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 OF THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

LAWS

MISCELLANEOUS

Blank Page

INTEREST OF AMICUS CURIAE

This brief *amicus curiae* is submitted with the consent of the parties,[1] on behalf of the National Education Association (NEA), a nationwide employee organization with more than 3.2 million members, the vast majority of whom are employed as teachers in public schools and colleges throughout the United States. Many of NEA's members are covered by collective bargaining agreements, and many of those agreements contain a grievance procedure.

Because NEA's members have a vital interest in the scope of First Amendment protection of job-related speech, NEA submitted a brief *amicus curiae* in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), in which this Court addressed the application of the First Amendment to speech made pursuant to an employee's official duties, and in *Connick v. Myers*, 461 U.S. 138 (1983), as well as in numerous other cases in this Court concerning the constitutional rights of teachers and other public employees.

This case concerns the application of the teachings of *Connick* and *Garcetti* to speech by a teacher on a matter of public concern that is voiced through the grievance procedure of a collective bargaining agreement. Because many of NEA's members work under agreements that provide for such procedures, the First Amendment issue in this case arises in a context of particular significance to NEA and its members.

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[1] Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

STATEMENT

Most public sector collective bargaining agreements contain grievance procedures. *See* Jill Kriesky, *Trends in Dispute Resolution in The Public Sector*, in *Employment Dispute Resolution and Worker Rights in the Changing Workplace* 247, 252 (Adrienne E. Eaton & Jeffrey H. Keefe eds., Industrial Relations Research Ass'n 1999). New York's Taylor Law, like many public sector labor relations statutes, expressly "encourag[es]... public employers and ... employee organizations to agree upon procedures for resolving disputes." N.Y. Civil Service Law § 200 (Consol. 2010).

Typically, a grievance procedure provides for a series of "steps" in which the employee or the union, on the one side, and the employer, on the other, lay out their positions with respect to a dispute, generally in writing, followed, if the matter is still unresolved, by arbitration before a neutral arbitrator, whose decision is typically final and binding except for a limited right to judicial review. *See, e.g.*, Richard C. Kearney & David G. Carnevale, *Labor Relations in the Public Sector* 302-07 (Marcel Dekker, Inc. 2001); Elkouri & Elkouri, *How Arbitration Works* 210, 213-14, 259 (6th ed. 2003); William H. Holley, et al., *The Labor Relations Process* 428-29 (South-Western 9th ed. 2008); Julius G. Getman, et al., *Labor Management Relations and the Law* 187-88 (Foundation Press 2d ed. 1999).

In the public sector, grievance systems often allow employees and unions to raise not only questions about the interpretation and application of the collective bargaining agreement, but also disputes over the interpretation of statutes, regulations and policies. *See, e.g.*, Benjamin Aaron, *Procedural Due Process and the Duty of Fair Representation in Public Sector Grievance Disputes*, in *Labor Relations Law in the*

Public Sector 180 (Andria S. Knapp ed. American Bar Ass'n 1977).

In this case, the Court of Appeals observed that teacher David Weintraub, through his grievance, was advocating greater attention to "classroom discipline, which is an indispensable prerequisite to effective teaching and classroom learning." Pet. App. 12a. The district court found there to be "no doubt" that Weintraub's speech was on "a matter of public concern, namely discipline in the public schools," Pet. App. 71a, and that, in pursuing his grievance, "Weintraub's ... primary motivation was a general concern for safety in the classroom and school," Pet. App. 73a. The Court of Appeals did not disagree with those findings. The case thus exemplifies the not uncommon situation in which a grievance procedure serves as a mechanism through which teachers and other public employees may express "informed opinions on important public issues." *Garcetti v. Ceballos*, 547 U.S. 410, 420 (2006), quoting *San Diego v. Roe*, 543 U.S. 77, 82 (2004). For example, depending on the particular agreements involved, a dispute about whether resources necessary to effective teaching are being made available, such as was involved in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), or about whether a school is engaging in discriminatory practices, such as was involved in *Givhan v. Western Line Consolidated Sch. Dist.*, 439 U.S. 410 (1979), might well be presented through a grievance.

The Second Circuit held that school authorities were free under the First Amendment to retaliate against teacher Weintraub for his speech, even though the speech addressed a matter of public concern, was nondisruptive, and did not undermine any legitimate interests of the employer, because Weintraub's speech was based on his concerns about impediments to the "proper[ ] execut[ion of] his duties," Pet. App. 12a, quoting *Williams v. Dallas*

Indep. Sch. Dist., 480 F.3d 689, 694 (5th Cir. 2007), and the speech had been expressed through "[t]he lodging of a union grievance [which] is not a form or channel of discourse available to non-employee citizens," *id.* at 14a. In the view of the Second Circuit, this meant that the speech was "made pursuant to [an] employee's official duties," as those words were used in *Garcetti*, 547 U.S. at 413. The Second Circuit ignored the fact that *Garcetti* involved speech by which an employee "fulfill[ed] a responsibility" of his job, 547 U.S. at 421, and as to which the employer would have had the right to dictate the content, whereas in this case, filing a grievance against his employer was not a responsibility that was placed on Weintraub by his job duties, nor would the employer have had any right to dictate what Weintraub should say in such a grievance.

As the Petition states, the Second Circuit's broad interpretation of what constitutes speech "pursuant to" an employee's official duties for purposes of the *Garcetti* rule is consistent with the approach taken by a number of other circuits, which treat speech that in any way *facilitates or promotes* the performance of an employee's duties as falling outside First Amendment protection by virtue of *Garcetti;* but the decision conflicts with decisions of two circuits which have held that *Garcetti* denies protection only to speech that is *required by* an employee's official duties. *See* Petition at 7-15. Review should be granted to resolve that fundamental conflict. And this case presents a particularly apt vehicle to address the matter, both because of the prevalence and importance of public employee grievance systems and because the Second Circuit's holding compellingly illustrates the constitutionally indefensible results that are being reached by those Circuits which, like the court below, treat *Garcetti's* "pursuant to" requirement as satisfied where

an employee's speech is merely related to, but not dictated by, his job duties.

SUMMARY OF ARGUMENT

In *Garcetti* this Court recognized a narrow exception to the rule that, under the First Amendment, a public employee who speaks on a matter of public concern may be subjected to discipline only if the employee's speech interests are outweighed by "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). The exception recognized by the Court in *Garcetti* allows a government employer to discipline an employee for speech with no First Amendment scrutiny at all in a limited class of cases: where the speech was "made pursuant to the employee's official duties" in the sense that, in speaking, the employee was "fulfilling a responsibility" of the job, 547 U.S. at 421, such that the public employer would have had the right to dictate the content of the employee's speech in the first place.

It is one thing to hold that First Amendment scrutiny has no place in a case like *Garcetti*, involving what is in essence government speech that the government has the right to prescribe; but it would be quite another thing to extend *Garcetti* to speech that merely relates to or facilitates the public employee's work. And, to apply *Garcetti* to speech expressed through a grievance *against* the government, which is at the furthest remove from government speech, is to completely unmoor the rule in *Garcetti* from its foundations.

Certiorari should be granted to resolve the split in the circuits over what *Garcetti* meant by speech "pursuant to [an] employee's official duties," and to correct the unwar-

ranted extension of *Garcetti* that is presented by the decision below.

ARGUMENT: THE *GARCETTI* RULE PROPERLY APPLIES ONLY TO SPEECH THAT CONSTITUTES THE PERFORMANCE OF JOB DUTIES SUCH THAT THE EMPLOYER HAD THE RIGHT TO PRESCRIBE THE CONTENT OF THE SPEECH IN THE FIRST PLACE, AND DOES NOT APPLY TO SPEECH EXPRESSED IN A GRIEVANCE AGAINST THE EMPLOYER

A. *Pickering* and *Connick* hold that, as a rule, speech by a public employee on a matter of public concern that does not harm legitimate interests of the public employer may not, consistent with the First Amendment, be made the subject of discipline. As this Court has recognized, the First Amendment provides protection to such speech not only because "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression," *Connick v. Myers*, 461 U.S. 138, 142 (1983), but also because "[public employees, and] [t]eachers [in particular] are, as a class, the members of a community most likely to have informed and definite opinions" on matters of public concern related to the operation of government programs. *Garcetti*, 547 U.S. at 421, quoting *Pickering*, 391 U.S. at 572. Public employees thus are in a position to have uniquely "informed opinions on important public issues," *id.* at 420, quoting *San Diego v. Roe*, 543 U.S. 77, 82 (2004), of which "the community would be deprived . . . [w]ere [public employees] not able to speak on [the operation of their employers]," *id.*

Accordingly, as to matters of public concern, "expressions related to the speaker's job" can qualify for First Amendment protection against discipline or retaliation, *Garcetti*, 547 U.S. at 421, as long as the *Pickering* balance

is satisfied, and that is true whether the employee spoke to the public or "expressed his views inside his office, rather than publicly," *id.* at 420 (citing *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 414 (1979)). *See also Rankin v. McPherson*, 483 U.S. 378, 387 n. 11 (1987).

B. In *Garcetti*, this Court recognized a limited class of cases in which the First Amendment provides a public employee with no protection whatsoever against being disciplined for speech on a matter of public concern, without regard to *Pickering* balance. The Court described this class of cases as those in which discipline is imposed "based on speech made pursuant to the employee's official duties." *Garcetti*, 547 U.S. at 413. As the Court explained, "[t]hat consideration" is present if an employee's speech consisted of "fulfilling a responsibility" of his job, *id.* at 421—in Ceballos' case, "to advise his supervisor about how best to proceed with a pending case," *id.* The speech at issue in *Garcetti* was "part of what [Ceballos], as a calendar deputy, was employed to do," *id.;* it constituted an "official communication[ ]," *id.* at 423, which, as the Court explained, Ceballos' supervisors could properly insist be "accurate, demonstrate sound judgment, and promote the employer's mission," *id.*

1. Thus, the "consideration" that constituted the "controlling factor in Ceballos' case," *id.* at 421, was not that his speech "concerned the subject matter of [his] employment," *id.*, which the Court stated was "nondispositive," *id.*, or that the subject matter was related to the "proper[] execut[ion] [of] his duties," Pet. App. 12a, which the Second Circuit in this case regarded as the key consideration. Rather, the "controlling factor," *Garcetti*, 547 U.S. at 421, was that the speech constituted an "official communication" which Ceballos was required to make *in order to fulfill a responsibility of his position* – and one as to which his superiors would have had *the right to dic-*

tate the content. In that limited context, where disciplining an employee for speech amounts to disciplining the employee for not "performing his or her job duties [properly]," *id.* at 423, the Court reasoned that the fact that the employee's job duties took the form of speech does not provide grounds for "mandating judicial oversight of communications between and among government employees and their superiors in the course of official business," *id.*

2. On its facts and in its reasoning, *Garcetti* is confined to situations where an employee's speech is in essence *government* speech as to which the government has plenary authority to dictate what an employee should state in the first place, and which therefore should not be subject to First Amendment review when the government decides that the employee's government speech work product was unsatisfactory. *See generally Pleasant Grove City v. Summum*, __ U.S. __, 129 S. Ct. 1125, 1131 (2009) (emphasizing government's authority to control its own expression); *id.* at 1139 (Stevens, J. concurring) (citing *Garcetti* as an application of the "government speech doctrine").

Speech in the form of a grievance against a government employer is the *antithesis* of government speech. It is speech that asserts a claim *against* the government, through a process in which the employee and the employer are expressly cast in the role of adversaries. *See supra* at 2. To regard such speech as government speech would be to say that the government has filed a grievance against itself. Equally to the point, unlike speech as to which the public employer would have a right to dictate the content, such as the disposition memorandum in *Garcetti* and similar "official communications," *Garcetti*, 547 U.S. at 423, Weintraub's employer obviously had no right to tell him what to say in framing and pursuing a grievance against the employer.

As to grievance speech, and other speech in which an employee is not imparting a message as to which the government would have a right to dictate the content, the categorical rule of *Garcetti* is inapposite. In such a case the *Pickering* balance adequately protects "the government's interest in the effective and efficient fulfillment of its responsibilities to the public," *Connick*, 461 U.S. at 150, and the unfettered power to discipline employees for their speech on matters of public concern that is available to a public employer in cases like *Garcetti* is neither necessary nor appropriate.

3. Far from suggesting that its decision should be given the expansive reading adopted by the Second Circuit and several of the other Circuits, in *Garcetti* this Court took care to limit the application of the rule in that case to situations where it has been "demonstrate[d] that conducting the task [that involved the speech for which the employee was disciplined] is within the scope of the employee's professional duties for First Amendment purposes." 547 U.S. at 425. What is more, the *Garcetti* Court recognized the importance of protecting public employees in giving their uniquely "informed . . . opinions" about government operations, *id.* at 419-20; and it is precisely when public employees are speaking about subjects closely related to their job duties that they are "the members of a community most likely to have informed and definite opinions" regarding such matters, *id.* at 421. That being the case, to hold that employees' speech on matters of public concern may be subjected to discipline or retaliation without any First Amendment protection merely because the speech was closely connected to the employees' job duties would lead to the very kinds of "widespread costs" to society, *id.* at 419, that *Garcetti* recognized as a reason why public employees' speech related to their jobs should not be readily "repressed," *id.*

4. The court below considered its holding to be "supported by the fact that [Weintraub's] speech ultimately took the form of an employee grievance, for which there is no relevant citizen analogue." Pet. App. 13a. This reasoning fails on its own terms. Considering that the First Amendment protects "the right of the people . . . to petition the Government for a redress of grievances," and that public employees are among "the people" who have that right, it is difficult to understand how speech by a public employee on a matter of public concern that is expressed as a formal grievance against the government employer is not sufficiently "citizen-like" to warrant protection. On the contrary, if one wishes to inventory "speech by citizens who are not government employees," *Garcetti*, 547 U.S. 423, in search of a "relevant analogue," *id.*, to a petition for redress that is expressed through an employee grievance arbitration system, such analogues are readily at hand in the form of judicial and administrative procedures invoked by individuals, businesses and other members of the polity. *Cf. Eastern R.R. Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

Moreover, *Garcetti* cannot properly be read as calling for the application of a distinct "citizen analogue" test, separate and apart from an analysis of whether the speech in question was uttered "pursuant to ...official duties," 457 U.S. at 421. Rather, this Court's reference to the concept of a "relevant analogue to speech by citizens who are not government employees" was part of a discussion of "the theoretical underpinnings of" the Court's case law in this area, and it was presented as a further explanation of why speech "pursuant to official duties" is not protected:

> Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. .... When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees.

Id. at 423-24. In its context, this passage makes clear that the concept of a "relevant analogue to speech by citizens who are not public employees" is not a separate First Amendment requirement, but rather an aid to understanding why speech pursuant to official duties is not protected against discipline.

It thus is clear that nothing in *Garcetti* calls for a mechanistic "citizen analogue" test such as the court below applied. It cannot be the case that, as the court below assumed, Pet. App. 14, speech by a public employee will be unprotected merely because the precise mechanism by which the employee conveyed that speech is one that is not available to all other citizens. After all, as the dissent below recognized, the teacher in *Givhan* had access to speak to the school principal in a way "that a regular citizen likely could not [have]," Pet. App. 20a, but her speech was no less protected for that fact.[2]

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[2] Furthermore, an overly literal application of any "citizen speech" requirement would be at odds with fundamental principles of this Court's First Amendment jurisprudence. For example, corporations, unlike public employees, are not citizens at all; but in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), this court, recognizing that a speaker need not be speaking in any particular capacity in order to be engaging in "expression that the First Amendment was meant to protect," *id.* at 776, held that the First Amendment protects a corporation speaking as a corporation. Similarly, a business entity

* * * *

As a rule, speech by a public employee on a matter of public concern relating to his job is "expression that the First Amendment was meant to protect," *First National Bank of Bellotti*, *supra* note 2, 435 U.S. at 776, *particularly* when it is based on knowledge about government operations that the employee's job makes him uniquely qualified to obtain. *See supra* at 9. As *Garcetti* recognizes, that principle does not apply where the employee is speaking as part of his job such that the government has the right to dictate the message. But *Garcetti's* reasoning cannot be extended to cases where, in the speech at issue, the employee was *not* tasked with delivering the government's message, but was conveying his own opinion in circumstances where he was free to do so. An employee's pursuit of a grievance against a government employer is a paradigmatic example of the latter category of case. In equating this with the very different situation that is the subject of the *Garcetti* rule, the Second Circuit cut the rule away from its underpinnings and reached a result that is at war with basic First Amendment principles.

CONCLUSION

The petition for a writ of certiorari should be granted.

that merely proposes a commercial transaction is not easily characterized as speaking "as a citizen," *see, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976), but such commercial speech is protected by the First Amendment against regulation that is not shown to serve a sufficient governmental purpose, *see Central Hudson Gas & Elec. Corp v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

Respectfully submitted,

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