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Government Workers and Government Speech

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GOVERNMENT WORKERS AND GOVERNMENT SPEECH

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Under what circumstances may the government consider the speech of its employees as its own, thus permitting it to control that speech without running afoul of the First Amendment? Concluding that a government employer should remain free to "exercise . . . employer control over what the employer itself has commissioned or created,"[1] the Supreme Court held in *Garcetti v. Ceballos* that public employees' speech made "pursuant to their official duties" receives no First Amendment protection.[2] In so holding, the Court created a bright-line rule that essentially defines government workers' speech pursuant to their official duties as the government's own speech—i.e., speech that the government has bought and thus may control, regardless of the strength of the public's interest in it or its impact, if any, on governmental efficiency.

Another illustration of courts' increasing willingness to permit government to control its workers' speech to protect its own expressive interests,[3] *Garcetti* significantly expanded government's already

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1. Garcetti v. Ceballos, 547 U.S. 410, 422 (2006).

2. *Id.* at 421.

3. As another example of this trend, consider courts' growing tendency to permit government agencies to control their workers' objectionable *off-duty* speech for fear that the public will inevitably associate that off-duty expression with government in a way that might undermine the government's ability to communicate its own contrary views. *See, e.g.*, City of San Diego v. Roe, 543 U.S. 77, 78 (2004) (rejecting a police officer's First Amendment challenge to his termination for appearing in sexually explicit videotapes); Dible v. City of Chandler, 515 F.3d 918,

substantial power[4] over public employee speech. It did so, however, without examining when and why government expression appropriately merits governmental control free from First Amendment scrutiny, thus imperiling not only employees' free speech rights but also the public's interest in transparent government.

GOVERNMENT SPEECH GENERALLY

Government must speak if it is to govern. As Professors Bezanson and Buss explain:

> Democratic governments must speak, for democracy is a two-way affair. This is particularly true in representative democracies, where governments' speech must consist not just of information but also of explanation, persuasion, and justification to a polity tethered to the

926 (9th Cir. 2008) (rejecting a police officer's First Amendment challenge to his termination for maintaining a sexually explicit website); Locurto v. Giuliani, 447 F.3d 159, 183 (2nd Cir. 2006) (rejecting public safety officers' First Amendment challenge to their termination for their racially offensive off-duty speech); Pappas v. Giuliani, 290 F.3d 143, 146-47 (2nd Cir. 2002) (upholding a police officer's termination based on his racially offensive off-duty speech). I plan to address the larger First Amendment implications of this collective trend involving greater judicial deference to government's asserted expressive interests in its employees' speech in an upcoming article.

4. Indeed, even before *Garcetti,* a number of commentators criticized the Court's longstanding approach to public employees' First Amendment claims—specifically, the *Connick/Pickering* test—as insufficiently protective of workers' speech rights. *See, e.g.*, Stephen Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43, 81 (1988) (maintaining that the *Connick* test "unfairly burdens the employee by requiring him to demonstrate that the speech fits neatly into a category of speech on a matter of public concern. . . . [yet] the courts have not defined with certainty what speech is protected") [hereinafter Allred]; Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1019 (2005) ("The *Pickering/Connick* doctrine collapses into little more than the constitutionalization of a heckler's veto."); Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1, 4 (1987) (criticizing *Connick* as too deferential to public employers' "mere anticipation of disruption as grounds for employee discipline").

> policies and preferences acted upon by its representatives . . . . Speech is but one means that government must have at its disposal to conduct its affairs and to accomplish its ends.[5]

Government speech is valuable as well as inevitable. Government expression, for example, facilitates significant First Amendment interests in sharing knowledge and discovering truth by informing the public on a wide range of topics.[6] Even more important, government speech furthers citizens' capacity to participate in democratic self-governance by enabling them to identify and assess their government's priorities.[7] Government expression thus carries great instrumental value because of what it offers its listeners: important information that furthers the public's ability to evaluate its government.

For these reasons, the constitutional standards for evaluating the government's control of its own speech differ dramatically from those that apply to the government's regulation of private expression. On one hand, government cannot discriminate on the basis of viewpoint when regulating private speech unless its action satisfies the demanding requirements of strict scrutiny.[8] On the other hand, government's own

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5. Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1380 (2001) [hereinafter Bezanson & Buss]. *See also* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1825 (1987) ("[I]t is probably not too outlandish an exaggeration to conclude that government organizations would grind to a halt were the Court seriously to prohibit viewpoint discrimination in the internal management of speech.").

6. Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 11 (2000) ("[G]overnment speech can help foster debate, fleshing out views, and leading toward a more educated citizenry and a better chance of reaching the right answer.") [hereinafter Greene]; Steven Shiffrin, *Government Speech,* 27 UCLA L. REV. 565, 569 (1980) ("[S]peech financed or controlled by government plays an enormous role in the marketplace of ideas.").

7. Shiffrin, *supra* note 6, at 604 ("Governments, then, can justify subsidizing the speech of public officials, not to reelect them or others, but because there is a substantial interest in hearing what they have to say. . . . [T]he public would have the advantage of knowing the collective judgment of the legislature and of knowing the views of its representatives, which would in turn be useful for evaluating them.").

8. *E.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) (recounting the First Amendment's bar on government's viewpoint-based discrimination against

speech "is exempt from First Amendment scrutiny[,]"[9] leaving the government generally free to adopt and deliver whatever message it chooses when it speaks on its own behalf.[10] Political accountability, rather than the free speech clause, provides the recourse for those unhappy with their government's own expressive choices.

Note, however, that constitutional constraints other than the First Amendment's free speech clause may still limit governmental speech. For example, government speech that endorses religion may violate the establishment clause, and government speech that furthers race, gender, or national origin discrimination may violate the equal protection clause.[11] Moreover, while the government does not violate the free speech clause when it prevents private speakers from joining or altering its own speech, most courts and commentators conclude that government generally possesses no First Amendment rights of its own.[12] Legislatures

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private speech); R.A.V. v. City of St. Paul, 505 U.S. 377, 391-92 (1992) (striking down St. Paul ordinance as unconstitutional viewpoint discrimination). For examples of the rare occasions on which governmental constraints on private speech survived strict scrutiny, *see, e.g.*, Burson v. Freeman, 504 U.S. 191, 211 (1992) (upholding government's ban on campaign speech within 100 feet of polling places); Buckley v. Valeo, 424 U.S. 1, 58 (1976) (upholding caps on campaign contributions).

9. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005).

10. *E.g.*, Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000) (distinguishing government's legitimate exercise of control over the views it itself expresses from government's impermissible efforts to control the views expressed by private speakers).

11. *See, e.g.*, Greene, *supra* note 6, at 37-38 (describing government speech that may violate the equal protection and/or establishment clauses, but not the free speech clause).

12. *See, e.g.*, Columbia Broad. Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 139-42 (1973) (Stewart, J., concurring) ("The First Amendment protects the press *from* governmental interference; it confers no analogous protection *on* the Government."); MARK G. YUDOF, WHEN GOVERNMENT SPEAKS 42-45 (1983) (concluding that government should not possess First Amendment free speech rights) [hereinafter YUDOF]; Bezanson & Buss, *supra* note 5, at 1501-08 (same). For an argument that state governments may be First Amendment rights holders, however, *see* David Fagundes, *State Actors as Government Speakers*, 100 NW. U. L. REV. 1637 (2006).

Note, however, that the Court has suggested that certain institutions with unique communicative functions—such as universities or broadcasters—may have First Amendment interests regardless of their public or private character. *See* Keyishian

thus remain free to enact laws limiting government speech and, indeed, they often do—most commonly, for example, by prohibiting government from engaging in electioneering speech.[13]

Government's claim to speech as its own arises most frequently as a defense to First Amendment challenges by private speakers who seek to alter or join what the government contends is its own expression. As an illustration,[14] consider the following dispute from the Fourth Circuit: A public school board passed a resolution opposing proposed school voucher legislation. The resolution also authorized public communication of the school board's position on the district's website and in e-mails and letters to parents and school employees.[15] A

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v. Bd. of Regents, 385 U.S. 589, 603 (1967) (observing that universities' academic freedom is "a special concern of the First Amendment"); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 673 (1998) (noting public and private broadcasters' First Amendment interests in journalistic freedom). *But see* United States v. Am. Library Ass'n, 539 U.S. 194, 210-211 (2003) (declining to decide whether government entities like public libraries have First Amendment rights of their own); *id.* at 225-26 (Stevens, J., dissenting) (urging the Court to recognize public libraries as First Amendment rights holders).

13. *See* YUDOF, *supra* note 12, at 170 (describing statutory restrictions on government's partisan speech).

14. As another illustration, states and private parties both increasingly claim the messages displayed on specialty license plates as their own expression. These disputes have generated a circuit split. The Sixth Circuit, for example, concluded that Tennessee's issuance of a "Choose Life" license plate reflected the legislature's own pro-life views and thus constituted government speech within the state's power to control; it thus rejected the ACLU's First Amendment challenge to the state's denial of its request for a "Pro-Choice" plate. *See* ACLU of Tenn. v. Bredesen, 441 F.3d 370, 371-80 (6th Cir. 2006), *cert. denied,* 548 U.S. 906 (2006). In contrast, the Ninth Circuit characterized the same plates as predominantly private expression, upholding the Arizona Life Coalition's challenge to Arizona's denial of its proposed "Choose Life" plate. Ariz. Life Coal., Inc. v. Stanton, 515 F.3d 956, 965-73 (9th Cir. 2008); *see also* Planned Parenthood of S.C. v. Rose, 361 F.3d 786, 792-800 (4th Cir. 2004), *cert. denied,* 543 U.S. 1119 (2005) (upholding Planned Parenthood's First Amendment challenge to South Carolina's decision to issue a "Choose Life" but not a "Pro-Choice" plate).

15. *See* Page v. Lexington County Sch. Dist. One, 531 F.3d 275, 277 (4th Cir. 2008). In the interests of full disclosure, I note that I served pro bono as counsel of record to *amici* in support of respondent school board in this case upon appeal. Brief for Nat'l Sch. Boards Ass'n. et al. as Amici Curiae Supporting Appellee, Page v. Lexington County Sch. Dist. One, 531 F.3d 275 (4th Cir. 2007) (No. 07-1697), 2007 WL 4114513.

proponent of the legislation then requested that he be allowed to post his pro-voucher materials on the district's website, and that he also be allowed to use the school's communication channels to distribute his pro-voucher materials to the school community.[16] When the district declined, he filed suit, arguing that his exclusion constituted viewpoint discrimination in violation of the First Amendment.[17] The school district successfully defended on the ground that the government speech doctrine permits it to communicate its own viewpoint without any obligation to allow others to misappropriate or distort that expression.[18]

In a recent article on government speech, I proposed that a public entity seeking to claim the government speech defense in disputes like these should establish that (1) it expressly claimed the speech as its own when it authorized the communication and (2) that onlookers understood the speech to be the government's at the time of its delivery.[19] First, requiring that government identify itself as the source of a message at the time of its creation forces government to articulate, and thus think carefully about, its expressive decisions. It also prevents the after-the-fact manufacture of a government speech defense as an opportunistic reaction designed to thwart those challenging government's regulation of what is really private speech. Second, even if government expressly announces its intent to claim authorship of a message at the time of its creation, much of the public may remain unaware of the message's governmental source if it is actually delivered at some later point. To

16. *Page*, 531 F.3d at 277-79.

17. *Id.* at 279-80.

18. *Id.* at 288 (affirming the district court's judgment).

19. Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587 (2008). For other commentators' thoughtful focus on meaningful accountability as a key measure of government speech, *see* Bezanson & Buss, *supra* note 5, at 1384 (stating that government speech "should be limited to purposeful action by government, expressing its own distinct message, which is understood by those who receive it to be the government's message"); Leslie Gielow Jacobs, *Who's Talking? Disentangling Government and Private Speech*, 36 U. MICH. J.L. REFORM 35, 57-63 (2002) (defining government speech to require both "general" and "specific" accountability); Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 1052 (2005) [hereinafter Lee] (arguing that a court should only conclude that something is government speech if "a reasonable recipient understands that the government bears responsibility for a communication").

ensure that the public can realize the possibility of holding government accountable as the source of messages they find objectionable, the government should also be functionally identifiable as the source of the message at the time of its delivery.

Because accountability efforts like petitioning and voting, rather than the First Amendment, remain the appropriate check on government speech, this approach emphasizes that such speech is most valuable and least dangerous when members of the public can actually identify the government as its source. By identifying two points at which government must expose its expressive choices, this approach maximizes opportunities for the public to engage in undeceived credibility assessments and meaningful political accountability measures. If a message's governmental source is obscured because the government fails to identify the speech as its own both formally and functionally, then political accountability provides no real safeguard and traditional First Amendment analysis should apply to the government's regulation of the contested expression.

Under this approach, the website and e-mails discussed above[20] should be considered the government's own speech that the First Amendment permits it to control. In that example, the school board publicly opposed pending legislation, and communicated that position in e-mails, letters, and website postings that clearly identified their governmental origins.[21] In so doing, the board provided the public with valuable information about the opinions of a public education body on proposed education policy, and any members of the public unhappy with this position now know to seek to elect new board members.

In contrast, some contested speech fails to indicate its governmental origin in a way that allows the public to evaluate the message and its source. In *Rust v. Sullivan*, for example, the Supreme Court rejected a First Amendment challenge to federal regulations that barred family planning clinics from making any mention of abortion when providing federally-funded counseling and referrals.[22] Although at the time it couched its holding in unconstitutional-conditions terms,[23] the

20. *See supra* note 15 and accompanying text.
21. *Page*, 531 F.3d at 277-79.
22. 500 U.S. 173 (1991).
23. *Id.* at 197-99.

Court later described *Rust* as a government speech case: the government had made the expressive choice to promote only some types of family planning, and was thus free not only to express that view directly, but also to pay others—like clinic workers—to express that view on the government's behalf.[24]

I agree that the First Amendment permits government to choose to advocate a pro-life or a pro-choice view—or neither[25]—because that expressive choice provides the public with valuable information about its government. I also agree that, as a practical matter, this must mean that the First Amendment permits the government to pay employees or other agents to help it deliver its chosen message.[26] But if the expression is to be characterized as government speech exempt from First Amendment scrutiny, the expression should be delivered in a way that allows the public to understand it as their government's viewpoint, so that voters can more accurately assess the message's credibility and hold the government accountable for that viewpoint if they so desire.

In *Rust,* however, doctors, nurses, and other clinic employees delivered the contested speech without any requirement that the expression's governmental origins be disclosed.[27] They were instead advised to respond to abortion-related requests by stating "'the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion.'"[28] Under these

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24. Legal Serv. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) ("The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding.").

25. Government's transparent decision to remain neutral on a particular topic may reflect a strategic choice to conserve limited political capital and/or to reserve judgment on a controversy as the public debate continues; either way, that decision provides the public with valuable information about its government's priorities.

26. *See* Frederick Schauer, *Principles, Institutions, and the First Amendment,* 112 HARV. L. REV. 84, 100 (1998) ("[T]he state cannot literally speak, but can speak only through the voices of others . . . .").

27. *Rust,* 500 U.S. at 180 (explaining that employees of clinics receiving federal funding were "expressly prohibited from referring a pregnant woman to an abortion provider, even upon specific request.").

28. *Id.* (quoting 42 C.F.R. § 59.8(b)(5) (1989)) (While the regulations did not require that the government be identified as the message's source, the majority

circumstances, patients might well misunderstand clinic employees to be offering their own independent counsel, rather than speaking as government agents required to convey the government's view that abortion is not a method of family planning to be discussed.[29] Because health professionals may be considered more credible than the government in this setting based on the public's perception of their expertise and objectivity, patients may have been misled into evaluating the counseling differently than they would have if the speakers had made clear its governmental source. Expressly signaling the message's governmental origins would have permitted listeners to evaluate its quality more accurately, as well as to engage in political accountability measures if they thought it appropriate to do so. *Rust* thus illustrates the danger of treating expression that the government fails transparently to claim as its own as government speech free from First Amendment scrutiny.

THE ROLE OF THE GOVERNMENT SPEECH DOCTRINE IN ASSESSING PUBLIC EMPLOYEES' FIRST AMENDMENT CLAIMS: GARCETTI'S FAILURE

Recognizing that government speech is most valuable and least dangerous when its governmental source is apparent should guide courts' application of the government speech doctrine to public employees' First Amendment claims: the First Amendment should be understood to permit government to claim as its own—and thus control—the speech of public employees that the government has specifically hired to deliver a particular viewpoint that is clearly governmental in origin and thus open to the public's meaningful credibility and accountability checks. This is the case, for example, where a school board hires a press secretary or lobbyist to promote its anti-voucher position; a health department hires an employee to implement an anti-smoking promotional effort; a school hires an educator to implement its abstinence-only youth public education campaign; or a mayor commissions a muralist specifically to

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observed that "[n]othing in [the Title X regulations] requires a doctor to represent as his own any opinion that he does not in fact hold."); *Id.* at 200.

29. *See, e.g.*, Bezanson & Buss, *supra* note 5, at 1394-96 (arguing that patients could mistakenly attribute the government's views to their doctors); Robert C. Post, *Subsidized Speech,* 106 YALE L.J. 151, 172-75 (1996) (same).

create patriotic art for the Fourth of July, or art promoting racial equality to celebrate Dr. King's birthday.

Each of these exemplifies government speech that is valuable to its listeners because it clearly reveals to the public the expressive choices of its government, enabling voters to evaluate the message's credibility and take accountability measures as appropriate. Because that speech is valuable to the public, the First Amendment should be understood to permit government to protect that viewpoint from being undermined or garbled—i.e., by taking adverse actions against such an employee who engages in speech that undermines the delivery of that governmental viewpoint.

Under this view, the value of government speech to the public turns primarily on its transparency,[30] rather than its popularity or even its accuracy. Indeed, as the Supreme Court has acknowledged, inaccurate speech is often inevitable and even valuable in a full and free public debate.[31] For this reason, the First Amendment should pose no bar to government's choice to express the view that climate change is not the result of human behavior; to engage employees specifically to help deliver that view (so long, in my opinion, as the governmental source of that view is apparent); and to take action against those employees if their speech undermines the delivery of the government's chosen viewpoint.[32] In that case, the government's expressive choice not only offers voters valuable information about its priorities, but also spurs those with other views to "unearth and disseminate facts that deepen the understanding of both speakers and listeners"[33]—thus furthering key First Amendment

30. *See* Lee, *supra* note 19 (urging transparency as the measure of government speech).

31. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271-73 (1964) (discussing the societal benefits of permitting free speech even when that speech is inaccurate).

32. Even though the First Amendment does not require that the government's speech be accurate, legislatures remain free to insist such accuracy as a statutory matter. *See, e.g.*, Note, *Avoidance of an Election or Referendum when the Electorate has been Misled*, 70 HARV. L REV. 1077 (1957) (describing statutes requiring truth in the government's statements accompanying propositions submitted to voters).

33. Mark Spottswood, *Falsity, Insincerity, and the Freedom of Expression* 16 WM. & MARY BILL RTS. J. 1203, 1203 (2007-2008) ("False speech, therefore, is valuable because it is an essential part of a larger system that works to increase society's knowledge.").

values of facilitating the public's participation in democratic self-governance and encouraging further contributions to the marketplace of ideas.

But while many employees' job duties require that they speak, only the speech of public employees engaged to speak *for the government*—i.e., those specifically hired to deliver a transparently government message—should be considered the government's own speech that is exempt from First Amendment scrutiny. For this reason, unless they were hired specifically to deliver the government's chosen viewpoint, government scientists who dissent from that message are not delivering the government's speech that remains subject to the government's viewpoint-based control.[34]

This formulation, however, describes a much smaller slice of public employee speech than does *Garcetti's* "pursuant to official duties" test. The *Garcetti* Court distinguished speech that the government has paid its employees or agents to deliver—and thus remains free to control—from speech delivered by those individuals in their private capacities: "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes . . . ."[35] It suggested that the government "owns," for First Amendment purposes, speech for which it paid, with the power to "exercise . . . employer control over what the employer itself has commissioned or created."[36]

But a thoughtful application of this principle requires us to delve more deeply into what exactly the government employer has "bought." The prosecutor's office in *Garcetti*, for example, hired Mr. Ceballos not to deliver a specific government viewpoint about the infallibility of the

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34. To be sure, just because a public employee's speech does not constitute the government's own speech does not mean that that employee's First Amendment claim should necessarily prevail. As discussed *infra*, notes 48-53 and accompanying text, the traditional *Connick/Pickering* balancing inquiry may still reveal that the government's efficiency needs outweigh the worker's expressive interests.

35. Garcetti v. Ceballos, 547 U.S. 410, 421 (2005); *see also id.* at 423 ("When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences. When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny.").

36. *Id.* at 422.

police department's factual assertions, but instead to provide sound legal analysis and competent prosecution. As Justice Souter observed in dissent, "Unlike the doctors in *Rust*, Ceballos was not paid to advance one specific policy among those legitimately available, defined by a specific message or limited by a particular message forbidden."[37] And the Court's new rule required no evidence that the government received anything other than the sound legal analysis and judgment for which it had paid.[38] *Garcetti* thus failed to distinguish the many government employees whose job duties require them to speak (e.g., scientists, lawyers, teachers, health care professionals, accountants) from those relatively few who are required to speak *for the government.*[39]

By treating as unprotected any public employee's speech delivered pursuant to that worker's official duties, the *Garcetti* majority ignored the fact that government speech is insulated from First Amendment scrutiny precisely because of its instrumental value to the public as listeners. But, of course, the public's interest in what Mr. Ceballos had to say about law enforcement is in no way diminished because he uttered those views pursuant to his official duties; if anything, the public interest may be enhanced because of his proximity and expertise as a deputy district attorney.[40]

Indeed, public entities frequently hire workers specifically to engage in speech that draws attention to dangerous or illegal conditions. Yet, *Garcetti* empowers the government to punish those workers for delivering just "what the employer itself has commissioned."[41] Lower courts now routinely apply *Garcetti* to reject the constitutional claims of public employees fired because the government found their reporting of

37. *Id.* at 437 (Souter, J., dissenting).

38. *See id.* at 421 ("We hold 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.").

39. *See id.* at 438 (Souter, J., dissenting) (characterizing the majority opinion as "portend[ing] a bloated notion of controllable government speech").

40. *See id.* at 430 (Souter, J., dissenting) (expressing concern that *Garcetti*'s new "official duties" rule protects internal employee reports of a school's racist hiring practices when made by a teacher but not by a personnel manager, even though the distinction matters not to the expression's value to the public).

41. *See Garcetti*, 547 U.S. at 422.

hazards or improprieties to be unwelcome or inconvenient. These include claims by police officers terminated for reporting public officials' illegal or improper behavior,[42] police officers discharged for detailing health and safety violations,[43] health care workers disciplined for conveying concerns about patient care,[44] primary and secondary school educators punished for describing concerns about student

42. *E.g.*, Morales v. Jones, 494 F.3d 590, 597-98 (7th Cir. 2007) (applying *Garcetti* to conclude that First Amendment does not protect police officers' report to district attorney and other officers that police chief and deputy chief were harboring an individual wanted on felony warrants when such reports were made pursuant to their official duties); Maule v. Susquehanna Regional Police Comm'n, 2007 Dist. LEXIS 73065 (E.D. Pa. 2007) (applying *Garcetti* to conclude that First Amendment does not protect police chief's report of local councilman's improprieties to state police for criminal investigation); Bland v. Winant, 2007 No. 03-6091, slip op. at 7-11 (D.N.J. April 27, 2007) (applying *Garcetti* to conclude that First Amendment does not protect police representative's reporting of councilmember's arrest to prosecutor); Wesolowski v. Bockelman, 506 F. Supp. 2d 118, 121-22 (N.D.N.Y. 2007) (applying *Garcetti* to conclude that First Amendment does not protect sheriff's department employee's report that corrections officer beat an inmate); Andrew v. Clark, 472 F. Supp. 2d 659, 662-64 (D. Md. 2007) (applying *Garcetti* to conclude that First Amendment does not protect police commander's criticism of police handling of an incident in which officers shot and killed an elderly man barricaded in his apartment); Burns v. Borough of Glassboro, No. 05-3034, slip op. at 17 (D.N.J. June 11, 2007) (applying *Garcetti* to conclude that First Amendment does not protect police officer's report to internal affairs that chief sexually harassed another officer).

43. *E.g.*, Ruotolo v. City of New York, 514 F.3d 184, 188 (2nd Cir. 2008) (plaintiff police safety officers concede that, after *Garcetti*, the First Amendment does not protect their speech identifying large number of cancers, miscarriages, birth defects and other health problems suffered by individuals working a precinct with underground gasoline tanks when such reports were made pursuant to plaintiffs' official duties); Foraker v. Chaffinch, 501 F.3d 231, 247 (3rd Cir. 2007) (applying *Garcetti* to conclude that First Amendment does not protect reports by state troopers and firearms instructors of health and safety hazards—including elevated heavy metals levels—at shooting ranges, where such reports were made pursuant to their official duties).

44. *E.g.*, Barclay v. Michalsky, 493 F. Supp. 2d 269, 271 (D. Conn. 2007) (applying *Garcetti* to conclude that First Amendment does not protect nurse's report that workers in correctional facility's psychiatric ward were imposing excessive restraints on patients when such reports were made pursuant to official duties); Coward v. Gilroy, 2007 U.S. Dist. LEXIS 30075, at 11-14 (N.D.N.Y. 2007) (applying *Garcetti* to conclude that First Amendment does not protect family care home operator's speech expressing concern about quality of patients' health care).

treatment,[45] and financial managers fired for reporting fiscal irregularities.[46] Lower courts now seize on the "expedited review"[47] offered by *Garcetti* to quickly dispose of government workers' First Amendment claims at great cost to the public's interest in government transparency—precisely the value that the government speech doctrine seeks to protect.

GOVERNMENT'S REMAINING POWER TO CONTROL EMPLOYEE SPEECH THAT DOES NOT CONSTITUTE GOVERNMENT SPEECH

That the government cannot claim the speech of an employee as its own in a particular situation does not mean that the worker's First Amendment claim necessarily prevails. Instead, the dispute should continue to the longstanding *Connick/Pickering* test, which is used for assessing claims that the government has unconstitutionally punished public employees for their speech. This test requires courts to balance the individual employee's interest "as a citizen, in commenting upon matters of public concern" and the government employer's interest in

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45. *E.g.*, Pagani v. Meriden Bd. of Educ., 2006 U.S. Dist. LEXIS 92267, 11-12 (D. Conn. 2006) (applying *Garcetti* to conclude that First Amendment does not protect teacher's report that another teacher had shared nude photos with students when such reports were made pursuant to official duties); Houlihan v. Sussex Tech. Sch. Dist., 461 F. Supp. 2d 252, 260-61 (D. Del. 2006) (applying *Garcetti* to conclude that First Amendment does not protect school psychologist's reports of Individuals with Disabilities Education Act noncompliance).

46. *E.g.*, Battle v. Bd. of Regents, 468 F.3d 755,761-62 (11th Cir. 2006) (applying *Garcetti* to conclude that First Amendment does not protect university financial aid manager's reports of financial irregularities when such reports were made pursuant to her official duties); Richards v. City of Lowell, 472 F. Supp. 2d 51, 80 (D. Mass. 2007) (applying *Garcetti* to conclude that the First Amendment does not protect city financial manager's report of financial improprieties); Levy v. Office of Legislative Auditor, 459 F. Supp. 2d 494, 498-99 (M.D. La. 2006) (eagerly applying *Garcetti* to conclude that the First Amendment does not protect state auditor's Toastmaster speech criticizing office policy when court concluded that government employer required participation in Toastmaster program to improve public speaking skills).

47. *See* Boyce v. Andrew, 510 F.3d 1333, 1349 (11th Cir. 2007) (Birch, J., concurring) ("In *Garcetti,* the Court has built upon *Pickering* and succeeding cases to give lower federal courts a distinction in analysis that expedites review of First Amendment[ ] retaliation cases involving government employees . . . .").

efficiently providing public services.[48] Under this test, some claims will fail if found to involve speech on matters of personal grievance rather than public concern.[49] Of those claims that do involve speech on matters of public concern, some will fail because of the expression's adverse effects on the government's efficiency interests.[50]

Indeed, *Garcetti's* focus on speech delivered pursuant to official duties most appropriately deserves attention as part of this balancing inquiry: a government employer's efficiency interest in regulating speech delivered pursuant to a public employee's official duties is especially strong because the intemperate tone or inaccurate content of that speech carries significant potential to undermine efficient government operations. The *Garcetti* majority, for example, correctly observed that an employee's inflammatory or misguided speech delivered pursuant to official duties threatens effective workplace operations: "Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission."[51] But the *Garcetti* Court did not call for the government to show that Mr. Ceballos' speech was flawed in any way, expressing concern that such a requirement would "demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound

48. Connick v. Myers, 461 U.S. 138, 143 (1983); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

49. *See, e.g.*, *Connick*, 461 U.S. at 146 (characterizing most of the plaintiff's speech—a questionnaire directed to co-workers about office policies and practices—as unprotected private grievances that failed to touch on matters of public concern); *Boyce*, 510 F.3d at 1344-47 (11th Cir. 2007) (characterizing social services case managers' complaints about their workloads as unprotected private grievances intended to improve their own working conditions rather than speech on a matter of public concern).

50. *See* Garcetti v. Ceballos, 547 U.S. 410, 426 (2005) (Stevens, J., dissenting) (explaining that the *Connick/Pickering* balancing test allows employers to discipline employee speech that is inflammatory or misguided). Before *Garcetti's* bright-line rule, courts generally characterized government workers' allegations of unsafe, illegal, or improper behavior as matters of public concern, but reached mixed results when weighing the value of that speech against its impact on the government employer's operations depending on its accuracy or tone. *See, e.g.*, Allred, *supra* note 4, at 62-63.

51. *Garcetti*, 547 U.S. at 422-23.

principles of federalism and the separation of powers."[52] Instead, the majority's bright-line rule treated his speech pursuant to his official duties—no matter how temperate, accurate, or otherwise sound—as entirely unprotected by the First Amendment.[53]

CONCLUSION

Garcetti treats a wide swath of public employee speech—that delivered pursuant to a government worker's "official duties"—as entirely beyond the First Amendment's protection. But while government can and should be held responsible for its operational performance as well as for its expressive choices, the government's political accountability to the electorate for its effectiveness may well be undercut by the carte blanche *Garcetti* gives government to discipline workers who truthfully report irregularities and improprieties pursuant to their official duties.

Recognizing that government speech is most valuable and least dangerous when its governmental source is apparent should help determine the appropriate application of the government speech doctrine to public employees' First Amendment claims. An approach informed by such an understanding would permit the government to claim the speech of its employees as its own only when it has specifically engaged those employees to deliver a transparently governmental viewpoint. By forcing government to expose its views in order to claim the power to discipline employees' contrary speech, this approach recognizes that government speech merits exemption from First Amendment scrutiny only when it enhances listeners' ability to evaluate their government.

But rather than identifying a theoretically principled approach for capturing the value of empowering government to control its own speech, the *Garcetti* Court instead formalistically imposed a bright-line rule to avoid the often challenging but entirely commonplace task of

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52. *Id.* at 423.

53. *See id.* at 421 ("We hold 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.").

balancing constitutional interests.[54] *Garcetti* thus reflects a distorted understanding of government speech that overstates government's own expressive interests while undermining the public interest in transparent government.

54. *See id.* at 434 (Souter, J., dissenting) ("[W]hen constitutionally significant interests clash, resist the demand for winner take all . . . ."); Charles W. "Rocky" Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism,* 15 WM. & MARY BILL. RTS. J. at 1173, 1187 (2007) ("Eschewing the prevailing balancing standard governing [government employee free speech] claims, the Court adopted a new categorical rule banning any constitutional safeguards.").