammer-Hoelter*, the court narrowed its view by requiring that the speech "reasonably contribute[ ] to or facilitate[ ]" an official duty for it to lose the cover of the First Amend-

167 Williams v. Dall. Indep. Sch. Dist., 480 F.3d 689, 693 (5th Cir. 2007) (per curiam).

168 *See id.* at 694.

169 Weintraub v. Bd. of Educ., 593 F.3d 196, 203 (2d Cir. 2010).

170 Foraker v. Chaffinch, 501 F.3d 231, 242 (3d Cir. 2007), *abrogated by* Borough of Duryea v. Guarnieri, 131 S. Ct. 2488 (2011) (abrogating *Foraker*'s distinction between the protections afforded by the Speech and Petition Clauses of the First Amendment).

171 *Id.* at 240.

172 Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1203 (10th Cir. 2007).

173 Green v. Bd. of Cnty. Comm'rs, 472 F.3d 794, 800–01 (10th Cir. 2007).

174 Raj Chohan, Note, *Tenth Circuit Interpretations of* Garcetti*: Limits on First Amendment Protections for Whistle-Blowers*, 85 DENV. U. L. REV. 573, 584 (2008) (footnotes omitted).

ment, as opposed to merely stemming from that duty.[175] Moreover, the case's "notion of 'uncontested employment responsibilities' seems to allow more gray-area speech to survive the *Garcetti* razor than *Green*'s 'generally consistent with[ ]' . . . analysis."[176] Yet, if *Garcetti* instructs courts to adhere strictly to official duties, and not stray to speech that reasonably contributes to or facilitates them, then *Brammer-Hoelter* "nevertheless remains broader than the specific application used" by the Supreme Court.[177] Moreover, the recent reappearance of *Green*'s language in the court's case law may signify the recurrence of a more expansive view of the scope of employment within the Tenth Circuit.[178]

B. The Future of Garcetti

As the courts of appeals began to construct their own readings of what *Garcetti* required, the ensuing debate revealed a number of problematic aspects of *Garcetti*'s future in the circuits. This section addresses defenses and criticisms of *Garcetti* and its ongoing treatment by the circuits. Specifically, there are three main points of contention: (1) the proper balance between the government's efficiency interest as an employer and the public interest in the speech of public employees; (2) the extent to which *Garcetti*'s holding, as applied by the circuits, is consistent with its formalist foundations; and (3) the degree to which *Garcetti* and its subsequent applications encourage a "perverse incentive" for public employees to speak outside the chain of command where their speech is more likely to find constitutional protection. Following this discussion, the section will conclude with a proposed alternative to *Garcetti* in the form of a balancing standard similar to the Court's pre-*Garcetti* public employee speech jurisprudence.

1. A Defense of *Garcetti*

The first aspect of the debate over the circuits' execution of *Garcetti* revolves around the fact that *Garcetti* "represents the Supreme

175 *Brammer-Hoelter*, 492 F.3d at 1203.

176 Chohan, *supra* note 174, at 586.

177 *Id.* at 587.

178 *See* Rohrbough v. Univ. of Colo. Hosp. Auth., 596 F.3d 741, 746 (10th Cir. 2010) (quoting *Green*, 472 F.3d at 801); *see also* Sarkar v. McCallin, 636 F.3d 572, 576 (10th Cir. 2011) ("It is clear from the record that all of these individuals . . . spoke with Plaintiff in his capacity as CCCS chief information officer, not as a private citizen, and that their discussions *stemmed from* Plaintiff's official duties to oversee the contract with SunGard . . . ." (emphasis added)).

Court's effort to balance two vital, yet competitive, interests: the government employer's interest in promoting the efficient operation of public services and the shared interest of the public employee and the community at large in preserving the value of unfettered speech."[179] One explanation for why the Court balanced in favor of the government's interest as an employer stems from the theory that the First Amendment's purpose in protecting whistleblowers is really a "commitment to free speech as a means of achieving political accountability" against public management.[180]

From the outset, strict regulation of employee speech is arguably necessary to provide maximum governmental efficiency. As explained by Professor Robert C. Post, "managerial domains" deserve a special place within the First Amendment universe because their constitutional significance lies in their "instrumental rationality, a value that conceptualizes persons as means to an end rather than as autonomous agents."[181] This in turn reveals an inherent paradox: these domains must organize themselves in a manner contrary to democratic principles, imposing ends upon employees so "that [the] democratic state can actually achieve objectives that have been democratically agreed upon."[182] It is for this reason that the government must have the ability to control speech within managerial domains, including the power to "regulate the speech of government employees so as to promote 'the efficiency of the public services [the government] performs through its employees.'"[183]

In turn, this type of power is required to ensure that public employers are held justly accountable. Unless public offices have some leeway in controlling their employees' speech, it becomes increasingly difficult for them to efficiently attain other legitimate objectives.[184] Managerial control over employee speech is then "essential" if public employers are to be held politically responsible by the electorate.[185] If, on the other hand, all speech claims were to be sorted out by the judiciary, it would prevent public officials from having any effective control over their offices, thereby "seriously compro-

179 Smith, *supra* note 9, at 290.

180 Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33, 38, 60 (2008).

181 Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 164 (1996).

182 *Id.*

183 *Id.* (alteration in original) (quoting Connick v. Myers, 461 U.S. 138, 142 (1983)).

184 *See* Rosenthal, *supra* note 180, at 88.

185 *See id.* at 38, 48.

mis[ing] the First Amendment's" goal of ensuring effective political accountability.[186]

Professor Dale takes a more limited view of this managerial prerogative. Agreeing that the opinion should be viewed through the lens of managerial rights, she argues that the Court recognized the right of employers to have the "discretion to define their mission, tasks, and work product."[187] Yet, although the majority embedded the notion that government agencies can silence certain types of employee speech, she also maintains that the Court implicitly delineated the bounds of managerial rights in three ways: by internal restraints such as custom or collective bargaining agreements, by external restraints in the form of law, and by public policy.[188] Accordingly, there can be no freedom of speech where a public employer has managerial control over the employee's speech. But this prerogative may be limited by the Constitution, laws, contracts, or public policy.[189] Structured in this way, Dale believes *Garcetti* "should increase the protections for public employees in the long run."[190]

The second point in the debate focuses on the characterization of *Garcetti* as a "hallmark of formalism" in its choice of an "absolute prophylactic rule" restricting public employee speech pursuant to official duties, as opposed to a balancing standard like that of the *Pickering/Connick* ilk.[191] The Court based its preference for a rule on principles of federalism and the separation of powers.[192] Professor Lawrence Rosenthal defends this decision on the grounds that a balancing standard would induce uncertain litigation and thus create a "chilling effect on employees and supervisors alike."[193] Supervisors inevitably will have to make official decisions based on anticipated litigation. Under a balancing standard, the resulting unpredictability will lead employers and employees to err on the silent side. More fundamentally, Rosenthal contends that *Garcetti* rejected a balancing standard for the simple reason that there is nothing to balance on the employee's end.[194] An employee who is required to speak pursuant to

186 *See id.* at 38.

187 Dale, *supra* note 56, at 213.

188 *See id.* at 214.

189 *See id.* at 218.

190 *Id.* at 217.

191 Rhodes, *supra* note 6, at 1191–92.

192 *See* Garcetti v. Ceballos, 547 U.S. 410, 423 (2006); Rhodes, *supra* note 6, at 1191.

193 Rosenthal, *supra* note 180, at 49.

194 *See id.*

his or her official duties has no "liberty" interest; the speech is supposed to be carried out according to management's wishes.[195]

Finally, there is an accountability argument to be made in response to those critics who argue that *Garcetti* creates a "perverse incentive" to speak outside the chain of command. According to detractors, *Garcetti* indirectly funnels public employees' speech into the public domain, where courts are more likely to confer First Amendment safeguards, instead of following traditional internal complaint procedures.[196] This creates efficiency concerns as public employees seek to invite public scrutiny of governmental activities rather than contain their complaints within the proper internal channels where they can be dealt with more expediently. However, *Garcetti* proponents point to the fact that employees speaking externally are, by definition, exposing misconduct to the general public.[197] As a result, they are enabling the "the process of political accountability to function" and therefore deserve the shelter of the Constitution.[198] In contrast, there is not much reason to apply the First Amendment to internal duty-related reports that inherently "contribute little to public discussion and debate."[199]

2. Criticisms of the *Garcetti* Analysis

Though it is beyond question that unqualified constitutional coverage of public employee speech would greatly disrupt the efficient performance of government agencies and offices, perhaps the Supreme Court went too far in swinging the pendulum in the other direction. As noted by Justice Souter and other scholars, the absolute nature of *Garcetti*'s ruling ignores the "possibility that an employee may be speaking both as an employee and as a private citizen on matters of public concern."[200] Contrary to the theory of accountability, a number of commentators have asserted that government speech is insulated from scrutiny "precisely because of its instrumental value to the public as listeners."[201] In supporting the managerial interest, the

195 *See id.*

196 *See, e.g.*, Chohan, *supra* note 174, at 594 ("Ironically, the *Garcetti* rule appears to have created a perverse incentive that encourages government employees to take their problems first to the media, or any authority outside of the employee's immediate chain of command.").

197 *See* Rosenthal, *supra* note 180, at 59–60.

198 *Id.*

199 *Id.*

200 Chohan, *supra* note 174, at 591.

201 Helen Norton, *Government Workers and Government Speech*, 7 FIRST AMENDMENT L. REV. 75, 86 (2008).

Court placed "all the weight on the side of the employer's interest in controlling employee speech . . . and [took] away from the employee's right to speak out about issues of public concern, and from society's right to know what the government is doing."[202] In fact, there is much to be said for the argument that, because public employees have intimate knowledge of their own duties, there is an enhanced value in allowing them to contribute to the "marketplace" of ideas by speaking on matters of public concern related to their jobs. It is this underlying public value that necessitates an approach that takes into account both sides of the scale.

Moreover, though the majority in *Garcetti* may have intended a categorical approach, the Court's endorsement of a "practical" inquiry undercut the very purpose of having a formalistic rule.[203] Because of the "almost limitless circumstances in which [public employee speech cases] arise," they "defy simple rule-based categorization."[204] As courts have struggled to manage these varied circumstances, the Court's vague rule has in turn generated the sort of uncertainty in circuit court decisions that commentators like Rosenthal feared.[205] The advantage of a rule is predictability, but without any guide for its implementation, *Garcetti* sapped its proposed rule of its intended value.[206]

Additionally, the Court's foundation for a rule in the principles of federalism and the separation of powers is not as solid as it appears. In the quarter century in between *Connick* and *Garcetti*, federal courts would not engage in an exhaustive analysis of a public employee's speech unless it decided first, as a matter of law, that the employee spoke on a matter of public concern. During this span then, "there was no judicial review of routine employment decisions if the speech related to the workplace or other private matters."[207] The Court's concern with avoiding excessive judicial intrusion may thus have been exaggerated.

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202 Daly, *supra* note 90, at 28.

203 *See* Rhodes, *supra* note 6, at 1192. Professor Dale has even asserted that *Garcetti* "requires courts to undertake a case-by-case analysis of the nature of an employee's duties and of the context of the employee's speech." Dale, *supra* note 56, at 209. Accordingly, she argues that the circuit court decisions that stray from the formalist viewpoint accurately reflect *Garcetti*'s emphasis on the "fact-based nature of the inquiry." *Id.* at 208.

204 Rhodes, *supra* note 6, at 1192.

205 *See id.* at 1194.

206 *Id.*

207 Daly, *supra* note 90, at 35.

For Professor Charles W. Rhodes, the trouble with a prophylactic rule in public employee speech cases exhibits itself in the ways circuit courts can interpret *Garcetti*. On the one hand, courts could take a narrow view, limiting speech that "the employer itself has commissioned or created."[208] Though this approach provides a more definitive classification of official duties, it conflicts with the Supreme Court's stated interest in avoiding "committing the judiciary to an 'intrusive role' overseeing 'communications between and among government employees and their superiors in the course of official business.'"[209] Taking a narrow course, courts would now have an opportunity to intervene more often and protect a larger amount of employee speech from the actions of the employer. On the other end of the spectrum, courts could take a broad approach, "categorizing any employee expression related to the tasks performed on the job as official duty speech."[210] However, a broad inquiry defeats predictability and has the potential for encroachments on the First Amendment interests of employees that *Garcetti* implicitly would have recognized anyway.[211] As a compromise, Rhodes suggests an analysis that determines "whether disciplining the employee would silence his or her ability to participate in public affairs," resting on comparisons to relevant citizen analogues.[212] Yet this compromise position also raises serious doubts that courts can adequately differentiate between what actions a citizen would have pursued in relation to what the public employee actually did.[213] For these reasons, Rhodes argues that a rule is not feasible: "[W]hen the application of the rule depends on an underlying categorization that is more ambiguous than the prior standard, the rule cannot serve its purposes."[214]

Lastly, many criticize *Garcetti*'s "perverse incentive" as a Catch-22 that forces employees to choose between speaking, in turn risking their continued employment, or remaining silent. Employees who have an opportunity to expose misconduct are faced with a few options: either (1) they can speak publicly and thus risk losing their job for breaking the chain of command; (2) they can speak internally, but they are not shielded from their employer's retaliatory action; or (3) they can choose not to speak at all, and in doing so deprive the

208 *See* Rhodes, *supra* note 6, at 1195 (quoting Garcetti v. Ceballos, 547 U.S. 410, 422 (2006)).

209 *Id.* at 1196 (quoting *Garcetti*, 547 U.S. at 423).

210 *Id.*

211 *See id.*

212 *See id.* at 1197.

213 *See id.*

214 *Id.* at 1198.

general public of relevant information.[215] What is more, if they do choose to speak, *Garcetti* and its subsequent interpretations encourage an employee to speak externally, thereby inviting a disruption in the efficient operation of government that the Supreme Court sought to protect in the first place.[216] Inevitably, the "predictable and unfortunate consequence . . . is the chilling impact on whistle-blowers whose economic need for a job may outweigh the desire to correct government improprieties."[217]

In addition, the precautions that the Court relied upon to facilitate continued exposure of governmental misbehavior, namely internal mechanisms and current whistleblower statutes, are inadequate. Any dependence on employers creating internal dissent mechanisms is misplaced because it relegates the determination of whether an employee can speak on a matter of public concern to the "grace" of the employer.[218] Though the precise extent of whistleblower statutes is debatable, many have argued that they too are insufficient.[219] And, as Justice Souter argued, as statutes vary with jurisdiction, the scope of statutory protection for public employee speech will necessarily fluctuate depending upon the applicable law.[220]

3. A Proposal to Reform the Public Employee Speech Analysis

To address the preliminary issue of whether an employee's speech falls within the *Garcetti* scope of employment, circuit courts should continue to engage in contextual analyses focusing on those duties plainly required by employers as well as those tasks so intertwined as to be nearly inseparable. In making this determination, courts should feel free to continue to use factors such as subject matter, audience, formal job descriptions, and comparisons to relevant citizen analogues, though none of these should be dispositive.

A number of examples from the circuit courts stand out as stark examples of how the foundational determination of the scope of offi-

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215 *See* Sonya Bice, Note, *Tough Talk from the Supreme Court on Free Speech: The Illusory Per Se Rule in* Garcetti *as Further Evidence of* Connick*'s Unworkable Employee/Citizen Speech Partition*, 8 J.L. Soc'y, Winter 2007, at 45, 80–83 (2007).

216 *See id.*

217 Chohan, *supra* note 174, at 592.

218 Daly, *supra* note 90, at 38.

219 *See, e.g., id.* at 40 (arguing that *Garcetti* "may overstate the level of protection that exists for public employees" because "[t]he principal sources of protection—whistleblower statutes—are sporadic and limited in scope"); Bice, *supra* note 215, at 79 ("[E]ven a cursory investigation reveals that expecting existing law to protect legitimate whistleblower claims is at best naïve, at worst, facetious.").

220 *See* Garcetti v. Ceballos, 547 U.S. 410, 440–41 (2006) (Souter, J., dissenting).

cial duties would proceed under this new standard by examining the various factors referenced above. For instance, the factually similar cases in *Nixon* and *Foley* demonstrate when a court should find a public official to be speaking within his or her official duties based on the lack of a relevant citizen analogue. When the police officer and fire chief in each case spoke to the media, the fact that they were on duty, in uniform, and involved in situations requiring the assistance of public officers (an automobile accident and a fire, respectively) inextricably tied their speech to the performance of their official tasks.[221] Though the statements were not openly demanded of the employees, the lack of any relevant parallel to the behavior of ordinary citizens indicated the intimate link between their comments and the pursuit of their plain duties as public officials representing their individual departments. Consequently, in cases such as these, courts should not extend the aegis of the First Amendment to the employee's speech.

The same reasoning also corresponds to certain cases where audience and subject matter play a central role in implementing this proposal. As an example of a case where the First Amendment would apply, in *Charles v. Grief*[222] a systems analyst at the Texas Lottery Commission sent reports of racial discrimination by the Commission to the Texas Legislature.[223] In combination with the lack of a "*Garcetti*-like nexus between [the subject matter of the employee's] systems analyst's work and the malfeasance that he sought to expose to the cognizant public authorities," the decision to file the report through external channels indicated that the speech should be placed outside the analyst's "official duties."[224] Likewise, in *Thomas*, the court should not have deemed the building code inspector's discovery of a prematurely signed certificate to be "official-duty" speech because he reported the illegal behavior to the Oklahoma State Bureau of Investigation.[225] Admittedly, the speech stemmed from a discovery made in pursuit of the inspector's official duties. Yet the act of reporting the wrongdoing to a state investigative agency could not be considered nearly inseparable from his plainly required duties of building inspection.

221 *See* Foley v. Town of Randolph, 598 F.3d 1, 2–3 (1st Cir. 2010); Nixon v. City of Houston, 511 F.3d 494, 496–97 (5th Cir. 2007).

222 522 F.3d 508 (5th Cir. 2008).

223 *See id.* at 510.

224 *Id.* at 514.

225 *See* Thomas v. City of Blanchard, 548 F.3d 1317, 1319–20 (10th Cir. 2008).

Though this is not as narrow of a proposal as some have put forth in the past,[226] it should be seen as an effort to curtail the tendencies of some circuits to expand their view of what constitutes "official duties." Courts should take caution not to adhere so rigidly to an either/or approach in evaluating whether a public employee spoke as a citizen or as an employee as to lose sight of the possibility that there may be situations where an employee's speech, though arising from an official duty, may not be part and parcel of those duties. Where certain circuits have framed the inquiry to include speech with a tenuous relation to an employee's clearly defined responsibilities, there is a danger that this opens the door to an overly comprehensive view of the scope of employment. Just as the *Garcetti* majority dreaded employers drawing up excessively broad job descriptions, the judiciary may end up doing exactly that if courts carry this current reasoning further.

Even now, existing precedent may instill fear among public employees that commenting on issues of clear public importance will fall under their official duties, thereby inducing employees to turn a blind eye to these matters. For example, in *Abdur-Rahman v. Walker*,[227] the Eleventh Circuit denied any application of the First Amendment to county sewer inspectors who drew their supervisors' attention to the county's noncompliance with state and federal laws.[228] The inspectors had been hired to formulate ordinances about the disposal of fat, oil, and grease as well as to investigate the causes of sewer overflows.[229] Yet the court refused to differentiate between those reports that dealt specifically with sewer flows and those that dealt with noncompliance.[230] Because "all of their speech 'owe[d] its

226 *See, e.g.*, Norton, *supra* note 201, at 83 (arguing that the "First Amendment should be understood to permit government to claim as its own—and thus control—the speech of public employees that the government has specifically hired to deliver a particular viewpoint that is clearly governmental in origin and thus open to the public's meaningful credibility and accountability checks"); *id.* at 85 ("[O]nly the speech of public employees engaged to speak *for the government*—i.e., those specifically hired to deliver a transparently government message—should be considered the government's own speech that is exempt from First Amendment scrutiny."); Suma, *supra* note 88, at 386 (asserting that courts "should construe job duties narrowly, with reference to the specific, explicit requirements of the employer rather than broad, implicit obligations" because "[n]arrow construction of job duties allows courts to protect individual and public interests in an employee's speech, and these interests can be significant").

227 567 F.3d 1278 (11th Cir. 2009).

228 *See id.* at 1283.

229 *See id.* at 1279–80.

230 *See id.* at 1284 ("It cannot be that the job duties of the inspectors were so narrow that they encompassed only a portion of the reports their job precipitated.").

existence to' those [official] duties," the Constitution could not apply to any of it.[231] However, this line of reasoning overlooks the fact that the inspectors were not conducting their investigations with the purpose of assessing compliance with state and federal law.

Comparing this opinion with *Thomas*, a difference that immediately stands out is the inspectors' choice to speak to their superiors rather than to an external agency. Indeed, the court admitted as much when it noted that the choice to speak to superiors suggested "that the inspectors did not believe that raising concerns about sewer overflows was exclusively the responsibility of someone else in some other unit of their department and that they did not take a narrow, rigid view of their own responsibilities."[232] Although this choice may be indicative, it cannot overshadow that, just like the building inspector in *Thomas*, the sewer inspectors went beyond their established duties to call attention to their agency's noncompliance with the law. On a more abstract level, the case epitomizes how the current approach incentivizes public employees to keep quiet and focus firmly on those duties that they know are required of them, rather than risking their careers to shed light on illicit conduct. When the courts thus impede a public employee's ability to raise these matters to their superiors, they promote a culture of willful ignorance instead of one that seeks to address and correct governmental shortcomings in the most efficient manner. It is the public, then, who ultimately loses out under this system.

Even where the scope of employment is not seriously in question, there will indubitably be situations in which a public employee is speaking on a matter of public concern, such as exposing official misconduct, while speaking within the purview of his or her official duties. Because there is a compelling accountability and efficiency interest in granting the government as an employer some flexibility in controlling the speech of its employees, this should tip the scales slightly in favor of management. However, these interests do not warrant a complete disregard for the value of having public employees speak on matters of clear public significance. Indeed, it might be best for purposes of efficiency to encourage public employees to file their complaints internally by offering them the prospect of protection for those important matters, rather than risk the complications that arise from employees leaking information to outside audiences. Furthermore, the fact that an employee speaks internally does not mechanically transform his speech from being a matter of public concern to a

231 *Id.* (quoting Garcetti v. Ceballos, 547 U.S. 410, 421 (2006)).

232 *Id.*

mere grievance. To be sure, the accountability interest is more evident when an employee speaks to the general public. But this does not mean that the same results cannot be attained when an employee stirs the pot internally, and possibly at less expense to the office or agency.

For these reasons, the courts should adopt a standard modeled on *Pickering/ Connick* for cases involving an employee speaking pursuant to his or her official duties, but with a slight modification in the form of a presumption that the government's efficiency interest will prevail unless the court can first determine that the speech was of such manifest public worth as to plainly deserve protection under the First Amendment.[233] This presumption reflects the need to preserve governmental efficiency in managerial contexts. But a purely formalistic approach is improper to meet the multitude of employment scenarios that continue to arise in the lower courts. *Garcetti*'s categorical ruling cannot accept the very real possibility of public employees speaking within their official duties on matters of strong public concern. Moreover, as evidenced by the variety of methods that circuit courts use to determine the scope of employment, the formalistic rule has not provided the kind of predictability that proponents of *Garcetti* have cited. If the choice has come down to opting between a formalistic rule and a balancing standard, neither of which offer strong degrees of adjudicative certainty, it would be better to take the standard that recognizes the intricate realities of public employee speech.

To illustrate how courts would bring this balancing approach into operation, certain employment scenarios already handled by the circuits elucidate how the analysis would function. In *Fox*, the school teacher's protests that her caseload exceeded that allowable by law did not hold any larger public significance beyond an individual employee grievance.[234] In filing her complaint, she did not seek to expose any wider practice of alleged illegal behavior by the school district. The same can be said of the case heard by the Seventh Circuit in *Mills v. City of Evansville*[235] where a police officer voiced her unease over the viability of planned departmental reassignments.[236] Again, the officer's speech contained no matter of substantial public relevance; it merely reflected a public employee's concerns about a pro-

233 *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968); Connick v. Myers, 461 U.S. 138, 147 (1983).

234 *See* Fox v. Traverse City Area Pub. Sch. Bd. of Educ., 605 F.3d 345, 347 (6th Cir. 2010).

235 452 F.3d 646 (7th Cir. 2006).

236 *See id.* at 647.

posed managerial decision. Certainly neither of these examples exceeds a presumption in favor of the employer.

Conversely, the Third Circuit's reasoning in *Reilly v. City of Atlantic City*[237] indirectly provides a paradigm for public employee speech on a matter of public concern that outweighs the employer presumption. In that case, a police officer claimed that his superiors retaliated against him because of his participation in an investigation, including giving trial testimony.[238] The court acknowledged that the officer's testimony stemmed from his official duties in the investigation, but nevertheless held that the First Amendment applied to his speech because of his duty as a citizen to testify truthfully, thereby protecting "the integrity of the judicial process and . . . insulat[ing] that process from outside pressure."[239] Such a duty, as the court implicitly accepted, undoubtedly prevails in the face of the government's efficiency interest.[240]

Unfortunately, because of *Garcetti*'s formalistic nature, several decisions by the circuits impede the advantages to be gained through the protected exercise of employee speech of strong public consequence. One recurring theme among these cases is the classic whistleblower scenario involving public corruption, exemplified by the *Phillips* case where a city clerk sought to expose the mayor's alleged misappropriation of funds and sexual harassment.[241] Judging that the reports fell within the clerk's official duties, the court rendered a chilling effect on public employees, thus jeopardizing future efforts to address corruption allegations that would have resulted had employees been given a prospect of protection in speaking out.

Accordingly, *Phillips* and cases like it throughout the courts of appeals[242] deny the public any possible curative benefits of an

237 532 F.3d 216 (3d Cir. 2008).

238 *See id.* at 219.

239 *Id.* at 231.

240 *See id.* ("That an employee's official responsibilities provided the initial impetus to appear in court is immaterial to his/her independent obligation as a citizen to testify truthfully.").

241 *See* Phillips v. City of Dawsonville, 499 F.3d 1239, 1240–41 (11th Cir. 2007).

242 *See* Fairley v. Andrews, 578 F.3d 518, 520 (7th Cir. 2009) (involving a prison guard reporting misconduct by other guards including the beating of prisoners); Abdur-Rahman v. Walker, 567 F.3d 1278, 1279 (11th Cir. 2009) (concerning sewer inspectors who expressed their concerns about the county's compliance with the Clean Water Act); Thomas v. City of Blanchard, 548 F.3d 1317, 1319 (10th Cir. 2008) (involving a building inspector who reported suspected illegality by the City Clerk); Thompson v. District of Columbia, 530 F.3d 914, 916 (D.C. Cir. 2008) (concerning the corruption investigation of an employee of the District of Columbia Lottery and Charitable Games Board); Tamayo v. Blagojevich, 526 F.3d 1074, 1079–80 (7th Cir.

employee's speech if the allegations seem genuine. Furthermore, where an employee speaks to superiors or other public employees, as did the clerk in *Phillips*,[243] *Garcetti*'s chilling effect generates the "perverse incentive" insofar as it precludes the employee's choice to speak internally. The employee's only remaining option, apart from remaining silent altogether, is to communicate to external parties, thus raising threats to governmental efficiency.

The same concerns are manifest in public employee speech regarding governmental performance where that performance is deficient or dangerous. In *Foraker*, the court declined to extend constitutional protection to the police officers who exposed the deteriorating conditions posing health and safety issues at their firing range.[244] Following decisions like these,[245] there is no longer any impetus for public employees to call attention to inadequacies in their employer's operation, including matters that might threaten the welfare of fellow employees or even the public at large.

CONCLUSION

Though *Garcetti* did not supply precise contours for its "scope of employment" inquiry, the circuit courts have developed their own variety of factors for handling the determination, drawing from the Supreme Court's own language as well as creating their own unique approaches. In light of the foregoing analysis of these interpretations of *Garcetti*, the initial question of determining a public employee's scope of employment should be answered by resorting to a contextual analysis that focuses on those duties either plainly required by employers or so intertwined as to be nearly inseparable. Those cases that do

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2008) (involving the Deputy Chief Counsel of the Illinois Gaming Board alleging wrongdoing by the Governor); Vose v. Kliment, 506 F.3d 565, 570 (7th Cir. 2007) (concerning a police officer investigating misconduct by fellow officers).

243 *See Phillips*, 499 F.3d at 1241 ("Nothing indicates that Plaintiff ever communicated her concerns about the then Mayor's conduct to anyone outside of the city's employment.").

244 *See* Foraker v. Chaffinch, 501 F.3d 231, 243 (3d Cir. 2007), *abrogated by* Borough of Duryea v. Guarnieri, 131 S. Ct. 2488 (2011) (abrogating *Foraker*'s distinction between the protections afforded by the Speech and Petition Clauses of the First Amendment).

245 *See* Rohrbough v. Univ. of Colo. Hosp. Auth., 596 F.3d 741, 743–44 (10th Cir. 2010) (involving a hospital employee who reported instances of substandard care and the misallocation of a heart transplant); Bivens v. Trent, 591 F.3d 555, 557 (7th Cir. 2010) (concerning an Illinois State Police officer who reported safety issues at a firing range); Green v. Bd. of Cnty. Comm'rs, 472 F.3d 794, 796 (10th Cir. 2007) (involving a drug-lab technician who commented on the inaccuracy of the lab's testing procedures).

involve a public employee speaking pursuant to his or her official duties should be resolved by a modified *Pickering/ Connick* balancing standard instead of *Garcetti*'s formalistic rule.