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# Note

## **GARCETTI v. CEBALLOS: MISCONSTRUING PRECEDENT TO CURTAIL GOVERNMENT EMPLOYEES' FIRST AMENDMENT RIGHTS**

In *Garcetti v. Ceballos*,<sup>1</sup> the Supreme Court of the United States considered whether the First Amendment protects government employees from discipline based on speech made pursuant to their official duties.<sup>2</sup> The Court held that the First Amendment does not protect such speech because government employees speaking in the context of their employment duties are not speaking as citizens.<sup>3</sup> In so holding, the Court created a bright-line rule that ignored precedent,<sup>4</sup> and needlessly adopted an expansive view of the government's ability to control speech.<sup>5</sup> As a result, the Court threatened the constitutional mandate of *Brady v. Maryland*<sup>6</sup> and the traditionally broad protection afforded to academic freedom.<sup>7</sup> The Court could have avoided this outcome if it had adopted Justice Breyer's approach and protected speech that raises special constitutional considerations.<sup>8</sup>

### I. THE CASE

Beginning in 1989, Richard Ceballos was employed as a deputy district attorney in the Los Angeles County District Attorney's office.<sup>9</sup> In this capacity, Ceballos had supervisory responsibilities over two to three deputy district attorneys.<sup>10</sup> Ceballos's "personal commitment to perform civic work" motivated him to obtain his position.<sup>11</sup>

In February 2000, the defense attorney for a pending criminal case contacted Ceballos regarding possible inaccuracies in an affidavit

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1. 126 S. Ct. 1951 (2006).

2. *Id.* at 1955.

3. *Id.* at 1960.

4. *See infra* Part IV.A.

5. *See infra* Part IV.B.

6. 373 U.S. 83 (1963).

7. *See infra* notes 208, 224 and accompanying text.

8. *See infra* Part IV.C.

9. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1955 (2006).

10. *Ceballos v. Garcetti*, 361 F.3d 1168, 1170 (9th Cir. 2004).

11. *Garcetti*, 126 S. Ct. at 1971 (Souter, J., dissenting).

for a search warrant.<sup>12</sup> He asked Ceballos to review the case and notified Ceballos of a motion he had filed challenging the search warrant.<sup>13</sup> Upon investigating the allegations, Ceballos determined that the affidavit did, indeed, include some factual misrepresentations.<sup>14</sup> As a result, Ceballos reported his findings to his supervisors, Carol Najera and Frank Sundstedt,<sup>15</sup> and submitted a memorandum recommending dismissal of the pending criminal case.<sup>16</sup> Sundstedt then ordered Ceballos to make the memorandum less accusatory of the deputy sheriff; Ceballos complied, and rewrote the memorandum.<sup>17</sup> After Ceballos submitted the re-written memorandum, Sundstedt held a meeting that he, Ceballos, Najera, and representatives from the sheriff's department, including the warrant affiant, attended.<sup>18</sup>

Following the meeting, Sundstedt decided to continue with the prosecution even though he and Najera had initially agreed that the validity of the warrant was questionable.<sup>19</sup> Ceballos informed Najera that he was constitutionally obligated to disclose his memorandum to defense counsel in the criminal case.<sup>20</sup> Following this disclosure, the defense called Ceballos as a witness during the hearing on the motion challenging the warrant, but the trial court nevertheless rejected the motion.<sup>21</sup>

After the hearing, Ceballos claimed that his supervisors took a number of retaliatory actions against him.<sup>22</sup> First, Ceballos's supervi-

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12. *Id.* at 1955 (majority opinion). The defense attorney believed that one of the deputy sheriffs may have lied to obtain the warrant. *Ceballos*, 361 F.3d at 1171.

13. *Garcetti*, 126 S. Ct. at 1955. It is not uncommon for defense attorneys to ask calendar deputies to investigate cases that they supervise. *Id.*

14. *Id.* In particular, Ceballos thought that what the affidavit referred to as a long driveway was actually a separate roadway. *Id.* Ceballos also believed that the roadway's composition called into question the affiant's statement that tire tracks led to the premises described in the warrant. *Id.* Specifically, Ceballos found that the roadway's composition in some areas was such that it would be nearly impossible to create visible tire tracks. *Id.*

15. Najera was Ceballos's immediate supervisor. *Ceballos*, 361 F.3d at 1171. Sundstedt was the head deputy district attorney at the time. *Id.*

16. *Garcetti*, 126 S. Ct. at 1955–56.

17. *Ceballos*, 361 F.3d at 1171.

18. *Garcetti*, 126 S. Ct. at 1956. The meeting allegedly became contentious and one representative from the sheriff's department criticized Ceballos for his work on the case. *Id.*

19. *Ceballos*, 361 F.3d at 1171. Sundstedt decided to proceed pending the outcome of the defense counsel's motion challenging the search warrant. *Id.*

20. *Id.*

21. *Garcetti*, 126 S. Ct. at 1956; *Ceballos*, 361 F.3d at 1171. During the hearing, Ceballos was unable to provide the court with some of his conclusions as to the accuracy of the warrant because of objections raised by the prosecution. *Ceballos*, 361 F.3d at 1171. The trial judge ultimately denied the motion because other grounds existed to support probable cause. *Garcetti*, 126 S. Ct. at 1972 (Souter, J., dissenting).

22. *Garcetti*, 126 S. Ct. at 1956.

sors demoted him from calendar deputy to trial deputy.<sup>23</sup> Second, they forced him to either accept this demotion or transfer to another courthouse, which would have significantly lengthened his commute.<sup>24</sup> Next, his supervisors reassigned his only murder case at the time to another deputy district attorney with no experience in such cases, and barred Ceballos from working on murder cases in the future.<sup>25</sup> Finally, Ceballos alleged that Najera became “rude and hostile” towards him at the trial, and that Sundstedt gave him the “silent treatment.”<sup>26</sup>

Based on these retaliatory actions, Ceballos filed an employment grievance, which was denied on a finding of no retaliation.<sup>27</sup> He subsequently filed suit in the United States District Court for the Central District of California pursuant to 42 U.S.C. § 1983.<sup>28</sup> Ceballos alleged that the defendants’ retaliation against him violated his First Amendment rights.<sup>29</sup>

The district court granted the defendants’ motion for summary judgment, holding that Ceballos’s memorandum was not protected speech under the First Amendment.<sup>30</sup> The court reasoned that Ceballos’s speech occurred within the scope of his employment duties and was not, therefore, the speech of a concerned citizen.<sup>31</sup> In denying Ceballos’s claim, the court relied on precedent from other federal courts of appeals, which held that the First Amendment does not protect employee speech created pursuant to an individual’s employment duties.<sup>32</sup>

The United States Court of Appeals for the Ninth Circuit reversed this grant of summary judgment and held that Ceballos’s memorandum constituted protected speech under the First Amendment.<sup>33</sup> The court engaged in a two-step analysis to determine: (1) whether

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23. *Ceballos*, 361 F.3d at 1171.

24. *Id.* at 1171 & n.2.

25. *Id.* at 1171–72.

26. *Id.* at 1171.

27. *Garcetti*, 126 S. Ct. at 1956.

28. *Ceballos v. Garcetti*, No. CV 00-11106 AHM (AJWx), 2002 U.S. Dist. LEXIS 28039, at \*7 (C.D. Cal. Jan. 30, 2002). The statute under which Ceballos sued provides a cause of action in federal court for citizens who suffer a deprivation of their constitutional rights. 42 U.S.C. § 1983 (2000).

29. *Garcetti*, 126 S. Ct. at 1956. Defendants included Najera, Sundstedt, and then-District Attorney Gil Garcetti. *Ceballos*, 361 F.3d at 1172.

30. *Ceballos*, 2002 U.S. Dist. LEXIS 28039, at \*20–22.

31. *Id.* at \*15–19 & n.5.

32. *Id.* at \*16–17 (citing *Gonzalez v. City of Chicago*, 239 F.3d 939, 941 (7th Cir. 2001); *Buazard v. Meredith*, 172 F.3d 546, 548–49 (8th Cir. 1999); *Thomson v. Scheid*, 977 F.2d 1017, 1020 (6th Cir. 1992)).

33. *Ceballos*, 361 F.3d at 1180, 1185.

Ceballos's speech addressed a matter of public concern; and, if so, (2) whether Ceballos's interest in expressing his speech outweighed the government employer's interest in maintaining workplace efficiency and avoiding workplace disruption.<sup>34</sup>

In rejecting the district court's per se rule that speech made within the scope of employment is not entitled to First Amendment protection, the Ninth Circuit examined the content of the speech at issue.<sup>35</sup> Focusing its inquiry on whether the content and purpose of the speech raised an issue of public concern, or simply expressed a private or personal interest, the appellate court found that Ceballos's memorandum was inherently a matter of public concern.<sup>36</sup> The Ninth Circuit then determined that Ceballos's interests outweighed those of his employer because the defendants had offered no evidence as to how Ceballos's memorandum caused inefficiency or office disruption.<sup>37</sup> As a result, the appellate court concluded that Ceballos's individual interests, combined with the public's interest in whistleblowing, outweighed the defendants' administrative interests.<sup>38</sup>

In a special concurrence, Judge O'Scannlain agreed that circuit precedent controlled the Ninth Circuit's decision, but contended that the court should have overruled this precedent.<sup>39</sup> Judge O'Scannlain criticized the majority's decision as focusing exclusively on the content of the speech and ignoring the distinction between an individual who makes speech as an employee and as a citizen.<sup>40</sup> He reasoned that when a government employee speaks in the course of employment, the government essentially owns the speech, and the employee, therefore, has no personal interest in the content of the speech.<sup>41</sup> Thus, Judge O'Scannlain would not have extended First Amendment

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34. *Id.* at 1173.

35. *Id.* at 1174–75, 1177. The court of appeals noted that such a rule would create an anomaly by affording protection to employees who speak publicly, but not to those who express their views privately to their supervisors. *Id.* at 1176.

36. *Id.* at 1174. Specifically, in reaching its conclusion, the court of appeals relied on circuit precedent holding that whistleblowing speech is a matter of public concern. *Id.* (citing *Blair v. City of Pomona*, 223 F.3d 1074, 1079 (9th Cir. 2000); *Johnson v. Multnomah County*, 48 F.3d 420, 425 (9th Cir. 1995)). Defendants conceded that Ceballos's speech constituted whistleblowing. *Id.*

37. *Id.* at 1179–80. The court also found it especially unlikely that Ceballos's speech resulted in disruption given that Ceballos had acted pursuant to his employment duties. *Id.* at 1180.

38. *Id.* at 1180.

39. *Id.* at 1185 (O'Scannlain, J., concurring specially).

40. *Id.* at 1187.

41. *Id.* at 1189.

protection to the speech at issue because it was spoken by Ceballos as a public employee, not as a citizen.<sup>42</sup>

The Supreme Court of the United States granted certiorari to decide “whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee’s official duties.”<sup>43</sup>

## II. LEGAL BACKGROUND

The First Amendment to the United States Constitution prohibits Congress from “abridging the freedom of speech.”<sup>44</sup> The Supreme Court of the United States uses a two-part test to determine when the First Amendment protects the speech of government employees from employer retaliation.<sup>45</sup> First, to merit constitutional protection, an individual must speak as a citizen on a matter of public concern.<sup>46</sup> Second, the employee’s interest in expressing opinions as a citizen must outweigh the government’s interest in preventing workplace disruption and inefficiency.<sup>47</sup> However, the government may nevertheless control the content of speech when it provides funds to convey a programmatic message with a particular purpose.<sup>48</sup>

### A. *The Connick Inquiry: Analyzing Whether an Employee Speaks as a Citizen on a Matter of Public Concern*

The Supreme Court first explicitly enunciated the threshold inquiry for determining when the First Amendment protects a public employee’s speech in *Connick v. Myers*.<sup>49</sup> *Connick* involved an assistant district attorney, Myers, who opposed her transfer to a different section of a criminal court.<sup>50</sup> Myers voiced her opposition to her supervisors and subsequently created a questionnaire to obtain her

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42. *See id.* at 1193 (noting the distinction between public employees’ speech as citizens and speech in their role as employees).

43. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1955 (2006).

44. U.S. CONST. amend. I. The First Amendment has been incorporated through the Fourteenth Amendment to apply to the states. *See Stromberg v. California*, 283 U.S. 359, 368 (1931) (“It has been determined that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech.” (citing *Gitlow v. New York*, 268 U.S. 652, 666 (1925))).

45. *See infra* notes 46–107 and accompanying text.

46. *See infra* Part II.A.

47. *See infra* Part II.B.

48. *See infra* Part II.C.

49. 461 U.S. 138 (1983).

50. *Id.* at 140.

colleagues' views concerning, among other issues, the office transfer policy, employee morale, and political campaigning by employees.<sup>51</sup>

The Court made clear that in order to enjoy First Amendment protection, an employee's speech must have been made as a citizen and touch upon a matter of public concern.<sup>52</sup> In assessing whether an employee speaks as a citizen, the Court differentiated between speech on matters of only personal interest and speech upon which "free and open debate is vital to informed decision-making by the electorate."<sup>53</sup> To assess whether Myers's speech expressed a matter of public concern, the Court examined the content, form, and context of her statements.<sup>54</sup>

The Court concluded that Myers's questionnaire, on the whole, did not address a matter of public concern, but that a question concerning pressure to work for political campaigns did.<sup>55</sup> Specifically, based on the overall context and form of the questionnaire, the Court reasoned that it clearly reflected an employment dispute, rather than an individual's attempt to speak as a citizen.<sup>56</sup> However, the Court explained that the content of the specific question concerning political campaigns implicated heightened individual and societal interests even though it occurred in the same context as the other questions.<sup>57</sup> The Court further explained that Myers's questionnaire did not merit

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51. *Id.* at 140–41. Specifically, the questionnaire solicited other employees' opinions on "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." *Id.* at 141.

52. *See id.* at 147 (holding that when a public employee speaks on a matter of personal interest, rather than as a citizen on a matter of public concern, a federal court is not the appropriate forum to review any resulting employment decision). In other words, *Connick's* public concern requirement became a threshold inquiry that an employee must overcome before the Court will balance the employee's interests against the employer's. *See id.* at 146 (explaining that if the speech at issue does not touch on a matter of public concern, judicial scrutiny of the employer's action becomes unnecessary).

53. *Id.* at 145 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571–72 (1968)).

54. *Id.* at 147–48.

55. *Id.* at 148–49.

56. *Id.* at 148. The Court reached this conclusion by stating that Myers did not seek to make the results of her questionnaire public, did not attempt to expose wrongdoing, and instead merely demonstrated her dissatisfaction with the transfer proposal. *Id.*

57. *Id.* at 149. The Court so concluded because such political pressure can threaten an employee's beliefs and involve the employee's fundamental rights. *Id.* The Court considered it "essential that public employees be able to speak out freely" on this topic without fear of retaliatory adverse employment decisions. *Id.* Furthermore, the Court found that forcing assistant district attorneys to work in political campaigns endangered society's interest in having government service based on merit, as opposed to partisan political service. *Id.*

constitutional protection simply because its content could have been of public concern in a different situation.<sup>58</sup>

Four years after *Connick*, the Court considered this threshold inquiry again in *Rankin v. McPherson*<sup>59</sup> when an employee made a controversial statement after hearing about an assassination attempt on the President.<sup>60</sup> Upon hearing this news, the employee said to her colleague: “[I]f they go for him again, I hope they get him.”<sup>61</sup> The employee was subsequently terminated.<sup>62</sup> The Court reviewed the context of the speech and determined that the statement was a matter of public concern because it occurred while discussing the policies of the President.<sup>63</sup> The Court also pointed out that the statement followed a news bulletin reporting a “matter of heightened public attention.”<sup>64</sup> Furthermore, in examining its content, the Court did not find the employee’s statement to be a punishable threat, which would have been undeserving of First Amendment protection.<sup>65</sup>

The Court again considered these factors in 1995 in *United States v. National Treasury Employees Union (NTEU)*.<sup>66</sup> In *NTEU*, the Court invalidated a federal law that prohibited a large majority of federal employees from accepting compensation for speeches or articles, regardless of their content.<sup>67</sup> Based on the content, form, and context factors, the Court determined that the employees made the speech at issue as citizens on matters of public concern.<sup>68</sup> As for the context

58. *Id.* at 148 n.8. Examination of the context and form factors required the Court to focus on the content of Myers’s speech in this specific instance, rather than assessing it abstractly. *Id.*

In his dissent, Justice Brennan, speaking for three other members of the Court, criticized the majority’s use of form and context to evaluate whether speech addresses a matter of public concern. *Id.* at 159 (Brennan, J., dissenting). Instead, Justice Brennan would have applied a more relaxed standard, finding matters to be of public concern if they “could reasonably be expected to be of interest to persons seeking to develop informed opinions.” *Id.* at 163.

59. 483 U.S. 378 (1987).

60. *Id.* at 381, 384.

61. *Id.*

62. *Id.* at 382.

63. *Id.* at 386. Although the Court did not explicitly analyze the form factor, it did note the private nature of the statement in that the public did not have access to the work room where the employee made the statement. *Id.* at 380, 386 n.11.

64. *Id.* at 386.

65. *Id.* at 386–87. The Secret Service had investigated the alleged threat and taken no action. *Id.* at 387 n.12.

66. 513 U.S. 454 (1995).

67. *Id.* at 457. The Court provided some examples of activities that the ban encompassed, including a mail handler who lectured on religion, an aerospace engineer who lectured on black history, and a microbiologist who reviewed dance performances. *Id.* at 461.

68. *Id.* at 465.

and form factors, the individuals addressed their speech to public audiences and did so outside of the workplace.<sup>69</sup> Additionally, on the whole, the content of the speech was unrelated to their employment.<sup>70</sup> Thus, the Court held that the speech restricted in *NTEU* touched on matters of public concern and did not merely reflect personal comments on employment.<sup>71</sup>

Nine years later, unlike *NTEU*, the Court struck down a public employee's First Amendment challenge when the government terminated a police officer for speech that occurred outside of the workplace.<sup>72</sup> In *City of San Diego v. Roe*,<sup>73</sup> a unanimous Court denied a police officer's First Amendment claim when the police department terminated him for creating a video of himself stripping off a police uniform.<sup>74</sup> In articulating the threshold inquiry, the Court defined public concern as "something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication."<sup>75</sup> Under this definition, the Court found that the content of the officer's speech failed to exhibit any redeeming public purpose, such as informing the public about the functioning of the police department.<sup>76</sup> In examining the context of the video, the Court concluded that Roe had capitalized on his official status to take advantage of the police department's image.<sup>77</sup> According to the Court, then, Roe's speech did not touch on a matter of public concern, but instead simply impeded the police department's ability to maintain its professional image, an essential part of its effectiveness in the community.<sup>78</sup>

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69. *Id.* at 466.

70. *Id.*

71. *Id.*

72. *City of San Diego v. Roe*, 543 U.S. 77, 79, 84 (2004) (per curiam).

73. 543 U.S. 77 (2004) (per curiam).

74. *Id.* at 78, 84. The police uniform was not the officer's specific San Diego Police Department uniform. *Id.* at 78. Roe sold these custom videos of himself on the Internet. *Id.*

75. *Id.* at 83–84. Despite this definition, the Court also noted that private remarks may receive constitutional protection, as in *Rankin v. McPherson*, 483 U.S. 378 (1987). *Id.* at 84.

76. *Id.* at 84. The Court noted that this speech would still be unprotected under the relaxed standard announced in Justice Brennan's dissenting opinion to *Connick*. *Id.*

77. *Id.*

78. *Id.*

B. *The Pickering Balancing Test: Weighing the Interests of the Employee Against Those of the Employer*

In *Pickering v. Board of Education*,<sup>79</sup> the Court announced what is now the second step that the Court takes in determining when the First Amendment protects a public employee's speech.<sup>80</sup> *Pickering* involved a public school teacher who was discharged for writing a letter to a newspaper that criticized the Board of Education and allegedly disrupted the efficient operation of the school.<sup>81</sup> The Court weighed the teacher's First Amendment right to free speech against the public school's interest, as an employer, in dismissing the teacher for speech it found disruptive.<sup>82</sup> The Court's decision sought "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."<sup>83</sup>

Applying this rule to the facts of *Pickering*, the Court found that the teacher's letter addressed a topic that a member of the general public would discuss, and did not comment on a matter closely related to his employment.<sup>84</sup> Additionally, the Court noted that the societal interest in having free and open debate weighed in the teacher's favor.<sup>85</sup> In assessing the interest of the school district, the Court noted that the Board of Education had introduced no evidence to support its claims that the letter to the newspaper created controversy or conflict among the board and teachers.<sup>86</sup> As a result, the Court concluded that the teacher's interest in expressing his opinions as a citizen exceeded the board's interest in preventing disruption or maintaining workplace efficiency, by limiting this contribution to public debate.<sup>87</sup> Thus, the Court concluded that *Pickering's* expression on matters of public importance did not justify the board's termination of his employment, and hence, the termination was unconstitutional.<sup>88</sup>

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79. 391 U.S. 563 (1968).

80. *Id.* at 568.

81. *Id.* at 564. In particular, the teacher criticized a proposed tax increase and the board's actions related to similar past proposals. *Id.*

82. *Id.* at 568.

83. *Id.*

84. *Id.* at 571–72. The Court stated that "whether a school system requires additional funds is a matter of legitimate public concern." *Id.* at 571.

85. *Id.* at 571–72.

86. *Id.* at 570. Such evidence would have weighed in the board's favor by bolstering its interests as an employer. *Id.* at 572–73.

87. *Id.* at 573.

88. *Id.* at 574–75.

Eleven years later, the Court expanded *Pickering* in *Givhan v. Western Line Consolidated School District*,<sup>89</sup> by applying the balancing test to analyze speech expressed privately.<sup>90</sup> In *Givhan*, a school failed to renew an employment contract with a teacher who expressed concerns to the principal regarding the school's racially discriminatory employment policy.<sup>91</sup> Although *Givhan* articulated her concerns to her supervisor privately, the Court afforded her speech First Amendment protection, and refused to confine the *Pickering* rule to government employee speech made in public.<sup>92</sup> Due to the increased risk that an employer may not be able to manage effectively in this situation, however, the Court reasoned that the manner, time, and place of the speech are factors, in addition to content, that the *Pickering* balancing equation must consider.<sup>93</sup>

In *Waters v. Churchill*,<sup>94</sup> the Court expounded upon the types of interests and underlying principles that it considers when performing this balancing.<sup>95</sup> Specifically, the Court maintained that the government can more easily restrain employee speech when it acts as an employer, rather than as a sovereign attempting to control the speech of ordinary citizens, because the government employs individuals to efficiently and effectively further its goals.<sup>96</sup> As a result, the Court explained, it gives greater weight to government employment decisions when they implicate the government's interest in effective operations.<sup>97</sup> Nevertheless, the Court recognized that government employees contribute to robust, public debate because their employment positions provide them with informed opinions.<sup>98</sup> Thus, the Court noted that the government will often need to make a substantial showing of disruption before it makes adverse employment decisions based upon such speech.<sup>99</sup>

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89. 439 U.S. 410 (1979).

90. *Id.* at 414–16.

91. *Id.* at 412–13.

92. *Id.* at 413, 415–16. In doing so, the Court reversed the United States Court of Appeals for the Fifth Circuit, which had held that *Pickering* did not apply to private expression. *Id.* at 413.

93. *Id.* at 415 n.4.

94. 511 U.S. 661 (1994) (plurality opinion).

95. *Id.* at 671–75.

96. *Id.* at 675.

97. *See id.* at 673 (noting that greater deference is afforded to the government's restrictions on employee speech when the restrictions are aimed at maintaining workplace order).

98. *Id.* at 674.

99. *Id.*

In *Board of County Commissioners, Wabaunsee County v. Umbehr*,<sup>100</sup> the Court again expanded *Pickering* by applying its balancing test to a public employer's retaliation against an independent contractor.<sup>101</sup> Umbehr, an independent contractor, wrote editorials in local newspapers and spoke at meetings where he criticized the Board of County Commissioners on multiple topics.<sup>102</sup> The board subsequently terminated his contract with the county.<sup>103</sup> After noting that the interests of a government employer and an independent contractor differ from those present in a typical employer-employee relationship, the Court held that application of the *Pickering* balancing test would account for such varied interests.<sup>104</sup> Specifically, the Court found the interests of independent contractors and government employees comparable, but noted that they may exist to different degrees because of the nature of the relationship between the independent contractor and the government.<sup>105</sup> The Court reasoned that these differences did not justify a complete denial of First Amendment protection to contractors.<sup>106</sup> In so concluding, the Court stated its preference for a nuanced, balancing approach as opposed to a bright-line rule that would unnecessarily foreclose First Amendment protection to an entire class.<sup>107</sup>

*C. The Government Has a Limited Ability to Control the Content of Subsidized Speech*

In the public employment context, the government may not deny an individual a benefit for the exercise of or to induce the relinquishment of the individual's free speech rights.<sup>108</sup> Nevertheless, the government does not violate the First Amendment when it selectively

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100. 518 U.S. 668 (1996).

101. *Id.* at 673.

102. *Id.* at 671. His criticism related to landfill user rates, the cost of obtaining county documents, alleged violations by the board, and alleged mismanagement of taxpayers' money. *Id.*

103. *Id.* Umbehr's contract was for solid waste disposal. *Id.*

104. *Id.* at 676–78 (explaining that the *Pickering* balancing test is fact intensive and can accommodate such competing interests).

105. *Id.* at 684 (“Independent government contractors are similar in most relevant respects to government employees, although both the speaker's and the government's interests are typically—though not always—somewhat less strong in the independent contractor case.”).

106. *Id.* at 678.

107. *Id.* at 678–79. In this vein, the Court also warned that adopting a bright-line rule would make First Amendment protection turn on whether the government labeled a person an employee or a contractor, and would leave this distinction open to manipulation. *Id.* at 679.

108. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

funds some speech, but not other speech, to encourage a particular message or activity.<sup>109</sup>

A unanimous Court enunciated this distinction in *Regan v. Taxation with Representation of Washington*,<sup>110</sup> when it upheld a tax provision that denied tax exempt status to non-profit organizations engaged in lobbying.<sup>111</sup> After explaining that a tax exemption is equivalent to a government subsidy, the Court determined that Congress had merely made a policy decision not to fund the lobbying activities of non-profit organizations.<sup>112</sup> The Court reasoned that the denial did not force the organizations to forego their non-lobbying activities, but rather represented Congress's refusal to subsidize lobbying.<sup>113</sup>

The next year, in *FCC v. League of Women Voters of California*,<sup>114</sup> the Court invalidated a law that prohibited certain activity as a condition to receipt of government subsidies.<sup>115</sup> Specifically, Congress created the Corporation for Public Broadcasting to subsidize noncommercial television stations, but prohibited the stations from engaging in "editorializing."<sup>116</sup> The Court rejected the government's argument that this restriction simply reflected Congress's refusal to fund editorializing, comparable to Congress's refusal to fund lobbying in *Taxation with Representation*.<sup>117</sup> According to the Court, the main difference here was that Congress's attempt to curtail editorializing also limited federal funds devoted to non-editorializing purposes.<sup>118</sup> The Court noted that Congress could remedy this prohibition in accordance with *Taxation with Representation* by allowing the broadcasting stations to create affiliate organizations that editorialized.<sup>119</sup>

Congress took the Court's advice to allow such a segregation of funds in *Rust v. Sullivan*,<sup>120</sup> where the government prohibited organizational recipients of family planning funds from promoting abortion

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109. See *infra* notes 110–135 and accompanying text.

110. 461 U.S. 540 (1983).

111. *Id.* at 542, 548.

112. *Id.* at 544.

113. *Id.* at 545. In particular, the Court explained that non-profit organizations could create separate entities to engage in lobbying, while still receiving the exemption for the non-lobbying activities of their other entities. *Id.* at 544.

114. 468 U.S. 364 (1984).

115. *Id.* at 399–400.

116. *Id.* at 366.

117. *Id.* at 399–400.

118. *Id.* at 400. To illustrate, the Court stated that a station that received only one percent of its funds from the government would be categorically prohibited from editorializing because it would have no way of segregating its use of federal funds, and would be equally unable to raise private funds for purposes of editorializing. *Id.*

119. *Id.*

120. 500 U.S. 173 (1991).

as an acceptable method of family planning.<sup>121</sup> The Court rejected a claim that the government had conditioned receipt of the subsidy on project employees not exercising their First Amendment rights because the restraint applied only to specific project activities that the subsidy funded.<sup>122</sup> The Court maintained that the project workers were free to express their opinions outside of these project activities and, therefore, that the government had only controlled speech within the context of a specific government-funded project.<sup>123</sup>

In contrast, when the government has disbursed funds to facilitate the speech of private citizens, the Court has restricted the government's ability to regulate that speech.<sup>124</sup> *Rosenberger v. Rector of the University of Virginia*<sup>125</sup> involved a university that prohibited a religiously affiliated student group from publishing a magazine using student funds.<sup>126</sup> The Court characterized the university's action as unconstitutional viewpoint discrimination in violation of the First Amendment.<sup>127</sup> The school's policy fell outside of the protection that *Rust* affords, the Court explained, because the student groups were not speaking for the government, but rather, the government funding was aimed at facilitating student speech.<sup>128</sup> Thus, the Court held that the government could not restrict the viewpoints of private speakers by placing limits on funding aimed at facilitating such speech.<sup>129</sup>

The Court adopted a similar approach in *Legal Services Corp. v. Velazquez*,<sup>130</sup> where the federal government attempted to restrict the ability of Legal Services Corporation (LSC) attorneys to litigate challenges to existing welfare laws.<sup>131</sup> As it invalidated the restriction, the Court took a narrow view of and distinguished *Rust*, stating that *Rust* had not explicitly relied on the notion that the funding recipients' speech amounted to governmental speech.<sup>132</sup> Accordingly, the Court

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121. *Id.* at 178.

122. *Id.* at 196 (“[H]ere the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized.”).

123. *Id.* at 198–99.

124. *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, 834 (1995).

125. 515 U.S. 819 (1995).

126. *Id.* at 822–23, 826.

127. *Id.* at 831.

128. *Id.* at 833–34.

129. *Id.* at 835.

130. 531 U.S. 533 (2001).

131. *Id.* at 536–37.

132. *Id.* at 541, 549 (“The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech . . .”).

classified the LSC attorneys' speech as private, not governmental.<sup>133</sup> The Court also pointed out that the government had not put forth a programmatic message to achieve its policy objectives here, as it had in *Rust*.<sup>134</sup> Thus, the Court found the LSC program analogous to *Rosenberger*, and struck down the law because the government funding was not intended to promote a government message, but to facilitate private speech.<sup>135</sup>

### III. THE COURT'S REASONING

In *Garcetti v. Ceballos*,<sup>136</sup> the Supreme Court of the United States reversed the United States Court of Appeals for the Ninth Circuit and held that a public employee's statements made pursuant to his official duties are not protected from employer discipline by the First Amendment.<sup>137</sup> Writing for the majority, Justice Kennedy began by reiterating the notion that the First Amendment protects public employees who speak as citizens addressing matters of public concern.<sup>138</sup> Additionally, Justice Kennedy confirmed the need to, under *Pickering*, balance the government's interests as an employer against the interests of an employee who speaks as a citizen.<sup>139</sup>

In applying these principles to Ceballos's speech, the Court explained that the critical point was that Ceballos made his speech pursuant to his official duties as a calendar deputy district attorney.<sup>140</sup> As a result, the Court reasoned that Ceballos had not spoken as a citizen.<sup>141</sup> Instead, according to the Court, Ceballos had simply performed the duties that he was employed to perform.<sup>142</sup> Thus, the Court determined, Ceballos's employer could control his speech because Ceballos spoke as a government prosecutor, rather than as a private citizen, and a government employer may control speech that it

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133. *Id.* at 542.

134. *Id.* at 548.

135. *Id.* at 542, 549.

136. 126 S. Ct. 1951 (2006).

137. *Id.* at 1960.

138. *Id.* at 1958.

139. *Id.*

140. *Id.* at 1959–60. In articulating this key distinction, Justice Kennedy also noted two facts that were not dispositive in Ceballos's case. *Id.* at 1959. First, the fact that Ceballos expressed his speech at work was not dispositive, the Court reasoned, because employees may receive First Amendment protection when speaking in the office. *Id.* Second, the Court explained that the fact that the subject matter of the memorandum related to Ceballos's employment also was not dispositive. *Id.*

141. *Id.* at 1960.

142. *Id.*

has commissioned.<sup>143</sup> The Court, therefore, concluded that Ceballos did not suffer unconstitutional retaliation.<sup>144</sup>

After enunciating this rule, the Court noted that the rule adequately protected an employee's interest in speaking as a citizen and society's interest in having free and open public debate.<sup>145</sup> To support this conclusion, the Court made clear that the inability to claim First Amendment protection in these circumstances would not prevent employees from engaging in public debate.<sup>146</sup> Additionally, the Court reasoned that the rule sufficiently safeguarded an employer's right to control the speech of employees who act pursuant to their duties.<sup>147</sup> The Court, therefore, concluded that when an employee is not speaking as a citizen, but rather as an employee pursuant to his official duties, the application of the *Pickering* balancing test is unnecessary.<sup>148</sup>

Finally, the Court rejected the argument that employers can restrict employees' rights through broad job descriptions that expand the scope of employees' official duties.<sup>149</sup> The Court explained that formal job descriptions have little impact on a court's inquiry into the scope of employment.<sup>150</sup> In addition, the Court declined to address the new rule's impact on academic freedom, opting instead to decide the issue at a later time.<sup>151</sup>

143. *Id.* To illustrate this distinction, the Court differentiated Ceballos's memorandum, which he wrote as a prosecutor, from the speech at issue in *Pickering*—writing a letter to a newspaper, which any private citizen could have done. *Id.*

144. *Id.* at 1961.

145. *Id.* at 1960.

146. *Id.* (“The employees retain the prospect of constitutional protection for their contributions to the civic discourse.”).

147. *Id.* According to the Court, an employer's interest in controlling employee-created speech in a professional forum is heightened due to the employer's need to effectively and consistently promote its mission. *Id.* The Court viewed Ceballos's memorandum as an example of a communication that entitled his supervisors to respond to it in evaluating his performance as an employee. *Id.* at 1960–61.

148. *Id.* at 1961. The Court responded to the anomaly that the court of appeals asserted would exist from this per se rule. *Id.* Specifically, the Court explained that when an employee speaks pursuant to his employment responsibilities, he does not engage in an activity in which private citizens engage and that could, as a result, receive First Amendment protection. *Id.* In other words, the Court reasoned that when a public employee speaks, “there is no relevant analogue to speech by citizens who are not government employees.” *Id.*

149. *Id.*

150. *Id.* at 1962.

151. *Id.* However, the Court noted that “[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests.” *Id.*

Justice Stevens wrote a dissenting opinion to stress that employees are still citizens when they are at work.<sup>152</sup> He highlighted the Court's earlier silence as to whether individuals speak pursuant to their employment to demonstrate that the Court has considered this fact immaterial.<sup>153</sup> Additionally, Justice Stevens voiced concern that the new rule would encourage employees to speak publicly before talking to their superiors.<sup>154</sup>

Justice Souter separately dissented on the basis that "private and public interests in addressing official wrongdoing and threats to health and safety can outweigh" a government employer's substantial interest in controlling its policies and objectives.<sup>155</sup> Justice Souter characterized the majority's rule as arbitrary line drawing, and he argued that individual and societal interests do not decrease simply because speech is created in the course of an individual's employment duties.<sup>156</sup> Moreover, he reasoned that public employees have a heightened interest in their speech because they are especially concerned about public issues given their original motivation to work in public service.<sup>157</sup>

Justice Souter also disputed the majority's broad view that speech made within the scope of public employment should be categorized as the government's own speech.<sup>158</sup> He asserted that Ceballos was not hired to promote a particular substantive view for the government, and that the government does not possess plenary control over every public employee's speech.<sup>159</sup> He further suggested that such a broad view could allow the government to regulate the speech of university

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152. *Id.* at 1963 (Stevens, J., dissenting).

153. *Id.* Specifically, Justice Stevens discussed *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), as an example of when an employee privately expressed views to her employer, but the Court did not rest its decision on whether the speech occurred pursuant to her employment duties. *Id.* In other words, he criticized the majority's rule for withholding First Amendment protection from speech in some instances simply because it falls within an employee's job description. *Id.*

154. *Id.*

155. *Id.* (Souter, J., dissenting). Justices Stevens and Ginsburg joined Justice Souter's dissent. *Id.*

156. *Id.* at 1965. Justice Souter also warned that the majority's new rule could undermine public employees' First Amendment rights because employers may begin crafting expansive descriptions of employees' job duties. *Id.* at 1965 n.2. Through job descriptions with more official duties, Justice Souter contended, government employers could severely limit the universe of employee speech available for protection. *Id.*

157. *Id.* at 1966.

158. *Id.* at 1968.

159. *Id.* at 1969. In particular, Justice Souter argued that the majority misread *Rust v. Sullivan*, 500 U.S. 173 (1991), as giving the government such authority. *Id.* Instead, Justice Souter viewed that case as limited to instances when the government appropriates funds for a particular policy. *Id.*

professors and threaten academic freedom as a result.<sup>160</sup> To remedy the shortcomings of the majority's opinion, Justice Souter would have undertaken a *Pickering* balancing of interests, but considered the employer's interests to be heightened, given the employer's need to control employee speech made in a professional capacity.<sup>161</sup>

In another dissent, Justice Breyer contended that speech created pursuant to employment should be subjected to *Pickering* balancing where: (1) a special demand for constitutional protection exists; (2) governmental justifications may be limited; and (3) administrable standards are available.<sup>162</sup> He explained that the present case met these requirements because the speech of lawyers is subject to independent regulation by the profession, and because a prosecutor has a constitutional obligation to communicate exculpatory evidence to the defense.<sup>163</sup> Although he agreed with most of Justice Souter's analysis criticizing the majority's per se rule, Justice Breyer believed that Justice Souter's balancing approach failed to account properly for the government's heightened managerial and administrative concerns.<sup>164</sup>

#### IV. ANALYSIS

In *Garcetti v. Ceballos*,<sup>165</sup> the Supreme Court of the United States held that the First Amendment does not protect government employees' speech if made within the scope of their employment.<sup>166</sup> In so holding, the Court misapplied the threshold inquiry of *Connick*<sup>167</sup> and misread the scope of *Rust*.<sup>168</sup> Instead, the Court should have adopted Justice Breyer's standard, which would have safeguarded the constitutional mandate of *Brady v. Maryland*<sup>169</sup> and avoided any curtailment of academic freedom.<sup>170</sup>

160. *Id.* at 1969–70.

161. *Id.* at 1967. Specifically, Justice Souter stated that “only comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee's favor.” *Id.*

162. *Id.* at 1974 (Breyer, J., dissenting).

163. *Id.* (citing *Brady v. Maryland*, 373 U.S. 83 (1963)).

164. *Id.* at 1975. Specifically, Justice Breyer argued that Justice Souter's formulation was too broad because government employment typically involves protecting health and safety. *Id.*

165. 126 S. Ct. 1951 (2006).

166. *Id.* at 1960.

167. *See infra* Part IV.A.

168. *See infra* Part IV.B.

169. 373 U.S. 83 (1963).

170. *See infra* Part IV.C.

A. *The Court's Adoption of a Bright-Line Rule Ignored Its Prior Flexible Approach*

In reversing the court of appeals, the Supreme Court criticized the Ninth Circuit's application of precedent for too heavily focusing on the content of employee speech and ignoring the citizen requirement.<sup>171</sup> However, the creation of a bright-line rule that prevents any speech created in the scope of employment from First Amendment protection equally misreads precedent for three reasons.<sup>172</sup> First, such a rule ignores the factors that the Court has previously considered in determining whether an employee spoke as a citizen on a matter of public concern, including content, form, and context.<sup>173</sup>

Second, and similarly, the Court has consistently avoided bright-line rules throughout its public employee speech jurisprudence.<sup>174</sup> For example, the Court used fact-intensive criteria in *Connick* and rejected the rule that the dissenting justices had offered to define the public concern requirement.<sup>175</sup> Specifically, the dissenters contended that statements should receive First Amendment protection based solely on their content, without regard to the context and form factors.<sup>176</sup> The *Connick* majority held, however, that context and form allow the Court to consider an employee's statement in each specific instance.<sup>177</sup> Likewise, in *Givhan*, a unanimous Court rejected another bright-line rule that would have removed First Amendment protection from all privately expressed statements.<sup>178</sup> Instead, because the private setting of the statement could heighten the employer's interest, the Court evaluated multiple factors to determine whether the speech warranted protection, and did not foreclose the inquiry entirely based on an arbitrary, rigid distinction.<sup>179</sup> Furthermore, the Court has also

171. *Garcetti*, 126 S. Ct. at 1956–57.

172. See *infra* notes 173–198 and accompanying text.

173. See *City of San Diego v. Roe*, 543 U.S. 77, 83 (2004) (per curiam) (explaining that the Court examines the content, form, and context of a statement to determine if it touches on a matter of public concern); *Rankin v. McPherson*, 483 U.S. 378, 384–85 (1987) (same); *Connick v. Myers*, 461 U.S. 138, 147–48 (1983) (same).

174. See *infra* notes 175–182 and accompanying text.

175. *Connick*, 461 U.S. at 148 n.8.

176. See *id.* at 160 (Brennan, J., dissenting) (arguing that whether a statement touches on a matter of public concern should not depend on where it is said or why).

177. See *id.* at 148 n.8 (majority opinion) (focusing the inquiry on whether a particular questionnaire touched on a matter of public concern, and not on whether it could have touched on a matter of public concern in a different situation).

178. See *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415–16 (1979) (rejecting the lower court's view that a categorical distinction existed between a public employee who spoke publicly and one who communicated privately with her employer).

179. See *id.* at 415 n.4 (listing manner, time, and place as additional factors for the Court to assess besides content).

extended *Pickering* to disputes between government employers and independent contractors, rather than categorically excluding contractors from First Amendment protection.<sup>180</sup> In refusing to adopt such a bright-line rule, the Court stated that foreclosing First Amendment protection based on formal labels, such as “independent contractor” or “employee,” undermined First Amendment rights.<sup>181</sup> In doing so, the Court found the *Pickering* balancing test to be a “nuanced approach” that is “superior to a bright-line rule.”<sup>182</sup> These instances demonstrate the Court’s preference for flexible judicial inquiries when First Amendment rights are at stake, and in rejecting such an inquiry, the *Garcetti* Court misapplied the *Connick* threshold.

Third, the Court’s preclusion of any inquiry into whether an employee spoke as a citizen on a matter of public concern while performing official duties also ignored precedent that has valued public employees’ individual interests as well as the societal interest in their speech.<sup>183</sup> By excluding this class of speech from protection, the Court overlooked an individual’s ability to speak as an employee and a citizen simultaneously.<sup>184</sup> Because of their positions, public employees are uniquely qualified to contribute to public debate when speaking as individuals;<sup>185</sup> however, the Court’s rule failed to consider employees’ interests in engaging in public speech related to their work. Similarly, this distinction also disregards the societal interest in benefitting from the unique expertise of public employees.<sup>186</sup> In categorically removing employee speech from First Amendment protec-

180. *See* Bd. of County Comm’rs, Wabaunsee County v. Umbehr, 518 U.S. 668, 677 (1996) (extending *Pickering* to relationships between independent contractors and the government because the balancing framework accommodates the varied interests of each party).

181. *See id.* at 678–79 (noting that resolving constitutional claims on such distinctions “is an enterprise that [the Court has] consistently eschewed”).

182. *Id.* at 678.

183. *See infra* notes 184–198 and accompanying text.

184. *See* *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1966–67 (Souter, J., dissenting) (explaining that employees also speak as citizens, for example, when “a public auditor speaks on his discovery of embezzlement of public funds, when a building inspector makes an obligatory report of an attempt to bribe him, or when a law enforcement officer expressly balks at a superior’s order to violate constitutional rights he is sworn to protect”).

185. *See, e.g.,* *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion) (“Government employees are often in the best position to know what ails the agencies for which they work . . . . And a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters.”); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968) (“Teachers are, as a class, the members of a community most likely to have informed and definite opinions . . . . Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.”).

186. *See, e.g.,* *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam) (“The interest at stake is as much the public’s interest in receiving informed opinion as it is the em-

tion, the Court has threatened society's access to information that may contribute to a robust, public debate.<sup>187</sup>

The Court has previously found the individual and societal interests to be so important that, when sufficiently heightened, they alter the framework with which the Court determines when speech touches on a matter of public concern.<sup>188</sup> Specifically, in *Connick*, the Court held that the content of one question concerning political pressure constituted a matter of public concern while the other questions on the questionnaire did not, even though they all arose in the same form and context.<sup>189</sup> The Court's reasoning, therefore, suggested that the content of a statement can dwarf the context and form factors when the content involves enhanced individual and societal interests.<sup>190</sup>

By the same token, the content of Ceballos's speech specifically implicated weighty individual and societal interests.<sup>191</sup> Ceballos worked in his position because of his "personal commitment to perform civic work,"<sup>192</sup> and, therefore, he had a particular interest in ensuring that his work served the public.<sup>193</sup> Furthermore, the constitutional mandate of *Brady v. Maryland*<sup>194</sup> compelled Ceballos to

ployee's own right to disseminate it."); *Pickering*, 391 U.S. at 571–72 (finding that "free and open debate is vital to informed decision-making by the electorate").

187. See, e.g., *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 470 (1995) (noting that a disincentive to government employee speech inhibits the public's ability to hear the speech); *Connick v. Myers*, 461 U.S. 138, 149 (1983) (finding that speech concerning pressure on employees to work in political campaigns "is a matter of interest to the community").

188. See *infra* notes 189–190 and accompanying text.

189. See *Connick*, 461 U.S. at 147–49 (finding that the questionnaire on the whole emerged in the context of an employment dispute, but that one question qualified as touching on a matter of public concern).

190. See *id.* at 149 (explaining that the individual and societal interests that the content of one question raised were sufficiently heightened to override the fact that the questionnaire arose in the context of an employment dispute).

Additionally, the *Connick* Court asserted that *Givhan* did not reflect a personal employment dispute and concluded that the content of protesting racial discrimination was "a matter inherently of public concern." *Id.* at 148 n.8. In dissent, Justice Brennan argued that the Court had, thus, created two categories of speech that touch on matters of public concern: (1) where the speech so touches as a result of content, context, and form; and (2) where the speech so touches because its subject matter is "inherently of public concern." *Id.* at 159–60 (Brennan, J., dissenting).

191. See *infra* notes 192–195 and accompanying text.

192. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1971 (2006) (Souter, J., dissenting).

193. *Id.* at 1966 & n.4 (noting that the district attorney's office that employed Ceballos and the federal government each seek employees who are motivated to serve the public, and that public employees enjoy the personal satisfaction that flows from that service).

194. 373 U.S. 83 (1963).

provide exculpatory evidence to the defense and increased society's interest in his speech as a result.<sup>195</sup>

Instead of adequately considering these heightened interests, the Court barred any inquiry into them and essentially created a new threshold inquiry, based on scope of employment, that courts must consider before they can reach the *Connick* question.<sup>196</sup> By solely emphasizing the employer's interest to the exclusion of these personal and societal interests, the Court overlooked the ability of the *Pickering* balancing test, after satisfaction of the *Connick* inquiry, to effectively consider an employer's heightened interest in certain employment contexts.<sup>197</sup> Because the Court is already well-versed in evaluating these interests, whether speech touches on a matter of public concern, and whether an employee speaks as a citizen, it can conduct equally thoughtful *Pickering* and *Connick* evaluations when the speech occurs during the course of employment.<sup>198</sup>

### B. *The Court Misread and Expanded the Government's Ability to Control Government-Funded Speech*

In addition to improperly adopting a bright-line rule contrary to precedent, the *Garcetti* Court wrongly adopted a broad view of the government's ability to control speech it funds.<sup>199</sup> In reasoning that the government has plenary control over the speech of its employees,<sup>200</sup> the Court misinterpreted its jurisprudence in this area, which simply allows the government to regulate the content of speech when it funds a project aimed at promoting a specific policy objective.<sup>201</sup> Al-

195. See *id.* at 87 (“Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.”).

196. See *Garcetti*, 126 S. Ct. at 1961 (explaining that when an employee speaks pursuant to his job duties, judicial scrutiny of the employer's decision becomes unnecessary).

197. See, e.g., *Rankin v. McPherson*, 483 U.S. 378, 390 (1987) (varying the employer's interest based on the responsibilities and authority of the employee); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 570 & n.3 (1968) (suggesting that employment relationships that are of a personal and intimate nature or involve confidentiality may require significantly different considerations when balancing the interests).

198. See *Garcetti*, 126 S. Ct. at 1967 (Souter, J., dissenting) (arguing that the existing *Pickering* framework can accommodate the adjusted interests).

199. See *infra* notes 200–210 and accompanying text.

200. See *Garcetti*, 126 S. Ct. at 1960 (explaining that government restriction of speech made pursuant to official employment duties was constitutional because it merely reflected the employer's control over speech it had commissioned).

201. See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 196 (1991) (“[H]ere the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized.”).

though the *Garcetti* Court interpreted *Rosenberger* as expanding *Rust*,<sup>202</sup> *Velazquez* directly questioned this view.<sup>203</sup> Specifically, *Velazquez*, decided six years after *Rosenberger*, adopted a limited view of *Rust* and held that the speech of government-funded Legal Services Corporation attorneys was private because the attorneys were not charged with promoting a specific governmental message.<sup>204</sup>

Nevertheless, the *Garcetti* Court ignored this development—that not every recipient of federal funds, or government employee, should be considered as per se speaking for the government.<sup>205</sup> Ceballos's position is analogous to that of the lawyer in *Velazquez* because the government did not condition either lawyer's paycheck on the promotion of a specific policy message.<sup>206</sup> The fact that the government did not hire Ceballos to promote a specific, governmental message, but instead to prosecute cases within the confines of the law, distinguishes this case from *Rust* and similar precedent, where the speaker in question was hired to promote a particular message.<sup>207</sup> Additionally, like the LSC attorneys in *Velazquez*, Ceballos lacked the ability to channel his speech, here his exercise of the *Brady* obligation, to another forum outside of the legal system.<sup>208</sup> Thus, the rule acted as a restriction on Ceballos as an individual rather than a restriction on any funded activities, and the Court has explicitly found such restrictions on an individual's speech to be unconstitutional.<sup>209</sup> Furthermore, Ceballos's

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202. *Garcetti*, 126 S. Ct. at 1960 (relying on *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, 833 (1995), and holding that when the government appropriates public funds it can control the speech it has created).

203. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (explaining that *Rust* did not rely on labeling the project participants' activities as governmental speech).

204. *Id.* at 541–42.

205. Compare *Garcetti*, 126 S. Ct. at 1960 (explaining that the government hired and paid Ceballos to speak as a prosecutor and, as a result, characterizing his speech as governmental), with *Velazquez*, 531 U.S. at 542 (explaining that the speech of a government-funded Legal Services Corporation attorney could not be classified as governmental speech).

206. See *Garcetti*, 126 S. Ct. at 1969 (Souter, J., dissenting) (explaining that Ceballos was hired to enforce the law rather than perform a “speaking assignment” for the government); *Velazquez*, 531 U.S. at 542 (explaining that the LSC program facilitated private speech and did not promote a governmental message).

207. See *Garcetti*, 126 S. Ct. at 1969 (Souter, J., dissenting); *Rust v. Sullivan*, 500 U.S. 173, 196 (1991).

208. See *Velazquez*, 531 U.S. at 546–47 (explaining that no alternative channel existed for expression of legal theories aside from litigation).

It should also be noted that the ethical rules that govern the legal profession prevent prosecutors from speaking in public about many issues related to pending cases. See MODEL RULES OF PROF'L CONDUCT R. 3.8(f) (2007) (describing a prosecutor's ethical duties concerning trial publicity).

209. See, e.g., *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 399–401 (1984) (invalidating a restriction on an organization's right to engage in prohibited speech outside of the federally funded program); *Regan v. Taxation with Representation of Wash.*,

speech was constitutionally compelled under *Brady*, and speech cannot be said to be commissioned by an employer where the Constitution requires it.<sup>210</sup> For these reasons, the Court should have applied the limited view of *Rust* consistent with *Velazquez*, instead of adopting the blanket claim that all employee speech made in the course of employment is governmental speech.

### C. Justice Breyer's Standard Properly Adheres to Precedent

Unlike the majority's bright-line rule, Justice Breyer's standard is consistent with the flexible approach of the *Connick-Pickering* case law, as well as the Court's narrow interpretation of *Rust*.<sup>211</sup> Justice Breyer's approach should have been adopted not only because it follows precedent, but also because it protects speech in areas that require special constitutional consideration.<sup>212</sup>

Instead of adopting the majority's bright-line rule, Justice Breyer's dissent advocated a fact-dependent inquiry that would have adhered to *Connick*.<sup>213</sup> Because Justice Breyer would have undertaken a *Pickering* balancing under certain conditions, his standard would still have first conducted the *Connick* public concern inquiry, but would then appropriately have emphasized the augmented interest of employers in controlling public employee speech.<sup>214</sup> As Justice Breyer noted, however, when speech requires special constitutional protection, the government's interest in controlling that speech is reduced and the balance may then tip in favor of the employee.<sup>215</sup> Therefore,

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461 U.S. 540, 544 (1983) (finding the denial of tax exempt status permissible because the organizations could segregate their funded activities and still engage in the speech).

210. See *Garcetti*, 126 S. Ct. at 1974–75 (Breyer, J., dissenting) (noting that Ceballos's speech was constitutionally mandated and, thus, the government's interest in controlling the speech was significantly diminished); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that the Constitution requires a prosecutor to provide exculpatory evidence to the accused).

211. See *infra* notes 213–220 and accompanying text.

212. See *infra* notes 221–229 and accompanying text.

213. See *Garcetti*, 126 S. Ct. at 1973–74 (Breyer, J., dissenting) (rejecting the majority's rule as too absolute and suggesting analysis on a case-by-case basis).

214. See *id.* at 1973–75 (applying *Pickering* where “circumstances with special demand for constitutional protection of the speech at issue [exist], where governmental justifications may be limited, and where administrable standards seem readily available,” but explaining that the government needs to be able to direct speech that is part of an employee's duties).

Thus, Justice Breyer's standard would have limited the content that could qualify for *Pickering* balancing, unlike Justice Souter's adjusted rule. Compare *id.* at 1967 (Souter, J., dissenting) (proposing comments on dishonesty, unconstitutional action, or threats to health and safety as a screen for subject matter), with *id.* at 1975 (Breyer, J., dissenting) (noting that Justice Souter's proposal would screen little because government administration typically involves threats to health and safety).

215. *Id.* at 1974–75 (Breyer, J., dissenting).

Justice Breyer's approach, unlike the majority's rule, properly applies precedent, allowing the flexibility of a fact-dependent *Connick* inquiry and appropriately considering the individual and societal interests at stake under *Pickering*.<sup>216</sup>

Justice Breyer's framework also properly rejected the majority's expansive view of *Rust*<sup>217</sup>—that the government can control all speech made in the course of public employment.<sup>218</sup> Rather than labeling Ceballos's speech as governmental, Justice Breyer explained that statements of lawyers constitute professional speech, which is independently regulated and, thus, involves a reduced governmental interest in regulating that speech.<sup>219</sup> He also relied on *Velazquez* to illustrate that restricting attorneys' speech distorts the legal system "by altering the traditional role of the attorneys."<sup>220</sup> As a result, Justice Breyer's framework avoids the majority's misguided application of *Rust*.

Finally, Justice Breyer's standard would have adequately protected *Brady*'s constitutional mandate, as well as speech related to academic freedom, because they demand special constitutional consideration.<sup>221</sup> For example, Ceballos's speech constituted speech of special constitutional concern because *Brady* mandates the prosecutorial disclosure of exculpatory evidence to the defense.<sup>222</sup> Justice Breyer's standard would, therefore, have encompassed Ceballos's speech.<sup>223</sup> Furthermore, Justice Breyer's framework would have also safeguarded the traditionally broad protection of academic freedom, which the majority's reasoning could undermine.<sup>224</sup> The First Amendment has a long history of vigorously protecting the integrity of

216. *See id.* at 1975 (stating that the *Pickering* balancing test should apply when certain conditions are met).

217. *See supra* notes 199–210 and accompanying text (describing the shortcomings of the majority's approach on this issue).

218. *See Garcetti*, 126 S. Ct. at 1974 (Breyer, J., dissenting) (rejecting the majority's absolute rule that all public employee speech is governmental speech).

219. *Id.*

220. *Id.* (quoting *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 544 (2001)).

221. *See infra* notes 222–226 and accompanying text.

222. *See Garcetti*, 126 S. Ct. at 1974 (Breyer, J., dissenting) (explaining that Ceballos's speech was constitutionally mandated); *Brady v. Maryland*, 373 U.S. 83, 87 (1963). As another example of a constitutional obligation, Justice Breyer described a prison doctor who could be professionally obligated to report unsafe conditions in prison cells. *Garcetti*, 126 S. Ct. at 1974–75 (Breyer, J., dissenting).

223. *Garcetti*, 126 S. Ct. at 1974–75 (Breyer, J., dissenting).

224. *See id.* at 1969 (Souter, J., dissenting) (arguing that the majority's notion of the government's plenary authority to control public employee speech could endanger the speech of public university professors).

academic freedom,<sup>225</sup> and this important interest is a relevant factor to include in the *Pickering* balancing. Such speech would, therefore, properly receive protection under Justice Breyer's more flexible balancing approach.<sup>226</sup>

In applying this standard, Justice Breyer announced that Ceballos's speech met the requirements to warrant the *Pickering* balancing test.<sup>227</sup> Specifically, Justice Breyer's framework recognized Ceballos's speech as the professional speech of a lawyer, and, additionally, that Ceballos spoke pursuant to his *Brady* obligation.<sup>228</sup> As a result, Justice Breyer properly concluded that these factors diminished the government's interest in controlling Ceballos's speech and necessitated application of the *Pickering* balancing.<sup>229</sup>

## V. CONCLUSION

In *Garcetti v. Ceballos*,<sup>230</sup> the Supreme Court of the United States held that government employees are not entitled to First Amendment protection for speech made pursuant to their official duties.<sup>231</sup> In doing so, the Court ignored the standards articulated in its precedent,<sup>232</sup> and adopted an overly expansive view of what constitutes governmental speech.<sup>233</sup> Instead, the Court should have adopted Justice Breyer's framework, which properly adhered to precedent and would have offered protection to employee speech that demands special constitutional protection.<sup>234</sup>

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225. See, e.g., *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, 835 (1995) (explaining that the danger of chilling individual expression is especially acute in the university setting); *Rust v. Sullivan*, 500 U.S. 173, 200 (1991) (noting that "the university is a traditional sphere of free expression").

226. See *Garcetti*, 126 S. Ct. at 1974 (Breyer, J., dissenting) (explaining that *Pickering* should be applied to speech with a special demand for constitutional protection).

227. *Id.*

228. *Id.*

229. *Id.* at 1975.

230. 126 S. Ct. 1951 (2006).

231. *Id.* at 1960.

232. See *supra* Part IV.A.

233. See *supra* Part IV.B.

234. See *supra* Part IV.C.

