No. 10-202

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

BRIEF IN OPPOSITION

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York,
Attorney for Respondents,
100 Church Street,
New York, New York 10007.
(212)788-0835 or 1010

LEONARD J. KOERNER,*
EDWARD F.X. HART,
of Counsel.

*Counsel of Record

September 13, 2010

Blank Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

STATUTES

OTHER AUTHORITIES

COUNTER-QUESTIONS PRESENTED

1. Whether this Court should grant certiorari in an interlocutory appeal where the issue before this Court would still need to be adjudicated in the District Court once this Court decides this appeal.

2. Whether the instant case was correctly decided under the precedents of this Court, *Garcetti v. Ceballos*, 547 U.S. 410 (2006), and *Connick v. Myers*, 461 U.S. 138 (1983), which do not provide First Amendment protection for speech "relating to" employee duties rather than only for speech "required" by an employee's duties.

3. Whether a split among the circuits is tolerable and, therefore, does not require this Court's intervention where the issue is whether a judge or a jury should determine if employee speech is afforded First Amendment protection, where the cases cited by petitioner do not demonstrate a difference in outcome.

COUNTER-STATEMENT OF THE CASE

(1)

In this civil action brought pursuant to 42 U.S.C. § 1983 for unconstitutional retaliation against petitioner, a former employee of the Board

of Education of the City of New York[1], he petitions for a writ of certiorari from an order and judgment of the United States Court of Appeals for the Second Circuit. The appeal from the United States District Court for the Eastern District of New York was an interlocutory appeal pursuant to 28 U.S.C. 1292(b). On appeal, petitioner raised as his sole contention whether a public employee acts as a "citizen" and not an "employee", when he notifies his supervisors, either formally or informally, of an issue regarding the safety of his workplace that touches upon an issue of public concern, as well as the employee's private interests. Although petitioner had raised three separate incidents, which he claimed constituted retaliation by his superiors, *i.e.*, his discussion with the assistant principal concerning the lack of action taken with reference to the student; his statements made at lunch to his faculty colleagues regarding the same issue; and his grieving the same issue through the process established by the school system to raise job-related issues, only the first and the third were appealed. Initially, the District Court determined that petitioner's conversation with his colleagues constituted speech made as a citizen and was protected by the First Amendment. That issue remains to be determined by the District Court after submissions and a trial. The District Court

---

[1] The Board of Education is now known as the Department of Education.

and the Court of Appeals granted petitioner's motions for an interlocutory appeal.

(2)

Petitioner was a probationary teacher assigned to the fifth grade. He commenced work there as a teacher in the New York School System on September 1, 1998. There were no apparent problems in his class until November 6, 1998, when petitioner sent a student to an assistant principal because petitioner alleged the fifth grader threw a book at him. Petitioner alleged that the same student threw a book at him the next day of class. Although a regulation of the Board of Education requires a teacher to report any seriously disruptive student behavior to a supervisor in writing, there is nothing in this record evidencing any written notice by petitioner concerning the student's behavior. Petitioner presumed the assistant principal spoke to the child, but the child was not suspended as petitioner believed he should have been.

Petitioner alleges that, as a result of his filing of grievances and expressing the intention to file grievances, he was treated differently after the early November incidents than before and was retaliated against by the assistant principal and other respondents. Petitioner was ultimately terminated on October 1, 1999.

Petitioner subsequently commenced an Art 78 proceeding (a challenge to an administrative determination) in New York State Supreme Court, alleging that his termination was in bad faith and in retaliation for his pursuing a claim for false imprisonment. The New York State Supreme Court found that there was no evidence of retaliation or bad faith. In 2000, petitioner commenced the instant action pursuant to 42 U.S.C. §1983 in United States District Court for the Eastern District of New York. Petitioner did not request a jury to determine any issues, although he asserts that they should be treated as a mixed question of fact and law.

SUMMARY OF ARGUMENT

In deciding whether the speech of a government employee is protected by the First Amendment Speech Clause, the Court of Appeals first determined whether the employee was speaking as a citizen or as a government employee before determining whether the speech touched upon an issue of public concern or safety. The Circuit Court held that petitioner's speech was made pursuant to or in accord with his employment duties and, therefore, acted within the scope of his employment. *Weintraub v. Board of Education of the City of New York*, 593 F.3d 196, 202 (2010). Consequently, the inquiry terminated and the Court held the speech to be without First Amendment protection. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

We submit that, in the instant case, petitioner's speech falls squarely within the parameters set by this Court in *Garcetti v. Ceballos* and *Connick v. Myers* and was engaged in expression pursuant to his duties as a teacher when he complained about and grieved the assistant principal's alleged failure to discipline a student in petitioner's charge. Because petitioner's claim of retaliation for exercising his protected speech rights cannot be sustained under this Court's precedents, the Court of Appeals properly affirmed the grant of summary judgment on the two issues on appeal.

The instant appeal, moreover, is non-final. While this Court grants certiorari in a limited number of interlocutory cases, they involve important issues or cases where the decision below is patently wrong. Neither is the case here. Rather, as demonstrated below, the splits among the circuit courts are reconcilable and the case at bar was correctly decided. This case is not a vehicle for determining any of the issues petitioner raises because under any theory raised his cause would be dismissed. *Virginia Military Institute v. United States,* 508 U.S. 946 (1993) (Scalia, J., concurring). See also *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365-366, n. 1 (1973).

The two issues which petitioner raises concerning splits in the circuit courts of appeal, while real, are better left to another case, because the decision in the instant case is clearly correct

and in keeping with this Court's instruction in *Connick* and *Garcetti*. The instant facts, moreover, do not lend themselves to a clarification that petitioner seeks because they are demonstrably well within the parameters set by this Court's jurisprudence concerning the applicability of First Amendment protection for governmental employee speech.

The split between the Eighth and Ninth Circuits on the one hand and virtually all the other Circuits on the other hand regarding whether an employee's speech is "related to" his official duties or is "required" by his official duties on the other hand is not an issue that arises in the case at bar. Under that approach, the facts herein require a determination of constitutionally unprotected speech whether the test is "pursuant to" or required by". The Second Circuit carefully followed the *Garcetti* language in reaching its decision in the instant case. This Court does not demand a strict adherence to what the job requirements are, but rather a "practical" approach to the question. *Garcetti v. Ceballos*, 547 U.S. at 424.

The split between the Third, Seventh, and Ninth Circuits on the one hand and the Fifth, Tenth, and D.C. Circuits on the other hand regarding the issue of whether the words "pursuant to" is a question of law or a mixed question of law and fact does not merit review by this Court now because the cases, which the circuits on both sides of the alleged split have decided, have not deviated

significantly one from the other. To this point, the split is more hypothetical than real. The District Courts and the Courts of Appeals can correct anomalies which arise from jury decisions that fail to follow instruction. The results, therefore, should ultimately be consistent as they have in fact been. This Court, moreover, in *Connick v. Myers*, 461 U.S. 138 (1983), resolved the issue at 148, footnote 7, where this Court determined that the issue is one solely of law.

ARGUMENT

PETITIONER'S STATEMENTS TO THE ASSISTANT PRINCIPAL AND THE GRIEVANCE FILED BY HIS UNION ON HIS BEHALF ARE NOT PROTECTED SPEECH BY A GOVERNMENT EMPLOYEE UNDER THE FIRST AMENDMENT BECAUSE, AS INSTRUCTED BY THIS COURT IN *GARCETTI V. CEBALLOS*, STATEMENTS WERE MADE NOT AS A CITIZEN ON ISSUES OF PUBLIC CONCERN, BUT RATHER PURSUANT TO HIS DUTIES AS A TEACHER AND ON A PERSONAL ISSUE. CONSEQUENTLY THE *PICKERING* BALANCING TEST DOES NOT APPLY. THE TWO ISSUES FOR WHICH

PETITIONER URGES THE COURT TO GRANT CERTIORARI ARE NOT SUBSTANTIAL ENOUGH TO MERIT REVIEW BY THIS COURT AT THIS TIME AND IN THIS CASE.

1. The Case At Bar Falls Within The Parameters of *Pickering*, *Connick*, and *Garcetti*.

This Court does not usually grant certiorari in an interlocutory appeal absent other factors, which the Court has deemed "intolerable" See S. Baker, *A Practical Guide to Certiorari.*, 33 Cath. U. L.U. Rev. 611, 617 (1984). Summary judgment would have been granted to defendants under any theory of the case. This case, moreover, does not lend itself as a proper vehicle for what is arguably an important question of constitutional law. It would have been decided this way no matter what position the Second Circuit espoused on the two issues which petitioner raises in his brief. We submit that this Court has held that to state a First Amendment retaliation claim under § 1983, a public employee must allege: (1) that the speech at issue was protected; (2) that he or she suffered an adverse employment action constituting conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights; and (3) a causal connection

between the protected speech and the adverse action. *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Connick v. Myers*, 461 U.S. 138 (1983).

In the instant case, petitioner has failed to allege any facts which would support a First Amendment retaliation claim because the speech for which he claims retaliation was made as part of and in the course of his official duties as a teacher in the City public school system. Consequently, as the Court of Appeals correctly held, pursuant to *Garcetti* and *Connick,* those expressions do not constitute protected speech. Because the speech at issue, moreover, did not address any matter of public concern nor was it intended to, the statement was not constitutionally protected under the circumstances here. It was proper, therefore, not to reach the *Pickering* balance test because petitioner was engaged in speech at the core of his job duties as a teacher and concerning his personal disagreements over the application of discipline to one student in his class by the assistant principal.

Pickering v. Board of Education, 391 U.S. 563 (1968), has served and continues to serve as the bright line test in determining whether the First Amendment protects the speech of a government employee. This Court imposed a two pronged test, balancing the public employee's interest as a citizen in commenting upon matters of public concern and the interest of the government, as an employer, in promoting efficiency of the

public services it performs through its employees. While declining to lay down a general standard against which all such statements may be judged, the Court, in holding that the teacher had a constitutionally protected right to comment in a letter to the editor on a recently proposed school budget, noted that the "statements are in no way directed towards any person with whom [the teacher] would normally be in contact in the course of his daily work as a teacher." *Id.* at 570. The Court further noted that the teacher's "employment relationships with the board and, to a somewhat lesser extent, with the superintendent, are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning." *Id.* at 570. In sum, this Court concluded that, where "the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by the teacher,... it is necessary to regard the teacher as a member of the general public he seeks to be." *Id.* at 573. This is clearly not the situation in the instant case, where the assistant principal is petitioner's direct supervisor and works in close and daily contact with him.

In *Connick v. Myers*, 461 U.S. 138, 147 (1983), this Court held that, "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interests, absent the most unusual circumstances, a federal court is not the

appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." The Court held that the questionnaire concerning personnel matters, were it released to the public, would convey no information to the public regarding the functioning of a public office, but rather reflect a single employee's dissatisfaction with the status quo. *Id.* at 148. The Court noted that, "[to] presume that all matters which transpire within a government office are of public concern would mean that virtually every remark – and certainly every criticism directed at a public official – would plant the seed of a constitutional case." *Id.* at 149. In sum, the Court opined that it would be a Pyrrhic victory for the great principles of free expression "if the safeguarding of a public employee's right, as a citizen to participate in discussions concerning public affairs, were confused with the attempt to constitutionalize the employee grievance". *Id.* at 154.

Applying *Pickering* and *Connick* to the facts at bar, and without the need of applying the *Pickering* balancing test, it is obvious that the instant issue is one of purely personal interest to plaintiff and of no public interest whatsoever. It seeks to constitutionalize an intra-office dispute between an employee and his immediate supervisor with whom he interacts on a close and daily basis over the proper disciplining of a single student. Under both *Pickering* and *Connick* there is no requirement that a balance between the employer

and the employee rights be struck where, as here, plaintiff is not speaking on an issue of public concern but on a strictly private matter.

In *Garcetti v. Ceballos*, 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, and the Constitution does not insulate their communications from employer discipline." The Court reasoned that "government employers, like private employers, need a significant degree of control over their employees' words and actions" to operate efficiently and provide necessary services. *Garcetti* at 421. Mr. Ceballos took a position clearly contrary to his employer. As a result of his actions, his superiors took negative employment actions against him. He sued for retaliation for his expression of protected speech on an issue of admittedly great public concern – the propriety of a search warrant affecting important Fourth Amendment Constitutional rights. *Id.* at 414-415.

However, the Court held that Ceballos's speech, important though it was, was not protected by the First Amendment Speech Clause. The Court observed at 422:

> Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way, he did not speak as a

> citizen by writing a memo that addressed the proper disposition of a criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee.

In the instant case, there is no question that petitioner's statements were made pursuant to his duties as a public school teacher. His threat to the assistant principal to file a grievance and the grievance he ultimately filed were based solely upon his private disagreement with the fact that the student he reported for allegedly throwing a book at him was not suspended by the assistant principal. This speech falls squarely within the parameters of employee speech which *Garcetti* held is not protected by the First Amendment Speech Clause. Consequently, the Court of Appeals properly rejected petitioner's claim that his words were spoken in his capacity of a private citizen speaking on a matter of public concern, as opposed to pursuant to his official job duties.

A strong analogy must be drawn between the facts in *Garcetti* and the instant facts. In *Garcetti*, the plaintiff complained in a memo to his superiors concerning a police officer's preparation of an affidavit in a motion to obtain a search warrant and testified in a hearing to the same effect. Here, plaintiff complained to his superior about the superior's handling of a disciplinary matter and then filed a grievance regarding the same matter.

Both the prosecutor's speech in *Garcetti* and the teacher's speech in the instant case were made pursuant to and in furtherance of their official duties and, therefore, do not constitute protected speech.

The threshold question is whether the speech at issue can "be fairly characterized as constituting speech on a matter of public concern" rather than speech addressing matters of personal interest. *Connick v. Myers*, 461 U.S. 138, 143 (1983). Whether an employee's speech addresses a matter of public concern must be determined by the "content, form and context of a given statement, as revealed by the whole record." *Id.* at 147-48. To constitute speech on a matter of "public concern," an employee's speech must satisfy two criteria. It must relate to a matter of political, societal, or other community concerns. And, significantly, the employee must speak "as a citizen upon matters of public concern," not simply "as an employee upon matters only of personal interest." *Id.* at 147. Both the context of the speech, as well as the content, are significant.

In the case at bar, the Court of Appeals ruled that petitioner's statements to the assistant principal that he would file a grievance and his actual filing of the grievance were made in pursuance of his duties of teacher. *Weintraub v. Board of Education of the City of New York*, 593 F.3d, *supra* at 203. Neither addressed nor were they intended to address a matter of public concern.

"Rather than voicing his grievance through channels available to citizens generally, Weintraub made an internal communication made pursuant to an existing dispute-resolution policy established by his employer, the Board of Education". *Weintraub v. Board of Education*, 593 F. 3d, *supra*, at 204. The Court concluded that petitioner's internal grievance filing lacked a relevant analogue to citizen speech and retained no possibility of constitutional protection. Speaking up on a topic that may be deemed one of public importance does not automatically mean the employee's statements address a matter of public concern as that term is employed in *Connick*. Speech that touches upon an issue of social importance does not comprise speech on a matter of public concern if the speech is motivated solely by a desire to advance the speaker's personal interests. *Connick* itself made the point that not all speech on matters of public significance is "public concern" speech.

As this Court in *Roe v. City of San Diego*, 543 U.S. 77, 82 (2005) stated, "[t]o require *Pickering* balancing in every case where speech by a public employee is at issue, no matter the content of the speech, could compromise the proper functioning of government offices." No public concern purpose can be attributed to plaintiff's statement here, as it did nothing to inform the public about any aspect of the functioning or operation of the educational system. Nor was plaintiff commenting privately to another coworker on an item of political news, as in *Rankin v. McPherson*, 483 U.S. 378 (1987).

2. Federal Appellate Decisions Subsequent To *Garcetti* All Support The Second Circuit Reasoning In *Weintraub*.

Since the Supreme Court decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), several Circuit and District Court cases have applied its holding to a variety of fact patterns. In *Cioffi v. Averill Park Central School District*, 444 F.3d 158 (2d Cir. 2006), *cert. denied*, 549 U.S. 953 (2006), decided a month prior to the *Garcetti* decision, the Second Circuit, based upon the record and petition in *Garcetti*, distinguished *Cioffi* from *Garcetti*, stating in footnote 3 at 166 that, unlike *Garcetti*, "the record here establishes that Cioffi's speech was not made strictly pursuant to his duties as a public employee. Rather, he was speaking as a citizen ... about circumstances that led to criminal activity in the public school system and the manner in which public school officials were responding to that conduct." The Court noted that both in Cioffi's letter and press conference, he emphasized that his primary concern was the health and safety of the students involved. *Id.* at 166.

In *Casey v. West Las Vegas Independent School District*, 473 F.3d 1323 (10th Cir. 2007), the Court reviewed a First Amendment speech retaliation claim brought by the director of a Head Start Program, alleging that her expressions of criticisms and accusations regarding her employer were protected by the First Amendment and were,

therefore, actionable. The Court held that, in light of the Supreme Court's holding in *Garcetti*, only one of her three claims survived the *Garcetti* test, the one in which her action exceeded her duties as director of the Head Start Program. *Id.* at 1328-1329. More significantly for the case at bar, the Court held that the question on *Pickering's* first prong is modified and the Court is obliged to ask "whether Mrs. Casey met her burden by providing evidence that her expressions were made in her capacity as a citizen and not pursuant to her 'official duties'." *Id.* at 1328. *See also* footnote 4 at 1328 quoting Schauer, *The Supreme Court, 2005 Term – Forward: The Court's Agenda – and the Nation's*, 120 Harv. La. Rev. 4, 35, noting that *Garcetti* "established a new rule governing a vast amount of lower court litigation"; and Chemerinsky, *The Kennedy Court: October Term 2005, 9 Green Bag 2d 335, 340 (2006)* ("the most significant [First Amendment decision] was likely *Garcetti*").

The Court also held that the communications made with reference to the Board of the Head Start program, of which she was the director, and the communications to the Board with reference to its failure to comply with the Open Meetings law were within the scope of her official duties and were, therefore, not protected speech under *Garcetti*. *Casey* at 1330-1333. The Court held that it was clear that the facts established "that Mrs. Casey was acting ' pursuant to' her official duties. *Black's* defines the relevant term as meaning [i]n

compliance with; in accordance with.' *Black's Law Dictionary* 1272 (8th ed. 2004)." The Court determined that, "[b]uttressing the conclusion that Mrs. Casey acted in accordance with, if not compelled by, her office, she also stated that ... she aimed at 'fixing the problem before it got worse'." *Id.* at 1330. The only speech the Court held to be protected by the First Amendment was Casey's communications with the New Mexico Attorney General's Office, which was clearly beyond the scope of her employment duties as Director of the Head Start Program and her obligations with reference to its Board. *Id.* at 1332. *See also Green v. Board of County Commissioners*, 472 F.3d 794, 801-802 (10th Cir. 2007) (Court held drug lab employee's speech not protected when she ignored her supervisors and scheduled confirmatory drug test, suspecting prior test had been a false positive, because her actions were generally "the type of activities she was paid to do."

In *Mills v. City of Evansville*, 452 F. 3d 646 (7th Cir. 2006), a police sergeant criticized a proposal to reorganize her department. Her remarks occurred during a gathering of senior police officers, subsequent to an official meeting to discuss the plans. *Id.* at 647-648. The Court held that her remarks were made in her capacity of a public employee and not as a citizen. *Id.* at 648.

In *Spiegla v. Hull*, 481 F.2d 961 (7th Cir. 2007), *cert. denied*, 552 U.S. 975 (2007), after holding that a prison guard's speech in reporting

possible lapses in prison security was protected under the First Amendment's Speech Clause, reversed itself after remand in light of *Garcetti* and held that the prison guard's speech was not protected because she was not speaking as a citizen, but rather in the course of her employment as a correctional officer. The Court held that after *Garcetti*, the *Pickering* balancing inquiry is not made if it is first determined that the employee was not speaking as a citizen, but as an employee. *Id.* at 965. Spiegla had attempted to search a state vehicle because of suspicions that she had that it may have been carrying contraband, but was prevented from doing so by a superior. When she reported this to another supervisor and he reported it to the other officials, she was transferred to a different post and sued for retaliation.

Here the Court held that, "based on the records as a whole, we conclude that Spiegla was speaking pursuant to her official duties – not as a citizen – when she told [her supervisor] about the conduct of [other guards]." *Id.* at 965-66. "She did not make a public statement, discuss politics with her co-worker, write a letter to newspapers or legislators, or otherwise speak as a citizen." *Id.* at 967.

Finally, in *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006), *cert. denied*, 549 U.S. 1323 (2007), a prison guard was the target of inappropriate, sexually explicit inmate behavior. When she submitted disciplinary forms documenting the

behavior, prison officials ignored them or acted too slowly for inmates to be disciplined. She wrote numerous memoranda and letters complaining of her supervisors' undermining her authority and allowing a hostile work environment to exist and continue. *Id.* at 533-534. Later, she filed a discrimination charge and wrote two letters to her state senator; the senator contacted the California Office of the Inspector General, which investigated and substantiated her charges. *Id.* at 535. Her employment was subsequently terminated and she brought suit, claiming retaliation for her complaints to her superiors, to her state senator and the Investigator General. The Court held she was acting as a citizen in her communications with the IG and her state senator, but that under *Garcetti* her internal communications (except one, which was remanded to the district court for further consideration) were not protected because they were submitted pursuant to her duties as a correctional officer. *Id.* at 545-546.

In sum, the holding in the instant case is in accord with the holdings in all the cases, where the issue is whether or not the plaintiffs were speaking as citizens on issues of public concern. The analysis used by each Circuit Court reached the same conclusions based upon the stated facts, despite the procedures utilized or the phrases employed in describing the parameters of an employee's scope of employment.

3. The Use Of "Related To" and "Required By" In The Decisions Since *Garcetti* Demonstrate A Uniformity Of Outcomes.

As with petitioner's characterization of a "deeply divided" split between the circuits on the question of the what procedure to use in determining factual issues (*infra* at 26), so is his characterization of the split between the Eighth and the Ninth on the one hand and the Second, Third, Fifth, Sixth, Seventh, Tenth, Eleventh, and the D.C. Circuits on the other as it relates to the scope of an employee's job duties as "irreconcilably divided" and "[i]n stark contrast". He argues that the phrase "related to" [the eight circuits) and the phrase "required by" [the Eighth and the Ninth] to describe what an employee's job tasks are when he or she acts "pursuant to" them, will determine whether an employee's speech is protected by the First Amendment speech clause. He implies that the application of the phrase "related to" will result in less protection for employee speech than the phrase "required by". We submit that the two positions, as applied, are not irreconcilable in a material way, as is demonstrated by the cases petitioner cites.

In *Davenport v. University of Arkansas Board of Trustees*, 553 F.3d 1110 (8th Cir. 2009), a state university employee complained on one occasion of an issue of resources and on another three years later of illegal expenditure of public funds. In its analysis of constitutionally protected

speech, the Court utilized the "pursuant to" language rather than "required by" and concluded that his speech was protected when he complained of misuse of public funds because it constituted an issue of public concern and which was not "pursuant to" his job duties. He had, however, a duty to cooperate with the Arkansas State Police investigation of misappropriation of funds and his speech was, therefore, not protected. This outcome would be no different under the "related to" rubric.

In *Lindsey v. City of Orrick*, 491 F.3d 892 (8th Cir. 2007), the facts dictate a similar outcome in both judicial camps. The plaintiff, a City employee working for the City Council, complained that the City Council was not complying with the law regarding the manner it conducted its public meetings. He aired his complaints at a public meeting of the council. The Court held that he was speaking as a citizen on an issue of public concern and that, therefore, his speech was protected by the Speech Clause of the First Amendment. Again, this would be the outcome in any of the eight Circuits applying the "related to" test.

In *Alaska v. EEOC*, 564 F 3d 1062 (9th Cir. 2009), *cert. denied*, 130 S.Ct. 1054 (2010), an employee in the governor's office, held a press conference to support a fellow employee's allegations of sexual harassment in the governor's office. The speech was held to be constitutionally protected. Without a doubt, the result here would have been the same under either test because in

virtually any case speech in an open forum about issues of public concern such as misuse of funds or sexual harassment in a government office are afforded First Amendment protection.

In *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006), discussed above at 20, a female correction officer complained to her supervisors regarding sexual harassment. When she received no satisfactory response, she sent several letters to a state senator outlining the harassment of herself and other female officers. Ultimately she was referred to the Investigator General. The Ninth Circuit deemed her communications to the state senator and the Investigator General to be constitutionally protected. The Court arrived at this decision without use of the "required" language and would have reached the same result under either test because speech proffered outside the scope of the requirements of an employee's job duties is always constitutionally protected. All the cases cited in petitioner's brief support the proposition that, despite different ways of expressing scope of a governmental employee's job duties, the outcomes prove to be the same under either test.

There is, moreover, another factor which this Court has interjected into this discussion that is critical. The Court, in its rejection of Justice Souter's in his dissent in *Garsetti* "suggestion that an employer can restrict employees' rights by creating excessively broad job descriptions," takes a

practical approach to the parameters of job titles. *Garcetti v. Ceballos*, 547 U.S., *supra*, at 424-425. (2006). The Court responded by indicating that "[t]he proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." *Id.* at 424-425.

The *Garcetti* Court has made it clear that tests regarding job descriptions are ineffective in determining what tasks an employee actually performs or is required to do. Rather, the test involves a much more practical determination of what is normally incorporated in a job title. Petitioner has argued that to allow the present situation to exist would result in inconsistent outcomes in a variety of cases. He has, however, failed to present one case where the outcome has or would result in a different decision depending upon the procedural framework employed or the legal formulas applied.

In sum, this Court in *Garcetti*, *supra*, at 416, adopted the concurrence of Judge O'Scannlain of the Court of Appeals for the Ninth Circuit (361 F.3d 1168, 1187 (2004), where he emphasized the distinction "between speech offered by a public employee acting as an employee carrying out his or

her ordinary job duties and that spoken by an employee *as a citizen* expressing his or her personal views on disputed matters of public import".

4. The Circuit Courts Have Not Decided Any Substantial Legal Issue Differently When Determining An Issue As A Mixed Question Of Law And Fact Or As A Question Of Law.

Petitioner argues that a split among the circuit courts cannot be tolerated on the issue of whether the speech of a government employee spoken "pursuant to" his official duties is a matter of law or a mixed matter of law and fact. We submit that in all of the cases cited by petitioner in which the Courts of Appeals applied one or the other procedure, in the final analysis, little or no difference exists between the circuits using a jury in what they determine to be questions fact and those circuits deciding them as matters of law.

In *Cioffi v. Averill Park Central School District*, 444 F.3d 158 (2d Cir. 2006), *cert. denied*, 549 U.S. 953 (2006), the Second Circuit held that the plaintiff's speech was protected because he was speaking as a citizen on issues of public concern at a press conference. We submit that allowing a jury to determine factual issues or restricting them to a District Court judge would not in a substantial majority of cases change the outcome. The result was similar in *Frietag v. Ayers, supra*, 468 F.3d 528 (9th Cir. 2006), where a jury determined fact

questions and the Court held that plaintiff engaged in protected speech when co: unicating with a state senator and the Inspec General, becau that communication was clearly beyond the scop of her employment.

The case at bar does not lend itself to review by this Court. The undisputed facts and the Second Circuit's application of this Court's teachings in *Pickering*, *Connick* and *Garcetti* to those facts make the instant case unworthy of a grant of certiorari. As we demonstrated above, petitioner's speech was spoken pursuant to his official duties as an educator and, therefore, was unprotected by the First Amendment. We respectfully suggest that, if this Court wishes to grant a Writ of Certiorari to clarify the issues raised by petitioner, it may be more judicially efficient to grant a writ in a case from the Ninth Circuit, which is the only circuit where both anomalies exist.

Petitioner argues that the Seventh Circuit should be counted with the Third and the Ninth as one of the three circuit courts who support the view that the issue whether the inquiry into the protected status of speech is a matter of law or a matter of law and fact. Petitioner cites *Davis v. Cook County*, 534 F.3d 650 (7th Cir. 2008), for the proposition that the Seventh Circuit tacitly endorses the mixed question of fact school because of *dicta* referring to the lack of fact issues in the case and summary judgment being properly granted. Much more telling, however, is the

Court's citation to footnote 7 in *Connick v. Myers*, 461 U.S. at 148, which states that "the inquiry into the protected speech is one of law, not fact." This quote, stating in clear and direct language this Court's position on the issue, indicates where the Seventh Circuit stands far more than the *dicta* in the Davis decision, which petitioner claims implies that the Court is in the mixed question camp.

In sum, although there is a procedural distinction between the Eighth and Ninth Circuits, which uses a jury to determine factual issues and all of the eight circuits, which have determined those issues as a matter of law, we submit that it is a distinction without difference.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
September 13, 2010

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York,
Attorney for Defendants-
Appellees,
100 Church Street,
New York, New York 10007
(212) 788-0835 or 1010

LEONARD KOERNER,
EDWARD F.X. HART,
Of Counsel.