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### Garcetti v. Ceballos: Government Workers, Whistleblowing and the First Amendment

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supervisor), of his concerns, and drafted a memorandum to them in which he recommended that criminal charges in a case assigned to him be dropped, because he suspected the Deputy Sheriff's averments used to obtain a search warrant were untrue.<sup>8</sup> Ceballos, Sundstedt, and Najera met with the Deputy Sheriff and other representatives of the Sheriff's Office to discuss the affidavit; the meeting became heated, and one representative from the Sheriff's Office sharply criticized Ceballos for his handling of the case.<sup>9</sup> Ceballos' superiors subsequently rejected his advice, and decided to move ahead with the case pending the outcome of defense counsel's motion challenging the search warrant.<sup>10</sup> During the hearing on the motion to challenge the warrant, Ceballos provided testimony favorable to the defendant, but the Court rejected the challenge to the warrant.<sup>11</sup>

Thereafter, Ceballos contended, the District Attorney's office engaged in retaliatory conduct for testifying truthfully at the hearing: demoting him from his calendar deputy position to a trial deputy position, transferring him to another courthouse significantly increasing his commute to work, and denying him a promotion.<sup>12</sup>

Ceballos then pursued a claim for lost wages and compensatory damages under Rev. Stat. § 1979, 42 U.S.C. § 1983 for adverse employment actions committed by his supervisors in retaliation for his engagement in speech protected by the First Amendment.<sup>13</sup> Ceballos pursued his claim against Gil Garcetti, the District Attorney, Sundstedt, and Najera, in their individual capacities.<sup>14</sup> He also pursued his claim against Garcetti in his official capacity and the County of Los Angeles.<sup>15</sup>

The District Court granted summary judgment in favor of the three individual defendants, because they had qualified immunity to the claim presented,<sup>16</sup> and in favor of the County of Los Angeles, because it was immune to the claim presented under the Eleventh Amendment.<sup>17</sup> The District Court also ruled that, because Ceballos wrote his memorandum as part of his official duties, he was not entitled to First Amendment protection for the contents of the memorandum.<sup>18</sup>

On appeal, the United States Court of Appeals for the Ninth Circuit reversed the District Court, deciding that, for the purposes of summary judgment, whistleblowing accusations and testimony by an assistant district attorney that an affidavit prepared by a deputy sheriff and used to obtain a search warrant contained grossly inaccurate statements, constituted protected speech under the First Amendment, even though the speech in question was expressed pursuant to his duties of employment.<sup>19</sup> In doing so, the Ninth Circuit relied on its own precedent rejecting the view that expression made pursuant to official responsibilities lacks First Amendment protection;<sup>20</sup> accordingly, the Ninth Circuit did not address whether Ceballos engaged in speech in his capacity as a citizen.<sup>21</sup>

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

<sup>9</sup> *Id.* at 1956.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* Because Ceballos was dissatisfied with the decision of his supervisors, he spoke to defense counsel and told him he believed the affidavit contained false statements. *See* Ceballos v. Garcetti, 361 F.3d. at 1168, 1171 (2004).

<sup>12</sup> *Id.* Ceballos also contended the District Attorney's office engaged in rude and hostile conduct, reassigned one of his murder cases to a junior deputy district attorney with no experience trying such cases, and barred him from handling any additional murder cases, thereby significantly reducing his chances for promotion. Ceballos v. Garcetti, 361 F.3d. at 1171-72.

<sup>13</sup> 126 S. Ct. at 1956. 361 F.3d at 1170.

<sup>14</sup> 361 F.3d at 1172.

<sup>15</sup> *Id.*

<sup>16</sup> 126 S. Ct. at 1956. 361 F.3d at 1172.

<sup>17</sup> 126 S. Ct. at 1956. 361 F.3d at 1172.

<sup>18</sup> 126 S. Ct. at 1956.

<sup>19</sup> 126 S. Ct. at 1956. 361 F.3d at 1173, 1178.

<sup>20</sup> 361 F.3d at 1174-75, citing cases including Roth v. Veteran's Admin. of Gov't of United States, 856 F.2d 1401, 1406 (9<sup>th</sup> Cir. 1988).

<sup>21</sup> 126 S. Ct. at 1956.

## GARCETTI V. CEBALLOS: GOVERNMENT WORKERS, WHISTLEBLOWING, AND THE FIRST AMENDMENT—LET THE LEAKS BEGIN

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### I. INTRODUCTION

In *Garcetti v. Ceballos* (hereinafter referred to as *Ceballos*),<sup>1</sup> the United States Supreme Court ruled that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”<sup>2</sup> This decision eviscerates First Amendment protection accorded to communications of government workers when their speech is undertaken as part of their regular job responsibilities and restricts government workers who engage in whistleblowing to statutory protections.<sup>3</sup> Because there are more than twenty million public employees and “because public employees by virtue of their access to information and experience regarding the operations, conduct, and policies of government agencies and officials, ‘are positioned uniquely to contribute to the debate on matters of public concern,’”<sup>4</sup> this decision will likely have a significant impact on First Amendment jurisprudence.

### II. FACTUAL BACKGROUND

Richard Ceballos, a deputy district attorney in the Los Angeles County District Attorney's Office, who in his role as calendar deputy exercised supervisory authority over other lawyers, was advised by a defense attorney that inaccuracies appeared in an affidavit submitted to obtain a search warrant and that he would file a motion to challenge the warrant.<sup>5</sup> Ceballos reviewed the affidavit, inspected the location it described, and determined that the warrant contained serious misrepresentations.<sup>6</sup> When Ceballos subsequently spoke to the Deputy Sheriff whose averments appeared in the affidavit, he was not satisfied with the explanations provided.<sup>7</sup> Ceballos notified his supervisors, Deputy Head District Attorney Frank Sundstedt and Carol Najera (his immediate

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<sup>1</sup> *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006).

<sup>2</sup> *Id.* at 1952.

<sup>3</sup> David L. Hudson, Jr., *When Does the Constitution Protect Public Employees' Workplace Speech*, ABA PREVIEW, September 26, 2005, at 44.

<sup>4</sup> *Ceballos v. Garcetti*, 361 F.3d at 1168, 1175 (9<sup>th</sup> Cir. 2004).

<sup>5</sup> 126 S. Ct. 1951 at 1955.

<sup>6</sup> *Id.* (The affidavit described a long driveway, and Ceballos thought it was a separate roadway; the affidavit described tire tracks leading to the premises covered by the warrant, and Ceballos concluded the road's composition made it impossible to leave tire tracks).

<sup>7</sup> *Id.*

### III. FIRST AMENDMENT PROTECTION OF JOB-RELATED SPEECH OF PUBLIC EMPLOYEES

When the Supreme Court of the United States granted certiorari in *Ceballos* on February 28, 2005, it identified the question presented as follows:

Should a public employee's purely job-related speech, expressed strictly pursuant to the duties of employment, be cloaked with First Amendment protection simply because it touches on a matter of public concern, or should First Amendment protection also require the speech to be engaged in "as a citizen," in accordance with this Court's holdings in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983)?<sup>22</sup>

Argument was conducted before the United States Supreme Court on October 12, 2005,<sup>23</sup> while Justice O'Connor was a member of the Court.<sup>24</sup> Justice Alito took Justice O'Connor's seat on the Court on January 31, 2006, and the case was restored to the calendar on February 17, 2006, and reargued on March 21, 2006.<sup>25</sup> That Justice Alito joined the majority in the five-to-four decision confirms that the Court was divided four-to-four without Justice O'Connor's vote and that Justice Alito's vote was needed to break the deadlock.<sup>26</sup>

In reaching its decision in *Ceballos*, the United States Supreme Court adopted the so-called *per se* rule, under which public employees are denied First Amendment protection for speech that occurs within the scope of their employment duties,<sup>27</sup> and resolved inconsistent decisions among the Circuit Courts.<sup>28</sup>

In order to assess the impact of the United States Supreme Court decision in *Ceballos*, this article will closely review the two major decisions, *Pickering v. Board of Education*<sup>29</sup> and *Connick v. Myers*,<sup>30</sup> which gave rise to the *Pickering-Connick* test applied to claims by public employees that their First Amendment rights have been violated when they engaged in speech as part of their jobs. Thereafter this article will examine the manner in which the United States Supreme Court in

*Ceballos* applied the *Pickering-Connick* test to the deputy district attorney's speech, and explore the public policy considerations affected by the *per se* rule declaring that job-related speech by public employees lacks First Amendment protection.

### IV. PICKERING-CONNICK TEST OF PUBLIC EMPLOYEE JOB-RELATED SPEECH

In *Pickering v. Board of Education*,<sup>31</sup> the U.S. Supreme Court ruled that firing a high school teacher for writing and sending a letter critical of the Board of Education and the district superintendent of schools to a local newspaper violated the First Amendment.<sup>32</sup> Published in the midst of a campaign by the Board and the superintendent to encourage the approval of a tax increase to fund educational programs of the Township High School District in Will County, Illinois,<sup>33</sup> the letter in question criticized the manner in which the Board and superintendent handled prior proposals to raise school district revenues and allocated financial resources between educational and athletic programs.<sup>34</sup> The Board fired Pickering for writing and publishing the letter, and, pursuant to Illinois law, conducted a hearing on the dismissal.<sup>35</sup> Affirming its decision to fire Pickering, the Board concluded that statements in the letter were false, impugned the reputations of Board members and the school administration, and fomented controversy and conflict among the teachers, administrators, and Board members.<sup>36</sup> Pickering's dismissal from his teaching position was subsequently upheld by the Illinois Supreme Court.<sup>37</sup>

The U.S. Supreme Court reversed the decisions.<sup>38</sup> The Court noted initially that the state's interest in regulating the speech of its employees differs significantly from the state's interest in regulating the speech of its citizens. The Court emphasized that a balance must be achieved between the right of the teacher as a citizen in commenting on public issues and the interest of the government as an employer in promoting efficiency in public services through its employees.<sup>39</sup> Examining the statements contained in the published letter, the Court noted that, while they questioned the need for additional tax revenues, they were not directed toward any individuals with whom Pickering worked on a daily basis and hence could not affect either discipline or harmony among coworkers.<sup>40</sup> Further, because Pickering did not have a close working relationship with either the Board or the superintendent, the Court questioned whether his comments breached or strained their interactions as claimed by the Board.<sup>41</sup> Likewise, because Pickering's comments on matters of public concern were "substantially correct," the Court rejected the Board's position that they furnished valid grounds for his dismissal.<sup>42</sup> Moreover, the Court emphasized that the questions raised by Pickering in his letter related to matters of public concern that are best resolved through free and open debate, and that Pickering, as a teacher in the school district, likely formulated, and should not be prohibited from providing, a relevant opinion about the manner in which school funds should be expended.<sup>43</sup> Finally, the Court noted that, while Pickering's statements were critical of his ultimate employer, they had no negative impact on the performance

<sup>22</sup> <http://www.supremecourtus.gov/qp/04-00473qp.pdf>. (last visited March 6, 2007). Authors retain copy.

<sup>23</sup> United States Supreme Court Docket No. 04-473 at <http://www.supremecourtus.gov/docket/04-473.htm> (last visited March 6, 2007). Authors retain copy.

<sup>24</sup> David L. Hudson, Jr., *The Return of the Reargument: Supreme Court to Hear Again a Key Employee Free Speech Case*, ABA JOURNAL REPORT, March 17, 2006, at 1, <http://www.abanet.org/journal/redesign/m17employ.html> (last visited July 3, 2007). Authors retain copy.

<sup>25</sup> United States Supreme Court Docket No. 04-473 at <http://www.supremecourtus.gov/docket/04-473.htm> (last visited March 6, 2007). Authors retain copy.

<sup>26</sup> Hudson, *supra* note 24, at 1, and *Midyear Report*, LAW MATTERS ABA, Spring 2006 at 6.

<sup>27</sup> 126 S. Ct. at 1960.

<sup>28</sup> The Fourth Circuit determined that there is no First Amendment protection of public employees' speech made in the course of carrying out their employment obligations. *Urofsky v. Gilmore*, 216 F.3d 401, 407-08 (4<sup>th</sup> Cir. 2000). The second, third, fifth, sixth, seventh, tenth and eleventh circuits ruled that the First Amendment protects public employees' speech when made in the course of carrying out their employment duties. *Lewis v. Cowen*, 165 F.3d 154, 161-64 (2d Cir. 1999); *Baldassare v. New Jersey*, 250 F.3d 188, 197 (3rd Cir. 2001); *Kennedy v. Tangipahoa Parish Library Bd. of Control*, 224 F.3d 359, 367-376 (5<sup>th</sup> Cir. 2000); *Rodgers v. Banks*, 344 F.3d 587, 597-602 (6<sup>th</sup> Cir. 2003); *Taylor v. Keith*, 338 F.3d 639, 643-46 (6<sup>th</sup> Cir. 2003); *Delgado v. Jones*, 282 F.3d 511, 519 (7<sup>th</sup> Cir. 2002); *Dill v. City of Edmund*, 155 F.3d 1193, 1202-03 (10<sup>th</sup> Cir. 1998); and *Fikes v. City of Daphne*, 79 F.3d 1079, 1084 (11<sup>th</sup> Cir. 1996). When the United States Supreme Court granted certiorari on February 28, 2005, it recognized "the growing inter-circuit conflict on the question of whether a public employee's purely job-related speech is constitutionally protected" in its description of the questions presented in *Garcetti v. Ceballos*. See United States Supreme Court Docket No. 04-473 at <http://www.supremecourtus.gov/docket/04-473.htm> (last visited March 6, 2007). Authors retain copy.

<sup>29</sup> 391 U.S. 563 (1968).

<sup>30</sup> 461 U.S. 138 (1983).

<sup>31</sup> *Pickering v. Board of Education*, 391 U.S. 563 (1968).

<sup>32</sup> *Id.* at 574-75.

<sup>33</sup> *Id.* at 564, 566.

<sup>34</sup> *Id.* at 566.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 567.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 574.

<sup>39</sup> *Id.* at 568.

<sup>40</sup> *Id.* at 569-70.

<sup>41</sup> *Id.* at 570.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 572.

of his daily duties as a teacher or the operations of the high school,<sup>44</sup> and consequently should be treated no differently than comments of members of the general public.<sup>45</sup> More particularly, “absent proof of false statements knowingly or recklessly made by him, a teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.”<sup>46</sup>

*Pickering* provides significant First Amendment protection to government employees by focusing on several key inquiries: whether the speech in question was directed to individuals with whom or under whose supervision the employee worked; whether the speech impacted either the discipline of, or harmony among, government workers; whether the speech has a negative impact on the performance of the government workers’ daily responsibilities; and whether the speech is related to, and provides relevant information about, topics best resolved by free and open debate. More particularly, to the extent the employee’s speech contributes to debate about issues of public concern without negatively impacting the government workplace or operations, it should be permitted; in contrast, to the extent the employee’s speech interferes with efficient delivery of public services by the government agency or department and fails to contribute to public debate about issues of public concern, it can be restrained.

In *Connick v. Myers*,<sup>47</sup> the District Attorney of New Orleans proposed to transfer an Assistant District Attorney from one section of the criminal court to another, requiring her to prosecute different criminal matters.<sup>48</sup> The Assistant District Attorney objected to the transfer and, in an effort to bolster her position, developed and distributed to fifteen assistant district attorneys a questionnaire designed to solicit their views concerning the transfer policy, office morale, confidence in supervisors, the need for a grievance committee, and pressure to work in political campaigns.<sup>49</sup> When the District Attorney learned of the questionnaire, he fired the Assistant District Attorney, because she refused to accept the transfer and because he considered her distribution of the questionnaire an act of insubordination.<sup>50</sup> The discharged Assistant District Attorney filed suit under 42 U.S.C. § 1983, alleging her employment termination improperly infringed on her right to free speech.<sup>51</sup> The Federal District Court concluded that the Assistant District Attorney was fired because of the questionnaire, that the questionnaire involved matters of public concern, and that the state had not demonstrated that the survey interfered with the operations of the District Attorney’s office.<sup>52</sup> It ordered her reinstated to her job, and awarded her backpay, damages and attorney’s fees.<sup>53</sup> The Court of Appeals for the Fifth Circuit affirmed, and the District Attorney appealed to the U.S. Supreme Court.<sup>54</sup>

The U.S. Supreme Court framed the issues presented as seeking “a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”<sup>55</sup> The first step in ascertaining how to balance the two interests is to establish whether the government employee’s speech addresses a matter of public concern.<sup>56</sup> This is “determined by the content, form, and context of a given statement, as revealed by the

whole record.”<sup>57</sup> Applying this test to the speech of the fired Assistant District Attorney, the Court concluded that her speech “with one exception” failed to “fall under the rubric of matters of public concern.”<sup>58</sup> More particularly, the Court determined that the responses to the Assistant District Attorney’s questions relating to the transfer policy, office morale, confidence in supervisors, and the need for a grievance committee were merely “extensions of [her] dispute over [her] transfer to another section of the criminal court,”<sup>59</sup> and would convey no information of interest to the public other than her disagreement with the transfer,<sup>60</sup> because the information gathered fails to address the performance of the office of the District Attorney.<sup>61</sup> Further, the Court stated, the disaffected employee simply seeks “to gather ammunition for another round of controversy with her superiors” and to turn her displeasure with the proposed transfer to another criminal section into a “cause celebre.”<sup>62</sup> Likewise, the Court noted, “a questionnaire not otherwise of public concern does not attain that status because its subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest.”<sup>63</sup> Indeed, “[t]o presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case,”<sup>64</sup> and transform all personnel issues into First Amendment controversies.<sup>65</sup> Observing that “as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees,” the Court cautioned that the First Amendment does not require government offices to engage in roundtable discussions of employee gripes about internal office matters.<sup>66</sup> Significantly, because the four above enumerated issues did not constitute matters of public concern, there was no need to address the balance between the speech interests of the fired Assistant District Attorney and the need of the District Attorney to promote the operational efficiency of his office.

Nonetheless, the Court also decided that one question in the questionnaire did “touch upon a matter of public concern,”<sup>67</sup> namely, whether assistant district attorneys “ever feel pressured to work in political campaigns on behalf of office supported candidates.”<sup>68</sup> That being so, the government is required to justify the employee’s discharge in light of the nature of the employee’s expression.<sup>69</sup> The Court noted that the government’s interest in maintaining “efficiency and integrity in the discharge of official duties” and “proper discipline in the public service”<sup>70</sup> should be accorded “full consideration,” because, as an employer, it requires “wide discretion and control over the management of its personnel and internal affairs,” including “the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch,” in order to avoid disruptions in employee morale, harmony and efficiency.<sup>71</sup> The Court also observed that the District Attorney characterized the actions of his dismissed Assistant District Attorney as an act of insubordination that interfered with employee working relationships and triggered a “mini-insurrection,”<sup>72</sup> and that the government as an employer need not “allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest

<sup>44</sup> *Id.* at 573.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 574. *Accord* Board of County Commissioners v. Umbehr, 518 U.S. 668 (1996) (nonrenewal of independent contractor’s trash hauling contract in retaliation for criticisms of the Board of County Commissioners violated the First Amendment).

<sup>47</sup> 461 U.S. 138 (1983).

<sup>48</sup> *Connick v. Myers*, 461 U.S. 138, 140 (1983).

<sup>49</sup> *Id.* at 141.

<sup>50</sup> *Id.*

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

<sup>52</sup> *Id.* at 142.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 147.

<sup>57</sup> *Id.* at 147-48.

<sup>58</sup> *Id.* at 148.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at note 8.

<sup>64</sup> *Id.* at 149.

<sup>65</sup> *Id.*

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

<sup>67</sup> *Id.*

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

<sup>69</sup> *Id.* at 150.

<sup>70</sup> *Id.* at 151.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

before taking action.”<sup>73</sup> Likewise, the Court concluded that “the time, place and manner” in which the questionnaire was distributed supported the firing of the Assistant District Attorney: the survey was distributed in, and completed by co-workers, in the workplace during working hours, and the survey questions themselves buttressed the District Attorney’s concern that the questionnaire would disrupt office operations.<sup>74</sup> Similarly, the Court emphasized that the administration of the questionnaire in the context of an internal transfer dispute constituted a threat to the authority of the District Attorney to manage the office.<sup>75</sup> In contrast, the Court characterized the nature of the questionnaire as touching “in only a most limited sense” on issues of public concern,<sup>76</sup> because it related largely to “an employee grievance concerning an internal office policy,” and accordingly had only “limited First Amendment interest.”<sup>77</sup> On balance, then, the Court decided that, given the underwhelming First Amendment significance of the questionnaire compared to the disruption in office operations, the challenge to the District Attorney’s authority, and the negative impact on office working relationships, firing of the Assistant District Attorney “did not offend the First Amendment.”<sup>78</sup>

Clearly *Connick* counterbalances *Pickering* in those instances in which the government worker’s expression disrupts, or threatens to disrupt, the operations of the government workplace. To begin with, to the extent the issues raised by the disaffected government worker are related to internal workforce issues, the U.S. Supreme Court will eschew treating them as issues of public concern. Second, the Court framed the balance that must be struck between the interest of efficient government operations required to deliver public services and the public sector employee’s right to comment on matters of public concern. In doing so, the Court narrowly circumscribed the issues raised by the discharged employee if they involved internal personnel matters, encouraged “full consideration” of possible disruption in the delivery of public services, and expressed grave concern about transforming personnel issues into First Amendment controversies that unnecessarily burden the disposition of employee complaints about internal office matters. Hence, the U.S. Supreme Court in *Connick* essentially denigrated any First Amendment concerns about government worker speech in instances in which the employee’s expression disrupts government office operations, undermines the authority of government supervisors, camouflages internal personnel matters as broader First Amendment issues, threatens government worker morale, or seeks to gather ammunition with which to dispute personnel decisions.

In both *Pickering* and *Connick*, the United States Supreme Court attempts to balance the right of a public employee as a citizen to comment on public issues and the interest of the government as an employer in promoting efficiency in public services through its employees. To the extent the employee’s speech contributes to debate about issues of public concern without negatively impacting the government workplace or operations, it should be permitted; in contrast, to the extent the employee’s speech interferes with efficient delivery of public services by the government agency or department and fails to contribute to public debate about issues of public concern, it can be restrained. Similarly, to the extent the employee attempts to camouflage an employee grievance as being a matter of public concern in order to distract attention from disruption of office operations, damage to employee morale, or undermining a supervisor’s authority, the speech in question will not be deemed worthy of First Amendment protection.

Notably, however, the Court did not address any connection between the speech in question—in *Pickering*, a school teacher’s objections to the manner in which the school district allocated resources to educational and athletic programs, and in *Connick*, an assistant district attorney’s attempt to gather ammunition with which to challenge a personnel decision—and the employee’s job responsibilities for the purpose of determining whether the speech in question is

entitled to First Amendment protection.<sup>79</sup> Indeed, it was not until the United States Supreme Court decision in *Ceballos* that one prong of the *Pickering-Connick* balancing test (the right of the government employee as a citizen to comment on public issues) became a necessary condition to First Amendment protection.

## V. UNITED STATES SUPREME COURT DECISION IN *CEBALLOS*

The United States Supreme Court began its analysis by reviewing the *Pickering-Connick* test, and characterized it as follows:

[T]wo inquiries [guide] interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer’s reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. This consideration reflects the importance of the relationship between the speaker’s expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity’s operations.<sup>80</sup>

The Court then noted that government employees “necessarily must accept limitations on their freedoms” to accommodate the need of the government to control its employees’ words and actions to ensure efficient delivery of services to the public, and to prevent government workplace decisions and grievances from being converted into constitutional issues.<sup>81</sup> The Court emphasized that two considerations were not dispositive: that Ceballos expressed his recommendation inside the District Attorney’s office and not publicly, and that the memo “concerned subject matter of Ceballos’ employment.”<sup>82</sup> Rather, the “controlling factor” was that Ceballos communicated his

<sup>73</sup> *Id.* at 152.

<sup>74</sup> *Id.* at 153.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 154.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> This is consistent with other United States Supreme Court decisions examining disciplinary actions taken against public employees who spoke out on matters of public concern. *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967) (striking down a New York statute that disqualified members of the Communist party for employment in the public schools or state government, and required the removal of those who advocate or teach doctrine of forcible overthrow of government from such employment); *Perry v. Sindermann*, 408 U.S. 593, 595-96 (1972) (striking down the non-renewal of the teaching contract of a faculty member at Odessa Junior College, who served as the president of the Texas Junior College Teachers Association and testified before the committees of the Texas Legislature in opposition to the plan of the Board of Regents to elevate Odessa Junior College to four-year status); and *Rankin v. McPherson*, 483 U.S. 378 (1987) (overturning the firing of a data entry clerical worker employed in the Constable’s Office of Harris County, Texas, because, upon hearing on an office radio that there was an attempted assassination attempt on President Ronald Reagan, she was overheard to remark to a co-worker that, “if they go for him again, I hope they get him.”)

<sup>80</sup> *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1958 (2006). As will be discussed more fully below in part VI, the United States Supreme Court’s description of the first inquiry does not quote language directly from either *Pickering* or *Connick*, but simply drops the phrase “as a citizen” into the determination of whether the speech related to a matter of public concern. The restriction “as a citizen” was never employed in either *Pickering* or *Connick* or its progeny in the discussion and resolution of the public concern issue. Rather the United States Supreme Court in those decisions completed the first step—determining whether the government employee’s speech addresses a matter of public concern—by simply examining the content, form, and context of the speech as revealed by the whole record. When it did so, it did not address whether or not the speech was communicated pursuant to the government workers job responsibilities.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 1959.

concerns about the search warrant affidavit “pursuant to his duties as a calendar deputy.”<sup>83</sup> The Court said:

That consideration—the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case—distinguishes Ceballos’ case from those in which the First Amendment provides protection against discipline.<sup>84</sup>

The Court held “that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for the First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”<sup>85</sup>

The Court provided three justifications for its conclusion: (1) restricting statements made pursuant to the employee’s official duties does not infringe upon a public employee’s freedom of expression because the government has the right to control speech it has “commissioned or created”;<sup>86</sup> (2) recognizing the right of the government to control its “employees’ work product” does not diminish the employee’s right to engage in public discourse and the constitutional protection accorded such speech<sup>87</sup> when that speech is “made outside the duties of employment”;<sup>88</sup> and (3) providing First Amendment protection to speech created pursuant to the public employee’s job responsibilities will “commit the federal and state courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business,”<sup>89</sup> a scenario which is “inconsistent with sound principles of federalism and the separation of powers.”<sup>90</sup>

Finally, the Court eschewed the possibility its decision may result in diminished expression by government workers. Rather, a public employer can “encourage its employees to voice concerns privately” by “instituting internal policies and procedures that are receptive to employee criticism.”<sup>91</sup> Providing such “an internal forum” will discourage public employees from “concluding the safest avenue of expression is to state their views in public.”<sup>92</sup> Likewise, because the determination of whether or not the expression falls within the scope of the government employees’ job responsibilities is “a practical one,” because “[f]ormal job descriptions often bear little resemblance to the duties an employee actually is expected to perform,”<sup>93</sup> and because listing a given task in a job description is not dispositive of whether or not it falls with the scope of the employee’s job responsibilities, the Court concluded government employers will not be successful in diminishing their employees’ speech “by creating excessively broad job descriptions.”<sup>94</sup> Lastly, while government employees lack First Amendment protection against their government employer’s disciplinary actions, they nonetheless may take advantage of “the powerful network of

legislative enactments—such as whistleblower protection laws and labor codes—available to those who seek to expose wrongdoing.”<sup>95</sup>

## VI. PUBLIC POLICY CONSIDERATIONS UNDERLYING THE *PER SE* RULE

Several public policy considerations underlie the adoption of the *per se* rule by the United States Supreme Court in *Ceballos*: (1) that the balancing test language in *Pickering*<sup>96</sup> and *Connick*<sup>97</sup> restricts First Amendment protection to those instances in which the public employee is acting as a citizen rather than as an employee; (2) that speech communicated by government workers as part of their employment responsibilities is “government speech” which lacks First Amendment protection; and (3) that protecting public employees’ speech on matters of public concern will prevent government agencies from performing their responsibilities.

### A. FIRST AMENDMENT PROTECTION OF PUBLIC EMPLOYEES’ SPEECH APPLIES ONLY WHEN THEY SPEAK AS CITIZENS

As noted above, the United States Supreme Court describes the two-prong *Pickering-Connick* test as follows:

[T]wo inquiries [guide] interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer’s reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. This consideration reflects the importance of the relationship between the speaker’s expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity’s operations.<sup>98</sup>

Notably, the United States Supreme Court’s description of the first inquiry does not quote

<sup>83</sup> *Id.* at 1959-60.

<sup>84</sup> *Id.* at 1960.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* (“Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees’ official communications are accurate, demonstrate sound judgment, and promote the employer’s mission. Ceballos’ memo is illustrative. It demanded the attention of his supervisors and led to a heated meeting with employees from the sheriff’s office. If Ceballos’ supervisors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action.”)

<sup>87</sup> *Id.* at 1960-61 (restricting government workers’ speech undertaken as part of their employment responsibilities “does not infringe any liberties the employee might have enjoyed as a private citizen”).

<sup>88</sup> *Id.* at 1961.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 1961-62.

<sup>95</sup> *Id.* at 1962. In his dissenting opinion, Justice Souter points out that the whistleblower protections cited by the majority opinion may be significantly less effective than claimed. *Id.* at 1970.

<sup>96</sup> *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968) (“arriv[ing] at a balance between the interest of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees”).

<sup>97</sup> *Connick v. Myers*, 461 U.S. 138, 147 (1983) (“[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to preview the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee’s behavior.”)

<sup>98</sup> *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1958 (2006). As will be discussed more fully below, the United States Supreme Court’s description of the first inquiry does not quote language directly from either *Pickering* or *Connick*, but simply drops the phrase “as a citizen” into the determination of whether the speech related to a matter of public concern. The restriction “as a citizen” was never employed in either *Pickering* or *Connick* or its progeny in the discussion and resolution of the public concern issue. Rather the United States Supreme Court in those decisions completed the first step—determining whether the government employee’s speech addresses a matter of public concern—by simply examining the content, form, and context of the speech as revealed by the whole record. When it did so, it did not address whether or not the speech was communicated pursuant to the government workers job responsibilities.

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Prior to *Ceballos*, the United States Supreme Court never restricted First Amendment protection to speech by public employees to communications made pursuant to their employment duties. Rather, the Court provided First Amendment protection to government employee speech that related to issues of public concern. Several decisions of the United States Supreme Court provided First Amendment protection to government workers when their communications were unrelated to their job responsibilities. That does not mean, however, that First Amendment protection is restricted to speech undertaken by a government worker in his role as citizen. In *Pickering*, the teacher published a letter questioning the manner in which the School Board handled and allocated funds raised in prior bond issues; the manner in which bond funds were used was unrelated to his role as a teacher.<sup>99</sup> In *Connick*, the assistant district attorney prepared her questionnaire to support her personal interest in retaining her job; the questionnaire was not prepared pursuant to her prosecutorial duties.<sup>100</sup> In *Perry v. Sindermann*,<sup>101</sup> a college professor, who testified before the Texas legislature in his capacity as president of the Texas Junior College Teachers Association, rather than in his role as teacher at Odessa Junior College, was deemed protected by the First Amendment.<sup>102</sup> In *United States v. National Treasury Employees Union*,<sup>103</sup> the United States Supreme Court struck down a statute prohibiting government workers from receiving honoraria for their expressive activities when they received “compensation for their expressive activities in their capacity as citizens” and their speech was unrelated to their employment responsibilities.<sup>104</sup> While all of these decisions protect the right of the government worker to engage in speech in his role as citizen rather than as government worker, there is no indication in the opinions that the protection was so restricted.

Significantly, the United States Supreme Court did provide First Amendment protection to government workers when speaking in dual roles of an employee and concerned citizen and when it was unclear whether the speech arose in their role as employee or as a citizen. In *City of Madison Joint School District v. Wisconsin Employment Relations Commission*,<sup>105</sup> the Court ruled that the school board violated the First Amendment when it prohibited a teacher from speaking at a school board meeting because he was not a union representative.<sup>106</sup> In doing so, the Court recognized that the teacher sought to address the school board both as an employee and as a concerned citizen.<sup>107</sup>

In *Givhan v. Western Line Consolidated School District*,<sup>108</sup> a public school teacher who had

been dismissed from her employment as a junior high school English teacher sought reinstatement to her job, because the school district retaliated for her private encounters with the school principal in which she complained about racially discriminatory employment policies and practices at the school. The District Court concluded that the teacher’s contract was not renewed because of her criticism of the school district, particularly the school to which she was assigned to teach, and that her dismissal violated the First Amendment.<sup>109</sup> The Court of Appeals for the Fifth Circuit reversed the District Court, ruling that, because the teacher had privately expressed her complaints and opinions to the principal, her expression was not protected under the First Amendment.<sup>110</sup> The United States Supreme Court reversed the Circuit Court’s ruling that private expression of one’s views is beyond constitutional protection, and ruled that public employees do not forfeit their protection against governmental abridgment of freedom of speech if they decide to express their views privately rather than publicly.<sup>111</sup> In reaching this decision, the Court did not address whether or not the speech in question was undertaken in her role as a teacher or citizen. Indeed, it is impossible to place the teacher’s complaints about racial discrimination into one role or the other.

In *Rankin v. McPherson*,<sup>112</sup> a data entry clerical worker employed in the Constable’s Office of Harris County, Texas, was fired because, upon hearing on an office radio that there was an attempted assassination attempt on President Ronald Reagan, she was overheard to remark, in a private conversation with a co-worker, in an area to which the public did not have access, “[I]f they go for him again, I hope they get him.”<sup>113</sup> The United States Supreme Court applied the *Pickering-Connick* test and affirmed the decision of the Fifth Circuit Court of Appeals that the deputy constable’s remark addressed a matter of public concern and that the deputy constable’s First Amendment right outweighed the government’s interest in maintaining an efficient and disciplined workplace.<sup>114</sup> The record is unclear, and the Court did not specifically address, whether the fired worker’s comment occurred as part of her job responsibilities.

Finally, in *Mt. Healthy City School District Board of Education v. Doyle*,<sup>115</sup> the United States Supreme Court upheld a District Court’s decision that a public school teacher’s communication to a radio station about the school’s dress code for teachers was protected by the First Amendment.<sup>116</sup> In doing so, the Court did not address, and the record does not clarify, whether the communication was made in his role as a teacher or as a citizen. Rather the Court simply reiterated the necessity to balance the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.<sup>117</sup>

Hence, close analysis of *Pickering*, *Connick* and its progeny demonstrates that, prior to *Ceballos*, the United States Supreme Court had not operationally limited First Amendment rights to government workers who speak in their role as a citizen rather than as an employee.

More importantly, adopting the *per se* rule renders the balancing test established in *Pickering* and *Connick* meaningless. The two-step balancing test requires the court (1) to ascertain whether

<sup>99</sup> *Pickering v. Board of Education*, 391 U.S. 563, 568-70 (1968) (the competing interests to be balanced are the interest of the government to promote efficiency in the delivery of public services and the interest of the public employee as a citizen to comment on matters of public concern).

<sup>100</sup> *Connick v. Myers*, 461 U.S. 138, 148 (1983).

<sup>101</sup> *Perry v. Sindermann*, 408 U.S. 593 (1972).

<sup>102</sup> *Id.* at 594-595, 598.

<sup>103</sup> *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995).

<sup>104</sup> *Id.* at 465.

<sup>105</sup> *City of Madison Joint School District v. Wisconsin Employment Relations Commission*, 429 U.S. 176 (1976).

<sup>106</sup> *Id.* at 177.

<sup>107</sup> *Id.* at 176 note 11 (“he appeared and spoke both as an employee and as a citizen exercising First Amendment rights.”)

<sup>108</sup> 439 U.S. 410, 415-17 (1979).

<sup>109</sup> *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 411, 415-17 (1979).

<sup>110</sup> *Id.* at 413.

<sup>111</sup> *Id.* at 414, 415-16 (“Neither the [First Amendment] nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public.”)

<sup>112</sup> 483 U.S. 378 (1987).

<sup>113</sup> *Id.* at 379-80 (1987).

<sup>114</sup> *Id.* at 383 (“Given the nature of [the deputy constable’s] job and the fact that she was not a law enforcement officer, was not brought by virtue of her job into contact with the public, and did not have access to sensitive information, the Court of Appeals deemed her ‘duties . . . so utterly ministerial and her potential for undermining the office’s mission so trivial’ as to forbid her dismissal for expression of her political opinion. ‘However ill-considered [her] opinion was,’ the Court of Appeals concluded, ‘it did not make her unfit’ for the job she held in [the Constable’s] office.”)

<sup>115</sup> *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1987).

<sup>116</sup> *Id.* at 284.

<sup>117</sup> *Id.*

the government worker's speech addresses a matter of public concern by examining the content, form, and context of the speech in question; and (2) to balance the government's interest in maintaining efficiency and integrity in the delivery of government services against the interest of the government worker in commenting upon matters of public concern. If the government employee's speech was communicated as part of his job responsibilities, the *per se* rule precludes the court from performing the first step, examining the speech in question and ascertaining whether it is really matter of public concern. Notably, the United States Supreme Court has decided that the test for determining whether the speech addresses a matter of public concern is the same as that used for determining whether a cause of action for invasion of privacy exists.<sup>118</sup> That test can be applied only by examining the content of the speech in question. The pivotal issue, then, is not the role of the speaker in engaging in speech, but the nature of the speech itself.

Further, the role of the speaker (employee or citizen) is examined in step two after determining the speech involves a matter of public concern. The purpose of determining the role of the speaker is to ascertain whether the speech really relates to a personnel matter (in which case the government has considerable latitude to control the speech), rather than a matter of public concern. As the United States Supreme Court noted in *Connick*:

When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable.<sup>119</sup>

Hence, because the previously employed *Pickering-Connick* test was specifically designed to weed out employee claims that were personnel issues and provided government agencies with "wide discretion and control over the management of its personnel and internal affairs," including "the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch," in order to avoid disruptions in employee morale, harmony, and efficiency, it is difficult to see how the *Ceballos* rule is an improvement of the *Pickering-Connick* test.<sup>120</sup>

#### B. GOVERNMENT WORKER SPEECH IS GOVERNMENT SPEECH

In adopting the *per se* rule in *Ceballos*, the United States Supreme Court emphasized that the government as employer can exert control over the speech the government "has commissioned or created."<sup>121</sup> In other words, government-funded speech is the equivalent of government speech,

<sup>118</sup> *Connick v. Myers*, 461 U.S. 138, 143 n. 5 (1983) ("The question of whether expression is of a kind that is of legitimate concern to the public is also the standard in determining whether a common-law action for invasion of privacy is present."). See *City of San Diego v. Roe*, 125 S. Ct. 521, 525-26 (2004) ("public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication").

<sup>119</sup> *Connick v. Myers*, 461 U.S. 138, 146 (1983).

<sup>120</sup> *Id.* at 151.

<sup>121</sup> *Garcetti v. Ceballos*, 126 S. Ct. at 1960, citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) ("When the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.")

and government speech is not protected by the First Amendment.<sup>122</sup> Hence, because *Ceballos*' speech was required as part of his job responsibilities as a prosecuting attorney and because *Ceballos*' salary was paid by a government agency, he engaged in government speech and cannot claim First Amendment protection.

This analysis misses the mark. To begin with, the record does not demonstrate that the District Attorney's office developed a prescribed message that it wished to disseminate to the public, and that *Ceballos* undermined or failed to support a government message. Further, *Ceballos*' speech did not advocate a program or policy of the government or support a government viewpoint. Rather, *Ceballos* simply attempted to meet his obligation as a prosecutor to provide all exculpatory materials in his possession to the defendant. Likewise, that the communication occurred while fulfilling his employment duties and earning his salary does not necessarily transform the speech into government speech.<sup>123</sup> If that were the case, the questionnaire developed and distributed by the assistant district attorney during work hours in *Connick* would have been considered government speech. Hence *Ceballos*' speech cannot necessarily be deemed government speech beyond the protection of the First Amendment.<sup>124</sup>

In the final analysis, *Ceballos* may be better understood simply as another application of the *government speech* doctrine that removes the speech under consideration from the ambit of the First Amendment. As described by the United States Supreme Court in *Rosenberger v. Rector and Visitors of the University of Virginia*, the doctrine of government speech permits the government to promote its policies and, in doing so, to say what it wishes without regard to First Amendment constraints:

[W]hen the state is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists

<sup>122</sup> *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217, 229 (2000) ("funds raised by the government will be spent for speech and other expression to advocate and defend its own policies"). *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. 2055, 2062 (2005) ("Compelled support of government—even those programs of government one does not approve of—is of course perfectly constitutional, as every taxpayer must attest. And some government programs involve, or entirely consist of, advocating a position. 'The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.' We have generally assumed, though not yet squarely held, that compelled funding of government speech does not alone raise First Amendment concerns."). *Legal Services Corp. v. Valasquez*, 532 U.S. 533 541 (2001) ("viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker"). *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 211-12 (2003) (requiring public libraries receiving federal funding to install internet filtering software to block obscene material does not violate the First Amendment).

<sup>123</sup> *Latino Officers Ass'n v. City of New York*, 196 F.3d 468 (2d Cir. 1999) ("not all speech by a government agent is government speech").

<sup>124</sup> *Legal Services Corp. v. Valasquez*, 531 U.S. 533, 542-49 (2001) (speech by legal aid attorneys is not government speech even if their salaries are paid by the government). *People for the Ethical Treatment of Animals, Inc. v. Gittens*, 414 F.3d 23 (DC Cir. 2005) ("We think it important to identify precisely what, if anything, constituted speech of the government. As to the message any elephant or donkey conveyed, this was no more the government's speech than are the thoughts contained in the books of a city's library. It is of no moment that the library owns the books, just as the District of Columbia owned the donkeys and elephants. Those who check out a Tolstoy or Dickens novel would not suppose that they will be reading a government message. But in the case of a public library, as in the case of the Party Animals exhibit, there is still government speech. With respect to the public library, the government speaks through its selection of which books to put on the shelves and which books to exclude. In the case before us, the Commission spoke when it determined which elephant and donkey models to include in the exhibition and which not to include. In using its 'editorial discretion in the selection and presentation of' the elephants and donkeys, the Commission thus 'engaged in speech activity'; 'compilation of the speech of third parties' is a communicative act.")



private entities to convey its own message. In the same vein, in *Rust v. Sullivan*, *supra*, we upheld the government's prohibition on abortion-related advice applicable to recipients of federal funds for family planning counseling. There, the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. 500 U.S. at 194. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.<sup>125</sup>

Further, the government may, without violating the First Amendment, levy taxes and impose mandatory fees to support its speech. As noted by the United States Supreme Court in *Board of Regents of the University of Wisconsin System v. Southworth*:

It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens. The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.<sup>126</sup>

Indeed, the United States Supreme Court ruled in *Johanns v. Livestock Marketing Ass'n*,<sup>127</sup> that the United States Department of Agriculture did not violate the First Amendment rights of beef producers and ranchers by requiring them to contribute funds to support generic advertisements for beef,<sup>128</sup> because the generic advertisements in question constituted the Government's own speech.<sup>129</sup> Just as "[citizens] have no First Amendment right not to fund government speech,"<sup>130</sup> beef producers and ranchers have no First Amendment right against compelled financing of government speech.<sup>131</sup>

Simply put, speech produced by government workers as part of their job is not protected by the First Amendment, merely because it is government speech. While adopting the doctrine of government speech provides a facile means of resolving the First Amendment claims in *Ceballos*, it is difficult to understand what the decision accomplished. Because *Ceballos* recognizes government workers' First Amendment rights when they engage in speech in the role of citizen, rather than government worker, government workers who wish to make information public may use channels of communications outside of the government workplace.<sup>132</sup> When they do so, issues of fact regarding the nature of the role they occupied when they engaged in speech—government

<sup>125</sup> *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995).

<sup>126</sup> *Board of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000). See also *Legal Services Corp. v. Valasquez*, 532 U.S. 533 541 (2001) ("viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker").

<sup>127</sup> *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. 2055 (2005).

<sup>128</sup> *Id.* at 2066.

<sup>129</sup> *Id.* at 2058.

<sup>130</sup> *Id.* at 2064.

<sup>131</sup> *Id.* at 2066. See also *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 211-12 (2003) (requiring public libraries receiving federal funding to install internet filtering software to block obscene material does not violate the First Amendment).

<sup>132</sup> In addition to placing his comments in a memorandum to his superiors, Ceballos also "spoke at a meeting of the Mexican-American Bar Association about misconduct of the Sheriff's Department in the criminal case, the lack of any policy at the District Attorney's Office for handling allegation of police misconduct, and the retaliatory acts he ascribed to his supervisors." *Garcetti v. Ceballos*, 126 S. Ct. at 1972.

worker or citizen—will arise and preclude any dismissal of the claim until summary judgment proceedings. It is difficult to see how *Ceballos* provides the government with an advantage regarding litigation of claims stemming from wrongful employer disciplinary actions.

### C. PROTECTING PUBLIC EMPLOYEES' SPEECH ON MATTERS OF PUBLIC CONCERN WILL PREVENT GOVERNMENT AGENCIES FROM PERFORMING THEIR RESPONSIBILITIES

The United States Supreme Court justifies its decision in *Ceballos* on the grounds that it will assist government employers to manage their operations more efficiently and effectively, because:

- Government employers need to control government employee speech to make sure official communications are consistent and clear.<sup>133</sup>
- Supervisors "must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission."<sup>134</sup>
- Government employers should not be restrained from evaluating employee performance and taking appropriate disciplinary or corrective action for "inflammatory or misguided" employee communications.<sup>135</sup>
- Providing government workers' communications with First Amendment Protection "would commit state and federal courts to a new, permanent and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business,"<sup>136</sup> and would create a "constitutional cause of action" out of "every statement a public employee makes in the course of doing his or her job."<sup>137</sup>

In short, by adopting the *per se* rule, the Court seeks to prevent government workers from transforming their job-required speech into actionable First Amendment claim(s), clogging courtrooms with First Amendment-based retaliation claims, and preventing government agencies from fulfilling their responsibilities by bogging them down defending those claims. Further, faced with the possibility of First Amendment claim, supervisors may become reluctant to undertake appropriate employee evaluations and disciplinary actions, because they fear those actions will be linked to prior instances of job-related speech that relate to matters of public concern.

Because the record fails to disclose data related to the number of First Amendment claims pursued by government workers, the efficacy of this argument cannot be determined.<sup>138</sup> Further, and in any event, by requiring the court to examine the content, form, and context of the speech, the *Pickering-Connick* test ascertains, (1) whether the government worker is attempting to pursue an internal workplace grievance or to communicate information that is of legitimate news interest; and (2) whether the speech causes any disruption or inefficiency in the operations of the government office.<sup>139</sup> It is certainly true that adoption of the *per se* rule may permit an earlier disposition of First Amendment claims at the pleadings stage. Nonetheless, as noted above, the

<sup>133</sup> *Id.* at 1960.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 1961.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> In his dissenting opinion, Justice Souter notes that, in those circuits that have recognized *Ceballos* claims, there was no debilitating flood of litigation." *Id.* at 1968.

<sup>139</sup> *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) ("In performing the balancing, the statement will not be considered in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose. We have previously recognized as pertinent considerations whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.")

determination of whether government workers engaged in speech pursuant to their employment responsibilities or pursuant to their role as citizens is a factual determination which may preclude dismissal of the cause of action prior to summary judgment. Likewise, deprived of First Amendment protection when the speech arises pursuant to their employment responsibilities, government workers are given an incentive to make their disclosures directly to the press or outside organizations rather than communicating their concerns internally within the government agency, thereby creating disruption of a different nature within the government agency. Further, in order to stem the flow of employee speech through non-government channels, government agencies may be tempted to adopt rules prohibiting its employees from making public disclosure of government information. In this manner, government employees are not protected if they go public with their concerns and may be fired if they do. Such a system is hardly conducive to disclosure of governmental wrongdoing. Such a system also reduces the chance that public wrongdoing will be exposed<sup>140</sup> and provides the supervisor the opportunity to take disciplinary action against a government worker for revealing “facts that the supervisor would rather not have anyone else discover.”<sup>141</sup>

## VII. CONCLUSION

The United States Supreme Court decision of in *Ceballos* denies First Amendment protection to government workers engaged in speech as part of their jobs. This decision affects the right of more than twenty million government employees to express their views on matters of public concern without fear of retribution by their employers. Because these government workers are in the best position to uncover, divulge, and rectify government wrongdoing, their ability to do so is vitally important to the public which otherwise lacks access to such information. Unfortunately, the adoption of the *per se* rule in *Ceballos* has stripped government workers of constitutional protection against retaliation for communicating information as part of their jobs, and provides a huge incentive for them to remain silent, to avoid internal channels of communications, or to divulge the information surreptitiously.

Further, the justifications advanced by the United States Supreme Court in the majority opinion for the decision do not ring true. First, the dichotomy of government worker speech undertaken in the role of citizen rather than in the role of government employee is a limitation that does not appear in prior decisions of the United States Supreme Court. Rather, the first step in the *Pickering-Connick* test determines only whether the government worker’s speech addresses a

matter of public concern by examining the content, form, and context of the speech. While *Pickering*, *Connick*, and *Perry* involved government worker speech that did not arise from their role as employees, other decisions providing First Amendment protection to government worker speech involve situations in which the role of the government worker either is not clear or is expressly acknowledged to be speech undertaken in the role of government employee. In short, *Ceballos* has operationally limited First Amendment protection of government worker speech to those government employees who speak in their role as citizen rather than as an employee, and renders the *Pickering-Connick* test inapplicable to government worker speech occurring as part of their employment responsibilities and prevents the court from examining the impact of the speech on the operations of the government agency.

Second, by declaring that speech produced by government workers as part of their jobs lacks First Amendment protection merely because it is government speech, the United States Supreme Court hopes to eliminate burgeoning government worker litigation and protect government agencies from distracting disputes which interfere with the efficient delivery of government services. This objective may not be attainable. Government workers will be encouraged to adopt the role of citizen when they engage in speech and to avoid channels of communication provided by the government agency to vet the speech. If they do so, issues of fact regarding the nature of the role they occupied when they engaged in speech—government worker or citizen—will arise and preclude any dismissal of the claim until summary judgment proceedings. Likewise, if the speech uncovers government wrongdoing, it will be equally disruptive to efficient delivery of government operations regardless of the role of the government worker speaker. Moreover, the United States Supreme Court appears to have given the doctrine of government speech greater importance and an expanded role in resolving first amendment claims, without any accompanying analysis addressing whether or not the speech actually supports and advances the role government speech is supposed to play.

Third, the United States Supreme Court hopes to enhance the efficient and effective delivery of government services by eliminating First Amendment protection of government worker speech undertaken as part of the employee’s duties. The evils supposedly avoided by eliminating First Amendment protection include unclear or inconsistent government worker communications, restraints on evaluation of employee performance and imposition of disciplinary or corrective actions, and intrusive judicial oversight over communications between and among government employees and their superiors. This objective may be illusive. Deprived of First Amendment protection when the speech arises pursuant to their employment responsibilities, government workers are given an incentive to make their disclosures directly to the press or outside organizations rather than communicating their concerns internally within the government. Further, government agencies may be tempted to adopt rules prohibiting their employees from making public disclosure of government information. If so, government employees are not protected when they go public with their concerns, and may be fired if they do. Such a system is hardly conducive to disclosure of governmental wrongdoing. Such a system also reduces the chance that public wrongdoing will be exposed and provides the supervisor with the opportunity to take disciplinary action against the government worker for revealing information the supervisor wants to keep secret, thereby creating disruption of a different nature within the government agency.

<sup>140</sup> *San Diego v. Roe*, 125 S. Ct. 521, 525 (2004) (“Underlying the decision in *Pickering* is the recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues.”).

<sup>141</sup> Dissenting opinion of Justice Souter, 126 S. Ct. 1951, 1962. Examples provided by Justice Souter in his dissenting opinion are persuasive: *Branton v. Dallas*, 272 F.3d 730 (5<sup>th</sup> Cir. 2001) (police internal investigator demoted by police chief after bringing the false testimony of a fellow officer to the attention of a city official); *Miller v. Jones*, 444 F.3d 929, 936 (7<sup>th</sup> Cir. 2006) (police officer demoted after opposing the police chief’s attempt to “use his official position to coerce a financially independent organization into a potentially ruinous merger”); *Delgado v. Jones*, 282 F.3d 511 (7<sup>th</sup> Cir. 2002) (police officer sanctioned for reporting criminal activity that implicated a local political figure who was a good friend of the police chief); *Herts v. Smith*, 345 F.3d 581 (8<sup>th</sup> Cir. 2003) (school district official’s contract was not renewed after she gave frank testimony about the district’s desegregation efforts); *Kincade v. Blue Springs*, 64 F.3d 389 (8<sup>th</sup> Cir. 1995) (engineer fired after reporting to his supervisors that contractors were failing to complete dam-related projects and that the resulting dam might be structurally unstable); *Fox v. District of Columbia*, 83 F.3d 1491 (D.C. Cir. 1996) (D.C. Lottery Board security officer fired after informing the police about a theft made possible by “rather drastic managerial ineptitude”). See also Monica Yant Kinney, *He Blew the Whistle, Now He Is Moving On*, PHILADELPHIA INQUIRER, July 2, 2006, p. B1 (Joseph Carruth fired as principle of Brimm Medical Arts High School in Camden, New Jersey, for telling the Camden County Prosecutor’s Office that a superior pressured him to falsify student scores on state standardized tests).

