No. 04-473

# In the Supreme Court of the United States

GIL GARCETTI, ET AL., PETITIONERS
*v.*
RICHARD CEBALLOS

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS


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## QUESTION PRESENTED

Whether the First Amendment protects speech by a public employee that touches on a matter of public concern but is expressed strictly pursuant to the duties of employment.

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### INTEREST OF THE UNITED STATES

This case presents the question whether the First Amendment protects speech by a public employee expressed pursuant to the duties of employment. Because it is the nation's largest public employer, the United States has a substantial interest in the outcome of the case.

### STATEMENT

1. Respondent is a deputy district attorney in the Los Angeles County District Attorney's Office. In the late 1990s, he became calendar deputy in the Office's Pomona branch, with supervisory responsibility over two to three other deputies. In February 2000, defense counsel in *People* v. *Cuskey*, a case being prosecuted by one of respondent's supervisees, told respondent that a deputy sheriff may have lied in an affidavit used to obtain a search warrant in the case. Respondent conducted an investigation and concluded that the deputy sheriff had, at the very least, grossly misrepresented the facts. Pet. App. 2-3, 53.

Respondent discussed his investigation with petitioner Carol Najera, who was respondent's immediate supervisor, and petitioner Frank Sundstedt, who was then Head Deputy District Attorney. Najera and Sundstedt agreed that there was reason to question whether the deputy sheriff had been truthful. On March 2, 2000, respondent sent Sundstedt a memorandum that summarized his investigation and recommended that the case be dismissed. Respondent also informed defense counsel of his determination that the affidavit contained false statements.[1] On March 9, 2000, respondent, Najera, and Sundstedt met with representatives from the Sheriff's Department. As a result of the meeting, Sundstedt was not certain that *Cuskey* should be dismissed, and he decided to await the outcome of a defense motion challenging the search warrant on the ground that there were false statements in the supporting affidavit. Pet. App. 3-4 & n.1, 53-54, 61.[2]

The defense served respondent with a subpoena, and he testified at the hearing on the motion challenging the warrant. The trial court ultimately denied the motion. Pet. App. 4, 54-55.

2. Pursuant to 42 U.S.C. 1983, respondent filed suit in the United States District Court for the Central District of California against Najera, Sundstedt, petitioner Gil Garcetti, who was then District Attorney, and the County of Los Angeles. Respondent alleged that petitioners had retaliated against him for preparing the memorandum about the *Cuskey* case, and had thereby violated his First Amendment

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[1] Respondent later told Najera that he had an obligation under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to turn over his memorandum concerning the investigation, but it does not appear that he did in fact provide it to the defense. Pet. App. 4, 61 & n.3.

[2] While the court of appeals' opinion suggests that respondent made the disclosure to the defense *after* the meeting with the Sheriff's Department, Pet. App. 3-4, it appears that the disclosure was made before the meeting, see J.A. 54.

rights. The alleged acts of retaliation included demoting respondent from his position as calendar deputy, refusing to assign him murder cases, denying him a promotion, and transferring him to a different branch of the Office. Respondent also asserted a state-law claim of intentional infliction of emotional distress. Pet. App. 1, 4-6, 52, 55-56.

Concluding that they were entitled to qualified immunity, the district court granted petitioners' motion for summary judgment on respondent's Section 1983 claim. The court held that the memorandum was not protected by the First Amendment, because its preparation and submission were part of respondent's duties as a prosecutor. In the alternative, the court held that, even if the memorandum was constitutionally protected speech, the law on that point was not clearly established. Having granted petitioners' motion for summary judgment on the federal claim, the district court declined to exercise jurisdiction over the state claim. Pet. App. 52-67.[3]

3. The court of appeals reversed and remanded for further proceedings. Pet. App. 1-51.

a. In an opinion by Judge Reinhardt, the court of appeals held that "[respondent's] allegations of wrongdoing in the memorandum constitute protected speech under the First Amendment." Pet. App. 7. The court reached that conclusion by applying the "two-step test" (*ibid.*) derived from this Court's decisions in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), and *Connick* v. *Myers*, 461 U.S. 138 (1983). As the court of appeals understood the test, a public employee's speech is protected by the First Amendment if (1) the speech "addresses a matter of public concern" and (2) the employee's interest in expressing himself outweighs the em-

[3] The district court also granted, on grounds of Eleventh Amendment immunity, the defendants' separate motion for summary adjudication of respondent's claims against Los Angeles County and Garcetti in his official capacity. Pet. App. 2.

ployer's interest in promoting efficiency and avoiding disruption in the workplace. Pet. App. 8.

In holding that respondent's speech satisfied the first part of the test, the court of appeals reasoned that "allegations that an arresting deputy sheriff may have lied in a search warrant affidavit" constitutes "whistleblowing," and speech about "corruption, wrongdoing, misconduct, wastefulness, or inefficiency" by government employees "inherently" addresses a matter of public concern. Pet. App. 10. The court rejected petitioners' contention that respondent cannot satisfy the first part of the *Pickering-Connick* test because his allegations of perjury were set forth in "a memorandum to his supervisors that he prepared in fulfillment of an employment responsibility." *Ibid.* The court believed that such a conclusion was foreclosed by the Ninth Circuit's decision in *Roth* v. *Veteran's Administration*, 856 F.2d 1401 (1988), which upheld the First Amendment claim of a plaintiff who had been fired from his government job after "expos[ing] corruption, mismanagement, and other problems in written reports that were prepared as part of his job responsibilities." Pet. App. 11. The court went on to say that petitioners' contention was in any event incorrect. A rule that public employees are not protected by the First Amendment "when their speech is uttered in the course of carrying out their employment obligations," the court said, would "undermine our ability to maintain the integrity of our governmental operations," because public employees' "access to information" and "experience regarding the operations, conduct, and policies of government agencies and officials" render them uniquely qualified to comment on matters of public concern. *Id.* at 12-13.

In holding that respondent's interest in expressing himself was not outweighed by his employer's interest in promoting efficiency and avoiding disruption in the workplace, the court of appeals found it "difficult to imagine" how "the

performance of one's duties" in "investigating allegations of law enforcement misconduct" could be "disruptive or inefficient." Pet. App. 22. In any event, the court said, petitioners "have failed even to suggest" how respondent's memorandum to a supervisor resulted in "disruption or inefficiency in the workings of the District Attorney's Office." *Ibid.* Under the second part of the *Pickering-Connick* test, the court thus found "little for [it] to weigh in favor of [petitioners]." *Ibid.*

The court of appeals went on to hold that it was clearly established that respondent's speech was protected by the First Amendment. Pet. App. 23-25. As to the first part of the *Pickering-Connick* test, the court reasoned that, as early as 1988, the Ninth Circuit had already held (in *Roth*) that a public employee has a First Amendment interest in "speech made pursuant to an employment duty." *Id.* at 24. As to the second part of the test, the court reasoned that "the law is clearly established" whenever, as in this case, "the balancing factors weigh heavily in favor of the employee." *Ibid.* The court of appeals also rejected petitioners' contention that the undisputed evidence shows that all the employment decisions of which respondent complains were taken for "nonretaliatory reasons." *Id.* at 25.[4] Those issues, the court held, are questions of fact for trial. *Ibid.* Having determined that petitioners were not entitled to qualified immunity on respondent's First Amendment claim, the court of appeals also

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[4] Petitioners had argued (Pet. C.A. Br. 7-12) that respondent was demoted from his position as calendar deputy because of a restructuring of the Pomona criminal-court system; that he was not assigned murder cases because there were few such cases and petitioners wanted other prosecutors to have the experience of handling them; that the decision to deny respondent a promotion was made by a person (Garcetti) who had no knowledge of the *Cuskey* matter; and that respondent's transfer was made pursuant to a rotation scheme that had been put into place before *Cuskey*.

reversed the district court's dismissal of respondent's state claim. *Id.* at 32.[5]

b. Judge O'Scannlain specially concurred. Pet. App. 32-51. He agreed that the Ninth Circuit's decision in *Roth* "controls the result" in this case, but believed that *Roth* "was wrongly decided" and "ought to be overruled." *Id.* at 32-33. The concurrence observed that this Court in *Connick* "took pains to recognize that '[t]he repeated emphasis in *Pickering* on the right of a public employee "as a citizen, in commenting upon matters of public concern," was not accidental.'" *Id.* at 35 (quoting *Connick*, 461 U.S. at 143, 147). In Judge O'Scannlain's view, the Ninth Circuit's decision in *Roth* "minimized—indeed, it entirely ignored—the significance of *Connick*'s distinction" between "speech offered by [a] public employee acting *as an employee* in carrying out his or her ordinary employment duties" and "speech spoken by an employee *acting as a citizen* expressing his or her personal views on disputed matters of public import." *Id.* at 36.

The concurrence found "a strong First Amendment basis for [*Connick*'s] having drawn such a distinction." Pet. App. 40. First, Judge O'Scannlain argued that public employees have no personal interest in speech expressed in the course of routine employment obligations, and that such speech in fact belongs to the State, *id.* at 41, which "has no First Amendment rights," *id.* at 43. Second, since "everything a public employee does in the course of carrying out the requirements of his or her job ultimately is connected to the public interest," Judge O'Scannlain believed that the extension of First Amendment protection to routine job duties has "'plant[ed] the seed of a constitutional case' in every task that every public employee ever performs." *Ibid.* (quoting *Connick*, 461 U.S. at 149). Third, since this Court's decisions

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[5] The court of appeals also reversed the district court's dismissal, on Eleventh Amendment grounds, of respondent's claims against Los Angeles County and Garcetti in his official capacity. Pet. App. 26-32.

make clear that the government may exercise control over the speech it subsidizes through its funding decisions, Judge O'Scannlain found "no plausible basis" for concluding that the government may not exercise control over employee speech expressed in performing routine job duties. *Id.* at 46.

In the view of the concurrence, *Connick* teaches that, although speech by public employees "must address an issue of public import" to be protected under the first part of the *Pickering-Connick* test, "satisfaction of such a virtually necessary condition is not by itself sufficient to trigger constitutional constraints on governmental action." Pet. App. 49-50. Instead, Judge O'Scannlain argued, a public employee's speech satisfies the first part of the test "only when it also results from the employee's decision to express his or her *personal* opinions"—*i.e.*, opinions that are held "*as a citizen* and not as a public employee." *Id.* at 50.

## SUMMARY OF ARGUMENT

A public employer obviously cannot violate the First Amendment by dismissing, transferring, demoting, or refusing to promote an employee based on the performance of job duties that do not involve speech. There is no basis for a different result in the vast number of cases where the employee performs the duties in question by speaking or writing. An employment action in either type of case might be unwarranted, or even illegal, but the First Amendment has nothing to say about actions based on the public employee's performance of his duties.

A. Until the middle of the twentieth century, this Court's view was that a citizen had a right to free speech but not to a government job. As it was then interpreted, the First Amendment did not prevent public employers from taking employment actions on the basis of an employee's speech, even if the speech was expressed outside the office and had no connection with the employee's job. The Court changed course in a series of cases involving requirements that public

employees take a general oath of loyalty and reveal their private associations. Those decisions upheld the right of public employees to participate in public affairs along with other citizens.

*Pickering* v. *Board of Education*, 391 U.S. 563 (1968), followed from that understanding of the First Amendment. It held that, in deciding whether an employment action in response to a public employee's speech violates the First Amendment, a court must balance "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." *Id.* at 568. Applying that test, the Court concluded that the First Amendment prohibited the dismissal of a public-school teacher for writing a letter to a newspaper that criticized school-board policies, because, in the circumstances of the case, the teacher was little different than a "member of the general public." *Id.* at 573, 574. In *Connick* v. *Myers*, 461 U.S. 138 (1983), which *rejected* a public employee's First Amendment claim, the Court emphasized that its responsibility is to ensure that "citizens are not deprived of fundamental rights by virtue of working for the government," and made clear that no balancing of interests is required when the employee is not speaking "as a citizen upon matters of public concern." *Id.* at 147.

B. The Ninth Circuit erred in holding that, under the first part of the *Pickering-Connick* test, a public employee has a First Amendment interest in any speech on a matter of public concern, even if it is expressed in carrying out his job duties. First, the holding is inconsistent with this Court's articulation of the applicable standard in *Pickering*, *Connick*, and other cases. Under that standard, the interest that is balanced against the interest of the employer is the interest of the employee, "*as a citizen*, in commenting upon matters of public concern." *Pickering*, 391 U.S. at 568 (emphasis

added). Second, the Ninth Circuit's decision is analytically flawed. Constitutional rights are personal, and when a public employee speaks in carrying out his job duties, he has no personal interest in the speech. Third, the court of appeals' decision has practical consequences that this Court could not have intended when it recognized that speech by public employees has limited First Amendment protection. Since virtually everything a public employee does in carrying out his job duties is ultimately connected to the public interest, and much of that activity involves speaking or writing, the decision below plants "the seed of a constitutional case," *Connick*, 461 U.S. at 149, in a very large proportion of the tasks that a public employee performs. Fourth, the Ninth Circuit's decision disregards the "historical evolvement" of the First Amendment rights of public employees. *Id.* at 143. While this Court has abandoned the view that a State may place unlimited conditions on the terms of public employment unrelated to the employment, it has not moved to the opposite extreme of constitutionalizing all aspects of public employment. The Court's decisions seek only to ensure that public employees have the same rights as their private-sector counterparts. Finally, contrary to the contentions of respondent and the court of appeals, a holding that public employees have no First Amendment interest in speech expressed pursuant to job responsibilities will not impair their ability or willingness to expose governmental misconduct.

C. If the Court holds that a public employee does have a First Amendment interest in speech expressed in carrying out his job duties, the Court should make clear that it will ordinarily be easier to justify an employment action when the speech is of that type. Because the second part of the *Pickering-Connick* test focuses on the effective functioning of an employer's enterprise, the employer should be able to defeat an employee's First Amendment claim if it can show that, in saying or writing the things at issue, the employee

was performing his duties in an inadequate or inappropriate manner.

## ARGUMENT

### A PUBLIC EMPLOYEE HAS NO FIRST AMENDMENT INTEREST IN SPEECH EXPRESSED IN PERFORMING HIS JOB DUTIES

When a public employee files an action alleging that his First Amendment rights were violated because an adverse employment action was taken against him in retaliation for his speech, this Court's decisions require a two-step inquiry. A court first determines whether the plaintiff's speech was expressed "as a citizen" on a "matter[] of public concern." *Connick* v. *Myers*, 461 U.S. 138, 140 (1983) (quoting *Pickering* v. *Board of Educ.*, 391 U.S. 563, 568 (1968)). If it was not, the First Amendment claim fails. If it was, the defendant must show that the employee's interest in the speech is outweighed by "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Ibid.* (quoting *Pickering*, 391 U.S. at 568).[6] The speech at issue in this case was expressed by respondent as an employee in performing his job responsibilities, not as a citizen in commenting on matters of public concern. Respondent therefore has no First Amendment interest in his speech. If the Court concludes otherwise, however, it should make clear that it will generally be easier for an employer to justify an employment action when the employee's speech was expressed in the course of carrying out his job duties.

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[6] Whether a public employee has a presumptively protected interest in his speech and, if so, whether it is outweighed by the interest of his employer are both questions of law. *Waters* v. *Churchill*, 511 U.S. 661, 668 (1994) (plurality opinion); *Rankin* v. *McPherson*, 483 U.S. 378, 386 n.9 (1987).

### A. Under *Pickering* And *Connick*, A Court Must Determine Whether The Employee's Speech Was Expressed As A Citizen On A Matter Of Public Concern And, If It Was, Must Balance The Employee's Interest In The Speech Against The Employer's Interest In The Efficient Performance Of Public Services

1. As interpreted for most of the nation's history, the First Amendment placed no limitation on a public employer's ability to make personnel decisions on the basis of an employee's speech. The First Amendment was thought to apply when the government acted as sovereign with respect to citizens, but not when it acted as employer with respect to employees. In the latter capacity, the government was treated like any other employer. As Justice Holmes famously put it, a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe* v. *Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

For a long time, "Holmes' epigram expressed this Court's law." *Connick*, 461 U.S. at 144. See *ibid.* (citing decisions from first half of twentieth century). Indeed, as recently as 1952, in *Adler* v. *Board of Education*, 342 U.S. 485, the Court relied on the principle that public-school teachers "have the right under our law to assemble, speak, think and believe as they will," but "have no right to work for the State in the school system on their own terms." *Id.* at 492. The Court modified its view, however, in "a series of cases arising from the widespread efforts in the 1950's and early 1960's to require public employees, particularly teachers, to swear oaths of loyalty to the State and reveal the groups with which they associated." *Connick*, 461 U.S. at 144. See *ibid.* (citing cases). Thus, fifteen years after *Adler*, the Court explained that "constitutional doctrine which has emerged since that decision has rejected its major premise," which was that "public employment, including academic employment, may

be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action." *Keyishian* v. *Board of Regents*, 385 U.S. 589, 605 (1967).

In the loyalty-oath cases, the Court invalidated statutes and actions that conditioned public employment on general oaths of loyalty and the disclosure of private associations. Those decisions thus preserved public employees' right "to participate in public affairs." *Connick*, 461 U.S. at 144-145. The Court's decision in *Pickering*, *supra*, "followed from this understanding of the First Amendment." *Id.* at 145.

2. The plaintiff in *Pickering* was a public-school teacher who was fired for writing a letter to a newspaper that criticized the way the school board had attempted to raise revenue. In upholding the teacher's First Amendment claim, this Court said that, insofar as the lower court had concluded that public-school teachers "may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools," the decision rested on a premise that had been rejected by the Court. *Pickering*, 391 U.S. at 568. At the same time, the Court recognized that "it 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." *Ibid.* To resolve a First Amendment claim in a case of this type, the Court said, it is thus necessary to balance "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." *Ibid.*

In striking the balance in the plaintiff's favor in *Pickering*, the Court described the case before it as one in which a teacher made "public statements upon issues then currently

the subject of public attention" that were "critical of his ultimate employer" but did not "impede[] the teacher's proper performance of his daily duties in the classroom" or "interfere[] with the regular operation of the schools generally." 391 U.S. at 572-573. Under these circumstances, the Court concluded, "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." *Id.* at 573. Making a similar point later in its opinion, the Court said that, "in a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher," the employee must be regarded as "the member of the general public he seeks to be." *Id.* at 574.[7]

3. Fifteen years after *Pickering*, in *Connick*, *supra*, this Court "return[ed] to th[e] problem" of striking a balance between the interests of a public employee and those of a public employer. *Connick*, 461 U.S. at 140. In rejecting the First Amendment claim in *Connick*, the Court explained that "[t]he repeated emphasis in *Pickering* on the right of a public employee 'as a citizen, in commenting upon matters of public concern,' was not accidental." *Id.* at 143. That language, the Court said, "reflects both the historical evolvement of the rights of public employees, and the commonsense realization that government offices could not function if every employment decision became a constitutional matter." *Ibid.* Thus, when a public employee is not speaking "as a citizen upon matters of public concern," his First Amendment claim should be rejected without any balancing of the

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[7] Likewise, in his separate opinion, Justice White observed that the holding of the Court was that, "in this case, with respect to the particular public comment made by [the teacher]," the First Amendment required that he be treated "like a member of the general public." 391 U.S. at 582 n.1 (opinion concurring in part and dissenting in part).

interests of the employee and the employer. *Id.* at 147. This Court's responsibility, *Connick* makes clear, is merely to "ensure that citizens are not deprived of fundamental rights by virtue of working for the government." *Ibid.*

The plaintiff in *Connick* was an assistant district attorney who was told she would be transferred and then circulated a questionnaire soliciting the views of her colleagues on office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns. She was fired as a result. The Court held that, with one exception, the questions in the questionnaire were "mere extensions" of the plaintiff's "dispute over her transfer," and thus did not "fall under the rubric of matters of 'public concern.'" 461 U.S. at 148. Presuming that "all matters which transpire within a government office are of public concern," the Court observed, would mean that "virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case." *Id.* at 149. Because the questions did not address a matter of public concern, the Court found it "unnecessary * * * to scrutinize the reasons for [the plaintiff's] discharge." *Id.* at 146. The one question that did touch on a matter of public concern, in the Court's view, was whether assistant district attorneys ever felt pressured to work in political campaigns. The Court thus went on to balance the employee's interest in commenting on that matter against her employer's interest in workplace efficiency. Striking the balance in favor of the employer, the Court deferred to the district attorney's judgment that the questionnaire was "an act of insubordination which interfered with working relationships." *Id.* at 151.

### B. Respondent Does Not Have A First Amendment Interest In His Speech, Because It Was Expressed In Carrying Out The Duties Of His Job

Respondent alleges that petitioners retaliated against him because of his memorandum concerning the *Cuskey* case. Pet. App. 61. That memorandum, which he sent to Sundstedt, described respondent's investigation, expressed his belief that the deputy sheriff's search-warrant affidavit had been falsified, and recommended that the case be dismissed. *Ibid.* Respondent acknowledges, as he must, that the memorandum was prepared pursuant to his employment duties. *Id.* at 64. As the district court observed, when respondent "looked into the defense lawyer's allegations" and "urged that the prosecution be dropped," he was "complying with his (and the government's) duties under the due process clause of the Fifth and Fourteenth Amendments," as interpreted by this Court in *Brady* v. *Maryland*, 373 U.S. 83 (1963), "not to introduce or rely on evidence known to be false." Pet. App. 64. The memorandum recommending dismissal, moreover, was a "disposition" report, *ibid.*; Br. in Opp. 3, a document that is "common[ly]" prepared by prosecutors in the Los Angeles County District Attorney's Office, Pet. App. 64. Indeed, respondent testified at his deposition that disposition reports are prepared in "any cases we've ever handled." J.A. 41.

As the concurrence below recognized (Pet. App. 42 n.3), and as respondent himself acknowledges (Br. in Opp. 1-2), the preparation of the disposition memorandum and its submission to respondent's supervisors were part of a broader course of conduct relating to the *Cuskey* prosecution. The conduct began with respondent's investigation of defense counsel's allegations and ended with his testimony at the hearing on the motion challenging the search warrant, and it included his disclosure to the defense of his conclusion that the supporting affidavit had been falsified. That disclosure,

like the memorandum, was speech expressed by respondent in carrying out his prosecutorial duties.

The Ninth Circuit did not dispute that respondent was carrying out the requirements of his job when he wrote the disposition memorandum and made the disclosure to the defense. On the contrary, the court acknowledged that respondent had a duty to do those things. Pet. App. 20, 22. The basis for the court's holding was that, for purposes of the first part of the *Pickering-Connick* test, that fact is irrelevant. The result would be the same whether respondent was addressing a matter of public concern independent of his job duties or looking into a matter of public concern as an integral part of his job. In the court of appeals' view, a public employee has a First Amendment interest in any speech that touches on a matter of public concern, whether or not it is expressed in the performance of his duties.

That view is incorrect. If petitioners took the challenged actions because of speech expressed by respondent in the exercise of his duties, they may have acted improperly, or even illegally, but they did not violate the First Amendment.

**1. *The Ninth Circuit's decision is inconsistent with this Court's articulation of the applicable standard***

In *Pickering*, the Court did not describe the interest of the public employee that is balanced against the interest of his employer merely as an interest in commenting on matters of public concern. The Court described it as the interest of the employee, "*as a citizen*, in commenting upon matters of public concern." 391 U.S. at 568 (emphasis added). The Court used the same formulation in *Connick*, no fewer than four times, see 461 U.S. at 140, 142, 143, 147, including when it said that balancing is not required if the public employee was not speaking "as a citizen upon matters of public concern," *id.* at 147. The Court has also used the *Pickering* for-

mulation in several post-*Connick* cases.[8] In one of them, *United States* v. *National Treasury Employees Union*, 513 U.S. 454 (1995), the Court struck down a law prohibiting federal employees from accepting compensation for speeches and articles, and relied, in part, on the fact that the law regulated speech by employees "in their capacity as citizens, not as Government employees." *Id.* at 465. See also *id.* at 466 (italicizing phrases "as a citizen" and "as an employee" in discussing first part of *Pickering-Connick* test) (quoting *Connick*, 461 U.S. at 147); *id.* at 482 (O'Connor, J., concurring in the judgment in part) (emphasizing impact of ban on "employees' interests in speaking out as citizens, rather than as employees").

As Judge O'Scannlain explained in his concurrence below, the fact that "speech uttered by public employees * * * address[es] an issue of public import" is therefore necessary but not sufficient for the speech to fall within the scope of the First Amendment, such that a balancing of interests is required. Pet. App. 49. The speech must also be uttered by the speaker "*as a citizen* and not as a public employee." *Id.* at 50. Judge Luttig has likewise explained that, under *Pickering* and *Connick*, "the citizen/employee distinction" is "equally" as "importan[t]" as "the public concern/personal interest distinction." *Urofsky* v. *Gilmore*, 216 F.3d 401, 420 (4th Cir. 2000) (en banc) (concurring opinion), cert. denied, 531 U.S. 1070 (2001). Thus, while most of the assistant district attorney's speech in *Connick* was held not to satisfy the first part of the *Pickering-Connick* test because it addressed a matter of "personal interest" rather than public concern, 461 U.S. at 147, even speech that does address a matter of

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[8] See *Rankin* v. *McPherson*, 483 U.S. at 384; *Rutan* v. *Republican Party of Ill.*, 497 U.S. 62, 99 (1990); *United States* v. *National Treasury Employees Union*, 513 U.S. 454, 465-466 (1995); *Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 676 (1996); *City of San Diego* v. *Roe*, 125 S. Ct. 521, 525 (2004) (per curiam).

public concern does not satisfy the first part of the test if it is not "citizen" speech. If the assistant district attorney had addressed improper political pressure on career attorneys as part of a public-integrity prosecution, the matter would equally have been of public concern, but she would not have had a First Amendment claim, because the speech would not have been expressed as a citizen. If the law were otherwise, it would be hard to explain why, in formulating the standard, the Court included the limiting phrase "as a citizen."

It is true, as respondent points out, that this Court has extended First Amendment protection to speech addressing a matter of public concern when the speech was both "related to the public employee's job and communicated in the workplace." Br. in Opp. 8. But none of the Court's decisions applying the principle established in *Pickering* and *Connick* has extended First Amendment protection to speech expressed in carrying out the public employee's job responsibilities. All involve "citizen" speech—whether related or unrelated to the employee's job, and whether communicated in or out of the workplace.[9] This Court has thus never held —or even assumed—that speech of the type at issue here may give rise to a First Amendment action.

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[9] See *Pickering*, *supra* (school teacher wrote letter to editor criticizing Board of Education); *Perry* v. *Sindermann*, 408 U.S. 593 (1972) (college professor publicly criticized Board of Regents); *Mt. Healthy City Sch. Dist.* v. *Doyle*, 429 U.S. 274 (1977) (school teacher informed radio station of substance of memorandum circulated by principal); *Givhan* v. *Western Line Consol. Sch. Dist.*, 439 U.S. 410 (1979) (school teacher complained to principal about policies teacher considered racially discriminatory); *Connick*, *supra* (assistant district attorney circulated questionnaire to colleagues concerning job satisfaction and related issues); *Rankin* v. *McPherson*, *supra* (clerk in constable's office told colleague, after President Reagan was shot, that she hoped any subsequent attempt on his life would be successful); *Waters* v. *Churchill*, *supra* (nurse made statements to colleague critical of hospital).

### 2. *The Ninth Circuit's decision is analytically flawed*

To hold that a public employee has a right under the First Amendment (or at least a presumptive one) to say what he wishes in performing the written and spoken aspects of his job, so long as the speech addresses a matter of public concern, is tantamount to holding that he has, at least in some circumstances, a federal constitutional right to perform his job as he sees fit. No employee, public or otherwise, has a right to do that. This Court's statements that the First Amendment covers speech by a public employee "as a citizen" are thus "not accidental." *Connick*, 461 U.S. at 143.

"[C]onstitutional rights are personal," *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973), and "[t]he purpose of the First Amendment is to protect private expression," *Columbia Broad. Sys., Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring) (quoting Thomas I. Emerson, *The System of Freedom of Expression* 700 (1970)). As the concurrence below pointed out, "when public employees speak in the course of carrying out their routine, required employment obligations, they have no *personal* interest in the content of that speech," Pet. App. 41, and their speech is not *private* expression. Instead, the public employees are speaking (or writing) because their job requires it, and their speech, "in actuality," is "the State's." *Ibid.* Unlike citizens, however, a State "has no First Amendment rights," *id.* at 43; accord *Gonzalez* v. *City of Chicago*, 239 F.3d 939, 941 (7th Cir. 2001), and nothing in the First Amendment "precludes the government from controlling its own expression or that of its agents," *Columbia Broad. Sys.*, 412 U.S. at 139 n.7 (Stewart, J., concurring) (quoting Emerson, *supra*, at 700).

In this respect, the Ninth Circuit's decision cannot be reconciled with the principle that governs the analogous issue of restrictions on government-funded speech. In *Rust* v. *Sulli-*

*van*, 500 U.S. 173 (1991), this Court rejected a First Amendment challenge to regulations prohibiting abortion-related advice by the staff of clinics that accepted federal funds. The Court reasoned that the only speech limited by the regulations was that of individuals in their capacity as employees of a federally funded entity; the regulations did not "in any way restrict the activities of those persons acting as private individuals." *Id.* at 198-199. In *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), the Court explained that, under the holding of *Rust*, "[w]hen the government appropriates public funds to promote a particular policy of its own," it "is entitled to say what it wishes" and "may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Id.* at 833. In *Legal Services Corp.* v. *Velasquez*, 531 U.S. 533 (2001), the Court held that a restriction on speech by a legal-services lawyer did violate the First Amendment even though the lawyer worked for a publicly funded entity, because, unlike in *Rust*, the employee was "not the government's speaker," but instead was engaged in "private speech" on behalf of an indigent client. *Id.* at 542.

The reasoning of these cases is equally applicable here. As the en banc Fourth Circuit has recognized, "[i]n both situations—public employee speech and government-funded speech—the government is entitled to control the content of the speech" because it is the government's message that is being conveyed and the government has in effect "'purchased' the speech * * * through a grant of funding or payment of a salary." *Urofsky* v. *Gilmore*, 216 F.3d at 408 n.6. Similarly, in both situations, there is a *limit* on the government's ability to control speech: "Just as the government as provider of funds cannot dictate the content of speech made outside the confines of the funded program, the government as employer is restricted in its ability to regulate

the speech of its employees when they speak not as public employees, but as private citizens on matters of public concern." *Ibid.* (citation omitted).[10]

### 3. *The Ninth Circuit's decision has practical consequences that this Court could not have intended when it recognized that speech by public employees has limited First Amendment protection*

As Judge O'Scannlain observed, virtually "everything a public employee does in the course of carrying out the requirements of his or her job ultimately is connected to the public interest." Pet. App. 43. Under the court of appeals' view, therefore, "the seed of a constitutional case," *Connick*, 461 U.S. at 149, is planted in nearly "every task that every public employee ever performs," Pet. App. 43. Accord *Urofsky*, 216 F.3d at 408 ("It is difficult to imagine the array of routine employment decisions that would be presented as

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[10] In support of its assertion that the First Amendment's protections "do not turn upon whether a citizen has a personal interest in a particular expressive activity," the court of appeals pointed out that, "under *Connick*, personnel grievances, which are often highly personal, do not receive protection at all." Pet. App. 13 n.5. This confuses the two components of the first part of the *Pickering-Connick* test. Under that test, there is no presumptive First Amendment protection for a public employee's speech unless it is speech as a citizen *and* on a matter of public concern. *Connick* involved the second component, not the first. The speech was held to be unprotected because, *even though* the plaintiff was speaking in her capacity as a citizen rather than an employee (*i.e.*, even though the plaintiff had a personal interest in the speech), the speech did not address a matter of public concern.

For his part, respondent contends that the disposition memorandum *did* express his "personal views," because his supervisors could "take or leave" his recommendation. Br. in Opp. 10 n.3. That is not correct. The memorandum expressed respondent's views as a prosecutor, not a citizen. The fact that respondent did not make a conclusive determination but merely recommended a course of action, and that his recommendation might ultimately be rejected by the Office's final decisionmaker, does not convert the memorandum into an expression of respondent's "personal" views.

constitutional questions * * * under this view of the law."). Requiring a case-specific balancing of the interests of the employee and the employer whenever an adverse employment decision can be connected to speech by the employee in the exercise of his duties is inconsistent with "the commonsense realization that government offices could not function if every employment decision became a constitutional matter." *Connick*, 461 U.S. at 143. Deciding whether the written and spoken aspects of a public employee's job have been performed in a way that disrupts the workplace is also a task for which federal judges are ill-suited. And the Ninth Circuit's decision has two additional consequences: it undermines the democratic process, by hindering the ability of politically accountable officials to run their agencies, and, as applied to federal employees, it encroaches on the authority of the Executive Branch.

Suppose, for example, that a district attorney directed one of his assistants to "make[] a formal statement to the press regarding an upcoming murder trial," the assistant "challenge[d] his employer's instructions regarding the content of the statement," and the assistant was demoted as a result. *Urofsky*, 216 F.3d at 407-408. Or suppose that petitioners were represented in this case, not by private counsel, but by a lawyer employed by the County of Los Angeles; the lawyer determined that respondent had "a viable First Amendment retaliation claim" and, contrary to the instructions of his superiors, filed a brief in the court of appeals "agreeing with the claims made by [respondent's] counsel" and "providing additional arguments to support them"; and the government lawyer was fired as a result. Pet. App. 44 (concurring opinion). Under the Ninth Circuit's view, the speech of the public employee in each instance would be presumptively entitled to constitutional protection, and the action by the employer would violate the First Amendment unless the employer could show that its interest in taking the action out-

weighed the employee's interest in his speech. That is an "absurd result." *Ibid.* And the fact that it is the result to which the court of appeals' decision leads is a strong indication that the decision is wrong.[11]

#### 4. *The Ninth Circuit's decision ignores the historical development of the First Amendment rights of public employees*

As this Court observed in *Connick*, the "unchallenged dogma" until the middle of the twentieth century was that "a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." 461 U.S. at 143. While the Court has since abandoned that strict view, it has not moved to the opposite pole. On the contrary, the Court's decisions in this area seek only to "maintain for the government employee the same right[s] enjoyed by his privately employed counterpart," *Urofsky*, 216 F.3d at 407, because "a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters," *Waters* v. *Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion). Thus, the rationale for *Pickering*'s holding that a public-school teacher's letter to the editor was protected by the First Amendment was that the teacher was entitled to

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[11] Respondent suggests, as did the court of appeals, that speech by a public employee in the exercise of his job duties may not be protected by the First Amendment when the employee is speaking to someone outside the government, but *is* protected when he is speaking to someone *within* the government. Br. in Opp. 10 n.3; Pet. App. 14 n.6. There is no basis for such a distinction. If respondent had sent his memorandum to Najera and she had directed him to make substantive changes before sending it to Sundstedt, but respondent had sent the memorandum to Sundstedt as it was and had been disciplined for not changing it, the disciplinary action, under respondent's view, would have been presumptively unconstitutional. That result is no less absurd than the result of the hypotheticals in the text. In any event, respondent *did* communicate with a person outside the government: he informed defense counsel that he believed the search-warrant affidavit had been falsified.

the same rights as any "member of the general public." 391 U.S. at 573, 574. And *Connick* reiterated that the Court's obligation was to ensure that "citizens are not deprived of fundamental rights by virtue of working for the government." 461 U.S. at 147. The Ninth Circuit's decision disregards this "historical evolvement" of the First Amendment. *Id.* at 143. It goes well beyond ensuring that public employees are treated the same as their private-sector counterparts, and effectively accords preferential treatment by granting them at least a presumptive "First Amendment right to dictate to the state how they will do their jobs." *Urofsky*, 216 F.3d at 407.[12]

**5. *A holding that public employees have no First Amendment interest in speech expressed in performing their job duties will not impair their ability or willingness to expose governmental misconduct***

According to respondent and the court of appeals, the rule advocated by petitioners and the concurrence would curtail speech by those "in the best position to expose governmental misconduct, corruption, and inefficiency." Br. in Opp. 20; accord Pet. App. 12-13. A holding that a public employee has no First Amendment interest in speech expressed pursuant to his job responsibilities, however, will not deprive public employees of the ability to expose wrongdoing. As it does

[12] Indeed, by virtue of the combined effect of the court of appeals' approach at step one of the *Pickering-Connick* inquiry and its approach at step two, public employees whose speech is expressed in their capacity as employees are not only accorded preferential treatment vis-à-vis private-sector employees, they are accorded preferential treatment vis-à-vis public employees whose speech is expressed in their capacity as citizens. While a plaintiff like respondent will prevail at step one *despite the fact* that his speech was required by his job, he will almost always prevail at step two *precisely because* the speech was required by his job, since, in the view of the court of appeals, "[i]t is difficult to imagine how the [good-faith] performance of one's duties * * * could be disruptive or inefficient." Pet. App. 22.

for any "member of the general public," *Pickering*, 391 U.S. at 573, 574, the First Amendment protects the right of a public employee, acting in his capacity as a citizen, to "seek to bring to light actual or potential wrongdoing or breach of public trust," *Connick*, 461 U.S. at 148. Indeed, *Connick* itself found that the plaintiff's questionnaire, which obviously was not within her job responsibilities, was citizen speech on a matter of public concern insofar as it asked whether other assistant district attorneys had ever felt pressured to work in political campaigns. *Id.* at 149. As for public employees whose job it is to expose governmental misconduct, there is little reason to think that a holding that the First Amendment does not protect what they say and write in the exercise of their job duties will affect their willingness to carry out those duties. Such employees already have powerful motivations for rooting out misconduct—a desire to serve the public and a desire to retain their jobs—and there will likely be some statutory remedy (under civil-service laws, for example) for employment action taken against a public employee who has performed his duties in an appropriate manner. In light of these specific statutory protections, there is no reason to constitutionalize every aspect of the relationship between public employers and employees whose job responsibilities include the investigation of wrongdoing.

Respondent also contends that a holding that there is no First Amendment protection for a public employee's speech in the exercise of his job responsibilities would "create perverse incentives" for both employers and employees. Br. in Opp. 20. Respondent argues that the rule advocated by petitioners would create an incentive for employers to "broaden their immunity" by "adding to their employees' reporting duties" the duty to "report[] official wrongdoing." *Ibid.* And he argues (as did the court of appeals, Pet. App. 14), that the rule would create an incentive for employees to "take every accusation of wrongdoing directly to the press instead of dis-

creetly pursuing internal channels." Br. in Opp. 20. There is no merit to either argument.

As to employers: If they sought to "broaden their immunity" from First Amendment lawsuits (Br. in Opp. 20) by making the reporting of official wrongdoing a job responsibility, it is likely that public employers would simultaneously be broadening their exposure to other forms of liability (under civil-service laws, for example). Under a regime in which all public employees are required to report governmental misconduct, an employee dismissed, demoted, or otherwise disciplined for doing so could plausibly claim that the employment action was unwarranted because an employee cannot be punished simply for doing his job.

As to employees: If reporting wrongdoing forms no part of a public employee's job responsibilities and he wishes to do so in his capacity as a citizen, the First Amendment will provide no less protection if he reports the conduct internally than if he reports it to the press. As this Court held in *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410 (1979), First Amendment rights are not "lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public." *Id.* at 415-416. If, on the other hand, the reporting of wrongdoing does fall within the employee's job duties, he is likely to fare worse, not better, by reporting wrongdoing to the press rather than his superiors. A public employee responsible for investigating wrongdoing is ordinarily prohibited from speaking to the press about an ongoing investigation without the permission of his employer. A prohibition of this type serves important governmental interests (for example, preventing an investigation from being compromised) and reflects settled professional norms (for example, ensuring that government attorneys maintain client confidences). If an employee responsible for investigating official wrongdoing nevertheless does speak to the press, his em-

ployer may well discipline him for violating the prohibition (without regard to the content of his speech), and any First Amendment challenge to the action will almost certainly fail under step two of the *Pickering-Connick* test (even assuming the employee can prevail at step one). An adverse employment action is much less likely if wrongdoing is reported through internal channels.

The contention that adopting petitioners' position will impair the ability or willingness of public employees to expose governmental misconduct also overlooks the fact that legislatures may "choose to give additional protections to [public] employees beyond what is mandated by the First Amendment." *Waters*, 511 U.S. at 674 (plurality opinion). Congress and the legislatures of many states have enacted whistleblower laws, see Pet. App. 46-49 (concurring opinion), and some of them do provide protection, at least in certain circumstances, for employees whose job duties obligate them to report official wrongdoing, see, *e.g.*, *Huffman* v. *OPM*, 263 F.3d 1341, 1351-1355 (Fed. Cir. 2001).[13]

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[13] Although the court of appeals decided that petitioners were not entitled to qualified immunity on respondent's constitutional claim, the only question presented in this Court is whether petitioners violated respondent's constitutional rights. See Pet. i. To the extent that the correctness of the court of appeals' holding on qualified immunity is fairly included within that question, cf. *Procunier* v. *Navarette*, 434 U.S. 555, 560 n.6 (1978), the court of appeals erred by holding that it was clearly established at the time of the challenged conduct that public employees have a First Amendment interest in speech expressed in performing their duties (even assuming the court of appeals' constitutional holding is correct). Courts of appeals have rendered conflicting decisions on the issue, see Pet. App. 14-16 & n.7 (citing cases); *id.* at 38-39 & n.2 (concurring opinion) (same), and "[i]f judges thus disagree on a constitutional question, it is unfair to subject [petitioners] to money damages for picking the losing side of the controversy," *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999). See *Hanlon* v. *Berger*, 526 U.S. 808 (1999) (per curiam) (reversing the Ninth Circuit's finding of no qualified immunity even though the Court agreed with the Ninth Circuit on the constitutional issue). The court of appeals claimed (Pet. App. 12, 24) that three decisions of the Ninth Circuit—*Roth* v. *Veteran's Administration*, 856 F.2d 1401 (1988), *Nunez* v. *Davis*, 169 F.3d

### C. If A Public Employee Has A First Amendment Interest In Speech Expressed In Performing His Job Duties, It Should Generally Be Easier For The Employer To Justify An Employment Action When The Speech Is Of That Type

1. If the Court were to hold that a public employee has a First Amendment interest in speech addressing a matter of public concern even when it is expressed in carrying out his job responsibilities, the burden in a case of this type would shift to the employer to show that the employee's interest in the speech is outweighed by the employer's interest in the efficient performance of public services. An employer's burden under the second part of the *Pickering-Connick* test "varies depending upon the nature of the employee's expression," *Connick*, 461 U.S. at 150, and thus the Court should clarify that an employer's burden is relaxed when the employee's speech is expressed in the course of performing his job duties (assuming the employee has any First Amendment interest in such speech). The "state interest element" of the *Pickering-Connick* test focuses on "the effective functioning of the public employer's enterprise." *Rankin* v. *McPherson*, 483 U.S. 378, 388 (1987). If an employer can show that, in saying or writing the things at issue, the employee was performing his duties inadequately or inappropriately, that showing should be sufficient to defeat the constitutional claim, because performing one's job in such a manner directly affects the functioning of the enterprise. Any constitutionally protected interest that a public employee might have in the written and spoken aspects of his job is less substantial than the interest of the employer—and

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1222 (1999), cert. denied, 528 U.S. 1115 (2000), and *Pool* v. *Vanrheen*, 297 F.3d 899 (2002)—had already resolved the issue. But while the speech in those cases may have been expressed in the performance of the public employee's duties, none addressed the question whether that fact deprived the speech of First Amendment protection.

the public it serves—in ensuring that every aspect of the employee's job is performed satisfactorily. And even the "[g]ood-faith" performance of one's job, Pet. App. 20; see note 12, *supra*, can be unsatisfactory. Accordingly, if the Court holds that a public employee has a First Amendment interest in any speech that addresses a matter of public concern, the Court should make clear that it will ordinarily be more difficult for the employee to prevail at the second step of the *Pickering-Connick* inquiry when the speech is expressed in the course of the employee's duties.

2. In the court of appeals, petitioners argued generally that, if they did not prevail at the first step of the *Pickering-Connick* inquiry, they should prevail at the second step. Pet. C.A. Br. 30-32. The court of appeals addressed (and rejected) that argument, Pet. App. 18-22, and the question whether respondent's speech is protected under part two of the *Pickering-Connick* test is fairly included within the question on which this Court granted certiorari, see Sup. Ct. R. 14.1(a).[14] Nevertheless, the current posture of this case makes a balancing of interests by this Court inadvisable.

This is not a case like *Connick*, 461 U.S. at 141, 151-154, *Rankin*, 483 U.S. at 380-382, 388-392, and *Waters*, 511 U.S. at 664-666, 680-682, where the defendants conceded that the employment actions were taken in response to the employee's speech but argued that the speech was sufficiently disruptive that any interest the employee had in the speech was outweighed by the employer's interest in workplace efficiency. Petitioners have consistently denied that the chal-

[14] The question presented is whether a public employee's speech expressed pursuant to the duties of employment is "cloaked with First Amendment protection." Pet. i. That question subsumes both parts of the test. See *Waters* v. *Churchill*, 511 U.S. at 668 (plurality opinion) (public employee's speech "is protected by the First Amendment" if employee prevails at both steps of *Pickering-Connick* inquiry). See also Pet. App. 7 (court of appeals applied "two-step test" to determine whether respondent's speech "is protected by the First Amendment").

lenged employment actions were taken as a result of respondent's speech. Instead, petitioners have explained their actions as routine employment actions not prompted by any specific conduct by respondent. See Pet. App. 25; note 4, *supra*. While taking that position might not have prevented petitioners from arguing in the alternative that their actions *would* have been justified if they *had* been taken in response to respondent's speech, petitioners apparently did not do so.

It may well be that respondent's speech in connection with the *Cuskey* prosecution had the potential to "interfere[] with the regular operation" of the District Attorney's Office, *Pickering*, 391 U.S. at 573; accord *Rankin*, 483 U.S. at 388, or "undermine management's authority," *Waters*, 511 U.S. at 680-681 (plurality opinion); accord *Connick*, 461 U.S. at 154. But petitioners have "offer[ed] no explanation" as to how respondent's speech "resulted in inefficiency or office disruption," Pet. App. 21, and they have not developed a record that would support such a theory. Accordingly, if the Court were to hold that respondent has a First Amendment interest in his speech under step one of the *Pickering-Connick* inquiry, the Court would not be in a suitable position to conduct the step-two balancing itself. The proper course in that event would be to clarify that the employer's burden is reduced in cases involving speech in the course of an employee's job duties and to vacate the judgment of the court of appeals. On remand, petitioners should then be free to supplement the record with evidence that is relevant to the balancing of interests and to argue that the undisputed facts, at a minimum, entitled them to qualified immunity.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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