

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 GIL GARCETTI, ET AL., :

4 Petitioners, :

5 v. : No. 04-473

6 RICHARD CEBALLOS. :

7 - - - - - x

8 Washington, D.C.

9 Wednesday, October 12, 2005

10

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States at

13 10:01 a.m.

14 APPEARANCES:

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16 Petitioners.

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19 the United States, as amicus curiae, supporting the

20 Petitioners.

21 BONNIE I. ROBIN-VERGEER, ESQ., Washington, D.C.; on behalf

22 of the Respondent.

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P R O C E E D I N G S

[10:01 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument now
in *Garcetti v. Ceballos*.

Ms. Lee.

ORAL ARGUMENT OF CINDY LEE
ON BEHALF OF PETITIONERS

MS. LEE: Chief Justice Roberts, and may it
please the Court:

The issue presented is whether the first
amendment requires protection for all public employee
speech that touches on a matter of public concern without
any consideration of whether the speech was expressed as a
citizen.

The Ninth Circuit's approach affords no
consideration for the role of the speaker as a citizen or
an employee at the time of the speech. This approach,
however, plants a seed of a constitutional claim in
virtually every speech that public employees express while
carrying out their regular job duties.

JUSTICE SOUTER: Well, that's -- I mean, I can
see --

JUSTICE O'CONNOR: Do you think that the Court
tried to apply the Pickering test?

MS. LEE: The Ninth Circuit clearly did not

1 apply the Pickering test when they were doing the initial
2 analysis, a threshold analysis, of whether or not the
3 speech at issue was constitutionally protected.

4 JUSTICE O'CONNOR: Do you think that the
5 Pickering test, properly applied, would have reached a
6 different result in this case?

7 MS. LEE: Not necessarily, not the way the Ninth
8 --

9 JUSTICE O'CONNOR: It could have --

10 MS. LEE: -- Circuit viewed it.

11 JUSTICE O'CONNOR: -- certainly.

12 MS. LEE: Well, in the Ninth Circuit's view, the
13 capacity of an employee at the time of the speech is of
14 some factor. It's a determinative factor. But, in its
15 view, it was a factor that should be weighed against
16 finding no constitutional protection. In its view --

17 JUSTICE O'CONNOR: Do you think that the proper
18 application of Pickering would yield a different result in
19 this case?

20 MS. LEE: Our view is that --

21 JUSTICE O'CONNOR: Could it?

22 MS. LEE: -- if the application of the Pickering
23 is rearticulated such that when job-required speech is at
24 issue, like in this case, the employer should invariably
25 win or have a -- an easier time of prevailing. But, in

1 this case, the Ninth Circuit didn't see it that way. The
2 Ninth Circuit took the view that the capacity of an
3 employee at the time of the speech is a factor, but it
4 would be difficult for an employer to justify employment
5 decisions made when the employee is speaking as required
6 by the duties of employment.

7 JUSTICE SOUTER: Counsel, you've made the point
8 that if we go the Ninth Circuit way, every time an
9 employee gets in Dutch there's a potential first amendment
10 issue. Why hasn't that been a problem since 1988 in the
11 Ninth Circuit? I think 1988 was the year of the Circuit's
12 Roth decision. So, we haven't seen a deluge, and doesn't
13 that rather discount your argument?

14 MS. LEE: Well, our view is that if we accept
15 the Ninth Circuit's approach, then speech by public
16 employees expressed while carrying out their assigned job
17 duties would virtually -- invariably be --

18 JUSTICE SOUTER: No.

19 MS. LEE: -- a matter --

20 JUSTICE SOUTER: I realize that, but that -- as
21 I understand it, that has been true since the Ninth
22 Circuit's Roth decision in 1988. And apparently we have
23 not seen a deluge of these claims, or we would have had
24 citations to the cases. So, doesn't that rather discount
25 the concern that you express?

1 MS. LEE: Not necessarily. The Ninth Circuit
2 and the other circuits that have made, primarily, content
3 the determinative factor in finding presumptive first-
4 amendment protection have, in some regards, considered the
5 capacity of an employee as whether or not the speech
6 should be protected under the first amendment, but they've
7 done so in the context of whether or not it is a matter of
8 public concern. So, the Ninth Circuit is alone in having
9 addressed squarely whether or not job-required speech
10 should not be afforded presumptive first-amendment
11 protection. The other --

12 JUSTICE SOUTER: But didn't -- maybe I'm wrong
13 on my assumption, but didn't the Ninth Circuit take that
14 position, back in 1988?

15 MS. LEE: That's correct.

16 JUSTICE SOUTER: Okay.

17 CHIEF JUSTICE ROBERTS: What do you do with a
18 public university professor, who -- is fired for the
19 content of his lectures? Certainly, in the course of his
20 employment, that's what he's paid to do. That has no
21 first-amendment protection?

22 MS. LEE: Well, it would be our view that if the
23 assigned job duties of that university professor was to
24 speak on a particular topic or content, and they were
25 getting paid for doing that, that that is a job-required

1 speech and that it should not be entitled, presumptively,
2 to first-amendment protection. Now, that is a far cry
3 from --

4 CHIEF JUSTICE ROBERTS: "Should not be entitled,
5 presumptively, to first-amendment protection," what does
6 that mean? That there might be first amendment
7 protection, in light of the particular context --

8 MS. LEE: Our --

9 CHIEF JUSTICE ROBERTS: -- of the speech?

10 MS. LEE: Well, according to the Ninth Circuit's
11 view, anything -- anytime a public employee speaks, and
12 that speech relates to a matter of public concern, that is
13 presumptively entitled to first-amendment protection, such
14 that the burden is on the employer to justify the
15 decisions for the employment actions taken.

16 Our view is that the employer should not have
17 that burden until the first threshold is made, that the
18 speech is expressed as a citizen on a matter of public
19 concern.

20 JUSTICE SCALIA: I suppose that, in the
21 situation the Chief Justice mentioned, the professor would
22 still be able to contend that the university fired him
23 because it disagreed with the political content of his
24 speech or because of the university's politics. He could
25 still make that claim, couldn't he?

1 MS. LEE: Our approach would not prohibit that
2 --
3 JUSTICE SCALIA: But the --
4 MS. LEE: -- kind of --
5 JUSTICE SCALIA: -- burden would be on him, as
6 it would be in most cases --
7 MS. LEE: That's correct, Justice Scalia.
8 JUSTICE SCALIA: -- to show that that was true.
9 MS. LEE: That's correct.
10 JUSTICE SCALIA: Whereas, the Ninth Circuit
11 would put it on the -- put the burden on the university to
12 show that it wasn't true.
13 MS. LEE: That's correct. The ninth --
14 CHIEF JUSTICE ROBERTS: I would have thought you
15 might have argued that it's speech paid for by the
16 Government, that's what they pay him for, it's their
17 speech; and so, there's no first-amendment issue at all.
18 MS. LEE: In essence, the principle of our
19 approach is supported by those Government subsidizer
20 cases, like the Rust v. Sullivan. Our --
21 JUSTICE GINSBURG: But in Rust v. Sullivan, the
22 Government was buying a commodity. It was the
23 Government's program, and it was employing people, funding
24 people to implement that program. Here is a person whose
25 job includes being candid, serving justice, serving truth.

1 If that's part of his job responsibilities, that's quite
2 different from speaking the speech that the Government
3 wants spoken.

4 MS. LEE: Well, in this case, we think that the
5 job duties are aligned with those subsidizer cases. We
6 have a deputy district attorney whose job duty was to
7 assess the merits of the prosecution's case, which he did.
8 That includes assessing the credibility of a witness.
9 Because his conclusions in this case were that the
10 prosecution's witness was not very credible does not make
11 that task extraordinary.

12 JUSTICE SCALIA: I guess if your job is to speak
13 truth, and you speak falsehood, that's a good reason to
14 fire you, which is what happened here.

15 MS. LEE: That could be a --

16 JUSTICE STEVENS: But you don't --

17 MS. LEE: -- legitimate reason. Or --

18 JUSTICE STEVENS: -- contend that, do you?

19 MS. LEE: -- or the employer doesn't --

20 JUSTICE STEVENS: Do you contend --

21 MS. LEE: -- necessarily have to --

22 JUSTICE STEVENS: -- that his statement was
23 false? Do you contend the speech was false?

24 MS. LEE: Our position is that the speech was
25 inaccurate and that --

1 JUSTICE SOUTER: Well, but how do we know that?
2 We're at summary judgment.

3 MS. LEE: Well, we have the -- the deputy
4 district attorney's disposition memorandum assessed that
5 -- in his view, that the prosecution was going to lose on
6 the pending motion to dismiss, in -- on the grounds of
7 that the search warrant was going to be -- was going to be
8 found invalid. That was the essence of the deputy
9 district attorney's assessment. And in his memorandum, as
10 part of his prosecutorial duties, he evaluated that. He
11 told his supervisor, "Look, you know, I'm looking at the
12 credibility of the officer. I conducted an investigation.
13 I don't think we're going to win on this case." The
14 supervisor initially thought, "Okay, you have a point,"
15 but ultimately decided, "You know what? I'm not as sure
16 as you are. We have a motion to traverse on calendar,
17 where we have a judge who's going to be assessing that, so
18 let's see what happens." That judge found that the search
19 warrant was valid. And so, in essence, we have a public
20 employee who is challenging employment decisions made by
21 his supervisors --

22 JUSTICE SOUTER: No, I realize that, but where
23 do you -- how do you infer, from that, that the
24 individual, the employee, was not telling the truth?

25 MS. LEE: That --

1 JUSTICE SOUTER: If --

2 MS. LEE: It is not our --

3 JUSTICE SOUTER: -- if I --

4 MS. LEE: -- position --

5 JUSTICE SOUTER: -- if my ethical record

6 amounted to a lie every time I made a -- an inaccurate

7 prediction about what a court was going to do when I was a

8 young lawyer, I would have had a very short career.

9 [Laughter.]

10 JUSTICE SOUTER: And that seems to me as much as

11 you can infer from what this individual did.

12 MS. LEE: Justice Souter, it is not our

13 position, and we have never taken the stance, that the

14 deputy district attorney in this case was reckless in

15 regards of his speech --

16 JUSTICE SOUTER: Oh. Oh. Okay.

17 MS. LEE: -- or his evaluation.

18 JUSTICE SOUTER: So, we don't --

19 MS. LEE: Our view is that --

20 JUSTICE SOUTER: -- we don't know why it didn't

21 pan out the way he said it was going to, and we don't know

22 that he was -- that he was lying.

23 MS. LEE: Correct. What --

24 JUSTICE SOUTER: Okay.

25 MS. LEE: -- we do know is that the -- it is our

1 view that the supervisor -- while the supervisor contended
2 that he did not react to this speech adversely, that he
3 could have. We have here speech that was required by the
4 job. The employee here -- if we take the Ninth Circuit's
5 approach, we would be providing public employees a
6 constitutional right to perform their assigned job-
7 required duties in a way that is to the dissatisfaction of
8 the public employer.

9 JUSTICE SCALIA: You don't have to establish
10 that he was lying; just that his prediction -- his job,
11 was to predict, and he made a -- an erroneous -- a false
12 prediction. Don't have to show that he intended to do
13 that.

14 MS. LEE: That's correct, Justice Scalia.

15 JUSTICE STEVENS: Yes, but the disposition by
16 the -- I mean, his grievance by the hearing examiner was
17 that there was no retaliation. He assumed that the speech
18 was proper and there was no inefficiency or misconduct on
19 the part of the speaker.

20 MS. LEE: Well, the internal grievance procedure
21 resulted in the finding that the supervisors did not
22 retaliate against the deputy district attorney for the --
23 for his job-required duties.

24 JUSTICE STEVENS: And, in my understanding, that
25 was the only defense that was made for the charge, that,

1 "We didn't retaliate." There was no claim that the speech
2 was improper in any way. Am I wrong on that?

3 MS. LEE: That's correct --

4 JUSTICE STEVENS: Yes.

5 MS. LEE: -- Justice Stevens.

6 JUSTICE STEVENS: So, we assume, for purposes of
7 our case, that what he said was totally accurate and did
8 not, itself, provide the basis for saying he was
9 incompetent or something of that -- like that.

10 MS. LEE: Well, we assume, for purposes of the
11 summary judgment motion, that he was within his
12 prosecutorial duties in making those assessments.

13 JUSTICE STEVENS: Can I ask you one --

14 JUSTICE SCALIA: Excuse me, I'm not sure I
15 understood the answer to the first question, John. Was he
16 not fired because he had made an improper assessment?

17 JUSTICE STEVENS: No.

18 MS. LEE: No, our position has never been that
19 the supervisors took any retaliatory action as a result of
20 his speech. He was not fired. What the --

21 JUSTICE SCALIA: Yes.

22 MS. LEE: -- deputy district attorney --

23 JUSTICE SCALIA: Right.

24 MS. LEE: -- challenges here is various
25 employment decisions by his supervisor, claiming that they

1 were in retaliation for him having prepared and
2 communicated a disposition memorandum that was within the
3 course and scope of his employment duties.

4 JUSTICE SCALIA: And your defense is that the --

5 MS. LEE: Our --

6 JUSTICE SCALIA: -- actions were not taken with
7 any reference to this -- to this at all.

8 MS. LEE: -- our position has been that the
9 employer could certainly have reacted, or responded, to
10 the speech or the way he conducted his job, or performed
11 his job, but they didn't, in this case. There were --
12 there were legitimate business reasons for the employment
13 --

14 JUSTICE SCALIA: But that's surely a --

15 MS. LEE: -- decisions made.

16 JUSTICE SCALIA: -- surely a factual inquiry,
17 which will be disputed. If you want to win on summary
18 judgment, it seems to me you have to establish that,
19 assuming he was fired because of this speech, that would
20 be -- or not promoted because of his speech -- that would
21 be perfectly okay.

22 MS. LEE: That's correct --

23 JUSTICE SCALIA: That's where --

24 MS. LEE: -- Justice Scalia.

25 JUSTICE SCALIA: -- we are.

1 MS. LEE: That's --

2 JUSTICE SCALIA: We assume --

3 MS. LEE: -- that's correct.

4 JUSTICE SCALIA: -- that that was the reason for

5 the later actions.

6 MS. LEE: And the problem with the Ninth

7 Circuit's approach is that every time there is job

8 performance at issue that's required by the public

9 employee, it essentially puts the question before a jury

10 or a Federal court to assess the motives --

11 JUSTICE GINSBURG: But what is your position?

12 MS. LEE: -- to assess the reasonableness of the

13 decisions made.

14 JUSTICE GINSBURG: Ms. Lee, is your position

15 that job-required speech -- an assistant district

16 attorney's obligation is to give his best opinion -- that

17 job-required speech is outside the first-amendment

18 protection? You say the Ninth Circuit went too far, in

19 one way. But are you saying that as long as it's related

20 to his job, it's simply not protected by the first

21 amendment? Is that your position?

22 MS. LEE: Our view is that job-required speech

23 is not of a character for which principles of first

24 amendment should protect. In Pickering, the public school

25 teacher sought to be treated as a member of the general

1 public when he sent his letter to the newspaper
2 criticizing the allocation of financial resources by the
3 school board.

4 JUSTICE GINSBURG: Yes, I understand --

5 MS. LEE: Nothing like that arises --

6 JUSTICE GINSBURG: -- I understand that, but I
7 was confused by your answer to Justice O'Connor, because
8 the question was, Would this come out a different way
9 under Pickering? And I take it your answer is, this
10 doesn't come in the door, because he's not speaking as a
11 citizen.

12 MS. LEE: Under the current -- my -- under my
13 current understanding of the Pickering balancing -- which
14 is -- shifts the burden to the employer to justify the
15 employment decisions made -- that we don't -- I don't
16 necessarily believe that the Pickering would clearly weigh
17 in favor of the employer in this case, even though the
18 speech was so connected to the duties of employment --

19 JUSTICE GINSBURG: I'm confused. You think that
20 this -- there was an aspect of it that was citizen speech?
21 Why --

22 MS. LEE: No.

23 JUSTICE GINSBURG: I --

24 MS. LEE: We contend that it should -- in
25 situations where the speech at issue is job-required, and

1 that employee is getting paid for engaging in that kind of
2 duty, that the balance should weigh in favor of the
3 employer. And I believe the respondent --

4 JUSTICE GINSBURG: Well, what do you mean --

5 MS. LEE: -- concedes as much.

6 JUSTICE GINSBURG: -- by "the balance, weigh in
7 favor"? Because, a moment ago, I thought you answered me,
8 "This kind of speech simply is not shielded by the" --

9 MS. LEE: That's correct.

10 JUSTICE GINSBURG: -- "first amendment."

11 MS. LEE: Our -- the -- our view is that job-
12 required speech should not be protected under the first
13 amendment, so there is no need to go into the balancing,
14 there is no need to go into the weighing of the interests
15 of the employer versus the interest of the employee. The
16 balancing has been required in the -- in the line of cases
17 that the Court has held -- the language that the Court has
18 used in this first-amendment public-employment context is,
19 when you do the balancing, you weigh the interests of the
20 State, as an employer, versus the interests of the
21 employee, as a citizen, when engaging in this speech. Our
22 view is that the balancing should only be required when
23 the --

24 JUSTICE STEVENS: You would give --

25 MS. LEE: -- public employee --

1 JUSTICE STEVENS: -- greater protection to a
2 public speech than to a comment from -- on the job from --
3 to one's superior. Can you give me an example of a
4 statement that would provide -- be entitled to complete
5 first-amendment protection if made in a speech, but could
6 justify a discharge if made face to face with your
7 employer?

8 MS. LEE: I'm sorry, could you repeat that?

9 JUSTICE STEVENS: Could you give me an example
10 of a statement that would be protected in a public speech,
11 but, if made privately to your superior, could provide the
12 basis for a discharge?

13 MS. LEE: I believe the Court's referring to
14 facts similar to Givhan, where there you had speech made
15 privately to a supervisor, and --

16 JUSTICE STEVENS: Which was --

17 MS. LEE: -- this Court --

18 JUSTICE STEVENS: -- protected.

19 MS. LEE: -- this Court has found that it was
20 protected under the first amendment.

21 JUSTICE STEVENS: Yes.

22 MS. LEE: However, the Court did not need to
23 address the role of the speaker in that case, because
24 there you had an English teacher who was criticizing the
25 racial --

1 JUSTICE STEVENS: You're not --

2 MS. LEE: -- policies --

3 JUSTICE STEVENS: -- responding to my question.

4 My question is, Can you give me an example of a statement
5 that would be entitled to protection if made in a public
6 speech, but could be a basis for discharge if made face to
7 face?

8 MS. LEE: It could be in this case, where the
9 prosecutor, who is assigned, or authorized, to speak on
10 behalf of the DA's office in a pending criminal action,
11 made comments to the press about the nature of the case,
12 but, rather -- and, in this particular scenario, goes too
13 far, goes beyond what the DA's office allowed him to speak
14 on.

15 JUSTICE STEVENS: No, I'm --

16 MS. LEE: He could --

17 JUSTICE STEVENS: -- asking you if --

18 MS. LEE: -- certainly be discharged for that.

19 JUSTICE STEVENS: -- what he says privately
20 could the basis for a discharge. Surely, he couldn't be
21 discharged for what you just described.

22 MS. LEE: The -- under our approach, the issue
23 is not whether it's privately or publicly. If the job
24 requires him to speak in a -- within the internal
25 channels, then that speech -- he's doing his job, he's

1 getting paid for it, and he should not be entitled to
2 first-amendment protection.

3 Unless there are any other questions --

4 JUSTICE SOUTER: Is that --

5 MS. LEE: -- I'd like to --

6 JUSTICE SOUTER: -- is that true in this case?
7 I realize they didn't get to it on summary judgment, but
8 is that true in this case with respect to a Brady
9 disclosure?

10 MS. LEE: Brady disclosures are the obligations
11 of the district attorney's office. So, in this case, when
12 the deputy district attorney believed that it should be
13 disclosed, his supervisor had an absolute right to, say,
14 on behalf of the DA's office, challenge that decision to
15 disclose.

16 JUSTICE SOUTER: What if -- what if the lawyer
17 simply believes that he has an ethical obligation to make
18 the disclosure, and he makes it, and he is then subject to
19 retaliation? No first amendment claim on his part?

20 MS. LEE: Those ethical obligations would build
21 -- would arise from his capacity as a prosecutor.
22 Prosecutors are employees. Governmental employees have a
23 general standard of ethical conduct. That doesn't mean
24 that they are getting paid for the same assigned job
25 duties.

1 JUSTICE SOUTER: Well, does that mean -- what's
2 your answer to my question? If he makes the Brady
3 disclosure because he believes that is an ethical
4 obligation, and he is then subject to retaliation, does he
5 have a first amendment claim, or not?

6 MS. LEE: It's our view that he does not.

7 I'd like to reserve the remainder of --

8 CHIEF JUSTICE ROBERTS: Thank you --

9 MS. LEE: -- my time for rebuttal.

10 CHIEF JUSTICE ROBERTS: -- Ms. Lee.

11 Mr. Himmelfarb.

12 ORAL ARGUMENT OF DAN HIMMELFARB

13 ON BEHALF OF THE UNITED STATES,

14 AS AMICUS CURIAE, SUPPORTING PETITIONERS

15 JUSTICE O'CONNOR: What's your answer to that
16 last question, Mr. Himmelfarb?

17 MR. HIMMELFARB: A Brady obligation is an
18 obligation of a prosecutor in his capacity as a
19 prosecutor; and a Brady disclosure, like a recommendation
20 to a superior that there should be a Brady disclosure,
21 constitutes the exercise of the prosecutorial function by
22 a prosecutor. It is employee speech, and that speech, if
23 it engenders an employment action, should not be
24 sufficient for the employee to get past the first step of
25 the Pickering balancing. If there is --

1 JUSTICE O'CONNOR: So, no free-speech protection
2 under Pickering.

3 MR. HIMMELFARB: That's exactly right, Justice
4 O'Connor.

5 JUSTICE O'CONNOR: And how about this case?
6 Could it not be resolved under a proper handling of
7 Pickering?

8 MR. HIMMELFARB: Well, we think a proper
9 handling of Pickering is that respondents should not get
10 past step one of the balancing, because the speech is
11 expressed in his capacity as an employee.

12 JUSTICE O'CONNOR: Now, what about retaliation
13 claims that the employee may have? What about
14 whistleblower-type claims by an employer? Are they -- are
15 they separate from the first-amendment concerns?

16 MR. HIMMELFARB: We don't think they are,
17 Justice O'Connor, if the whistle-blowing is required by
18 the employee's speech. If an investigator in an inspector
19 general's office, whose job it is to investigate and
20 report government misconduct, reports misconduct, and an
21 action is taken as a result -- an employment action is
22 taken against them as a result -- he is demoted or
23 transferred, because it's the view of his superior that he
24 didn't perform his job properly in speaking on that issue
25 -- that should not enable the investigator to get past the

1 first step.

2 JUSTICE SCALIA: What if the reason -- what if
3 the reason for the -- for firing him is that he's a
4 Democrat and it's a Republican Administration, and the
5 speech is used as the pretext?

6 MR. HIMMELFARB: Justice Scalia, I think that
7 case would be covered by this Court's patronage cases,
8 which would absolutely prohibit that sort of employment
9 action. But in a case where it's not party affiliation
10 that motivates the employment action, if the speech is
11 expressed in carrying out the employee's duties, he may
12 have a civil-service remedy -- indeed, that's precisely
13 what the civil-service laws were designed to deal with, a
14 situation where the employee is just doing his job, an
15 action is taken against him, and there's a dispute as to
16 whether he was doing his job properly, about whether he
17 was insubordinate, or simply about whether he was --

18 JUSTICE BREYER: Suppose that we have an
19 instance where it is job related. He is not speaking as a
20 private citizen, and it's also a public concern. Now, in
21 such an instance, could we say that, at least if the
22 matter of public concern rises to the level where it's
23 related to an independent constitutional protection --
24 say, founded in the due-process clause -- under those
25 circumstances, the employer cannot unreasonably -- though

1 we give him an area of discretion, he cannot unreasonably
2 retaliate.

3 MR. HIMMELFARB: I don't think so, Justice --

4 JUSTICE BREYER: Why not?

5 MR. HIMMELFARB: -- Breyer.

6 JUSTICE BREYER: Why not? And here is an
7 independent obligation.

8 MR. HIMMELFARB: To --

9 JUSTICE BREYER: It's very unusual --

10 MR. HIMMELFARB: To --

11 JUSTICE BREYER: -- but it's there.

12 MR. HIMMELFARB: To use the example of this
13 case, if respondent advised his supervisor that, in his
14 professional judgment, a Brady disclosure should be made,
15 and if the supervisor disagreed with him, and if
16 reasonable minds could differ as to whether the disclosure
17 should be made, and he made it, nonetheless, he would be
18 insubordinate. And we don't think that that is the --

19 JUSTICE BREYER: You'd only lose -- the
20 Government would lose, only where you can conclude that
21 they could -- "they," the Government -- could not -- could
22 not reasonably conclude that he'd been insubordinate.

23 MR. HIMMELFARB: Justice Breyer --

24 JUSTICE BREYER: So, we covered the case of the
25 Democrat, Republican, et cetera. In other words, we'd

1 give him -- should we give him total discretion? Can't we
2 limit that discretion of the supervisor?

3 MR. HIMMELFARB: If it's -- if it's a situation
4 where reasonable minds cannot differ, and the superior
5 directs him not to make the disclosure, in clear
6 contravention of the due-process clause as interpreted in
7 Brady, that is a situation --

8 JUSTICE STEVENS: But, Mr. Himmelfarb, in that
9 case he could also be fired if he made the statement in a
10 speech, could he not?

11 MR. HIMMELFARB: If he made the statement in a
12 public speech --

13 JUSTICE STEVENS: Right.

14 MR. HIMMELFARB: -- or in a letter to the editor
15 of a newspaper, we think that speech would be
16 presumptively protected by the first amendment.

17 JUSTICE STEVENS: But could he not be fired if
18 the scenario you just described as --

19 MR. HIMMELFARB: Maybe he could, Justice
20 Stevens, but that would be subject to balancing, and it
21 would be the employer's duty to justify the firing, based
22 on workplace disruption.

23 JUSTICE STEVENS: It seems to me odd that the
24 employee has greater protection if he goes outside the
25 regular channels and makes a speech than if he does -- he

1 goes right to his superior and says, "I think this is
2 what's wrong and should be remedied."

3 MR. HIMMELFARB: Well, it's not that odd,
4 Justice Stevens, because if you have an obligation to
5 report misconduct -- take, again, the example of the
6 investigator in the inspector general's office -- you will
7 ordinarily be better off by reporting it through the
8 ordinary channels.

9 JUSTICE STEVENS: Right.

10 MR. HIMMELFARB: Because, ordinarily, you have
11 --

12 JUSTICE STEVENS: You may have no constitutional
13 protection. But if you go ahead and make a speech, you
14 do.

15 MR. HIMMELFARB: Well, you have presumptive
16 first-amendment protection. If you work in the inspector
17 general's office, and there is a prohibition on disclosing
18 pending investigations, and you hold a press conference,
19 there is a very good chance you're going to lose at step
20 two of Pickering, which is why it's in your interest to
21 disclose it through appropriate channels, because --

22 CHIEF JUSTICE ROBERTS: And it's going to be
23 clear that that's violating your job, and it has an
24 adverse impact on your job-related duties, because you're
25 going public, instead of going through the channels.

1 MR. HIMMELFARB: Well, that's right. If you
2 have an -- if it's a part of your job, you have an
3 incentive to do it, just like any other job requirement.
4 And it's ordinarily not the case that public employees are
5 punished for doing their jobs. They're more often
6 punished for not doing their jobs. So, in that situation,
7 the employee is going to likely be better off by making
8 the disclosure through appropriate channels.

9 JUSTICE STEVENS: But he has less constitutional
10 protection.

11 MR. HIMMELFARB: That's true, Justice Stevens,
12 but civil -- it's our view that civil service laws are the
13 mechanism for dealing with a situation where you're doing
14 your job and there's a dispute as to whether you're doing
15 it properly or not.

16 CHIEF JUSTICE ROBERTS: How comfortable are you
17 that this line you're trying to draw is one that's going
18 to be workable in practice? I mean, suppose the employee
19 writes a memo, and the boss comes and says, "If you don't
20 promise me you're not going to talk about this publicly,
21 you're fired." And he says, "Well, I'm not going to
22 promise that." And so, he's fired. Now, is that
23 internal, or is that external?

24 MR. HIMMELFARB: If the -- if the memo is
25 required by his job, it's --

1 CHIEF JUSTICE ROBERTS: Right.

2 MR. HIMMELFARB: -- a recommendation about what
3 policy the agency --

4 CHIEF JUSTICE ROBERTS: That's --

5 MR. HIMMELFARB: -- should take --

6 CHIEF JUSTICE ROBERTS: -- required by his job.
7 But "promise that he's not going to talk about it" is not
8 required by his job. And this case, kind of, raises the
9 question, because the only reason it's squarely presented
10 on the memo is because the Court didn't reach the Brady
11 disclosure or the talk to the bar association that were
12 related to the memo.

13 MR. HIMMELFARB: That's right. In answer to
14 your question of how difficult it's going to be to draw
15 the line, I think in most cases it won't be difficult to
16 draw the line. I don't think it was difficult in this
17 case. I'm not aware of any cases that applied principle
18 we advocate where it has been. There may be some cases
19 where it will be difficult to draw the line, but --

20 JUSTICE KENNEDY: I suppose you have the rule
21 which distinguishes between employment-related and outside
22 speech, under the hypothetical -- difficult hypothetical
23 posed by the Chief Justice, it would be an -- the promise
24 would be an unconstitutional condition, or something like
25 that.

1 MR. HIMMELFARB: That may --

2 JUSTICE KENNEDY: I --

3 MR. HIMMELFARB: -- that may -- that may be,
4 Justice Kennedy.

5 JUSTICE KENNEDY: I suppose it's a hard case --

6 JUSTICE SCALIA: And I suppose that what
7 constitutes a matter of public interest is not the
8 clearest line in the world either, is it?

9 MR. HIMMELFARB: That's absolutely right,
10 Justice Scalia. This Court has already decided that it's
11 important to draw a line at step one in distinguishing
12 between speech on a matter of public concern and speech on
13 a matter of private concern, even though it will often be
14 hard to draw that line. And the reason that line has to
15 be drawn is that the alternative is, in effect, to
16 constitutionalize the law of public employment.

17 JUSTICE SOUTER: Do you -- let me ask you this
18 -- do you propose drawing the line -- or at least drawing
19 a line in some circumstances this way: That, at step one,
20 if it can be concluded that a private communication
21 between the employer and the employee would have
22 constituted the discharge of the employee's assigned work
23 -- so that it would have been within the scope of his
24 employment, and, therefore, not subject to Pickering
25 balancing, if he had made the statement to the employer --

1 MR. HIMMELFARB: May I answer the question?

2 CHIEF JUSTICE ROBERTS: Yes.

3 MR. HIMMELFARB: My understanding is that that's
4 not part of the complaint, Justice Ginsburg. And my
5 understanding also is that, in the district court,
6 respondent took the position that his testimony at the
7 hearing was in his capacity as an employee.

8 CHIEF JUSTICE ROBERTS: Thank you, Mr.
9 Himmelfarb.

10 Ms. Robin-Vergeer.

11 ORAL ARGUMENT OF BONNIE L. ROBIN-VERGEER

12 ON BEHALF OF RESPONDENT

13 MS. ROBIN-VERGEER: Mr. Chief Justice, and may
14 it please the Court:

15 Ever since Pickering, it has been the law that
16 the first amendment protects public employees from being
17 fired or punished for expressing views on matters of
18 public importance where, as here, there is no harm or
19 disruption to their employers. Petitioners in -- the
20 United States asked this Court to scrap that. It is not
21 just the Ninth Circuit.

22 JUSTICE SCALIA: Well, it --

23 JUSTICE KENNEDY: Well, I'm not sure that that
24 was clear from the decisions of this Court. Certainly,
25 that wasn't what was involved in Pickering. That was

1 outside speech.

2 MS. ROBIN-VERGEER: That's correct. But it's
3 been the --

4 JUSTICE KENNEDY: And the same -- and the same
5 with Connick. So, I'm -- if you're saying that this is
6 what the circuits have understood, fine, but that's not
7 this -- that's why we took this case.

8 JUSTICE SCALIA: And I think all the cases did
9 say "expressing views as a citizen on a matter of public
10 concern." Wasn't that qualifier always used?

11 MS. ROBIN-VERGEER: The qualifier has always
12 been used in conjunction with the phrase "on matters of
13 public concern."

14 JUSTICE SCALIA: So, what does it mean? What is
15 -- what is your explanation for that qualifier,
16 "expressing views as a citizen"? Why do we --

17 MS. ROBIN-VERGEER: It --

18 JUSTICE SCALIA: -- continually say that?

19 MS. ROBIN-VERGEER: -- it was used descriptively
20 to explain, and especially to look at the context in which
21 the phrase first appears, in Pickering, that public
22 employees, like all citizens, have an interest --

23 JUSTICE KENNEDY: Well, let's assume that --

24 MS. ROBIN-VERGEER: -- on matters --

25 JUSTICE KENNEDY: -- I think that that's an open

1 question under Pickering, and that this case presents it.
2 Do you -- do you concede -- and maybe you don't -- that
3 there is any category of first amendment speech, as a
4 matter of public concern, which an employee cannot direct
5 to the employer? Are there -- are there some matters as
6 to which the employer can protect its own interests and
7 stifle the employee's speech?

8 MS. ROBIN-VERGEER: Speaking on a matter of
9 public concern only gets the employee presumptive first-
10 amendment protection.

11 JUSTICE KENNEDY: So, there's always Pickering
12 balance.

13 MS. ROBIN-VERGEER: There would be a Pickering
14 balance, yes. And the Pickering balancing test is quite
15 deferential to the employer. The Court observed, in the
16 Pickering case, that it's proper to look -- that a court
17 should look at the proper performance of the employee's
18 daily duties. In Rankin, the Court talked about the
19 questions whether the speech interferes with work,
20 personnel relationships, or the speaker's job performance.

21 The bar is already quite high for the employee,
22 coupled with causation burdens, qualified immunity, and so
23 on. And so, it is not the case that just because a -- an
24 employee speaks on a matter of public concern, that that
25 employee is necessarily going to win a first-amendment

1 case. Also --

2 JUSTICE GINSBURG: Ms. Lee -- Ms. Lee told us
3 that the Ninth Circuit weighed the capacity of the
4 plaintiff as an employee, rather than a member of the
5 public, in favor of the employee and against the employer.
6 Is that how you read the Ninth Circuit's decision?

7 MS. ROBIN-VERGEER: No, I think -- it's not
8 quite right. I think the Ninth Circuit just looked at
9 whether his speech which was reporting Government misconduct,
10 a type of speech that the circuit said uniformly recognized
11 was of paramount public importance.

12 JUSTICE KENNEDY: But --

13 MS. ROBIN-VERGEER: And --

14 JUSTICE KENNEDY: -- any comment that an
15 employee makes regarding how the office is working is a
16 matter of public concern. I would concede that. I mean
17 --

18 MS. ROBIN-VERGEER: With --

19 JUSTICE KENNEDY: -- that has to be.

20 MS. ROBIN-VERGEER: -- with respect, I don't --

21 JUSTICE KENNEDY: And the consequence of your
22 view is to have the first amendment being used for courts
23 to monitor the discussions that take place in every public
24 agency -- local, State, and Federal -- in the United
25 States. It's -- you are advocating a sweeping rule. Now,

1 you'll say, "Oh, well, Pickering balance will protect it."

2 MS. ROBIN-VERGEER: With --

3 JUSTICE KENNEDY: But I still think the
4 intrusive consequences of your -- of your rule are
5 sweeping.

6 MS. ROBIN-VERGEER: With respect, the public-
7 concern threshold is not so easily met. the Court has
8 said --

9 JUSTICE BREYER: I guess our law clerks would
10 meet it every day.

11 MS. ROBIN-VERGEER: Maybe. Maybe not.

12 JUSTICE BREYER: Yeah, maybe, maybe not. I
13 don't --

14 MS. ROBIN-VERGEER: But the Court has --

15 JUSTICE BREYER: -- anything that goes on in my
16 chamber that isn't a matter of public concern, and I would
17 think everything at OSHA and everything at -- look, I'll
18 -- let me put my question to you, because you're going to
19 make an argument that I don't think is too widely shared;
20 namely, that Pickering decides this case. If that's your
21 argument, I'd like to ask you a question based on the
22 assumption Pickering does not decide this case. And it
23 seems to me that Pickering involves a case in which it's
24 both a matter of public concern and outside the scope of
25 employment.

1 MS. ROBIN-VERGEER: Right.

2 JUSTICE BREYER: And here we have a case that is
3 a matter of public concern, but inside.

4 MS. ROBIN-VERGEER: Right. I --

5 JUSTICE BREYER: So, in those circumstances, I
6 want to know how you believe the first amendment requires
7 us to decide this case. And as I read this case, in the
8 record, we have one individual, your client, who looked at
9 an affidavit. The affidavit said that the deputy sheriffs
10 were trying to locate where a vehicle that was chocked up
11 came from. They saw tire tracks. The tire tracks went
12 back to a fence at the end of a long driveway.

13 So, I looked in the record. I couldn't find the
14 affidavit. So, I assume that's what it says. And I
15 wanted to know what the deputy sheriff said. What they
16 said is that your client agreed that there were tire
17 tracks. There were tire tracks that did not go the whole
18 length of the driveway, but, rather, tire tracks near the
19 house, where they got the search warrant for. And, they
20 added, that -- the deputies -- that there was rocks broken
21 up.

22 All right. So, we have two sides to this
23 argument: the deputies, who might reasonably contend that
24 they did nothing wrong; your client, who thinks they were
25 lying. And we also have a letter that your client wrote,

1 where he said that these deputies are grossly inaccurate
2 and clearly misleading.

3 Suppose his supervisor goes to him and says, "I
4 think that that letter is not the right tone. Maybe
5 you're right, maybe you're wrong; maybe they're in good
6 faith, maybe they're not. And so, if you don't change
7 that tone, I'm going to discipline you." All right?

8 Now, that's my hypothetical, which seemed to me,
9 perhaps, very much like this case. How, in your opinion,
10 does the first amendment handle such a matter?

11 MS. ROBIN-VERGEER: If the supervisor told Mr.
12 Ceballos that there was something wrong in the manner in
13 which he conveyed his speech, and told him to revise the
14 memo, that would have been -- he would have been well
15 within his rights to do so. Bear in mind that there's
16 never been an argument here that there was anything
17 inappropriate about Mr. Ceballos's speech, that he
18 exercised poor judgment, that there was anything
19 disruptive about the manner in which he communicated. The
20 head of the office --

21 JUSTICE KENNEDY: But I don't under- --

22 MS. ROBIN-VERGEER: -- actually said --

23 JUSTICE KENNEDY: -- I understand the ultimate
24 answer you gave the hypothetical. I don't understand the
25 principle you're following. I mean, it's a matter of --

1 MS. ROBIN-VERGEER: It's --

2 JUSTICE KENNEDY: -- you would agree this is a

3 matter of public concern.

4 MS. ROBIN-VERGEER: Yes.

5 JUSTICE BREYER: Which is what I'm looking --

6 MS. ROBIN-VERGEER: Yes.

7 JUSTICE BREYER: -- for. I'm looking for --

8 MS. ROBIN-VERGEER: It is --

9 JUSTICE BREYER: -- a standard.

10 JUSTICE KENNEDY: But we don't have a standard.

11 MS. ROBIN-VERGEER: The principle is that an

12 employer -- we agree with the position of the United

13 States, that the employer has the ability to dictate how

14 an employee carries out his duties. In a case where the

15 employee --

16 CHIEF JUSTICE ROBERTS: But in Justice --

17 MS. ROBIN-VERGEER: -- is insubordinate --

18 CHIEF JUSTICE ROBERTS: -- in Justice Breyer's

19 hypothetical, if the employee filed a lawsuit claiming a

20 violation of his first-amendment rights, you would say

21 that could not be thrown out, on summary judgment, on the

22 ground that the speech was within the scope of his

23 employment.

24 MS. ROBIN-VERGEER: It would be not on that

25 ground.

1 CHIEF JUSTICE ROBERTS: No.

2 MS. ROBIN-VERGEER: The reason it would be
3 thrown out in summary judgment would be because the
4 employer had a different reason for taking retaliatory
5 action --

6 JUSTICE BREYER: No, no there is --

7 CHIEF JUSTICE ROBERTS: Well, that would --

8 MS. ROBIN-VERGEER: -- against the employee.

9 CHIEF JUSTICE ROBERTS: -- be a dispute of fact,
10 so it probably wouldn't -- so it wouldn't be thrown at
11 summary judgment at all.

12 MS. ROBIN-VERGEER: Virtually all of these cases
13 are able to be disposed of at summary judgment. And you
14 have, basically, 20 years of litigation in the circuit
15 courts to look at where --

16 JUSTICE BREYER: Look --

17 MS. ROBIN-VERGEER: -- the problems that are
18 being posited haven't materialized.

19 JUSTICE BREYER: I'm not making my question too
20 clear. I imagine the district judge. I get just the
21 facts I described to you. Your client, who's very upset,
22 says, "This is the most unreasonable thing that ever
23 happened. They were trying to prevent me from
24 communicating with the judge. I'm the one who saw the
25 sheriffs. They didn't." The other side says, "We think

1 it's reasonable what we did."

2 My question to you is, What standard does that
3 judge apply under the first amendment? What does he do?

4 MS. ROBIN-VERGEER: The judge looks first at
5 whether the speech is on a matter of public concern. And
6 if it's a dispute over Government misconduct, it would
7 meet that threshold. Second, the Court would proceed to a
8 Pickering balance and would say the employer's actual
9 reason for retaliating or taking action would be because
10 of the -- you know, the tone or the message or because it
11 was a disagreement, and the supervisor's views ultimately
12 prevail. And so, that's how it would be --

13 JUSTICE KENNEDY: So, the Federal --

14 MS. ROBIN-VERGEER: -- analyzed.

15 JUSTICE KENNEDY: -- Federal courts supervise
16 the constant dialogue that is the everyday routine
17 practice in every governmental agency, local and Federal,
18 in the United States.

19 MS. ROBIN-VERGEER: With respect, no. These
20 cases are not that hard to dispose of at summary judgment.
21 Most actions that employers take against the employees
22 are not because of the employees' speech anyway, it's
23 because of how they carry out their job functions.

24 JUSTICE GINSBURG: But that would be something
25 that would have to go to trial, to prove that the -- that

1 the employee was incompetent.

2 MS. ROBIN-VERGEER: Respectfully, I don't -- I
3 don't think that most of these cases -- they don't go to
4 trial, most of them. They're -- of course, there are some
5 trials, but that is not the way most of these cases are
6 handled. And, besides that, adding an extra test, another
7 preliminary hurdle, wouldn't change the litigation burden.
8 Instead of it being the Connick-Pickering test, it would
9 be Connick-Pickering-Ceballos test. And then the question
10 would be, Was the person doing their job? How do you
11 decide that? Is it in his job description? Is it a
12 matter of custom and practice? What if he's doing extra-
13 credit work to build up goodwill with his employer, but
14 it's something that's not --

15 JUSTICE KENNEDY: Well, in --

16 MS. ROBIN-VERGEER: -- ordinarily required?

17 JUSTICE KENNEDY: -- in this case, the
18 supervisor said, "There can't be -- can't be tracks on
19 asphalt, so you're probably right." Then he finds out
20 that it's a tire rim, and of course the rim makes a -- so
21 we have to find out this at discovery -- at the discovery
22 stage of a lawsuit?

23 MS. ROBIN-VERGEER: As long as he's made an --
24 as long as he's made allegations or spoken in good faith
25 in their -- and it isn't demonstrably false, then he would

1 clear that initial hurdle. And there certainly was
2 nothing suggesting that he spoke in bad faith or was
3 obviously false, whether or not he was correct in his
4 assessment.

5 And it wasn't just an argument over a tire rim.
6 He accused these -- the deputy sheriff here of perjury.
7 It was a quite serious allegation of Government misconduct
8 that was made here, and not, sort of, a mundane dispute
9 over --

10 CHIEF JUSTICE ROBERTS: Why doesn't --

11 MS. ROBIN-VERGEER: -- whether or not --

12 CHIEF JUSTICE ROBERTS: -- why doesn't Rust
13 answer this question? I mean, there, it was really --
14 this issue was just outsourced by the Government. They
15 paid for the speech there, and we said that if you pay the
16 piper, you get to call the tune. And this is just an
17 insourced -- the same question.

18 MS. ROBIN-VERGEER: Ceballos was not speaking on
19 behalf of the Government when he went to his supervisor.
20 That was an internal communication to his supervisor
21 reporting --

22 CHIEF JUSTICE ROBERTS: He was writing a memo
23 about why the case should be dismissed. Wasn't --

24 MS. ROBIN-VERGEER: Right.

25 CHIEF JUSTICE ROBERTS: -- that part of his job?

1 MS. ROBIN-VERGEER: It was part of his job,
2 although I -- I'd quibble with the idea that it was
3 required by his job. But it was part of his job. And, in
4 doing so, he spoke to the Government, not as the
5 Government.

6 A better analogy with respect to Rust would be
7 if the doctor in Rust -- let's say it's a doctor at a
8 public university hospital, and the doctor was told that
9 the policy is not to engage in abortion counseling. And
10 he wrote a memo to the supervisor saying, "This is a
11 terribly policy. This is inhibiting our ability to
12 counsel my patients and for me to do my job correctly."
13 That memo would not be the Government's message. And
14 Ceballos's memo here to his supervisor was also not the
15 Government's message.

16 But I want to -- I want to get --

17 CHIEF JUSTICE ROBERTS: Well, why is that? In
18 the -- in your hypothetical, the doctor is -- it's not his
19 job to challenge the restriction on the Government grant,
20 but that's what he's doing, so that's not part of his job.
21 Here, it's part of Ceballos's job to explain why the case
22 should be dismissed, and that's what he wrote in his memo.

23 MS. ROBIN-VERGEER: But this is a very malleable
24 and manipulable concept, what's part of a job. I mean,
25 for a doctor to talk to his supervisor about a restriction

1 that he feels is inhibiting his ability to counsel his
2 patients is as much part of his job as a prosecutor going
3 to his supervisor and saying, "There's government
4 misconduct in this case, and we need to do something about
5 it." Just like a teacher in the Givhan case, going to her
6 principal, a conference between a teacher and her
7 principal about whether there's racial -- racially
8 discriminatory practices in the school would be part of a
9 teacher's job, complaining about something that affects
10 her students.

11 CHIEF JUSTICE ROBERTS: What do you do with your
12 friend's response to that, that in Connick the Court
13 characterized Givhan as involving a case of a citizen
14 complaining about a particular practice?

15 MS. ROBIN-VERGEER: Well, I think that
16 underscores the point, that the employee in Givhan was
17 speaking both as an employee and as a citizen, and these
18 roles are not mutually exclusive. You can be both.
19 There's no artificial distinction that the Court has drawn
20 here. And where a Government employee comes forward and
21 reports misconduct and puts himself at risk, he is doing
22 just that, speaking in both capacities. And --

23 JUSTICE SCALIA: We just shouldn't have said "as
24 a citizen" in all of these cases. We were just padding
25 our opinion with unnecessary words.

1 MS. ROBIN-VERGEER: the Court -- the Court
2 always views the "as a citizen" language in conjunction
3 with the -- speaking on a matter of public concern. And
4 it seems to me that the Court equated the two concepts.

5 But I want to get to why it is unwise and
6 unjustified to draw the per se rule that petitioners are
7 urging here. For one, it essentially means that a public
8 employee such as Ceballos has to go public in order to
9 have presumptive first-amendment protection.

10 JUSTICE GINSBURG: But then he would be
11 violating the internal rules of the workplace.

12 MS. ROBIN-VERGEER: Correct.

13 JUSTICE GINSBURG: Where as giving his candid
14 views -- the search warrant -- he's giving his own
15 opinion. But if he goes outside, he is violating a rule
16 of the workplace. And it would seem to me that there are
17 certainly measures could be taken against him for that.

18 MS. ROBIN-VERGEER: Correct. It's a trap. They
19 don't tell you about what happened in the second case. If
20 Ceballos had taken suspicions of police misconduct and
21 gone to the Los Angeles Times, they would have fired him.
22 And had he brought a case challenging that termination
23 under the first amendment, he would have lost on under the
24 Pickering balance. The circuit --

25 CHIEF JUSTICE ROBERTS: Do you think he should

1 have lost under the Pickering balance, in that case, if he
2 went public right away?

3 MS. ROBIN-VERGEER: Yes. If he had evaded
4 proper internal channels of communication, then the
5 employer would be well within his rights to fire him for
6 taking an action that's so disruptive in bringing --
7 discrediting the office without even letting his own
8 employer try to address the situation internally first.

9 JUSTICE SOUTER: What if he does let the
10 employer try first, and the employer does nothing, then he
11 goes public? Where does the Pickering balance come out
12 then?

13 MS. ROBIN-VERGEER: Closer question. I think he
14 probably still loses, but it's a closer question. I
15 think, at some point, if the magnitude of this -- of the
16 problem is so large -- I mean, imagine in the Ramparts
17 scandal situation if -- which has been discussed in the
18 briefs -- if a prosecutor tried to deal with that within
19 the DA's office, and failed to get any response, and then
20 went public with the Ramparts scandal, something of such
21 magnitude, a court perhaps would find their way. But in
22 the --

23 JUSTICE KENNEDY: What --

24 MS. ROBIN-VERGEER: -- individual --

25 JUSTICE KENNEDY: -- what you're saying is, is

1 that the first amendment has an office and a function
2 within the confines of a Government agency that it doesn't
3 have outside. That's a curious calculus. It seems to me
4 that the first amendment has its most application when you
5 talk to newspapers, when you talk outside. That's what
6 the first amendment's about. The first amendment isn't
7 about policing the workplace.

8 MS. ROBIN-VERGEER: the Court held, in both
9 Givhan and Rankin, that private communications on matters
10 of public concern are still protected. And it's -- and
11 there's very good reasons for that to be. I mean, imagine
12 an employee at FEMA who thinks that FEMA is not ready to
13 handle the next hurricane, that it has problems in its
14 disaster preparedness, and so that FEMA employee goes to
15 his supervisor and says, "We have problems here. Here are
16 the four areas in which we're not ready to handle the next
17 hurricane." He gets fired, because the supervisor doesn't
18 want to hear that. It's critically important that public
19 employees who have information, who know what ails the
20 agencies that they work for, be able to find an avenue to
21 communicate issues of public importance. If that FEMA
22 employee had gone --

23 JUSTICE SCALIA: Is any -- is any duty of an
24 employee in a -- an agency devoted to service of the
25 public -- is any of his functions not a matter of public

1 concern?

2 MS. ROBIN-VERGEER: Yes. The standard isn't
3 anything of public interest, it's something of legitimate
4 news interest. the Court reiterated that recently in the
5 Roe case. The standard does -- it's not a --

6 JUSTICE SCALIA: It's news. This is a press --
7 a press kind of a test.

8 MS. ROBIN-VERGEER: Newsworthy. And it's the
9 same test --

10 JUSTICE SCALIA: Newsworthy.

11 MS. ROBIN-VERGEER: -- the Court has applied in
12 invasion-of-privacy contexts. It's -- although it's a
13 broad standard, but it's also a well-known and well-
14 established standard that --

15 JUSTICE GINSBURG: I thought that's --

16 MS. ROBIN-VERGEER: -- courts are using --

17 JUSTICE GINSBURG: -- what Connick was about,
18 that there are things that are said in the workplace that
19 are of no public interest. They're personal gripes.

20 MS. ROBIN-VERGEER: Correct. The line the Court
21 was drawing in Connick was between the personal and the
22 public. the Court said that, had the prosecutor in that
23 case come forward had -- to bring to light actual
24 potential wrongdoing, a breach of public trust, the Court
25 suggested strongly that that would have been a matter of

1 public concern, and that the Court would then --

2 JUSTICE SCALIA: So --

3 MS. ROBIN-VERGEER: -- have proceeded to the
4 Pickering balance.

5 JUSTICE SCALIA: -- so if an employee -- I
6 really don't understand it -- an employee comes forward
7 with some scurrilous information about a family member of
8 his boss, who is a public figure, and his whole families
9 are public figures, which would be picked up by the press,
10 that would be a matter of public concern?

11 MS. ROBIN-VERGEER: If he's talking --

12 JUSTICE SCALIA: Gee, I never understood that
13 that's what the test was. I thought this was a matter
14 that deals with the welfare of the public, rather than --
15 rather than the welfare of the press.

16 MS. ROBIN-VERGEER: Two things. One is that if
17 the public employee is basically reporting something
18 corrupt in the --

19 JUSTICE SCALIA: Well, that I understand.

20 MS. ROBIN-VERGEER: -- in the workplace.

21 JUSTICE SCALIA: That's the welfare of the
22 public.

23 MS. ROBIN-VERGEER: Correct. And --

24 JUSTICE SCALIA: No, he's --

25 MS. ROBIN-VERGEER: -- in Government --

1 JUSTICE SCALIA: -- he's just saying, you know,
2 his boss's wife, a mayor of a big city, is running around
3 with somebody. Okay? And that's picked up by the press.
4 It's there on the gossip pages. She's a public figure.
5 You say that would be covered by this.

6 MS. ROBIN-VERGEER: The test the Court
7 enunciated in Connick is public, social, or -- excuse me
8 -- political, social, or other concerns is up to the
9 community. If it's something that would be of legitimate
10 news and --

11 JUSTICE SCALIA: Anything that would get in the
12 press. That's it.

13 MS. ROBIN-VERGEER: Then potentially --

14 JUSTICE SCALIA: Wow.

15 MS. ROBIN-VERGEER: But it has to be legitimate
16 news interest. And the Court -- the Courts have not
17 usually taken idle gossip to meet that test.

18 JUSTICE BREYER: We live in a world where people
19 are leaking things all the time. And there are thousands
20 of things that are in the public interest every day. But
21 what's bothering me is, while I see the Government's rule
22 as protecting the interests of the employer, it's very
23 hard for me to believe that never is there an instance
24 where the first amendment offers protection. But the only
25 choice you've given me is a rule that says every dispute

1 of the public interest is going to go right into
2 constitutional litigation. And I don't like that either.
3 So, am I hopelessly --

4 MS. ROBIN-VERGEER: No.

5 JUSTICE BREYER: -- forced to choose which is
6 the lesser of the evils, or is there some middle approach
7 that gives discretion to the Government, but doesn't allow
8 them to exceed that discretion in a certain category of
9 cases? If so, what? And --

10 MS. ROBIN-VERGEER: Certainly --

11 JUSTICE BREYER: -- how would you phrase it?

12 MS. ROBIN-VERGEER: -- at a minimum, a report of
13 Government misconduct by an employee to his supervisor, at
14 a minimum, should be treated as meeting whatever threshold
15 the Court establishes. And there's something that all the
16 all circuits that have addressed this point agree, that
17 whistleblower-types of speech is of paramount public --

18 JUSTICE KENNEDY: So, we do this --

19 MS. ROBIN-VERGEER: -- concern.

20 JUSTICE KENNEDY: -- so we do this as a -- so we
21 do this as a matter of what is sound management principles
22 for a Government agency? How does that relate to the
23 first amendment?

24 MS. ROBIN-VERGEER: Because Government
25 misconduct goes to the very heart of Government

1 accountability and the public's ability to hold officials
2 accountable when there is --

3 CHIEF JUSTICE ROBERTS: But Government
4 misconduct -- if I get a memo from a law clerk that says,
5 "Justice So-and-So's jurisprudence is wacky," that goes to
6 --

7 [Laughter.]

8 CHIEF JUSTICE ROBERTS: -- that goes to
9 Government misconduct, under your theory, right? And I
10 fire them, because I think that's not appropriate to put
11 in a memo.

12 MS. ROBIN-VERGEER: But if --

13 CHIEF JUSTICE ROBERTS: They have a first-
14 amendment claim, right?

15 MS. ROBIN-VERGEER: Well, they have a first-
16 amendment interest in their speech, but they have no
17 claim, because if the -- if you fired them just because --

18 JUSTICE SCALIA: Nobody's wacko here. I mean,
19 it's plainly --

20 [Laughter.]

21 JUSTICE SCALIA: -- plainly false.

22 MS. ROBIN-VERGEER: You know, it would depend
23 why -- it would depend why you fired them.

24 CHIEF JUSTICE ROBERTS: Well, they disagree with
25 it. They think it's -- whatever -- unprincipled, wrong.

1 They write me a memo, and I say, "Don't write me a memo
2 like that." And they write me another one, and then I
3 fire them.

4 MS. ROBIN-VERGEER: All right. But if you're
5 firing them because you think they've exercised poor
6 judgment in the -- in the way that they've communicated,
7 then it's --

8 CHIEF JUSTICE ROBERTS: And they think it's
9 Government misconduct because of the way cases are
10 decided, and that they have a first amendment interest.
11 What could be more important than how the Court decides
12 cases? And that violates their first-amendment rights.

13 MS. ROBIN-VERGEER: In the hypothetical you gave
14 me, it doesn't -- I mean, it doesn't sound like a serious
15 claim of Government misconduct. It sounds like more like
16 an offhand remark with -- which, if you thought it was
17 inappropriate, you might be able to take action against
18 that employee. Here, we have a very grave allegation to
19 public -- of Government misconduct, not casually made. I
20 mean, the -- Mr. Ceballos talked to --

21 CHIEF JUSTICE ROBERTS: But there was --

22 MS. ROBIN-VERGEER: -- other people --

23 CHIEF JUSTICE ROBERTS: -- a dispute about that
24 in this case, too. I mean, it -- under the supervisor's
25 view, it may come down to simply whether there were tire

1 tracks or tire rim tracks. And that's not as serious, in
2 one view, as your client thinks it's serious.

3 MS. ROBIN-VERGEER: My client carefully
4 considered what the -- what the allegations were in the
5 case, and they talked to people in this office. So
6 seriously did the supervisors take it that they actually
7 released somebody who pleaded guilty, who was in custody
8 for seven months, and let them out on their own
9 recognizance, because that's how seriously -- what a
10 problem they thought, in his office, they had with this --
11 the affidavit. It was only after the meeting with the
12 sheriff's department where they, kind of, launched into
13 him exactly like a public defender, did the tide turn.
14 So, we're not -- it's not a casual dispute over tire
15 tracks, or not tire tracks, in this case.

16 But getting back to Justice Breyer's question
17 about drawing lines, I think that's just --

18 JUSTICE SCALIA: Your answer to Justice Breyer's
19 -- I was just going to jump in there -- your answer to
20 Justice Breyer's question is, look at -- if you want to be
21 sure that, in every case, you know, the good cases fall on
22 this side, the bad cases fall on -- he should buy your
23 position that every case should go to a balancing test.
24 That will give you the perfection of first-amendment
25 application. The absolute perfection. Now, it'll cost a

1 lot of money, and it'll, you know, interfere with a lot of
2 employment things, but it will give you first-amendment
3 perfection. Right? I mean, that's the answer.

4 MS. ROBIN-VERGEER: There's an -- with respect,
5 I think there's --

6 JUSTICE BREYER: Is that your answer?

7 MS. ROBIN-VERGEER: I'm not sure I can answer
8 that.

9 [Laughter.]

10 MS. ROBIN-VERGEER: I'll take that as a
11 rhetorical question.

12 But, to get back to Justice Breyer's question,
13 there's also -- I think this came up in -- when my
14 opposing counsel was talking, that there's this extra element
15 present here, which is that there is an independent
16 constitutional problem here, in that when you have a --
17 police misconduct, you have someone whose right to fair
18 trial are at stake, and you have a prosecutor who's trying
19 to fulfill his individual ethical and constitutional
20 obligation --

21 JUSTICE KENNEDY: Well, that --

22 MS. ROBIN-VERGEER: -- on top of it.

23 JUSTICE KENNEDY: There would -- in this case,
24 unlike any other case I've seen in the employment area,
25 there is a hearing in -- before a court of general

1 jurisdiction, who goes into this. That's what the
2 criminal trial is for. And he did. There was also a
3 grievance proceeding.

4 MS. ROBIN-VERGEER: Had Ceballos remained
5 silent, however, then this speech would never have been
6 aired, and police misconduct --

7 JUSTICE BREYER: All right --

8 MS. ROBIN-VERGEER: -- would go unchecked.

9 JUSTICE BREYER: -- I've got -- you've got me
10 part of the way. Now, I'm not saying I -- I have to think
11 this through, but you got part of the way. You say here,
12 there's an independent constitutional basis for the speech
13 being permitted. But, now, still within that, the
14 Government agency has to have some authority to discipline
15 a person, even there, because, after all, he might have
16 been accusing these sheriffs of things that were really
17 not justified by what they, in fact, did. Or maybe he was
18 right. What about that part of the standard? Do you want
19 to say that the Government wins, as long as it behaved
20 reasonably? Do you want to say that the Government loses
21 only if there was an abuse of ordinary employer
22 discretion? Do you want to say the Government -- et
23 cetera. What do you want to say?

24 MS. ROBIN-VERGEER: If the Government takes
25 action because the employee has exercised -- has done --

1 carried out his job in an inappropriate way that reflects
2 a lack of fitness or poor judgment and what have you, the
3 employer's within his rights to do so. The Court
4 acknowledged that in Pickering, it acknowledged that in
5 Rankin. That has never really been an issue in the
6 Court's cases. And it's not --

7 JUSTICE BREYER: All right. Suppose --

8 MS. ROBIN-VERGEER: -- our position --

9 JUSTICE BREYER: -- we were to write this,
10 hypothetically. Indeed, the employer has broad discretion
11 to discipline the employee for the manner -- or whatever
12 he does -- even in such an area, but that discretion can
13 be abused. And, therefore, it is up to the judge to
14 determine whether a jury could find such abuse of
15 discretion here.

16 MS. ROBIN-VERGEER: Correct. I agree with that
17 standard.

18 JUSTICE SOUTER: But that does --

19 MS. ROBIN-VERGEER: That --

20 JUSTICE SOUTER: -- that does mean that
21 potentially -- as the Government says, potentially every
22 case is at least going to get as far as summary judgment
23 in court.

24 MS. ROBIN-VERGEER: That's already the case.
25 Almost all these cases go to summary judgment. It's

1 almost impossible to dismiss one of these cases on the
2 pleadings. That's true even in the Fourth Circuit.

3 JUSTICE GINSBURG: Well, you -- it wouldn't be
4 that way if the rule was that if it's employee speech on
5 the job, it's not protected at all.

6 MS. ROBIN-VERGEER: Respectfully, that's not
7 correct. Even in the fourth circuit --

8 JUSTICE GINSBURG: No, that's the argument
9 that's being made here by both the --

10 MS. ROBIN-VERGEER: I understand that, but that
11 argument is unfounded. Even in the fourth circuit, which
12 has come closest to adopting the per-se rule the
13 petitioners are asking for, district courts -- and there's
14 a case we cited in our brief, Echtenkamp -- it's from the
15 eastern district of Virginia -- where the Court said, in
16 trying to decide, "Did the employee speak as a citizen or
17 as an employee?" this is going to take factual
18 development. We can't decide this on the pleadings. It's
19 going to --

20 JUSTICE SOUTER: Okay, do --

21 MS. ROBIN-VERGEER: -- have to go to summary
22 judgment.

23 JUSTICE SOUTER: -- do we know how many cases of
24 this sort there are?

25 MS. ROBIN-VERGEER: I can only say based looking

1 at published cases --

2 JUSTICE SOUTER: Yeah.

3 MS. ROBIN-VERGEER: -- on Westlaw.

4 JUSTICE SOUTER: Yeah.

5 MS. ROBIN-VERGEER: There seem to be around 60

6 or 70 court-of-appeals cases --

7 JUSTICE SOUTER: Over what --

8 MS. ROBIN-VERGEER: -- a year.

9 JUSTICE SOUTER: -- period of time?

10 MS. ROBIN-VERGEER: Each year, for the least

11 five years, about --

12 JUSTICE SOUTER: In --

13 MS. ROBIN-VERGEER: -- 60 or 70 court-of-appeals

14 cases.

15 JUSTICE SOUTER: -- in all of the circuits --

16 MS. ROBIN-VERGEER: In all of the circuits.

17 JUSTICE SOUTER: -- that follow a ninth-circuit

18 kind of rule?

19 MS. ROBIN-VERGEER: Yes, in all of the circuits.

20 JUSTICE SCALIA: That's court of appeals. You

21 really don't know how many district-court judgments there

22 may have been that didn't go up to the court.

23 MS. ROBIN-VERGEER: There's around a hundred a

24 year in the district courts that appear on Westlaw, each

25 year for the last five years.

1 JUSTICE GINSBURG: There's one aspect of this
2 case that no one has touched on. The concurring judge,
3 Judge O'Scannlain, said, this is what whistleblower
4 statutes are supposed to handle, and that if we accepted
5 your view of the first-amendment coverage, the
6 whistleblower statutes would be superfluous.

7 MS. ROBIN-VERGEER: That's incorrect. The
8 whistleblower statutes, which are sort of a patchwork
9 nationwide, protect, or at least they have the ability to
10 protect, speech beyond what the first amendment does. If
11 you take the Federal whistleblower protection statute, for
12 example, if an employee makes a protected disclosure, and
13 an employer takes a prohibited action in response, there's
14 no balancing. The employee wins. The causation burden is
15 also lower. The agency's on the hook for paying the
16 money. There's no immunity, and so on.

17 JUSTICE GINSBURG: California does have a
18 whistleblower statute. Is that right?

19 MS. ROBIN-VERGEER: It does.

20 JUSTICE GINSBURG: And there was a claim made
21 under it, but we're not told how it came out.

22 MS. ROBIN-VERGEER: There wasn't a claim made
23 under it.

24 JUSTICE GINSBURG: There was not.

25 MS. ROBIN-VERGEER: There was not a --

1 JUSTICE SCALIA: I -- I'm --

2 MS. ROBIN-VERGEER: -- did not bring a claim

3 under California whistle-blowing --

4 JUSTICE GINSBURG: He did -- he --

5 JUSTICE SCALIA: I'm not sure you've answered

6 Justice Ginsburg's question. Her question was, Don't

7 whistleblower statutes cover this? And your answer, if I

8 understood it correctly, is, whistleblower statutes cover

9 this, and a lot more. That doesn't prove --

10 MS. ROBIN-VERGEER: Oh, I'm sorry, I --

11 JUSTICE SCALIA: -- that doesn't prove--

12 MS. ROBIN-VERGEER: -- understood the question

13 --

14 JUSTICE SCALIA: -- that they don't take care of

15 this problem.

16 MS. ROBIN-VERGEER: No, I understood her

17 question to be whether they're rendered superfluous.

18 Whistleblower statutes are patchwork across the country.

19 Some would cover this kind of speech, some would not.

20 JUSTICE SCALIA: Some would not cover it.

21 MS. ROBIN-VERGEER: Not all whistleblower

22 statutes cover internal communications. Some do --

23 JUSTICE GINSBURG: Some are quite narrow --

24 MS. ROBIN-VERGEER: -- some don't

25 JUSTICE GINSBURG: -- of what they cover.

1 MS. ROBIN-VERGEER: I'm sorry?

2 JUSTICE GINSBURG: Some of the whistleblower

3 statutes are very specific and narrow --

4 MS. ROBIN-VERGEER: Yes.

5 JUSTICE GINSBURG: -- of what they cover.

6 CHIEF JUSTICE ROBERTS: Some of them --

7 MS. ROBIN-VERGEER: Yes.

8 CHIEF JUSTICE ROBERTS: -- in fact, don't cover

9 disclosures that are job related. If it's the employee's

10 job to blow the whistle on this type of thing, it's

11 usually not covered by a whistleblower statute.

12 MS. ROBIN-VERGEER: Well, no, that's not --

13 that's not correct. I mean, in -- many of the statutes do

14 cover internal, and some don't. In some, you have to go

15 to a legislature, or you have to go -- take it to a

16 certain outside organization or entity in order to cover

17 it, and --

18 CHIEF JUSTICE ROBERTS: I guess I'm --

19 MS. ROBIN-VERGEER: -- some internal --

20 CHIEF JUSTICE ROBERTS: -- thinking of the

21 Federal law, where the idea is, if it's part of your job,

22 you have the normal civil-service job protections if

23 you're being retaliated or discriminated against for doing

24 your job, so you don't get the extra protections of the

25 whistleblower law. The only people who get it are the

1 people who -- it is not part of their job.

2 MS. ROBIN-VERGEER: The Federal circuit has
3 interpreted the Federal whistleblower statute to narrow
4 the protection, so if it's within your normal duties of
5 employment, then it would be excluded.

6 But if I could -- if I can -- just for a moment,
7 I want to return -- I've hinted -- I've hinted at this
8 somewhat, but I haven't -- oh, I see my time's up.

9 CHIEF JUSTICE ROBERTS: Yeah. Thank you, Ms.
10 Robin-Vergeer.

11 MS. ROBIN-VERGEER: Thank you.

12 CHIEF JUSTICE ROBERTS: Ms. Lee, you have one
13 minute left.

14 REBUTTAL ARGUMENT OF CINDY S. LEE

15 ON BEHALF OF PETITIONERS

16 MS. LEE: Under our approach, we believe that
17 many cases won't even be filed, because they won't be able
18 to make a colorable claim that it is citizen speech. This
19 case, in its essence, is about whether a public employee
20 has a constitutional right to perform his assigned job
21 duties in such a way that is to the dissatisfaction of the
22 employer. In Pickering and in Connick, this Court
23 contemplated first-amendment litigation in a public-
24 employment context in the relatively rare circumstances in
25 which adverse employment action was taken as a result of

1 an employee's extracurricular activities. Under the Ninth
2 Circuit and the respondent's approach, the exception would
3 become the rule.

4 It is our view that the Ninth Circuit has simply
5 gone too far in giving a broad sweep for first-amendment
6 protection for any public employee speech, simply because
7 it happens to be a matter of public concern. As Judge
8 O'Scannlain stated in his special concurring opinion, "The
9 time is right for this Court to steer the drifting first-
10 amendment jurisprudence back to its proper moorings."

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you, Ms. Lee.

13 The case is submitted.

14 [Whereupon, at 11:02 a.m., the case in the
15 above-entitled matter was submitted.]

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