

# Does the First Amendment Protect Testimony by Public Employees?

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## INTRODUCTION

The First Amendment represents a national commitment to the idea that public discussion is a fundamental principle of American government and citizenship that must be protected by the law.<sup>1</sup> The Supreme Court has recognized several classes of speech that receive less protection, however, including speech by public employees. The Court has justified this limitation by concluding that the government has interests in maintaining control over its employees and an efficient workplace that may, at times, outweigh its employees' interest in free speech.<sup>2</sup> One recent case, *Garcetti v Ceballos*,<sup>3</sup> narrows the class of public-employee speech that can receive First Amendment protection. *Garcetti* provides that statements made by public employees pursuant to their official duties are not protected by the First Amendment because such statements owe their existence to the public employees' professional responsibilities.<sup>4</sup>

This Comment addresses a recent circuit split concerning whether and when testimony by public employees is “pursuant to official duties” under *Garcetti*. It argues that the courts of appeals have not struck an appropriate balance among the *Garcetti* holding, a public employee's duty *as a citizen* to testify, and the government employer's interest in maintaining control over its employees. It proposes that the best way to reconcile these competing interests is to take a closer look both at how the employee came to testify—as part of his job, under subpoena, or purely voluntarily—and whether that testimony was given on his employer's behalf. These distinctions allow a line to be drawn between speech made pursuant to official duties and speech about official duties. This is the appropriate place to draw such a line because, on the one hand, the public employer's interest in disciplining employees for performing their job duties poorly is very strong in light

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<sup>1</sup> See *New York Times Co v Sullivan*, 376 US 254, 270 (1964).

<sup>2</sup> See *Pickering v Board of Education*, 391 US 563, 568 (1968).

<sup>3</sup> 547 US 410 (2006).

<sup>4</sup> *Id.* at 421.

of the employer's goal of providing efficient public services. On the other hand, its ability to discipline employees merely for speaking about things they learned on the job is not as strong, because speaking about things learned as part of the job does not necessarily implicate the employee's ability to do his job well.

This Comment suggests an easily administrable solution that would quell the confusion among the courts of appeals: the speech of a public employee who testified either voluntarily or under subpoena and not on behalf of his employer should be protected by the First Amendment and not be deemed unprotected official-duty speech. This rule would apply regardless of the employee's ordinary job duties. Instead, it would look to the circumstances of how he came to testify.

The Comment proceeds as follows: Part I introduces the Court's precedents regarding free speech rights for public employees, the *Garcetti* "official duties" standard, and two other duties, the citizen's ordinary, nonbinding duty to assist in the enforcement of the laws and the citizen's binding duty to comply with compulsory judicial process. Part II reviews the split among the courts of appeals. Finally, Part III proposes that a narrow reading of *Garcetti* best satisfies the relevant policy concerns and is consistent with the current judicial doctrine. It then posits five fact-specific contexts to provide a framework for determining how far the official-duties rule should extend.

## I. PUBLIC EMPLOYEES' RIGHTS, DUTIES, AND PROTECTIONS

Public employment does not relieve the public employee of the rights and duties that he would enjoy and be subject to as an ordinary citizen. The Supreme Court has noted, however, that the public employment context creates situations in which the employee's First Amendment rights must be balanced against the needs of the government as employer. This Part explores the Supreme Court jurisprudence on the free speech rights of public employees and the potential conflicts with citizen duties raised by *Garcetti*.

### A. The Free Speech Rights of Public Employees

The Supreme Court has long recognized the critical nature of free speech protection.<sup>5</sup> It has also, however, allowed the government as employer a freer hand in regulating the speech of its employees than the government possesses in regulating the speech of the public at

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<sup>5</sup> See, for example, *New York Times Co v Sullivan*, 376 US 254, 270 (1964) (describing a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials").

large. The Court has justified this expansion of government power by pointing out that when the government is employing someone in order to achieve its goals and duties, the government's interest in regulating speech is "elevated from a relatively subordinate interest" to a "significant one."<sup>6</sup>

1. *Pickering* and *Connick*: Balancing speech and workplace efficiency.

Despite its recognition of the government employer's interest in workplace efficiency, the Supreme Court has recognized that a public employee retains some free speech rights that may not be contravened by the government as an employer. In *Pickering v Board of Education*,<sup>7</sup> it announced a balancing test for courts to use when deciding whether a public employer's interest in efficient management of services outweighed the employee's interests as a citizen in commenting on matters of public concern. "The problem," wrote the Court, "is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."<sup>8</sup> The *Pickering* Court noted that the state, like any other employer, retains an interest in promoting the efficiency of its services, and may discipline its employees accordingly.<sup>9</sup> Given the unique position of the public employer, however, it may not restrict all speech.

Applying its test in *Pickering*, the Court found that the appellant's statements were "upon issues then currently the subject of public attention" and "critical of his ultimate employer."<sup>10</sup> The statements were therefore on matters of public concern, so they were protected by the First Amendment. The Court went on to conclude that, on the facts of the case, the public employer's interest in limiting its employees' opportunities to contribute to public debate was "not significantly greater than its interest in limiting a similar contribution by any member of the general public," so the employer could not fire *Pickering* for his protected speech.<sup>11</sup> In short, *Pickering* acknowledged the

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<sup>6</sup> *Waters v Churchill*, 511 US 661, 675 (1988) (plurality).

<sup>7</sup> 391 US 563 (1968).

<sup>8</sup> *Id.* at 568.

<sup>9</sup> *Id.* ("[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.")

<sup>10</sup> *Id.* at 572 (concluding that *Pickering*, a schoolteacher who had criticized the school board's alleged misuse of funds in a letter to a newspaper, was uniquely situated to comment upon how funds allotted to schools should be spent).

<sup>11</sup> *Pickering*, 391 US at 573.

rights of public employees to comment upon matters of public concern, but was careful to note that these rights remained subject to balancing against the employer's interest in maintaining the efficient provision of public services. Thus, the public employer remained able to discipline an employee when its interests in workplace efficiency outweighed the employee's interests in speaking.

Subsequently, the Court clarified in *Connick v Myers*<sup>12</sup> that the "public concern" element is a threshold inquiry. When an employee does not speak on a matter of public concern, the government employer can act with wide latitude in making personnel decisions, free from "intrusive oversight by the judiciary in the name of the First Amendment."<sup>13</sup>

## 2. *Garcetti*: Adding a step to reach the "public concern" threshold.

*Pickering* and *Connick* remained the leading cases on the free speech rights of public employees for the next two decades. When considering allegations that a public employer violated an employee's First Amendment rights, lower courts regularly looked first to whether the speech qualified as upon a matter of public concern. If it did qualify, the courts then applied the *Pickering* balancing test.<sup>14</sup>

*Garcetti* was the Court's first major adjustment to the *Pickering* doctrine since *Connick*.<sup>15</sup> The 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."<sup>16</sup>

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<sup>12</sup> 461 US 138 (1983).

<sup>13</sup> *Id.* at 146.

<sup>14</sup> The various courts of appeals have developed their own multipart tests for applying the *Pickering* doctrine, but they uniformly treat the public concern inquiry as a threshold matter, applying the balancing test only if the plaintiff was able to meet that threshold. See, for example, *Love-Lane v Martin*, 355 F3d 766, 776 (4th Cir 2004) (applying a multipart *Pickering* test wherein the "first question is whether [the plaintiff's] speech was about a matter of public concern"); *Cox v Dardanelle Public School District*, 790 F2d 668, 672 (8th Cir 1986) (treating the public concern inquiry as the first part of a two-step test to determine if an expression is constitutionally protected). For a review of the diverse treatment of the *Pickering* doctrine by the circuits, see Joseph O. Oluwole, *The Pickering Balancing Test and Public Employment-Free Speech Jurisprudence: The Approaches of Federal Circuit Courts of Appeals*, 46 *Duquesne L Rev* 133, 145–175 (2008).

<sup>15</sup> See, for example, Paul M. Secunda, *Garcetti's Impact on the First Amendment Speech Rights of Federal Employees*, 7 *First Amend L Rev* 117, 125 (2008) (stating that *Garcetti* "changes everything" at the first stage of the *Pickering* inquiry by making the threshold question one of whether the employee was acting pursuant to official duties or speaking as a citizen); Emily Gold Waldman, *Returning to Hazelwood's Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 *U Fla L Rev* 63, 82 (2008). But see Elizabeth Dale, *Employee Speech & Management Rights: A Counterintuitive Reading of Garcetti v. Ceballos*, 29 *Berkeley J Emp & Labor L* 175, 211–12 (2008) (arguing that, contrary to the belief of most courts and commentators, *Garcetti* "did not add elements to the *Pickering-Connick* test" and did not significantly change the analysis of public employees' First Amendment rights).

<sup>16</sup> *Garcetti*, 547 US at 421.

Effectively, this adds another step to the *Pickering-Connick* framework. Only if an employee did not make statements pursuant to his official duties does a court even consider whether the speech is protected under *Pickering*.

In *Garcetti*, Richard Ceballos, a deputy district attorney, was serving as calendar deputy—a position that involves oversight responsibility, including some supervision of other prosecutors—when he was asked by a defense attorney to investigate claimed inaccuracies in an affidavit used to obtain a search warrant. Ceballos investigated the defense attorney’s allegations and decided that the affidavit contained serious misrepresentations.<sup>17</sup> Ceballos drafted two memoranda exposing the misrepresentations. The first, the “disposition memorandum,” summarized Ceballos’s concerns and recommended that the case be dismissed. The second was a follow-up memo describing a conversation that Ceballos later had with the warrant affiant.<sup>18</sup> The district attorney’s office decided to go forward with the case anyway, and the defense filed a motion to traverse and called Ceballos. At the motion hearing, Ceballos testified truthfully about his observations regarding the affidavit.<sup>19</sup> Ceballos was then allegedly subjected to a series of retaliatory actions, and he sued under § 1983 for violation of his First Amendment rights.<sup>20</sup>

In rejecting Ceballos’s First Amendment claim, the district court addressed only the retaliation stemming from Ceballos’s speech in the disposition memorandum, which neither party disputed was prepared pursuant to Ceballos’s official duties as calendar deputy.<sup>21</sup> Although the Ninth Circuit later pointed out that Ceballos alleged that the retaliation stemmed not only from his submission of the disposition memorandum, but also from his testimony and his other allegations of misconduct,<sup>22</sup> the district court did not address the testimony, the second memorandum, or any of *Garcetti*’s other speech. The court of appeals reversed, again addressing only the speech in the disposition memorandum.<sup>23</sup>

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<sup>17</sup> *Id.* at 414–15. The defense attorney’s request and Ceballos’s subsequent investigation were characterized by Ceballos as fairly routine parts of the calendar deputy’s job. See *id.*

<sup>18</sup> *Id.* at 414.

<sup>19</sup> *Id.* at 414–15.

<sup>20</sup> See *Garcetti*, 547 US at 415 (describing the retaliatory actions as including “reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion”).

<sup>21</sup> See *Ceballos v Garcetti*, 2002 WL 34098285, \*5–6 (CD Cal) (granting summary judgment to the employer on the First Amendment claim). See also *Garcetti*, 547 US at 424.

<sup>22</sup> See *Ceballos v Garcetti*, 361 F3d 1168, 1171 (9th Cir 2004).

<sup>23</sup> See *id.* at 1173 (“We hold that, for purposes of summary judgment, Ceballos’s allegations of wrongdoing in the memorandum constitute protected speech under the First Amendment; accordingly, we need not determine here whether similar protection should be afforded to his other communications. Those matters are best explored at trial.”).

His case wound up in the Supreme Court, which, like the lower courts, addressed only the retaliation for the disposition memorandum. It held that Ceballos did not speak as a citizen when he wrote the disposition memorandum because he wrote it “pursuant to his duties as a calendar deputy. . . . [Writing the memo was] part of what he, as a calendar deputy, was employed to do.”<sup>24</sup> Although the Court acknowledged that “public employees do not surrender all their First Amendment rights by reason of their employment,” it noted that the *Pickering* doctrine protects a public employee’s right to speak as a citizen addressing matters of public concern only “in certain circumstances.”<sup>25</sup> The Court reiterated the dual nature of the *Connick-Pickering* inquiry: the test begins by determining whether the employee spoke as a citizen on a matter of public concern. If the employee did so speak, only then does the balancing test apply.<sup>26</sup>

Importantly, the Court did not even reach the question of whether the content of Ceballos’s memorandum involved a matter of public concern. Instead, it determined that because Ceballos was “simply performing his . . . job duties, there [was] no warrant” for application of the *Pickering* balancing test.<sup>27</sup> In effect, the Court added an extra step that precedes the test’s traditional public concern prong: if the employee spoke as part of his official duties, it does not matter whether he spoke on a matter of public concern.<sup>28</sup>

The Court distinguished employees speaking pursuant to their official duties from employees “who make public statements outside the course of performing their official duties,” like writing a letter to a newspaper or discussing politics with a coworker,<sup>29</sup> because those employees are engaged in the “kind of activity engaged in by citizens who do not work for the government.”<sup>30</sup> The Court justified its limit on constitutional protection by pointing out that declining to protect official-

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<sup>24</sup> *Garcetti*, 547 US at 421.

<sup>25</sup> *Id.* at 417.

<sup>26</sup> See *id.* at 418 (noting that if the employee spoke on a matter of public concern, the “question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public”).

<sup>27</sup> *Id.* at 423 (explaining that “to hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers”).

<sup>28</sup> Most courts and commentators agree that despite the Court’s reference to the “dual nature” of the *Connick-Pickering* inquiry, the *Garcetti* rule effectively adds an extra step. See *Huppert v City of Pittsburg*, 574 F3d 696, 702 (9th Cir 2009) (collecting cases and noting that “[o]ur sister circuits and the Supreme Court have said that the question whether the plaintiff acted pursuant to his or her job duties is antecedent to a determination whether the plaintiff spoke regarding a matter of public concern”). But see Dale, 29 Berkeley J Emp & Labor L at 211–12 (cited in note 15).

<sup>29</sup> *Garcetti*, 547 US at 423.

<sup>30</sup> *Id.*

duty speech does not “infringe any liberties the employee might have enjoyed as a private citizen.”<sup>31</sup> It added that “a powerful network of legislative enactments—such as whistle-blower protection laws and labor codes”—are available to those who seek to expose wrongdoing, removing the need for constitutional protection.<sup>32</sup>

In sum, *Garcetti* sets up a new obstacle that public employees who seek to prove that their speech is constitutionally protected must clear. It adds to the traditional public concern prerequisite a requirement that the speech was not made pursuant to their official duties. Only by clearing both of these hurdles can employees reach the *Pickering* balancing test.

#### B. The Duties of Testifying Public Employees

*Garcetti* recognized the public employee’s obligation to perform his job duties, and discouraged judicial interference with the public employer–public employee relationship. The citizen has other, potentially conflicting duties, however. These include the ordinary, nonbinding duty of the citizen to assist law enforcement as well as the binding duty of the citizen who is subpoenaed to testify. *Garcetti* did not answer several questions that this conflict implicates. What activities are “pursuant to official duties”? Does “pursuant to official duties” include speech that was not necessarily part of the employee’s job duties, such as speech about issues that the employee knew about because of his job? And when official duties conflict with citizen duties, which control?

##### 1. Official duties under *Garcetti*.

Prior to *Garcetti*, the courts of appeals to consider the issue all acknowledged that the First Amendment potentially could protect testimonial speech by public employees concerning issues they learned about at work.<sup>33</sup> In considering whether such testimony was protected speech, the courts of appeals typically focused on the content of the testimony, as well as its form and context, with the aim of ultimately determining whether the speech was upon a matter of public concern.<sup>34</sup> After *Garcetti*, the calculus has changed. Now the question is

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<sup>31</sup> Id at 421–22.

<sup>32</sup> Id at 425–26.

<sup>33</sup> See Scott E. Michael, Comment, “Lie or Lose Your Job!” *Protecting a Public Employee’s First Amendment Right to Testify Truthfully*, 29 Hamline L Rev 413, 425–37 (2006) (reviewing the courts of appeals’ pre-*Garcetti* treatment of testimony by public employees in the context of defining “public concern”).

<sup>34</sup> See, for example, *Pro v Donatucci*, 81 F3d 1283, 1291 (3d Cir 1996).

not just about the content, form, and context of the speech, but also about whether the speech was made pursuant to official duties. If the testimony was made pursuant to official duties, *Garcetti* forecloses First Amendment protection.

The *Garcetti* Court apparently equated official duties with job duties. It focused on the idea that restricting speech that “owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen.”<sup>35</sup> The principle seems clear: because a public employee who speaks as part of his official duties does not engage in “free” speech, but instead in speech required by his job duties, his speech is not protected by the Constitution. How far this principle extends, however, is less clear. Does it reach all speech that could never have occurred in the absence of the employer–employee relationship—that is, speech *about* one’s official duties?

## 2. The citizen’s duty to testify when subpoenaed.

Irrespective of First Amendment protections, the Court has also recognized the existence of “duties” in many other situations. One duty that the Court has previously acknowledged in the First Amendment context is the ordinary citizen’s “duty” to assist in the enforcement of the laws. The Court has made clear that this duty is a major part of the adversary system: the “conviction that private citizens have a duty to provide assistance to law enforcement officials when it is required is by no means foreign to our traditions.”<sup>36</sup> Thus property owners, for example, in some circumstances can be forced to cooperate with government investigations that require the government’s use of private property.<sup>37</sup>

The First Amendment does not necessarily provide a shield from these citizen duties: indeed, individuals may be compelled to speak by them.<sup>38</sup> This is in contrast to the general rule that the government typically cannot force a person to speak, even when that speech would

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<sup>35</sup> *Garcetti*, 547 US at 421–22.

<sup>36</sup> *United States v New York Telephone Co*, 434 US 159, 175 n 24 (1977) (collecting cases in which such a duty was recognized). See also *Branzburg v Hayes*, 408 US 665, 696 (1972) (noting with approval the federal misprision statute, which makes it a crime to knowingly fail to report the commission of a felony); *In re Quarles*, 158 US 532, 535 (1895) (“It is the duty and the right, not only of every peace officer of the United States, but of every citizen, to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States.”).

<sup>37</sup> See *New York Telephone*, 434 US at 174.

<sup>38</sup> See *Branzburg*, 408 US at 682–91 (noting that the “public has a right to every man’s evidence” and that the First Amendment does not protect the average citizen from having to disclose information).

assist a government investigation or support a government policy.<sup>39</sup> This is the role of the subpoena. A person who voluntarily complied with the citizen's duty to assist in law enforcement would not be complying with any binding legal duty. His speech would likely be "free" speech protected by the First Amendment. But the subpoena, like the public employee's job obligation, converts a citizen's "duty" of assistance in law enforcement into a mandatory obligation—a legal duty, as opposed to an ordinary one.

Therefore, the ordinary, nonbinding "duty" of the citizen converts to a legal duty when the judicial system uses compulsory process. "It is . . . beyond controversy that one of the duties which the citizen owes his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned."<sup>40</sup> Legislatures "may provide for the performance of this duty and prescribe penalties for its disobedience,"<sup>41</sup> and have done so via, for example, the federal statute giving courts the power to punish criminally those who fail to comply with a subpoena.<sup>42</sup> The Court has routinely required citizens to testify and otherwise to assist in the judicial process,<sup>43</sup> has blessed the punishment of citizens who fail to comply with the judicial process,<sup>44</sup> and has carved out only narrow exceptions to this legal duty.<sup>45</sup>

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<sup>39</sup> See, for example, *West Virginia State Board of Education v Barnette*, 319 US 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

<sup>40</sup> *Blackmer v United States*, 284 US 421, 438 (1932).

<sup>41</sup> *Id.*

<sup>42</sup> See 18 USC § 401(3) (giving any federal court the power to punish those who fail to comply with a lawful "writ, process, order, rule, decree, or command").

<sup>43</sup> See, for example, *Cohen v Cowles Media Co*, 501 US 663, 669 (1991) (holding that "all citizens" share an obligation to respond to subpoenas and answer questions related to criminal investigations); *United States v Nixon*, 418 US 683, 713 (1974) (requiring the President to comply with a subpoena and holding that a generalized interest in confidentiality does not overcome the demands of due process in a criminal trial).

<sup>44</sup> See, for example, *Blackmer*, 284 US at 438 (affirming the contempt conviction of a citizen who failed to comply with a subpoena).

<sup>45</sup> Some of the most prominent of these exceptions include the Fifth Amendment right against self-incrimination, the congressional privilege stemming from the Speech or Debate Clause, and the executive privilege. The Court has narrowly construed these privileges and explicitly traced several of them to the Constitution. See, for example, *Miranda v Arizona*, 384 US 436, 467 (1966) (pointing to the Fifth Amendment as conferring a privilege against self-incrimination); *Gravel v United States*, 408 US 606, 615–16 (1972) (stating that the Speech or Debate Clause exempts members of Congress from being questioned about their activities in Congress); *Nixon*, 418 US at 711–12 (noting that the general privilege of confidentiality of executive communications is "constitutionally based," but balancing it against "the guarantee of due process of law" and the "basic function of the courts"). The Court has also acknowledged that other privileges can be established by state statute or common law. See *Maness v Meyers*, 419 US

Thus, a citizen's ordinary, nonbinding "duty" to assist in the enforcement of the laws is different from his legal duty to appear in court when compelled. This distinction is important when one applies *Garcetti* to public-employee testimony. While *Garcetti* established that the judiciary should not interfere with public employer–public employee relations, it did not address a possible tension that arises when the citizen's duty to testify is implicated. The principle of *Garcetti* is that whenever a public employee is compelled by his job duties to testify, he does not speak as a citizen for First Amendment purposes. But when the public employee is compelled to testify by a subpoena, he has a binding citizen's duty to comply with the subpoena that may conflict with his official duties as a government employee.

## II. THE CIRCUIT SPLIT: IS A PUBLIC EMPLOYEE'S TESTIMONY PROTECTED?

The courts of appeals have varied in their approaches to how *Garcetti* should be applied when public employees testify. Some have read official duties very narrowly, while others have read it more broadly. The courts of appeals have also varied in the attention that they have paid to potential conflicts between citizen duties and "official duties." Accordingly, a circuit split has arisen over the circumstances in which a public employee's testimonial speech is protected by the First Amendment. This Part explores the different approaches of the courts of appeals that have considered the issue.

### A. *Reilly*: The Third Circuit Protects All Testimony

In *Reilly v City of Atlantic City*,<sup>46</sup> the Third Circuit concluded that a public employee's testimony made pursuant to his official duties still could qualify as protected speech post-*Garcetti*.<sup>47</sup> In *Reilly*, the plaintiff, an Atlantic City police detective, "initiated and took part in" an investigation into corruption in the Atlantic City Police Department, and testified for the prosecution at the criminal trial of a fellow officer.<sup>48</sup> Several years after the trial, Officer Robert Reilly was subjected to allegedly retaliatory actions that forced his early retirement. After retiring, Reilly sued, alleging violations of his First Amendment right to speak about

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449, 461 n 8 (1975) (pointing out that such other privileges include the priest–penitent, lawyer–client, and doctor–patient privileges).

<sup>46</sup> 532 F3d 216 (3d Cir 2008).

<sup>47</sup> See *id.* at 230–31.

<sup>48</sup> Complaint, *Reilly v City of Atlantic City*, No 03-5975, ¶¶ 14–15 (D NJ filed Dec 16, 2003) ("Reilly Complaint") (stating that Reilly investigated allegations that two police department employees extorted money from prostitutes and committed acts of theft, assault, and brutality). See also *Reilly*, 532 F3d at 220.

matters of public concern.<sup>49</sup> On appeal post-*Garcetti*, the defendants argued that Reilly's testimony was made pursuant to his official duties, and therefore was not protected by the First Amendment.<sup>50</sup>

The Third Circuit held that Reilly's testimony was protected as a matter of law. The court began by acknowledging *Garcetti*'s official-duties test. In doing so, the Third Circuit looked to Reilly's job duties, noting that "Reilly's trial testimony[] appears to have stemmed from his official duties in the investigation."<sup>51</sup> It would seem, then, that a faithful application of *Garcetti* would have led the Third Circuit to the conclusion that Reilly's testimony was not protected.

The *Reilly* court sidestepped the official-duties test, however, by pointing out that *Garcetti* did not address trial testimony. Because *Garcetti* offered no explicit instruction regarding the testimony of public employees, the Third Circuit turned instead to what it termed "settled principles."<sup>52</sup> The court noted that every citizen owes his government the "duty" of giving truthful testimony. It then held that Reilly's speech could be protected despite *Garcetti* because when Reilly testified, he "spoke as a citizen."<sup>53</sup> Thus, even though Reilly's court appearance "stemmed from" his official duties, the Third Circuit held that Reilly spoke "as a citizen" upon a matter of public concern; this allowed the court to apply the *Pickering* balancing test, which it determined favored Reilly.<sup>54</sup>

*Reilly*'s result is called into question by the holding and purposive implications of *Garcetti*, as well as by the decisions of the Seventh, Ninth, and Eleventh Circuits discussed below. The *Reilly* court noted that the *Garcetti* rule created a conflict with the citizen's duty to testify.<sup>55</sup> All of the cases that the Third Circuit relied on, however, dealt with the citizen's legal duty to testify under or answer a subpoena.<sup>56</sup>

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<sup>49</sup> See *Reilly*, 532 F3d at 222.

<sup>50</sup> See *id.* at 226–27.

<sup>51</sup> *Id.* at 231.

<sup>52</sup> *Id.*

<sup>53</sup> *Reilly*, 532 F3d at 228–31.

<sup>54</sup> See *id.* at 232 ("[T]he District Court properly held that the public's interest in hearing testimony about police corruption outweighed Appellants' interest in maintaining order by disciplining Reilly for that speech.").

<sup>55</sup> See *id.* at 231 (asserting that although Reilly's "official responsibilities provided the initial impetus to appear in court," this was "immaterial to [his] independent obligation as a citizen to testify truthfully").

<sup>56</sup> See *id.* at 228–29, citing *United States v Mandujano*, 425 US 564, 575–76 (1976) (refusing to suppress subpoenaed grand jury testimony given without a *Miranda* warning); *United States v Nixon*, 418 US 683, 709 (1974) (ruling that presidential privilege did not allow the President to refuse to comply with a subpoena); *United States v Calandra*, 414 US 338, 345 (1974) (declining to apply the exclusionary rule to prevent subpoenaed grand jury testimony); *Branzburg v Hayes*, 408 US 665, 686 (1972) (requiring journalists to comply with subpoenas); *Piemonte v United States*, 367 US 556, 559, 561 (1961) (affirming the detention of a convict who refused to testify

The court never distinguished between the citizen's ordinary duty to assist in law enforcement and his binding duty to comply with a subpoena; it never addressed whether Reilly was subpoenaed to testify, or whether he did so voluntarily. Instead, it just read *Garcetti* extremely narrowly in order to avoid what it saw as an irreconcilable conflict. In fact, the Third Circuit's reading of *Garcetti* may be too narrow: if *Garcetti* exists to bar suits by public employees alleging violations of their First Amendment rights anytime those employees spoke pursuant to their official duties, *Reilly* impermissibly circumvents that rule by concluding that Reilly's testimony was protected even though it was given pursuant to his official duties.

B. The Ninth and Eleventh Circuits Do Not Protect Testimony Pursuant to Official Duties

1. *Huppert*: The Ninth Circuit expressly declines to follow *Reilly*.

In *Huppert v City of Pittsburg*,<sup>57</sup> the Ninth Circuit, over a dissent by Judge William Fletcher, applied the plain rule of *Garcetti* and held that subpoenaed testimony made pursuant to official duties is not protected by the First Amendment.<sup>58</sup> Ron Huppert, a police officer, was subpoenaed and testified before a grand jury that was probing corruption in his police department. Huppert was just one of several officers who was subpoenaed and testified before the grand jury. According to Huppert, not all of the officers subpoenaed were whistleblowers like himself; indeed, he was identified by the chief of police as a potentially "bad witness," which Huppert understood to reflect a view that he was a "malcontent."<sup>59</sup> This view, he claimed, stemmed from the fact that he had previously worked on and cooperated with other internal investigations.<sup>60</sup>

Huppert filed a § 1983 suit claiming that he was subjected to retaliation for his testimony—a violation of his First Amendment rights. The Ninth Circuit applied *Garcetti* in affirming the dismissal of Huppert's claim, pointing out that *Garcetti* "drew a distinct line between

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before a grand jury even after a subpoena and a grant of immunity); *New York v O'Neill*, 359 US 1, 11 (1959) (allowing one state to compel another state's citizen to travel across state lines and testify); *Blackmer v United States*, 284 US 421, 438 (1932) (upholding contempt charge against a United States citizen living in France who failed to respond to a subpoena); *Blair v United States*, 250 US 273, 281 (1919) (affirming contempt charges against witnesses who refused to testify before a grand jury under subpoena).

<sup>57</sup> 574 F3d 696 (9th Cir 2009).

<sup>58</sup> See id at 707–08.

<sup>59</sup> Id at 700.

<sup>60</sup> See id.

speech pursuant to one's job duties and speech in a private capacity."<sup>61</sup> It also expressly refused to follow *Reilly*. The Ninth Circuit pointed out that the Third Circuit's *Reilly* holding implied that truthful testimony could never be part of a police officer's official duties for the purposes of the *Garcetti* test. "By first finding that Reilly's speech was pursuant to his job duties, but subsequently concluding that it was protected by the First Amendment, the *Reilly* court impermissibly began chipping away at the plain holding in [*Garcetti*]."<sup>62</sup>

In short, the *Huppert* majority applied a strict interpretation of *Garcetti* to truthful testimony: testimony made as part of a public employee's official duties is never protected. In its view, "[t]estifying before a grand jury charged with investigating corruption is one part of an officer's job" regardless of the circumstances under which the officer appeared.<sup>63</sup> It does not matter whether the officer was the lead investigator, an allegedly corrupt cop, or a whistleblower. Thus, Huppert's subpoenaed testimony was not protected by the First Amendment.<sup>64</sup>

In dissent, Judge Fletcher, relying in part on *Reilly*, argued that Huppert's testimony was protected as a matter of law. "[W]here there is an independent legal duty to speak . . . the employee has First Amendment protection for truthful speech uttered in performance of that independent legal duty. . . . When he appeared before the grand jury, Huppert acted as a citizen."<sup>65</sup> He went on to suggest a narrow holding that would have preserved the "sound policy" of protecting police officers' testimony: "when an officer testifies before a grand jury pursuant to a subpoena concerning corruption of his or her fellow officers, the officer is not performing an official duty."<sup>66</sup>

Judge Fletcher left open the question of how a citizen's "independent legal duty" comes about. By pointing to the subpoenaed nature of Huppert's testimony, he suggested that compulsory testimony represents an "independent legal duty" that should be protected. By arguing that Huppert's speech was protected as a matter of law and relying on *Reilly* in doing so, however, Judge Fletcher seemed to suggest that all testimonial speech is protected speech that satisfies both the *Garcetti* and *Connick* prongs of the tripartite test.

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<sup>61</sup> *Huppert*, 574 F3d at 708–09 (distinguishing the cases relied upon by the dissent because, in those cases, the testimony was held not to be part of the plaintiffs' official duties).

<sup>62</sup> *Id.* at 708, citing *Reilly*, 532 F3d at 230–31.

<sup>63</sup> *Huppert*, 574 F3d at 707–08.

<sup>64</sup> *See id.*

<sup>65</sup> *Id.* at 721–22 (Fletcher dissenting) (quotation marks omitted).

<sup>66</sup> *Id.* at 722.

2. *Green*: The Eleventh Circuit treats testimonial speech like ordinary speech.

The Ninth Circuit's decision in *Huppert* echoed that of the Eleventh Circuit in an earlier case. In *Green v Barrett*,<sup>67</sup> the Eleventh Circuit held that a public employee's testimony receives no special treatment, and therefore does not qualify as protected speech if it is made pursuant to the employee's official duties.<sup>68</sup> Shirly Green, the chief jailer of a county jail, appeared at an emergency court hearing regarding the appropriateness of the jail as a holding place for high-security prisoners. Green never claimed that she was subpoenaed, but she did initially assert that, because she held the position of chief jailer, she was "required" to testify at that hearing.<sup>69</sup> Later, on appeal post-*Garcetti*, Green changed her tune to argue that her testimony was not part of her official duties.<sup>70</sup>

In any event, Green testified that "many of the cell door locks were either broken or could be easily jammed by prisoners, including locks in the area of the jail used to house high-security prisoners," that "prisoners regularly let themselves out of the cells at night," and that the jail was "unsafe."<sup>71</sup> Green was fired the next day, ostensibly because her testimony exposed major problems with her management of the jail.<sup>72</sup> Green sued, arguing that the firing violated her First Amendment rights.

The court of appeals rejected her claim, holding that because Green's testimony was given "as part of her duties as a public employee," it was unprotected regardless of its status as testimony.<sup>73</sup> In doing so, it relied on *Garcetti* as well as pre-*Garcetti* Eleventh Circuit precedent holding that testimony does not automatically qualify as speech on a matter of public concern, and that the fact that speech was

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<sup>67</sup> 226 Fed Appx 883 (11th Cir 2007).

<sup>68</sup> *Id.* at 886.

<sup>69</sup> See Amended Complaint, *Green v Barrett*, No 1:04-CV-00014, ¶ 18 (ND Ga filed Mar 24, 2004) (available on Westlaw at 2004 WL 2560796) ("Because Green was then the Chief Jailer, she was required to testify at [the emergency] hearing on behalf of the Sheriff's Department regarding circumstances at the jail.").

<sup>70</sup> See Brief of the Appellee, *Green v Barrett*, No 06-15104-BB, \*16 (11th Cir filed Dec 4, 2006) (available on Westlaw at 2006 WL 4127031) (stating that her "obligation to testify in court was independent of any duty she owed to her employer").

<sup>71</sup> *Green*, 226 Fed Appx at 884.

<sup>72</sup> See *id.* (noting that Green's employer told a local newspaper that she fired Green because the testimony exposed problems at the jail); Brief in Opposition to Petition for a Writ of Certiorari, *Green v Barrett*, No 07-177, \*4 (US filed Sep 12, 2007) (arguing that Green was fired because her testimony convinced the employer of her incompetence as chief jailer).

<sup>73</sup> *Green*, 226 Fed Appx at 886.

testimonial has no impact on the protected status of the speech.<sup>74</sup> Instead, the Eleventh Circuit focuses on the content, form, and context of the speech.<sup>75</sup> Since the Eleventh Circuit does not grant special status to testimony, it applied *Garcetti* in a straightforward manner: the speech was unprotected because it was part of Green's official duties.

### C. The Seventh Circuit is Ambiguous about *Garcetti*'s Effect

Three recent cases from the Seventh Circuit address the conflict between the official-duties rule and public employees' duty to testify as citizens. These cases fail, however, to solve the problem of determining *Garcetti*'s broad effect. It remains unclear in what circumstances the Seventh Circuit would provide First Amendment protection to testimony by public employees.

#### 1. *Morales* and *Tamayo*: The Seventh Circuit addresses legislative and civil testimony.

In *Morales v Jones*,<sup>76</sup> the Seventh Circuit held that a police officer's subpoenaed testimony in a civil deposition about events that occurred while he was on the job was protected speech because giving subpoenaed testimony in a civil deposition is not part of an officer's official duties.<sup>77</sup> Alfonso Morales, a Milwaukee police officer, was subpoenaed to give a deposition in another officer's civil suit for alleged retaliation. He complied with the subpoena and testified about a possible incident of retaliation by Milwaukee's chief of police.<sup>78</sup> Morales was then transferred from one department to another; he alleged that the transfer was retribution for complying with the subpoena and giving the deposition.

On appeal after *Garcetti*, the Seventh Circuit noted that Morales's testimony was "about speech he made pursuant to his official duties."<sup>79</sup> The court held, however, that his deposition was protected speech: "[b]eing deposed in a civil suit pursuant to a subpoena was

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<sup>74</sup> See *id.* ("[I]f a plaintiff speaks as part of her duties as a public employee, the speech is not protected by the First Amendment. This distinction is not affected by the fact that the plaintiff made the statements in testimony."), citing *Garcetti*, 547 US at 420; *Morris v Crow*, 142 F3d 1379, 1382–83 (11th Cir 1998).

<sup>75</sup> See *Green*, 226 Fed Appx at 886 ("The key consideration is the purpose of the communication."). See also *Lyon v Ashurst*, 2009 WL 3725364, \*1–2 (11th Cir) (deciding that subpoenaed testimony in an employment grievance was not a matter of public concern because it was "personal to" the employee and the grievant).

<sup>76</sup> 494 F3d 590 (7th Cir 2007).

<sup>77</sup> See *id.* at 598.

<sup>78</sup> See *id.* at 595, 598.

<sup>79</sup> *Id.* at 598 (emphasis added).

unquestionably not one of Morales' job duties because it was not part of what he was employed to do."<sup>80</sup>

Concurring that Morales's deposition speech was protected, Judge Ilana Rovner agreed that the civil deposition was not part of Morales's job duties: "Although the subject matter of the deposition related to information Lt. Morales learned on his job, his testimony owed its existence not to his job but rather to a subpoena in a lawsuit."<sup>81</sup> Judge Rovner emphasized that "the fact that [Morales's] speech concerned the subject matter of his employment is not dispositive."<sup>82</sup>

The *Morales* opinion is as notable for what it does not address as what it does. Morales was deposed to testify in a civil suit, and the court made clear that subpoenaed testimony by a police officer in a civil suit is not part of the officer's official duties.<sup>83</sup> Although both the majority and dissent in *Morales* noted that Morales was subpoenaed, neither refined the key element that made Morales's testimony protected speech. Was it that he was subpoenaed, that he testified in a civil suit, or that he testified at all?

Additionally, *Morales* says nothing about whether court testimony given as part of one's job is protected. For example, would a police officer's testimony on behalf of the government in a criminal proceeding stemming from an investigation in which that officer took part be protected?<sup>84</sup> Another post-*Garcetti* Seventh Circuit case indicates that it would not be. In *Tamayo v Blagojevich*,<sup>85</sup> the interim administrator of the Illinois Gaming Board, Jeannette Tamayo, was removed from her position after testifying at a legislative hearing about the governor and his staff's alleged interference with the board's operations. Affirming the district court's dismissal of her First Amendment claim, the Seventh Circuit rejected the plaintiff's argument that her testimony was given outside the scope of her employment. Since the testimony was given

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<sup>80</sup> *Morales*, 494 F3d at 598.

<sup>81</sup> *Id.* at 603 (Rovner concurring in part and dissenting in part).

<sup>82</sup> *Id.* at 602 (arguing that *Garcetti* reaffirmed the principle that some public-employee speech related to the speaker's job is protected). When it afforded protection to Morales's subpoenaed civil testimony, the majority implicitly acknowledged that speech about things learned on the job can be protected. See *id.* at 598 (majority) (holding that civil deposition testimony about what happened on the job is protected).

<sup>83</sup> The Seventh Circuit has applied this reasoning in similar contexts. See *Fairley v Fermaid*, 482 F3d 897, 899–902 (7th Cir 2007) ("*Fairley I*") (concluding that testimony in prisoners' civil suits is not part of prison guards' job duties); *Matrisciano v Randle*, 569 F3d 723, 731 (7th Cir 2009) (determining that a high-ranking prison official who took a day off to testify on behalf of an inmate at a parole hearing did not act pursuant to his official duties), abrogated on other grounds, *Gross v FBL Financial Services, Inc.*, 129 S Ct 2343 (2009).

<sup>84</sup> Consider *Reilly*, 532 F3d at 230 (analyzing *Morales* and focusing on the non-job-related aspect of Morales's testimony, and distinguishing it from a situation in which testifying was part of the employee's official duties).

<sup>85</sup> 526 F3d 1074 (7th Cir 2008).

“because of the position she held within the agency” and “about matters within the scope of her job duties as Interim Administrator,” Tamayo’s testimonial speech was not protected by the First Amendment.<sup>86</sup>

This suggests a willingness in the Seventh Circuit to apply *Garcetti*’s bar on First Amendment protection to testimony given pursuant to job duties. Although the Seventh Circuit has not yet ruled whether court testimony given pursuant to one’s job duties is protected speech or considered the role of compulsory process in such testimony, one can easily imagine the Seventh Circuit applying the reasoning of *Tamayo* to come down on the side of the defendant in a case with facts like those in *Reilly*. It remains uncertain, however, where exactly the Seventh Circuit would draw the line between testimony *pursuant* to official duties and testimony *about* official duties.

## 2. *Fairley II*: Employers must not influence testimony.

Most recently, the Seventh Circuit dealt with this issue in *Fairley v Andrews*<sup>87</sup> (“*Fairley II*”). There, the Seventh Circuit held that threats made by a public employer to deter its employees from complying with a subpoena *could* constitute a violation of the First Amendment.<sup>88</sup> The case arose when guards at a county jail quit and then sued, alleging harassment by their coworkers for saying that they would testify truthfully if they were subpoenaed to testify in a civil suit brought by prisoners alleging abuse.<sup>89</sup>

In reversing the district court’s dismissal of the guards’ First Amendment claims, Judge Frank Easterbrook stated that a public employer may not attempt to restrain its employees’ testimony. In doing so, he did not draw a distinction between official-duty and non-official-duty testimony. Instead, he offered the broad proposition that “[t]estifying against the Jail might not be part of the job, but that doesn’t matter. . . . [A government] [t]hreatening penalties for future speech . . . is the quintessential first-amendment violation.”<sup>90</sup>

This statement suggests two things. First, that compelled testimony is protected by the First Amendment; second, that government restraints on testimonial speech are a violation of the First Amendment

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<sup>86</sup> Id at 1092 (ruling that the plaintiff “cannot escape the strictures of *Garcetti* by including in her complaint the conclusory legal statement that she testified ‘as a citizen . . . outside the duties of her employment’”) (ellipsis in original).

<sup>87</sup> 578 F3d 518 (7th Cir 2009).

<sup>88</sup> See id at 524–25.

<sup>89</sup> See id at 520–21.

<sup>90</sup> Id at 524–25. The court also noted that both retaliation and “prior restraint” (threatening penalties for future speech) are First Amendment violations; in other words, that whether punitive measures precede or succeed the speech is immaterial for First Amendment purposes. See id at 525.

regardless of whether the speech was made as part of the speaker's official duties. But notwithstanding the force of Judge Easterbrook's opinion, the effect of *Fairley II* is uncertain. In an earlier iteration of the *Fairley* case, the court held that assisting prisoners with civil litigation was not part of a prison guard's job duties.<sup>91</sup> Thus, Judge Easterbrook's statement that it "doesn't matter" whether the testimony was part of the guards' duties was not necessary to the *Fairley II* holding—in short, it was dicta. Moreover, Judge Easterbrook's broad proposition may conflict with his own reading of *Garcetti* given in the same opinion: "*Garcetti* holds that the first amendment does not protect statements made as part of one's job."<sup>92</sup>

#### D. The State of the Law Is Uncertain

*Fairley II*'s position that the government may never restrain its employees' testimony also underlies the Third Circuit's stance in *Reilly*, but is in conflict with the positions of the other courts of appeals, and possibly with *Tamayo*. After *Garcetti*, can a broad notion that all testimony is protected from government retaliation coexist with government jobs that require employees to testify? On the other hand, *Huppert* and *Green* may read *Garcetti* more broadly than is appropriate, thus unnecessarily creating a catch-22 for the public employee subpoenaed to testify: either testify and expose oneself to retaliation, or refuse to testify and face contempt charges and other consequences. These varying positions leave testifying employees in the dark as to whether their testimonial speech will be protected.

### III. COURTS SHOULD PROTECT SUBPOENAED AND VOLUNTARY TESTIMONY

The courts of appeals' varying applications of *Garcetti*'s official-duties test leave open the question of when a public employee's testimonial speech is protected. This Part evaluates the various situations that implicate *Garcetti* and its impact on testimonial speech. It argues that the courts should adopt a rule that public employees who testify either voluntarily or under subpoena and not on behalf of their government employers engage in protected speech.

This Part lays out the theoretical justifications for such a rule, concluding that a narrow, but respectful, reading of *Garcetti* as it pertains to testimony will preserve critical First Amendment protection for citizen testimony, which is integral to the judicial process, while

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<sup>91</sup> See *Fairley I*, 482 F3d at 902.

<sup>92</sup> *Fairley II*, 578 F3d at 522, 524 (citation omitted).

also protecting public employers' ability to discipline employees. Additionally, such a rule would be easy to administer, thereby quelling the confusion that currently reigns in the courts of appeals. This Part then outlines a new framework for dealing with public employee testimony after *Garcetti* by breaking down the types of testimonial speech into five distinct categories and considering the proper application of the above principles within each category.

A. A Narrow Reading of *Garcetti* Best Serves the Various Interests at Stake

Courts should adopt a narrow reading of *Garcetti*, applying it only to a small and specific class of public-employee testimony. Specifically, when public employees testify, courts should apply *Garcetti*'s official-duties rule only to testimony given on behalf of the government as part of the public employee's job duties. To ensure that this application is consistent, courts should adopt a rule that public employees who testify either voluntarily or under subpoena and not on the behalf of their government employers engage in protected speech. In contrast to the regime set out by the Ninth Circuit in *Huppert*, speech about information that a public employee happens to learn about at work should be protected if that speech is given pursuant to the employee's duty as a citizen to testify when subpoenaed.

1. Protecting subpoenaed and voluntary testimony is consistent with *Garcetti*.

*Garcetti* holds 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."<sup>93</sup> It seems to equate official duties with job duties.<sup>94</sup>

A reading of *Garcetti* in which speech "pursuant to official duties" is only that speech that is required by the employee's job duties is the right reading for two reasons. First, this reading is consistent with *Garcetti* because *Garcetti* is best understood to acknowledge that speech *pursuant to* official duties is different from speech *about* official duties. *Garcetti* requires that speech given pursuant to official duties not be protected by the First Amendment: Ceballos did not speak

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<sup>93</sup> *Garcetti*, 547 US at 421.

<sup>94</sup> See id at 421–22 (noting that *Garcetti* wrote the disposition memorandum as part of his job responsibility to "advise his supervisor about how best to proceed with a pending case" and pointing out that speech that "owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen").

as a citizen because he was required to write the disposition memorandum as part of his job. The government employer must have the ability to decide to discipline its employees for doing their jobs poorly—even when those jobs include testifying on the government’s behalf. This is the point of *Garcetti*,<sup>95</sup> and the Third Circuit erred when it evaded a faithful application of this principle in *Reilly*.

*Garcetti* expressly recognized, however, that *Pickering* survived the Court’s narrowing of the protections given to public employees’ speech.<sup>96</sup> This shows that the Court understood that public employees remain uniquely qualified to comment on certain matters upon which they acquire expertise as part of their official duties. Speech concerning such matters is speech *about* official duties, not *pursuant to* official duties within the meaning of *Garcetti*. Thus, testimony “pursuant to official duties” should be understood to be only testimony that is given on the government’s behalf as part of the testifying employee’s ordinary job duties.

Second, a narrow reading of *Garcetti* is consistent with the idea, long acknowledged by the Court, that citizens are bound by certain duties, including the duty to testify when compelled. Public employees have duties as citizens in addition to their official duties as government employees. The vital importance of these other citizen duties counsels that *Garcetti*’s official-duties test not be read too broadly. Just as the exceptions to the general duty of citizens to testify and otherwise comply with law enforcement are “not lightly created nor expansively construed, for they are in derogation of the search for truth,”<sup>97</sup> *Garcetti* should be read narrowly, so as not to interfere with the traditional duties of the citizen.

When the testifying employee is a “professional testifier”—that is, an employee who routinely is required to testify on the government’s behalf as part of his job duties—the government’s interest in retaining control over the employee’s official-duty speech is very strong. In effect, the employee is a government mouthpiece, and the government must be able to control its spokesperson. But when the government employer’s interest in regulating employee speech is not as strong—

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<sup>95</sup> See *id.* at 424 (“When a public employee speaks pursuant to employment responsibilities . . . there is no relevant analogue to speech by citizens who are not government employees.”).

<sup>96</sup> See *id.* at 423 (explaining that employees “who make public statements outside the course of performing their official duties,” such as writing a letter to a newspaper, “retain some possibility of First Amendment protection”), citing *Pickering*, 391 US 563.

<sup>97</sup> *United States v. Nixon*, 418 US 683, 710 & n 18 (1974) (adding that “courts have historically been cautious about privileges” because of the “key role of the testimony of witnesses in the judicial process”). See also *Blair v. United States*, 250 US 273, 281 (1919) (noting that the “public duties [of] every person within the jurisdiction of the government” to testify upon being properly summoned are subject to mitigation only in “exceptional circumstances”).

that is, when the speech is not a part of the employee's job, as it is for the professional testifier—the employee should be understood to be speaking as a citizen, not as an employee, and his speech should be protected by the First Amendment.

A counterargument against these justifications is that *Garcetti* raises a broader principle that calls into question whether compulsory testimony can ever be “free” speech. If a public employee's official-duty speech is not protected because he does not speak freely, but compulsorily, in his capacity as an employee, then perhaps a citizen summoned to testify does not speak freely either. Instead, the testifying citizen speaks pursuant to a duty to comply with the subpoena. His speech is neither voluntary nor “free” as contemplated by the First Amendment, so it is unprotected. *Garcetti* does not require this result, however. It addresses only the official duties of public employees. Applying *Garcetti*'s rule narrowly—that is, only to testimony given as part of the public employee's job duties and on behalf of his employer—makes the most sense from a policy perspective, particularly when viewed in light of the longstanding *Pickering* doctrine.

2. Protecting subpoenaed and voluntary speech is consistent with longstanding principles.

*Pickering* and its progeny recognize that public employees do not stop being citizens when they accept government employment.<sup>98</sup> The Supreme Court also has often acknowledged the high value of free speech on matters of public concern. Protection for such speech exists to ensure an interchange of ideas in the political process, as well as to safeguard citizens' right to participate in public affairs.<sup>99</sup>

Additionally, the Supreme Court has consistently recognized the importance of truthful testimony in the judicial process. All citizens share a nonbinding duty to help in the enforcement of the laws. Given some citizens' reluctance to do so, the availability of effective compulsory process to help the courts ensure such compliance is imperative. The Court thus has blessed the existence of an independent legal duty of the citizen to testify when subpoenaed.

The First Amendment must protect testimony, given its recognized value and the value of speech on matters of public concern

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<sup>98</sup> See *Pickering*, 391 US at 568 (acknowledging that public employees retain the rights they enjoy as ordinary citizens and that government employers' ability to interfere with those rights is limited). See also *Garcetti*, 547 US at 413 (“[The] State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.”).

<sup>99</sup> See, for example, *Connick*, 461 US at 145 (explaining that the protection against the suppression of the rights of citizens to participate in public affairs is the highest purpose of the First Amendment).

more generally. Whistleblower protection law does not provide sufficient protection to testimony by public employees. The scope of its protection varies from jurisdiction to jurisdiction.<sup>100</sup> The varying protections of whistleblower protection regimes are no substitute for the security of the Constitution; as the Court has noted, “the applicability of a provision of the Constitution has never depended on the vagaries of state or federal law.”<sup>101</sup> Indeed, the very point of the *Pickering* test is to elevate substance over form and allow for a sensitive weighing of the critical and competing interests at hand.<sup>102</sup>

An overly broad reading of *Garcetti* undercuts courts’ ability to engage in the sensitive treatment of these concerns that is needed. *Huppert* is the archetype. In that case, the court declined to protect speech that exposed wrongdoing in a city police department solely because the official duties of police officers include testifying in some situations.<sup>103</sup> It thus did not protect testimony about what happened at work, even though the testifying employee was not acting as a government spokesperson. The negative effects of such a decision are clear: if public employees know that the content of their testimony could subject them to retaliation checked only by the vagaries of whistleblower protection law, they are less likely to speak out voluntarily about what happened at work and will be more reluctant to comply with the judicial process. This will chill public discourse and undermine the judicial system.

Instead, the official-duties rule should be read narrowly, thereby enabling public employees to reach the substance of the *Pickering* test. *Garcetti* plainly forecloses a plaintiff like Reilly from receiving constitutional protection when he testifies pursuant to his official duties. Reilly is in effect a government spokesman whose truthful testimony’s content, tone, and purpose are subject to control by his public

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<sup>100</sup> Whistleblower protection regimes “differ in many respects with regard to how such protections are provided. Some statutes apply only to employees of the state government and not to employees of . . . other political subdivisions.” Daniel P. Westman and Nancy M. Modesitt, *Whistleblowing: The Law of Retaliatory Discharge* 67 (BNA 2d ed 2004). Other “significant points of divergence” among the regimes include “protected topics of complaints, to whom those complaints may be made without losing protections, and the remedies available.” *Id.* See also *Garcetti*, 547 US at 439–40 (Souter dissenting) (collecting state statutes, and arguing that they add up to nothing more than a “patchwork, not a showing that [retaliation] worries may be remitted to legislatures for relief”).

<sup>101</sup> *Board of County Commissioners v Umbehr*, 518 US 668, 678–80 (1996) (noting that the *Pickering* test allows for a sensitive weighing of both government and citizen interests and is therefore superior to a bright-line rule).

<sup>102</sup> See *Pickering*, 391 US at 568 (describing the purpose of the test as to balance the citizen’s interest in free speech upon matters of public concern against the government’s interest in efficient public services). See also *Umbehr*, 518 US at 679–80 (concluding that the *Pickering* test is preferable to bright-line rules given the weighty constitutional interests at stake).

<sup>103</sup> See Part II.B.1.

employer. In other words, the government employer has the right and ability to discipline Reilly if and when he goes off message. But the *Garcetti* rule can and should apply only to plaintiffs like Reilly. A conclusion that subpoenaed speech and voluntary speech not made on behalf of the government are not official-duty speech allows other public employees to surpass the *Garcetti* test and (so long as the speech was upon a matter of public concern) have their claims judged on the merits under *Pickering*.

One may argue that a public employee asked to testify might try to take advantage of this rule by asking for a subpoena whenever his employer asks him to testify. This tactic, however, would fail. If the duty to testify on the employer's behalf is truly part of the employee's job duties, the employee will not be able to get away with asking for the subpoena: his employer will simply discipline him for refusing to do his job. Citizens who accept government employment must understand that their employer can require them to speak on its behalf in certain circumstances. Just as the President can discipline his press secretary for refusing to defend a policy decision before the media, a police department can discipline an officer for refusing to give testimony about a criminal investigation in which he took part.

Nor does this result otherwise strip government employers of their ability to manage the workplace. To the contrary, the employer retains the ability to prove either that the employee did not speak on a matter of public concern or, even if he did, that its interests outweighed the employee's First Amendment interests. The government thus would still be able to prove that it was well within its discretion to fire the incompetent chief jailer or dirty cop whose testimony exposed his own wrongdoing. But it would not be able to simply claim that all government jobs include a duty to give testimony on the government's behalf, and that therefore any testimony by government employees is unprotected speech, because *Garcetti* expressly forbids such practices by employers.<sup>104</sup>

This Comment's proposed rule merely provides the courts with an easily administrable way to determine that testimony was not given pursuant to official duties: the speech of an employee who testified either voluntarily or under subpoena and not on behalf of his employer would automatically be rendered non-official-duty speech. Because the employee would not testify pursuant to his official duties, his testimonial speech would not be barred by *Garcetti* from First Amendment

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<sup>104</sup> See *Garcetti*, 547 US at 424–25 (rejecting “the suggestion that employers can restrict employees’ rights by creating excessively broad job descriptions,” because courts can and should make a practical inquiry into the employee’s actual job duties, which often bear little resemblance to the formal job description).

protection. This simple solution would ensure that the substance of the employee's constitutional claim is heard.

### B. Applying the *Garcetti* Problem in Five Factual Situations

In applying *Garcetti* to public-employee testimony, the courts of appeals have failed to consider the problems of application that diverse factual situations create. Namely, the courts have not considered how the testimony came about and on whose behalf it was given.

There are five situations implicated. First, testimony on behalf of the government could be a routine part of a public employee's job duties: think police officers or crime lab technicians. No subpoena would be needed to compel these employees' testimony on their employer's behalf: failure to testify would result in discipline for failing to do their job. Second, a "professional testifier" like a police officer or lab technician could be subpoenaed by the defense or another third party to give testimony; this testimony may be distinguishable from his ordinary official-duties testimony because it would not be on the government's behalf and thus not pursuant to official duties. These situations are discussed in Parts III.B.1 and III.B.2.

The third and fourth situations are discussed in Parts III.B.3 and III.B.4. An ordinary public employee, one who does not regularly testify, might either be asked to testify on his employer's behalf or summoned to testify by a third party about something he learned at work. Finally, as covered in Part III.B.5, either type of public employee might voluntarily give personal testimony about something that happened at work.

#### 1. The professional testifier's speech on behalf of the government.

The first situation involves the professional testifier—the police officer, crime lab technician, or government agency head, to name a few examples—who is routinely called to testify before courts or legislatures as part of his job duties. The plaintiff in *Reilly* is the paradigm. In that case, Reilly initiated and took part in the internal investigation, and was called to testify at the criminal trial of one of the officers whose alleged corruption was uncovered.<sup>105</sup> Giving such testimony was part of his job, as the Third Circuit acknowledged.<sup>106</sup> Even though his testimony turned out to be offensive to his eventual supervisor, Reilly spoke as part of his job and on behalf of the government.

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<sup>105</sup> See *Reilly* Complaint at ¶¶ 14–15 (cited in note 48). See also *Reilly*, 532 F3d at 220.

<sup>106</sup> See *Reilly*, 532 F3d at 231 (“Reilly’s trial testimony appears to have stemmed from his official duties in the investigation.”).

Reilly's testimony was given pursuant to his official duties within the meaning of *Garcetti*, and the Third Circuit was wrong to avoid *Garcetti* by concluding that all testimonial speech is protected speech. It argued that citizens in general owe a duty to testify that is independent of their job duties, but every one of the cases it relied upon advanced the citizen's "duty" to give testimony not as a general duty, but as a duty to comply with a subpoena.<sup>107</sup>

The Third Circuit never asked whether Reilly was subpoenaed, however. And even if it had, that question should not matter in the case of the professional testifier who testifies on behalf of the government. Imagine that, not wanting to put a fellow officer behind bars, Reilly refused to testify or told his boss that he would not do so absent a subpoena. The employer could discipline Reilly for refusing to do his job: giving testimony for the government in a criminal proceeding about a criminal investigation in which the officer took part is unquestionably part of a police officer's official duties, and the employer must have the ability to manage those employees.

Thus, the employer would have the capacity to force Reilly to testify on its behalf independent of any citizen's obligation to comply with a subpoena. If Reilly refused, the employer could discipline him just as it could if he refused to comply with any other ordinary job instruction. The public employee who happens to be subpoenaed, but who testifies as part of his official duties on behalf of the government, testifies pursuant to his official duties first, and pursuant to the subpoena second, because the subpoena did not cause the employee to speak—his job did. His speech, then, is unprotected under *Garcetti*.

This result is somewhat hard to swallow, because *Reilly* appears to be a case in which the supervisor abused his authority simply because he did not like what the public employee said pursuant to his duties on the stand. Retaliation for whistleblower speech like Reilly's is a very salient danger in the public workplace, but *Garcetti* holds that the public employee who speaks pursuant to his official duties does not get First Amendment protection. This is because the government must be able to discipline a worker who refuses to do his job duties. When a worker refuses to do his job or fails to do it well, it is his conduct that is the issue, not his speech, so no First Amendment problem is raised. Instead, this is a situation which must be resolved via public policy, such as through whistleblower protection statutes—exactly what the *Garcetti* opinion acknowledged to be the appropriate check on governmental abuse in these situations.<sup>108</sup>

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<sup>107</sup> See note 56 and accompanying text.

<sup>108</sup> See *Garcetti*, 547 US at 425–26.

2. The professional testifier's subpoenaed speech not on behalf of the government.

As shown above, testimony on the government's behalf by an employee who routinely testifies as part of his job duties is foreclosed by *Garcetti* from First Amendment protection. The professional testifier might, however, also give testimony not on his employer's behalf. The *Huppert* and *Morales* situations are on point. In those cases, a police officer was subpoenaed to testify before a grand jury probing police corruption<sup>109</sup> and in a civil suit involving workplace retaliation.<sup>110</sup> The *Huppert* court held that grand jury testimony was part of the officer's official duties; the *Morales* court held that civil testimony was not. The ultimate question is whether testimony about issues learned on the job is speech pursuant to official duty.

The *Huppert* court reached the conclusion that Huppert's speech was not protected by relying on longstanding California precedent that "[t]estifying before a grand jury charged with investigating corruption is one part of an officer's job."<sup>111</sup> There is force to this argument. Police officers routinely testify as part of their job duties. The circumstances of Huppert's testimony, however, undercut the conclusion that he spoke pursuant to his official duties. Unlike Reilly, Huppert was summoned to give testimony in a legal proceeding about an investigation that he did not initiate and in which he did not have a major role. Huppert was one of several officers subpoenaed to testify; not all of those summoned were whistleblowers.<sup>112</sup> Huppert testified as a witness to the corruption much as Morales testified as a witness to the retaliation.

When Huppert and the other subpoenaed officers (some of whom were likely not as forthcoming as Huppert was) spoke before the grand jury, they did not speak as employees on the police department's behalf. They spoke about what happened at work. Huppert was a "professional testifier," but when he testified before the grand jury, he did not speak in his governmental capacity; nor would an officer who was subpoenaed, then grilled about his own corruption. Huppert testified *about* something that happened at work, not *pursuant* to his official duties.<sup>113</sup> Indeed, if Huppert had testified on his employer's behalf, there would have been no need for the subpoena: the employer could have merely forced him to testify as part of his job. Thus, when

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<sup>109</sup> See *Huppert*, 574 F3d at 700.

<sup>110</sup> See *Morales*, 494 F3d at 595.

<sup>111</sup> *Huppert*, 574 F3d at 707–08, citing *Christal v. Police Commission of the City and County of San Francisco*, 92 P2d 416, 419 (Cal App 1939).

<sup>112</sup> See *Huppert*, 574 F3d at 700.

<sup>113</sup> See Part III.A.2.

Huppert and his fellow officers testified before the grand jury pursuant to subpoena, they testified pursuant to their legal duty as citizens, not as part of their official duties.

Similarly, a “professional testifier” who routinely testified on behalf of the government, but was instead called by an adverse party in an attempt to undermine the government’s position, would not be speaking pursuant to his official duties, but only about what he learned or saw at work. For example, if the defense in a criminal case called a lab technician to testify about mishandled evidence, the lab technician would not be speaking pursuant to his job duties, but about what happened at work. His speech would thus be protected under this Comment’s narrow reading of *Garcetti*.

It is worth noting here that simply finding that testimony is not pursuant to official duties does not grant absolute protection to the employee. If one of Huppert’s corrupt colleagues admitted in testimony that he routinely took bribes, the department could still fire him. This is because the employer’s interest in regulating its employee’s conduct would outweigh any First Amendment rights claimed by the employee. Protecting subpoenaed speech by professional testifiers merely provides them with the ability to reach the *Connick*, and potentially the *Pickering*, tests in an attempt to show that the discipline was undeserved.

### 3. Subpoenaed testimony by employees who do not routinely testify.

Most public employees do not routinely testify as part of their job duties. Yet, drawing a line between subpoenaed testimony not on behalf of the employer and testimony as an employee on behalf of the employer also provides a helpful distinction as to public employees who are not “professional testifiers.” As in the cases of the professional testifiers, the line between nonsubpoenaed testimony and subpoenaed testimony separates those who testify pursuant to official duties from those who do not.

Imagine, for example, an action brought against a school district by a parent and child under the Individuals with Disabilities Education Act.<sup>114</sup> The plaintiff might subpoena a classroom teacher to testify about his factual observations on the implementation of the school’s policies. In a later retaliation suit, the court would need to determine whether the classroom teacher testified as part of his official duties. He did not. Like Morales, Fairley, and Huppert, he testified pursuant to a subpoena

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<sup>114</sup> See 20 USC § 1415(i)(2).

about things that happened at work. He did not testify as the school district's mouthpiece, but pursuant to his duty as a citizen to comply with the subpoena, thereby aiding the court in its search for truth.

4. Official testimony by employees who do not routinely testify.

One can easily imagine the school district asking a special education teacher to appear in court to explain the school's special education policy as it relates to the student plaintiff. Again, the question would be whether the special education teacher testified as part of his official duties when he testified on behalf of the school district. This would be a more difficult question than the one in *Reilly*, because schoolteachers do not routinely testify on the school's behalf. Thus, it would be unclear whether the isolated, nonroutine testimony of the public employee was given pursuant to official duties. Focusing on whether there was a subpoena would provide clarity. If the school district could require the special education teacher to testify as part of his job, then there would be no need for the district to subpoena him. This would indicate that the testimony explaining the school district's policy was part of his official duties. But if the school district needed to subpoena him in order to get him to testify, the subpoena would signal that the teacher owed the district no obligation to testify on its behalf and therefore did not speak pursuant to his "official duties."

The counter to this is that if a subpoena is required for the testifying employee to maintain his First Amendment rights, the testifying employee will always refuse to testify unless subpoenaed. This would discourage employees from "volunteering" to testify on the government's behalf, because the employee who "volunteered" to testify for the employer would risk losing the First Amendment protection that waiting for a subpoena would provide. But this is not necessarily a bad result. A regime in which it is uncertain whether the testifying employee's speech will be protected (precisely the regime we have today, as the divergent court of appeals cases show) is a regime in which the fear of retaliation can chill testimonial speech. The adversary system is meant to allow courts to engage in a search for truth, and any chill to testimonial speech saps the courts' ability to undertake this search. The subpoena would serve as an insurance policy: it would tell the employee that he could testify with the knowledge that he will have a remedy against retaliation, thereby freeing him to add to the discourse that is required for the courts to properly function.

The case of the special education teacher asked by the school to explain its policy sounds something like the circumstances in *Green*. When *Green*, called by her boss, testified at a hearing about conditions at the county jail, she was likely testifying as part of her official duties as chief jailer: she was the person responsible for overseeing the

jail and implementing government policies there.<sup>115</sup> But even if Green were subpoenaed, indicating that she did not speak pursuant to her official duties, her employer would remain free to discipline her for her conduct. Simply put, the government employer has a very strong interest in firing a chief jailer who is not maintaining a secure jail, regardless of how it found out about her failures. The fact that the jailer spoke about her ineptitude does not prevent the employer from firing her for her poor job performance.

5. Voluntary testimony that is not on the government's behalf.

Finally, there is the example of a public employee giving purely voluntary testimony about things that happened at work that is not given on the government's behalf. For example, a prison official might volunteer to testify on his own time as a character witness at a parole hearing.<sup>116</sup> In these situations, the public employee's speech is voluntary and personal. He speaks independently of any duty owed to his employer. Similarly, he is free of any duty to comply with a subpoena. This is free testimonial speech in its pure form, and does not fall within even a very broad reading of the *Garcetti* principle. Nonetheless, the public employer potentially could still discipline the employee in the name of workplace efficiency under *Pickering*.

#### CONCLUSION

This Comment analyzed the circuit split stemming from the application of *Garcetti*'s official duties rule to testimony given by public employees. As a means of understanding the courts of appeals' varying approaches to applying *Garcetti* to testimonial speech, the Comment examined the Supreme Court precedent on the free speech rights of public employees as well as the Court's frequent reiteration of the duty of citizens to testify when compelled.

This Comment concluded that the approaches taken by the courts of appeals have been inadequate and have led to the wrong result in at least two cases. To address these shortcomings, this Comment proposes that courts take a closer look at how the employee came to testify, and suggests a narrow reading of official duties in the context of testimony. The speech of a public employee who testified either voluntarily or under subpoena and not on behalf of his employer should be deemed protected speech, not unprotected official-duty speech.

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<sup>115</sup> See *Green*, 226 Fed Appx at 884.

<sup>116</sup> See *Matrisciano v Randle*, 569 F3d 723, 731 (7th Cir 2009) (holding that such voluntary action is outside of the employee's official duties).

This rule would protect the rights and duties of many public employees and safeguard the judicial process. It would not strip government employers of the ability to discipline employees, because it would not affect the protections afforded by the *Connick* public concern threshold and the *Pickering* balancing test. It would also preserve *Garcetti*'s official-duties rule in full.

A rule that narrowly limits the definition of testimony pursuant to official duties is consistent with longstanding Supreme Court precedent that emphasizes the critical nature of constitutional protection for free speech, acknowledges the rights of citizens who work for the government, and prizes the ability of the judicial process to compel testimony and the duty of citizens to give such testimony. It provides public employees who testify pursuant to subpoena with an acknowledgment that in doing so, they fulfilled their duties as citizens, not employees, and affords them the protection due to citizens who testify. The idea that the rights and duties of citizens come first is an enduring one in American law, and this solution preserves that vision.