No.

# In the Supreme Court of the United States

GARY N. WEINTRAUB, AS ADMINISTRATOR OF THE ESTATE OF DAVID H. WEINTRAUB,

*Petitioner*,

v.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, COMMUNITY SCHOOL DISTRICT 32, CITY OF NEW YORK, DOUGLAS GOODMAN, DAISY O'GORMAN, FELIX VAZQUEZ, FRANK MILLER, AIDA SERRANO, LAWRENCE BECKER, AND JERRY CIOFFI,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

In *Garcetti* v. *Ceballos*, 547 U.S. 410, 421 (2006), this Court held that a public employee who engages in speech "pursuant to" his official duties cannot invoke the protection of the First Amendment to insulate his speech from employer discipline. The questions presented are:

1. Whether the reasoning of *Garcetti* applies only to speech "required" by a public employee's official duties or extends to all speech "stemming from" or "related to" those duties.

2. Whether the inquiry into whether an employee spoke "pursuant to" his official duties is purely a question of law, which a court may resolve at summary judgment, or a mixed question of fact and law properly reserved for a jury.

## RULE 14.1(b) STATEMENT

The parties to the proceedings below were plaintiff/appellant David H. Weintraub, and defendants/appellees the Board of Education of the City School District of the City of New York, Community School District 32, City of New York, Douglas Goodman, Daisy O'Gorman, Felix Vazquez, Frank Miller, Aida Serrano, Lawrence Becker, and Jerry Cioffi.

David H. Weintraub died while the appeal was pending before the Second Circuit, and the district court substituted Gary N. Weintraub as administrator of the estate of David H. Weintraub. See App., *infra.*, 93a–94a. Accordingly, the caption reflects Gary N. Weintraub as petitioner.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner, Gary N. Weintraub, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a–24a) is reported at 593 F.3d 196. The May 29, 2007 opinion of the district court (App., *infra*, 25a–49a) is reported at 489 F. Supp. 2d 209. And the April 28, 2006 opinion of the district court (App., *infra*, 50a–92a) is reported at 423 F. Supp. 2d 38.

## JURISDICTION

The judgment of the court of appeals was entered on January 27, 2010. The order denying the petition for rehearing was entered on April 12, 2010. App., *infra*, 95a–96a. On June 21, 2010, Justice Ginsburg extended the time for filing the petition for a writ of certiorari to August 11, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

## STATEMENT

This petition presents two deep and intractable circuit splits over important and recurring questions concerning the First Amendment rights of public employees. As this Court has repeatedly held, "the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Garcetti* v. *Ceballos*, 547 U.S. 410, 417 (2006); see also *Pickering* v. *Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968). In *Garcetti*, this Court held that a public employee who engages in speech "pursuant to"

his official duties cannot invoke the protection of the First Amendment to insulate his speech from employer discipline. However, this Court left open the questions of when an employee speaks "pursuant to" his official duties, and whether that inquiry is a mixed question of law and fact properly reserved for a jury or a pure question of law appropriate for summary judgment.

Here, the Second Circuit held that a public school teacher acted pursuant to his official duties when he petitioned an independent union to file a grievance concerning an assistant principal's repeated failures to discipline a physically abusive student. The Second Circuit's decision is consistent with decisions in the Third, Fifth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits, holding that a public employee speaks "pursuant to" official duties whenever speech is loosely "related to" those duties. However, the Second Circuit's decision is fundamentally incompatible with decisions in the Eighth and Ninth Circuits holding that only speech that is required by a public employer is unprotected under *Garcetti*. In these circuits, speech voluntarily engaged in by an employee, even if related to job responsibilities, remains protected.

The Second Circuit also deepened a second circuit split by affirming the entry of summary judgment on the question whether the public school teacher's petition for a grievance was pursuant to his official duties. The Second Circuit's decision is consistent with the positions of the Fifth, Tenth, and D.C. Circuits, which have treated this question as a question of law. But the decision is at loggerheads with the Third, Seventh and Ninth Circuits, which

regard the question as a mixed question of law and fact.

Petitioner seeks this Court's intervention to resolve these conflicting lines of authority, correct the Second Circuit's erroneous application of *Garcetti*, and clarify *Garcetti*'s standard for public employee First Amendment claims.

### A. Factual Background

David H. Weintraub was a new fifth-grade teacher at P.S. 274, a public school in Brooklyn, New York. On November 6, 1998, a student threw a book at him during class. Mr. Weintraub immediately sent the student to the Assistant Principal's office, but the Assistant Principal sent the student back to class without discipline. The very next school day, the student threw several more books at him. Mr. Weintraub again sent student to the Assistant Principal's office, and the Assistant Principal again failed to discipline the student. App., *infra*, 3a.

Mr. Weintraub raised his concerns regarding this failure to discipline the student privately with the Assistant Principal, and he notified the Assistant Principal that he planned to petition the teachers' union to file a grievance if the Assistant Principal did not fulfill his responsibilities and take disciplinary action. Mr. Weintraub also communicated his concerns, including his intent to file a grievance petition, to fellow teachers. When the Assistant Principal persisted in his steadfast refusal to discipline the student, Mr. Weintraub petitioned the union to file the grievance. App., *infra*, 3a–4a.

As a result of his grievance petition, Mr. Weintraub was subjected to a vicious retaliatory campaign by the Assistant Principal and his colleagues. Mr.

Weintraub received unfounded negative evaluations. He was wrongfully accused of sexually abusing a student. He was accused of abandoning his class. And, he was falsely accused of an attempted assault of another teacher, resulting in his arrest. Despite clear and repeated determinations that all of these allegations were unfounded, Mr. Weintraub was ultimately fired from his job as a public school teacher. *Id.* at 4a, 53a–62a.

### B. Procedural Background

On July 28, 2000, Mr. Weintraub commenced this action in the Eastern District of New York against the Board of Education of the City of New York, Community School District 32, the City of New York, and several individual defendants, alleging retaliatory adverse employment action in violation of his First Amendment rights; and false arrest and malicious prosecution in violation of state law, the Fourth Amendment of the Constitution, and 42 U.S.C. § 1983. App., *infra*, 50a–51a. Defendants moved for summary judgment.

1. On April 28, 2006, the district court issued an opinion denying defendants' motion for summary judgment on Mr. Weintraub's First Amendment retaliatory action claim. App., *infra,* 68a–75a. "Considering the content, context, and form of Weintraub's speech, in light of all of the facts disclosed by the record, the Court [found] that Weintraub's complaint to [Assistant Principal] Goodman and subsequent grievance were protected by the First Amendment." *Id.* at 73a. Specifically, the district court found that Mr. Weintraub spoke on a matter of public concern—classroom discipline—and that a "jury could infer that Goodman initially intended to punish Weintraub for his speech with minimal retaliatory action,

but when Weintraub was vindicated against each improper act, a more egregious action followed in furtherance of Goodman's improper motive." *Id.* at 72–74a. Thus, the court found sufficient disputed material facts to survive summary judgment.

2. After this Court issued its *Garcetti* decision, defendants moved for reconsideration of the district court's order denying summary judgment. App., *infra*, 28a. Upon reconsideration, the district court held that "*Garcetti* precludes Weintraub's § 1983 claim, to the extent that that claim is based on Weintraub's private conversation with Goodman and his formal grievance," and permitted Weintraub's claim only to the extent that it was based on his conversations with other teachers. *Id.* at 45a–46a. However, in recognition of the fact that "supererogatory nature of [his] * * * actions may prove sufficient to sustain the view that Weintraub was not acting pursuant to any duty when he performed those actions," the district court encouraged interlocutory appeal. *Id.* at 47a–48a.

3. The Second Circuit accepted the case for interlocutory review and, in a 2-1 decision, affirmed the district court's grant of summary judgment. Writing for the court, Judge Walker opined that Mr. Weintraub's grievance petition was filed "pursuant to" his official duties, "because it was 'part-and-parcel of his concerns' about his ability to 'properly execute his duties' * * * as a public school teacher." App., *infra*, 12a. In reaching this conclusion, the majority emphasized that "[t]he lodging of a union grievance is not a form or channel of discourse available to non-employee citizens." *Id.* at 14a. Thus, the majority held that "because Weintraub made his statements 'pursuant to' his official duties as a schoolteacher, he

was 'not speaking as [a] citizen[ ] for First Amendment purposes.'" *Id.* at 16a (quoting *Garcetti*, 547 U.S. at 421).

Judge Calabresi filed a dissenting opinion criticizing the majority's "expansive reading" of *Garcetti*. App., *infra,* 16a–24a. Judge Calabresi wrote that the "majority's first prong, which looks to whether speech is 'in furtherance of' an employee's 'core duties,'" is too broad because it "could be read to imply that * * * classroom teachers receive no First Amendment protection anytime they speak on matters that implicate * * * speech on a wide variety of topics." *Id.* at 17a. Judge Calabresi also noted that the "majority's second prong, which asks whether there is a 'relevant citizen analogue' to Weintraub's speech" stands in tension with this Court's decision in *Givhan* v. *Western Line Consolidated School District,* 439 U.S. 410, 414 (1979). App., *infra,* 18a–20a. Judge Calabresi urged a rule that an "employee's speech is 'pursuant to official duties' when the employee is required to make such speech in the course of fulfilling his job duties." *Id.* at 22a. Finally, Judge Calabresi argued that the question was one that "should be explored on remand or put before a jury." *Id.* at 24a n.12.

## REASONS FOR GRANTING THE PETITION

### I. The Federal Courts Of Appeals Are Deeply Divided Over The Application Of *Garcetti* To Speech That Is Only Tangentially Related To An Employee's Official Duties.

In *Garcetti*, this Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." *Garcetti*, 547 U.S. at

421. *Garcetti* concerned a deputy district attorney who wrote a memorandum to his superiors recommending that a case be dismissed. Because the parties did not dispute "that Ceballos wrote his disposition memo pursuant to his employment duties," this Court had "no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." *Id.* at 424. In the absence of direct guidance, the lower courts have split over when an employee speaks "pursuant to" his official duties, and whether that inquiry is a mixed question of law and fact properly reserved for a jury or a pure question of law appropriate for summary judgment. This case is an excellent vehicle to resolve these intractable splits of authority and develop a framework to guide the lower courts.

### A. The Courts Are Divided Over The Definition Of "Pursuant To" Under *Garcetti*.

The lower courts are irreconcilably divided over whether the reasoning of *Garcetti* applies only to speech "required" by a public employee's official duties or extends to all speech "stemming from" or "related to" those duties. The Second Circuit's decision in this case is consistent with decisions of the Third, Fifth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits holding that a public employee speaks "pursuant to" official duties whenever speech is "related to" those duties. The Second Circuit's decision is at loggerheads with decisions in the Eighth and Ninth Circuits holding that only speech that is required by a public employer is unprotected under *Garcetti*.

*1. The Second, Third, Fifth, Sixth, Seventh, Tenth, Eleventh, And D.C. Circuits Define "Pursuant To" To Include All Speech That Facilitates Official Duties.*

In deciding this case below, the Second Circuit held that Mr. Weintraub's voluntary act of petitioning an independent teachers' union to file a grievance was "'pursuant to' his official duties because it was 'part-and-parcel of his concerns' about his ability to 'properly execute his duties' as a public school teacher—namely, to maintain classroom discipline, which is an indispensable prerequisite to effective teaching and classroom learning." App. *infra.*, 12a (citation omitted). Specifically, the court reasoned that Mr. "Weintraub's speech challenging the school administration's decision to not discipline a student in his class was a 'means to fulfill,' and 'undertaken in the course of performing,' his primary employment responsibility of teaching. *Ibid.* (citations omitted). The Second Circuit's approach is consistent with that of the Third, Fifth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits, which have adopted an expansive definition of the "pursuant to" standard that encompasses all speech that may be said to facilitate official duties.

In the Fifth Circuit, for example, "[a]ctivities undertaken in the course of performing one's job are activities pursuant to official duties." *Williams* v. *Dallas Indep. Sch. Dist.*, 480 F.3d 689, 693 (5th Cir. 2007) (per curiam). *Williams* concerned a high school athletic director who wrote a letter to school officials addressing account abnormalities and an official's failure to provide account information. *Id.* at 690. The Fifth Circuit found that Williams "needed account information so that he could properly execute

his duties as Athletic Director, namely, taking the students to tournaments and paying their entry fees." *Id.* at 694. Thus, although the court explicitly recognized that the athletic director was not required to speak on the issue, it nevertheless held that the athletic director's complaint was "pursuant to" official duties because it was "part-and-parcel of his concerns about the program he ran." *Ibid.*

Similarly, the Tenth Circuit takes a "broad view of the meaning of speech that is pursuant to an employee's official duties." *Rohrbough* v. *Univ. of Colo. Hosp. Auth.*, 596 F.3d 741, 746 (10th Cir. 2010) (internal quotation marks omitted). There, speech not required of the employee is nevertheless denied protection if it "stem[s] from" the employee's job responsibilities, see *id.* at 746–747, or "reasonably contributes to or facilitates the employee's performance of the official duty," *Brammer-Hoelter* v. *Twin Peaks Charter Acad.*, 492 F.3d 1192, 1203 (10th Cir. 2007). In *Rohrbough*, the Tenth Circuit determined that a nurse's complaints to supervisors and other hospital personnel about a staffing crisis in the hospital were unprotected speech. 596 F.3d at 748. The court reasoned that the complaints were "within the scope of [the nurse's] official duties" because "the staffing crisis *affected* her ability to do her job and provide appropriate patient care." *Ibid.* (emphasis added).

The Third, Sixth, Seventh, Eleventh, and D.C. Circuits, as well, have adopted a broad reading of *Garcetti*, finding that an employee speaks "pursuant to" official duties if there is a colorable relationship between the speech and employment responsibilities. See, *e.g.*, *Gorum* v. *Sessoms*, 561 F.3d 179, 185 (3d Cir. 2009) (professor who authored university disciplinary code acted "pursuant to" official duties when

he voluntarily assisted student in disciplinary proceedings because he possessed "'special knowledge' or 'experience' acquired through his job"); *Weisbarth* v. *Geauga Park Dist.*, 499 F.3d 538, 543 (6th Cir. 2007) (park ranger acted "pursuant to" official duties when she spoke candidly with outside consultant hired by her employer because conversation concerned personnel and morale problems in workplace and consultant had "official duty to interview" her); *Swearnigen-El* v. *Cook County Sheriff's Dep't*, 602 F.3d 852, 862 (7th Cir. 2010) (correctional officer spoke "pursuant to" official duties because he was on duty when he told supervisor he would "fight" supervisor's discriminatory efforts to remove all male officers from women's division of prison); *Abdur-Rahman* v. *Walker*, 567 F.3d 1278, 1284 (11th Cir. 2009) (scientists spoke "pursuant to" official duties when they reported that sewer spills were not being properly disclosed or remediated; although scientists were hired only to investigate *cause* of spills, and their complaints about disclosure and remediation were made voluntarily, their complaints "owed [their] existence" to official duties); *Winder* v. *Erste*, 566 F.3d 209, 214–216 (D.C. Cir. 2009) (manager hired to implement federal court orders on transportation of special-education students spoke "pursuant to" official duties when he testified before city council that his supervisors were interfering with implementation of orders).[1]

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[1] The First and Fourth Circuits have interpreted *Garcetti*'s "pursuant to" standard in light of unique factual situations and legal postures. See *Foley* v. *Town of Randolph*, 598 F.3d 1, 7 (1st Cir. 2010) (fire chief who complained about staffing levels and funding in press conference at scene of fatal fire spoke "pursuant to" official duties in part because his boss, the Mas-

### 2. *The Eighth And Ninth Circuits Define "Pursuant To" To Include Only Speech That Is Required By Official Duties.*

In stark contrast with the circuits discussed above, the Eighth and Ninth Circuits interpret *Garcetti* narrowly, holding that a public employee's speech is denied First Amendment protection only if the employer *requires* the speech as part of the employee's job responsibilities.

In the Eighth Circuit, the "pursuant to" inquiry focuses on the specific requirements of an employee's job. In *Davenport* v. *University of Arkansas Board of Trustees*, 553 F.3d 1110 (8th Cir. 2009), the plaintiff was a university security officer charged with patrolling the campus, supervising other officers, developing firearms training, and investigating crime. *Id.* at 1112. The plaintiff suffered retaliation at the hands of his supervisor, the chief of security, when he complained to university officials about his supervisor's misuse of resources and about a lack of equipment, uniforms, and parking available to security officers. *Ibid.* The court found that the plaintiff's "duties did not include reporting either wrongdoing by a superior officer or a lack of resources" and that his complaint was therefore protected by the First Amendment. *Id.* at 1113.

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sachusetts State Fire Marshal, convened press conference); *Andrew* v. *Clark*, 561 F.3d 261, 267–268 (4th Cir. 2009) (reversing district court's dismissal of First Amendment claim because whether plaintiff "had an official responsibility to submit a [certain] memorandum" was subject of "serious debate"); *Lee* v. *York County Sch. Div.*, 484 F.3d 687, 694 n.11 (4th Cir. 2007) (applying pre-*Garcetti-Pickering* standard because "[t]he Court [in *Garcetti*] explicitly did not decide whether th[e *Garcetti*] analysis would apply in the same manner to a case involving speech related to teaching").

Similarly, in *Lindsey* v. *City of Orrick*, 491 F.3d 892 (8th Cir. 2007), the plaintiff was a city public works director charged with maintaining the city's parks, sewers, and streets. *Id.* at 895. As part of his job responsibilities, he was required to attend meetings of the city council to report on public works issues and, in 2003, was required to attend a training session on the state's open meetings (or "sunshine") law. *Id.* at 895–896. Later, when he began raising concerns at city council meetings that the council was not complying with the sunshine law and suggested that he would bring the matter to the attention of state officials, he was fired. *Id.* at 896. The Eighth Circuit recognized that the plaintiff's job duties included attendance at city council meetings and the sunshine law training session. See *id.* at 898. However, his duties did not require him to ensure the city's compliance with the sunshine law. *Ibid.* Accordingly, his complaints to the council were not "pursuant to" his official duties and were thus protected. See *ibid.*

The Ninth Circuit shares this focus on job requirements and has expressly held that, unless official duties require an employee to speak out, the speech is protected. In *Alaska* v. *EEOC*, a public employee convened a press conference to support a fellow employee's allegations of sexual harassment against the Alaska governor's office. 564 F.3d 1062, 1069 (9th Cir. 2009), cert. denied, 130 S. Ct. 1054 (2010). In *Freitag* v. *Ayers*, a female corrections officer complained to a state legislator and the state inspector general concerning prison officials' failure to respond to her complaints about inmate sexual harassment. 468 F.3d 528, 535 (9th Cir. 2006). In each case, the court found that the employee's speech was not "pursuant to" her official duties because "official

duties didn't require her to complain." *Alaska*, 564 F.3d at 1070; see *Freitag*, 468 F.3d at 545 ("It was certainly not part of [the employee's] official tasks to complain to the Senator or the IG about the state's failure to perform its duties properly."); see also *Eng* v. *Cooley*, 552 F.3d 1062, 1073 (9th Cir. 2009) (if apparent on remand that employee "had no official duty to complain," his speech is protected), cert. denied, 130 S. Ct. 1047 (2010).[2]

*3. Mr. Weintraub Would Have Obtained A Different Result If He Had Been Employed Within The Jurisdiction Of The Eighth Or Ninth Circuits.*

If Mr. Weintraub had taught fifth grade in a public school system in any of the 16 states within the jurisdiction of the Eighth or Ninth Circuits rather than the Second Circuit, he would have obtained a

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[2] Although the majority below purported to rely on *Freitag* v. *Ayers*, Judge Calabresi aptly noted that *Freitag* does not "support[] the majority's conclusion." See App., *infra*, 24a n.12. In *Freitag*, the Ninth Circuit found that internal reports were not protected because "Freitag submitted those reports pursuant to her official duties as a correctional officer"; however, the court found that complaints to a state legislator and the Inspector General were protected because"[i]t was certainly not part of her official tasks to complain to the Senator or the IG about the state's failure to perform its duties properly." 468 F.3d at 545–546. The court also denied summary judgment regarding Freitag's complaint to the director of the California Department of Corrections and Rehabilitation because it was "unsure whether prison guards are expected to air complaints regarding the conditions in their prisons all the way up to the Director of the CDCR at the state capitol in Sacramento." *Id.* at 546. There is no evidence that Mr. Weintraub's external grievance petition was part of his official tasks; therefore, under the *Freitag* decision, summary judgment was improper.

different result. Mr. Weintraub voiced concerns to an independent teachers' union about his supervisor's repeated failures to impose proper discipline in his school. Like the employees in *Davenport*, *Lindsey*, *Alaska*, and *Freitag*, he was in no way *required* to engage in the disputed speech. Accordingly, under the established precedents in both the Eighth and Ninth Circuits, his speech was not "pursuant to" his official duties because his "official duties didn't require [him] to complain," *Alaska*, 564 F.3d at 1070, and he could sue to seek redress for the retaliation that he endured.

The Eighth and Ninth Circuit decisions limiting *Garcetti* to speech specifically "*required*" by official duties are fundamentally inconsistent with the Second Circuit's decision. Rather than limiting *Garcetti* to to speech specifically "*required*," the Second Circuit relied on the Fifth Circuit's loose formulation in *Williams* to conclude that Mr. Weintraub's grievance petition to the teachers' union was speech "pursuant to" official duties because it "was 'part-and-parcel of his concerns' about his ability to 'properly execute his duties' * * * as a public school teacher." App., *infra*, 12a (quoting *Williams*, 480 F.3d at 694). The Second Circuit's decision cannot be reconciled with the decisions in the Eighth and Ninth Circuits because Mr. Weintraub was under no official obligation to petition for a formal grievance with his independent union.

Indeed, the Seventh Circuit has recognized that public employees raising First Amendment claims may obtain different results depending on the jurisdiction in which they are employed. In *Fairley* v. *Andrews*, two Illinois state prison guards were subjected to retaliation for exposing their peers' mi-

streatment of prisoners. 578 F.3d 518, 520–521 (7th Cir. 2009), cert. denied, 130 S. Ct. 3320 (2010). Judge Easterbrook noted that the Ninth Circuit's understanding of *Garcetti* supported the guards' First Amendment claims because, in the Ninth Circuit, "*Garcetti* does not apply unless the employer has officially assigned to the employee a task of making *particular* speech, requiring the worker to act precisely as she did." *Id.* at 523. However, Judge Easterbrook declined to endorse this reading, asserting that "*Garcetti* is not limited to tasks officially assigned to an employee." *Ibid.* "We disapprove *Alaska* v. *EEOC*, [564 F.3d 1062 (9th Cir. 2009)]," he wrote, "to the extent that decision rests on a belief that *Garcetti* applies only to speech expressly commanded by an employer." *Ibid.*

Judge Easterbrook's opinion highlights the circuit split over *Garcetti*. Simply put, the Eighth and Ninth Circuits—which encompass a substantial portion of the Nation's federal district courts and population—interpret "pursuant to" to mean "required by," while the Second, Third, Fifth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits think "pursuant to" means "related to." This rift has created a patchwork of inconsistent speech protections tied to the geographic location of an employee's job—and it is a rift that only this Court can mend.

### B. The Courts Are Divided Over Whether The "Pursuant To" Standard Presents A Question Of Law Or A Mixed Question Of Law And Fact.

In addition to the substantive split outlined above, the circuits are irreconcilably divided over whether to analyze *Garcetti*'s "pursuant to" standard as a question of law or as a mixed question of law

and fact. See, *e.g.*, *Fox* v. *Traverse City Area Pub. Sch. Bd. of Educ.*, 605 F.3d 345, 350 (6th Cir. 2010) ("[T]he circuits are divided over 'whether the inquiry into the protected status of speech remains one purely of law as stated in *Connick* [v. *Myers*, 461 U.S. 138 (1983)], or if instead *Garcetti* has transformed it into a mixed question of fact and law.'"); *Posey* v. *Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1127 (9th Cir. 2008) ("Our sister circuits are split over the resolution of this question.").

*1. The Fifth, Tenth, And D.C. Circuits Regard The "Pursuant To" Standard As A Question Of Law.*

On one side of the split, the Fifth, Tenth, and D.C. Circuits treat the determination of whether a government employee acted pursuant to his official duties as a question of law.

For example, in *Charles* v. *Grief*, 522 F.3d 508 (5th Cir. 2008), the Fifth Circuit rejected a magistrate judge's recommendation that the "question whether Charles's statements were made in his capacity as a concerned citizen or as a Commission employee is a material issue of genuine fact properly resolved at trial." *Id.* at 513 n.17 (internal quotation marks omitted). The court reasoned that "even though analyzing whether *Garcetti* applies involves the consideration of factual circumstances surrounding the speech at issue, the question whether Charles's speech is entitled to protection is a legal conclusion properly decided at summary judgment." *Ibid.*; see also *Davis* v. *McKinney*, 518 F.3d 304, 315 (5th Cir. 2008) ("[T]he question of whether a communication is made as an employee or as a citizen is a question of law.").

The Tenth and D.C. Circuits reached the same conclusion without analysis in several recent cases. In *Brammer-Hoelter*, 492 F.3d at 1203, the Tenth Circuit held that "[t]he first three steps" of the inquiry into the protected status of speech, including the determination whether the employee has spoken pursuant to his official duties, "are to be resolved by the district court * * * [and not] the trier of fact." See also *Rohrbough*, 596 F.3d at 746 ("'The determination of whether a public employee speaks pursuant to official duties is a matter of law.'"); *Chavez-Rodriguez* v. *City of Santa Fe*, 596 F.3d 708, 713 (10th Cir. 2010) (same); *Hesse* v. *Town of Jackson*, 541 F.3d 1240, 1249 (10th Cir. 2008) (same); *Glover* v. *Mabrey*, No. 08-7048, 2010 WL 2563032, at *4 n.4 (10th Cir. June 28, 2010) (same). Similarly, in *Wilburn* v. *Robinson*, 480 F.3d 1140, 1149 (D.C. Cir. 2007) (internal quotation marks omitted), the D.C. Circuit held that the question whether a plaintiff "ha[s] spoken as a citizen on a matter of public concern" is a "question[ ] of law for the court to resolve," and not a "question[ ] of fact ordinarily for the jury."

Here, the Second Circuit joined the Fifth, Tenth, and D.C. Circuits by finding that the "pursuant to" inquiry is a question of law appropriate for summary judgment despite disputed facts regarding the scope of Mr. Weintraub's official duties. See App., *infra*, 16a.

*2. The Third, Seventh, And Ninth Circuits Regard The "Pursuant To" Standard As A Mixed Question Of Law And Fact.*

In direct conflict with the Second, Fifth, Tenth and D.C. Circuits, the Third, Seventh, and Ninth Circuits have held that "pursuant to" inquiry presents a mixed question of law and fact.

For example, in *Posey*, 546 F.3d at 1129, the Ninth Circuit held that "the determination whether the speech in question was spoken as a public employee or a private citizen presents a mixed question of fact and law." The Court reasoned that "[f]acts that can be 'found' by 'application of . . . ordinary principles of logic and common experience . . . are ordinarily entrusted to the finder of fact.'" *Ibid.* (quoting *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 501 n.17 (1984)). And "[t]he *Garcetti* Court itself seems to have anticipated as much when it explained that '[t]he proper inquiry is a practical one,' requiring more than mere mechanical reference to '[f]ormal job descriptions[, which] often bear little resemblance to the duties an employee actually is expected to perform.'" *Ibid.* (quoting *Garcetti*, 547 U.S. at 424–425). Thus, the Ninth Circuit concluded that "[b]ecause the task of determining the scope of a plaintiff's job responsibilities is concrete and practical rather than abstract and formal, * * * a factual determination of a plaintiff's job responsibilities will not encroach upon the court's prerogative to interpret and apply the relevant legal rules."[3] *Ibid.*

The Ninth Circuit has since expressly reaffirmed *Posey* in several published decisions. See, *e.g.*, *Anthoine* v. *N. Cent. Counties Consortium*, 605 F.3d 740, 749 (9th Cir. 2010) ("'[W]hether the plaintiff spoke as a public employee or a private citizen[ ] is a mixed question of fact and law.'"); *Robinson* v. *York*, 566 F.3d 817, 823–824 (9th Cir. 2009) ("'[W]hen

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[3] As the Ninth Circuit noted, this Court has held that "'[a]n issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question.'" *Posey*, 546 F.3d at 1129 (quoting *Miller* v. *Fenton*, 474 U.S. 104, 113 (1985)).

there are genuine and material disputes as to the scope and content of the plaintiff's job responsibilities, the court must reserve judgment . . . until after the fact finding process.'"); *Eng*, 552 F.3d at 1071 ("While 'the question of the scope and content of a plaintiff's job responsibilities is a question of fact,' the 'ultimate constitutional significance of the facts as found' is a question of law."); *Densmore* v. *City of Maywood*, 320 F. App'x 497, 499 (9th Cir. 2008). However, the court has addressed the question on summary judgment where the material facts are not in dispute. See *Huppert* v. *City of Pittsburg*, 574 F.3d 696, 708 (9th Cir. 2009) (finding that "any speech Huppert gave during his grand jury testimony was 'pursuant to his duties as a [police officer],'" as a matter of law); *Marable* v. *Nichtman*, 511 F.3d 924, 932 (9th Cir. 2007) (finding that "it cannot be disputed that [plaintiff's] job was to do the tasks of a Chief Engineer on his ferry, and such tasks did not include pointing to corrupt actions of higher level officials").

The Third Circuit reached the same conclusion in *Reilly* v. *City of Atlantic City*, 532 F.3d 216, 227 (3d Cir. 2008), cert. denied, 129 S. Ct. 1316 (2009). The court reasoned that "[i]n *Garcetti*, the Supreme Court described the inquiry into whether the plaintiff spoke pursuant to his official duties as 'a practical one,' noting that '[f]ormal job descriptions often bear little resemblance to the duties an employee actually is expected to perform.'" *Ibid.* (quoting *Garcetti*, 547 U.S. at 424–425). Therefore, the Third Circuit held that "'whether a particular incident of speech is made within a particular plaintiff's job duties is a mixed question of fact and law.'" *Ibid.* (quoting *Foraker* v. *Chaffinch*, 501 F.3d 231, 240 (3d Cir. 2007)).

Finally, the Seventh Circuit has implicitly sided with the Third and Ninth Circuit. In *Davis* v. *Cook County*, 534 F.3d 650 (7th Cir. 2008), the Seventh Circuit held that summary judgment was appropriate because "no rational trier of fact could find" that Davis's speech had been made in her capacity as a private citizen. *Id.* at 653. By approaching this issue from the standpoint of the jury, the *Davis* court tacitly endorsed treating the "pursuant to" inquiry as a mixed question of law and fact. See also *Fox*, 605 F.3d at 351 ("Even if the question were purely a question of fact * * * the district court properly granted summary judgment because the factual record presents no genuine issue for trial.").

*3. Mr. Weintraub Might Have Obtained A Different Result If His Case Were Litigated In The Third, Seventh, Or Ninth Circuits.*

If Mr. Weintraub had litigated this case in the Third, Seventh, or Ninth Circuits, he could have obtained a different result. Given that "[f]ormal job descriptions often bear little resemblance to the duties an employee actually is expected to perform" (*Garcetti*, 547 U.S. at 424–425), the Third, Seventh, and Ninth Circuits would have remanded this case for factual determinations of Mr. Weintraub's official duties and the relationship between his official duties and the independent union's grievance procedure. Thus, the question whether genuine issues of material fact can survive summary judgment turns on nothing more than the jurisdiction in which cases are litigated. This Court's intervention is accordingly warranted.

## II. Review Is Also Warranted Because the Decision Below Is Wrong.

For decades, this Court has unequivocally held that "teachers may [not] constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work." *Pickering* v. *Bd. of Ed. of Twp. High Sch. Dist. 205,* 391 U.S. 563, 568 (1968). Indeed, this Court has explicitly recognized that "it is essential that [teachers] be able to speak out freely on such questions without fear of retaliatory dismissal." *Id.* at 572. Although *Garcetti* carved out a narrow exception to *Pickering* for speech made "pursuant to" official duties, the Second Circuit erred by interpreting that narrow exception to swallow the well established rule that "teachers may [not] constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens." *Id.* at 568.

As a threshold matter, the "pursuant to" standard articulated in *Garcetti* dictates a limited category of unprotected speech. The *Garcetti* decision explicitly states that "public employees do not surrender all their First Amendment rights by reason of their employment," 547 U.S. at 417, and it cautions courts against circumscribing those rights too narrowly. Accordingly, "[s]o long as employees are speaking as citizens about matters of public concern," this Court wrote, "they must face *only those speech restrictions that are necessary for their employers to operate efficiently and effectively.*" *Id.* at 419 (emphasis added).[4]

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[4] In this case, there is no dispute that petitioner's speech pertained to a matter of "public concern."

Driving home the point, this Court made two observations. First, it emphasized that speech communicated "at work" may be entitled to First Amendment protection. See *id.* at 420. As this Court noted, "[m]any citizens do much of their talking inside their respective workplaces." *Ibid.* Thus, to find such speech automatically unprotected "would not serve the goal of treating public employees like 'any member of the general public.'" *Id.* at 420–421 (quoting *Pickering,* 391 U.S. at 573). Second, this Court pointed out that employee speech does not shed constitutional protections simply because it pertains to the "subject matter" of employment. *Id.* at 421. The decision explicitly recognized that "[t]he First Amendment protects some expressions *related to* the speaker's job." *Ibid.* (emphasis added).

Thus, under *Garcetti*, workplace speech related to a speaker's job is not automatically beyond the protection of the First Amendment. To come within *Garcetti*'s narrow exception, the speech must be undertaken "pursuant to" the speaker's job duties. Rather than recognizing this critical distinction, the Second Circuit engaged in an expansive reading of *Garcetti* that threatens to chill constitutionally protected speech. Moreover, the Second Circuit improperly treated the "pursuant to" inquiry as a question of law.

### A. The Second Circuit's Construction Of The "Pursuant To" Standard Is Unworkable And Inconsistent With This Court's Precedents.

As Judge Calabresi's dissent explained, the Second Circuit's opinion creates an unworkable construction of the "pursuant to" standard that turns the reasoning of *Garcetti* on its head. See App., *infra*,

16a–24a (Calabresi, J., dissenting). The majority found Mr. Weintraub's speech unprotected because 1) it was "in furtherance of" his "core duties" as a teacher, and 2) it had "no relevant citizen analogue." *Id.* at 12a–13a. That standard broadens *Garcetti*'s narrow holding, is hopelessly vague, and conflicts with this Court's precedents.

First, the majority piled inference upon inference to arrive at the conclusion that the act of filing a voluntary grievance petition was somehow pursuant to "core duties" as a school teacher: "effective teaching and classroom learning." See App., *infra*, 12a. At bottom, the Second Circuit's reasoning amounts to nothing more than the observation that the subject matter of Mr. Weintraub's speech was related to his job, which this Court explicitly found to be insufficient in *Garcetti*, 547 U.S. at 421. The logic of the Second Circuit's bootstrapping argument would transform nearly all workplace expression into speech "pursuant to" official duties. As Judge Calabresi observed in dissent,

> the prerequisites for effective learning are broad and contentious; everything from a healthy diet to a two-parent family has been suggested to be necessary for effective classroom learning, and hence speech on a wide variety of topics might all too readily [under the majority's reasoning] be viewed as "in furtherance of" the core duty of encouraging effective teaching and learning.

See App., *infra*, 17a (Calabresi, J., dissenting).

Second, the majority disregarded this Court's precedents by relying heavily on the fact there was "no relevant citizen analogue" for Mr. Weintraub's

speech because "[t]he lodging of a union grievance is not a form or channel of discourse available to non-employee citizens." See App., *infra*, 13a–14a. Although the *Garcetti* decision noted as non-dispositive the fact that a public employee "expressed his views inside his office, rather than publicly," 547 U.S. at 420, "[t]his Court's decisions * * * do not support the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly." *Givhan* v. *W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414 (1979). If, as *Garcetti* declares, "[e]mployees * * * may receive First Amendment protection for expressions made at work," 547 U.S. at 420, then "*some* speech that is not 'through channels available to citizens at large' must be free from retaliation." App., *infra*, 19a (Calabresi, J., dissenting). The majority's refusal even to attempt to draw a principled line stands in direct conflict with this Court's prior rulings. See *id.* at 19a–20a.

Moreover, the majority's "citizen analogue" inquiry creates a perverse incentive for public employees wishing to voice their legitimate concerns. The ultimate goal of *Garcetti* was to promote efficient governance. 547 U.S. at 417, 420. However, by reducing constitutional protections for complaints made either internally or through unions and by suggesting that whistleblowers should resort directly to the press to air their grievances with their government employers, App., *infra*, 13a–14a, the decision below encourages employees to go public with their complaints. The decision thus heightens the likelihood that internal governmental disputes will be fought in public forums. See Paul M. Secunda, Garcetti*'s Impact on the First Amendment Speech Rights of Federal* Employees, 7 First Amend. L. Rev. 117, 127

(2008); Martha M. McCarthy & Suzanne E. Eckes, *Silence in the Hallways: The Impact of* Garcetti *v.* Ceballos *on Public School Educators*, 17 B.U. Pub. Int. L.J. 209, 209, 231 (2008); see also Kathryn B. Cooper, Casenote, Garcetti *v.* Ceballos*: The Dual Threshold Requirement Challenging Public Employee Free Speech*, 8 Loy. J. Pub. Int. L., 73, 91 (2006); Steven J. Stafstrom, Jr., Note, *Government Employee, Are You a "Citizen"?* Garcetti *v.* Ceballos *and the 'Citizenship' Prong to the* Pickering/Connick *Protected Speech Test*, 52 St. Louis U. L.J. 589, 625 (2008).

Finally, the majority decision fundamentally misinterpreted this Court's caution in *Garcetti* that employers could not restrict employee free speech rights by crafting "excessively broad job descriptions," emphasizing that "[t]he proper inquiry is a practical one." *Garcetti*, 547 U.S. at 424. The majority's decision read that language as a warning to courts not to "construe[] a government employee's official duties too narrowly," App., *infra*, 10a, when this Court clearly intended just the opposite, *Garcetti*, 547 U.S. at 424. The Court should take this opportunity to correct the Second Circuit's misunderstanding and clarify *Garcetti* for the lower courts. Because the "pursuant to" standard carves out only a limited category of unprotected speech, it is best given effect by an analysis of what an employee's job *actually requires* of him or her.[5] As Judge Calabresi explained:

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[5] Indeed, a test that looks to a job's actual requirements seems compelled by the *Garcetti* Court's focus on "official *duties*." See THE COMPACT OXFORD ENGLISH DICTIONARY 487 (2d ed. 1991) (defining duty as "action which one's position or station *directly requires*") (emphasis added); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 705 (1986) (defining duty as "*obligatory*

> [T]he scope of *Garcetti* [should] be coextensive with its prime concerns and [should] go no further. An employee's speech is "pursuant to official duties" when the employee is required to make such speech in the course of fulfilling his job duties. * * * [I]t must be possible to say that the employer has "commissioned or created" the speech * * *—that the employer in some way *relies* on the speech made by the employee, as where the speech is an "official communications" or is used by the employer to "promote the employer's mission."

App., *infra*, 22a (Calabresi, J., dissenting). The majority's overbroad definition the "pursuant to" standard, misapplication of this Court's prior precedents, and misinterpretation of *Garcetti* warrant review.

### B. The Decision Below Improperly Affirms The District Court's Treatment Of The "Pursuant To" Standard As A Question Of Law.

The Second Circuit improperly affirmed the district court's treatment of the "pursuant to" standard as a question of law, rather than a mixed question of law and fact reserved for a jury. As the Court noted in *Garcetti*, the determination of whether a given speech act is "pursuant to" an employee's official duties is a "practical one," in which no particular fact or configuration of facts is dispositive. *Garcetti*, 547 U.S. at 424. Thus, this "practical" inquiry requires consideration of many factual particularities that differ on a case-by-case basis. And facts that can be

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*tasks*, conduct, service, or functions enjoined by order or usage according to rank, occupation, or profession") (emphasis added).

"found" by "application of * * * ordinary principles of logic and common experience * * * are ordinarily entrusted to the finder of fact." *Bose Corp.*, 466 U.S. at 501 n.17. Accordingly, this Court should grant review and clarify that the "pursuant to" standard presents a mixed question of fact and law that requires a factual determination of the scope and content of a plaintiff's job responsibilities. See, *e.g.*, *Posey*, 546 F.3d at 1129.

## III. This Case Presents An Issue Of Great Importance.

In the four years since *Garcetti* was decided, the federal district courts have issued more than 630 decisions discussing the "pursuant to" standard—an average of more than 150 cases per year. A substantial portion of those decisions has been appealed, with more than 130 cases litigated in the courts of appeals since May 2006. Given the high volume of litigation surrounding this standard, the federal courts can anticipate a substantial *Garcetti*-related caseload for the foreseeable future, a caseload that will produce arbitrary differences in outcomes due to jurisdictional happenstance as a result of the confusion over the procedural and substantive aspects of *Garcetti*'s "pursuant to" standard.

The volume of litigation activity surrounding the "pursuant to" standard reflects not only the sheer size of the governmental workforce, but also the crucial stakes implicated by *Garcetti* and its progeny. If left uncorrected, the decision below and the decisions of the circuits with which it is aligned will have a negative impact on the enterprise of public education and government institutions more broadly.

Most immediately, the Second Circuit's opinion threatens to chill the speech of any teacher who would raise a grievance regarding disciplinary or pedagogical issues. See McCarthy & Eckes, 17 B.U. Pub. Int. L.J. at 235. Indeed, the decision below removes longstanding constitutional protections against retaliation and forces teachers to rely on a complicated, non-comprehensive matrix of federal and state anti-retaliation statutes and common law precedents. See Richard R. Carlson, *Citizen Employees*, 70 La. L. Rev. 237, 243 (2009) ("[W]hile the number and variety of laws protecting citizen employees seems impressive, these laws form an incomplete, inconsistent, and unreliable patchwork. There is no master anti-retaliation law on the order of Title VII to fill the gaps, either at the federal level or in any but a few states. A citizen employee's protection against retaliation and interference depends as much on the luck of geography, occupation, and the law the employer violated as on the merits of the employee's conduct or the value of his action to the community."); see also *id.* at 276–278; McCarthy & Eckes, 17 B.U. Pub. Int. L.J. at 232–233; Neal H. Hutchens, *Silence at the Schoolhouse Gate: The Diminishing First Amendment Rights of Public School Employees*, 97 Ky. L.J. 37, 75 (2008).[6] In the face of this complex

[6] The work of these scholars confirms concerns raised by Justice Souter in his *Garcetti* dissent. See *Garcetti*, 547 U.S. at 440–441 (Souter, J., dissenting) (cataloging inconsistent federal and state anti-retaliation laws and noting that "individuals doing the same sort of governmental jobs and saying the same sorts of things addressed to civic concerns will get different protection depending on the local, state, or federal jurisdictions that happened to employ them").

maze of anti-retaliation law, teachers cannot speak with confidence that their speech will be protected.

To the extent that the Second Circuit's decision chills the speech of teachers on legitimate disciplinary issues, it threatens to undermine the safety of school children. See Hutchens, 97 Ky. L.J. at 49. As the Second Circuit noted, an orderly classroom is "an indispensable prerequisite to effective teaching and classroom learning,'" App., *infra* 17a, and classroom discipline will undoubtedly be threatened if teachers are afraid to challenge decisions made by school administrators on disciplinary issues.

Moreover, the Second Circuit's decision potentially reaches beyond the public school setting to include all government employees and government institutions. The decision's chilling effect is not limited to teachers; it threatens to chill the speech of any public employee who challenges misguided or malfeasant conduct by co-workers. See McCarthy & Eckes, 17 B.U. Pub. Int. L.J. at 230; Secunda, 7 First Amend. L. Rev. at 118; see also Raj Chohan, *Tenth Circuit Interpretations of* Garcetti*: Limits on First Amendment Protections for Whistleblowers*, 85 Denv. U. L. Rev. 573, 593 (2008). By sheltering retaliators, the decision dramatically reduces the incentives of government regulators, public administrators, police officers, and others to report misconduct and malfeasance in their workplaces, with the ultimate costs accruing to citizens in the form of substandard services, unchecked corruption, fraud, and abuse. See John Sanchez, *The Law of Retaliation After* Burlington Northern *and* Garcetti, 30 Am. J. Trial Advoc. 539, 563 (2007); see also Chohan, 85 Denv. U. L. Rev. at 593.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2010