

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 Tuesday, March 21, 2006

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 1:00 p.m.

13 APPEARANCES:

14 CINDY S. LEE, ESQ., Glendale, California; on behalf of
15 the Petitioners.

EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; for the
United States, as amicus curiae, supporting the
Petitioners.

20 BONNIE I. ROBIN-VERGEER, ESQ., Washington, D.C.; for
21 the Respondent.

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P R O C E E D I N G S

[1:00 p.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument
next in 04-473, Garcetti versus Ceballos.

Ms. Lee.

ORAL ARGUMENT OF CINDY S. LEE

ON BEHALF OF PETITIONERS

MS. LEE: Thank you. Mr. Chief Justice, and
may it please the Court:

At its core, the First Amendment is about
free and open debate on matters of public importance.
It's about citizens' rights to participate in public
debate and contribute their personal opinions and views
whether they are mainstream or not. The first
amendment is not, however, about policing the
workplace. It is not about constitutionalizing the law
of public employment. Nor should it be. Yet, if the
Ninth Circuit's approach is accepted or adopted, this
is what it will do.

In this section 1983 action, a deputy
district attorney prepared a disposition memorandum,
First Amendment pursuant to his prosecutorial duties,
setting forth the reasons why, in his prosecutorial
judgment, the criminal case that he was supervising was
likely to be dismissed. The fact that the supervisor

1 did not agree with the content of that memorandum should
2 not give the plaintiff a constitutional right to
3 challenge adverse employment decisions that he claims
4 were in response to the product of that memorandum.

5 There are no First Amendment interests that
6 are served when public employees are allowed to perform
7 assigned job duties in such a way as to the
8 disagreement of the public employer. Essentially, what
9 the --

10 JUSTICE KENNEDY: Well, I --

11 MS. LEE: -- Ninth Circuit --

12 JUSTICE KENNEDY: -- I suppose the public
13 might have an interest in knowing about this debate. I
14 don't know if you can say there are no public interest
15 served. It might be that there are other
16 counterbalancing first -- interests, but I don't think
17 you could say we have no interest in speech. This was
18 -- this is a -- on its face, a rather interesting -- a
19 rather interesting argument that they're -- that
20 they're having.

21 MS. LEE: When --

22 JUSTICE KENNEDY: They're interested in
23 criminal law, criminal procedure, et cetera, et cetera.

24 MS. LEE: Well, it's our position that when
25 speech by public employees cannot fairly be said to be

1 speech as a citizen, then the Government should have a
2 presumptive right to manage its personnel affairs and
3 internal --

4 JUSTICE KENNEDY: Well, that -- yes, that's
5 something different. But your statement, that there's
6 just no First Amendment interest --

7 MS. LEE: Well, there's no core First
8 Amendment values that are furthered when public
9 employers have to justify employment decisions that
10 they make on a routine basis.

11 JUSTICE SOUTER: Well, why wasn't that
12 equally true in Connick?

13 MS. LEE: Well, the difference in Connick is
14 that the employee -- the prosecutor in that actions
15 spoke more closely with a citizen, and the Government -
16 -

17 JUSTICE SOUTER: Yes, but I mean that's --

18 MS. LEE: -- had --

19 JUSTICE SOUTER: -- that's a fine
20 characterization, but I'm not sure that that helps us.

21 In Connick, the one subject of the speech that was
22 held to be protected was the speech questioning
23 political pressure to help in campaigns and so on. The
24 issue here that would arguably favor protection is the
25 issue of calling public attention to lying by police

1 officers in criminal cases. And it seems to me that
2 the -- that if there's a public interest in political
3 pressure, there's a public interest in mendacity in law
4 enforcement.

5 MS. LEE: Well, if the employee is required
6 to investigate or report that kind of conduct pursuant
7 to their normal duties of employment, then that is
8 speech that the employer should absolutely or
9 presumptively have an ability to monitor.

10 JUSTICE SOUTER: Well, yes, but why?

11 JUSTICE SCALIA: Well, that's the difference,
12 not the lack of public interest --

13 MS. LEE: That's --

14 JUSTICE SOUTER: Yes.

15 JUSTICE SCALIA: -- that you're --

16 MS. LEE: -- absolutely right.

17 JUSTICE SCALIA: -- pointing to, is that in
18 one case he is making this statement as an employee;
19 and you say the employer, if it's a stupid statement,
20 ought to be able to fire him for it. In --

21 MS. LEE: That's correct.

22 JUSTICE SCALIA: -- the other case, he's
23 making the statement as a member of the public. And
24 what the First Amendment is all about is that we allow
25 stupid statements to be made. Right?

1 MS. LEE: If it's not part of -- if it's --
2 if it's not part of your core job duties that you --
3 that employers should evaluate.

4 JUSTICE SOUTER: No, but it may well -- I
5 guess the point that I'm trying to get at -- and it
6 goes back to your original public-interest issue -- is,
7 let's assume -- as Justice Scalia's hypo had it, let's
8 assume that the statement made by the employee on the
9 subject within job duties -- case like this one -- is,
10 in fact, a "stupid statement." Let's assume it's
11 wrong, it's inaccurate, whatnot. The issue is not
12 whether an employer, it seems to me, should, if that
13 turns out to be the case, be able to fire. The issue,
14 it seems to me, is whether, if it is not stupid, it
15 should be totally unprotected, so that the employer
16 could do anything, even if it's an accurate statement.
17 And my understanding is that your argument on public
18 interest was an argument that says, even if it's
19 accurate and they were lying and so on, that there
20 should be no protection. Am I -- and do I understand
21 you correctly?

22 MS. LEE: Well, our position is, whether or
23 not the prosecutor in this case made an accurate
24 statement during the performance of his job -- so, in
25 other words, if his disposition memorandum -- if the

1 employer accepted it and agreed with it, and the case
2 didn't go any further, there wouldn't be a basis of
3 First Amendment, because normally he is acting pursuant
4 to his job duties and it's up to the employer to
5 evaluate whether or not he's adequately performing
6 those job --

7 JUSTICE SOUTER: Sure, but take --

8 MS. LEE: -- duties.

9 JUSTICE SOUTER: -- take the case in which
10 the employee says, "It was accurate." The employer
11 says, "No, it was stupid. You got everything wrong."
12 I take it, in -- your position is that regardless of
13 whether the employee got it right or not, there
14 shouldn't be protection, because it's within job
15 duties. Is --

16 MS. LEE: Right. It --

17 JUSTICE SOUTER: -- that correct?

18 MS. LEE: -- should not be protected under
19 the First Amendment.

20 JUSTICE SOUTER: Okay.

21 MS. LEE: That's not to say that the public
22 employer is free from being challenged with regards to
23 the employment decision. It may be a matter for the
24 employee to seek, through the grievance procedure, that
25 -- like Mr. Ceballos did initially, or even pursue it

1 to civil service remedies. And those are the type of
2 decisions that the personnel in those departments are
3 more ably, I think, to decide.

4 JUSTICE SCALIA: Or he could go public, I
5 assume. He could say, "I got fired for saying this.
6 And this was true." Right? Take it to the press. The
7 press would love it.

8 MS. LEE: If his job --

9 JUSTICE SCALIA: Right?

10 MS. LEE: -- is not -- if that speech was not
11 required to be kept --

12 JUSTICE SCALIA: I'm assuming it was --

13 MS. LEE: -- internally.

14 JUSTICE SCALIA: -- not required to be kept
15 confidential.

16 JUSTICE ALITO: But if he -- if it's part of
17 his job to speak publicly, then he has no -- things
18 that are said publicly in the performance of official
19 responsibilities have no First Amendment protection?

20 MS. LEE: In our view, no. If it's a job --
21 if the public employee's assigned job duties is to, on
22 behalf of the Government or the employer, speak to the
23 public about certain things that are going on in the
24 office, and he happens to get disciplined for it, that
25 wouldn't pass our step.

1 JUSTICE ALITO: So, what if the employer
2 tells the employee to go out and lie? There's no First
3 Amendment protection if the employee, instead, tells
4 the truth?

5 MS. LEE: Well, I don't know if that's a --
6 if that's a detailed enough hypothetical. I mean, if
7 the employee's core job duties are to report X, Y, and
8 Z, and that employee goes out to the public and reports
9 X, Y, Z, E, and F --

10 JUSTICE KENNEDY: Well, no, that's not --

11 MS. LEE: -- I think that's --

12 JUSTICE KENNEDY: -- that's not -- that's not
13 the hypothetical. So, suppose that a supervising
14 district attorney tells the deputy district attorney,
15 "Go in and make a misrepresentation to the court, or
16 conceal evidence," or whatever --

17 MS. LEE: Well, the question would be if he's
18 --

19 JUSTICE KENNEDY: -- and he refuses to do
20 that, or he goes in and he says the opposite, he tells
21 the truth, and he's fired. What result?

22 MS. LEE: Well, I think the plaintiff could
23 argue that, "That's not my core job duties. My job
24 duties is to" -- if it's a prosecutor, "is to make
25 statements" --

1 JUSTICE KENNEDY: Oh, so --

2 MS. LEE: -- "pursuant to" --

3 JUSTICE KENNEDY: -- so you're saying that
4 there's an exception to your rule, so that if, in this
5 case, he has a -- he has a defense if he said, "Well,
6 it's my duty to call it as I see it"?

7 MS. LEE: Absolutely --

8 JUSTICE KENNEDY: Then --

9 MS. LEE: -- not.

10 JUSTICE KENNEDY: Well, then, if that's so,
11 you ought to remand this case.

12 JUSTICE SCALIA: Well, sure you'd agree with
13 that, if it's his duty to call it or -- just as it's
14 the duty of a -- of a lawyer not to lie to the court.
15 If there was a similarly clear legal duty for him to
16 say something, you'd say that was part of his job
17 description, right?

18 MS. LEE: That would be the required
19 assignments of his job.

20 JUSTICE KENNEDY: And -- and I suppose, in
21 this case, in the hypothetical we propose, that the
22 California courts and the California bar would have
23 disciplinary mechanisms against the senior attorney who
24 hypothetically told the junior attorney to mislead.

25 MS. LEE: Well, that would be an issue of

1 fact.

2 JUSTICE KENNEDY: Does California have, or
3 have not, disciplinary procedures in the hypothetical
4 case where a senior attorney who tells a junior
5 attorney lie to the court --

6 MS. LEE: They do.

7 JUSTICE KENNEDY: All right.

8 JUSTICE GINSBURG: What is the --

9 JUSTICE ALITO: Well, what is it?

10 JUSTICE GINSBURG: What is the California
11 remedy? Let's say his boss says, "Don't turn over
12 Brady materials."

13 MS. LEE: And the employer goes ahead and
14 turns it over?

15 JUSTICE GINSBURG: Yes.

16 MS. LEE: If the boss makes a determination
17 that, "This is not Brady materials. I don't want that
18 disclosed," and the employee goes ahead and discloses
19 it, our position is, that would not be protected First
20 Amendment speech.

21 JUSTICE GINSBURG: What about -- you were
22 talking about public speaking. There was, as I
23 remember, a talk that was given to the Mexican-American
24 Bar Association, and that was not something that his
25 employer required him to do, but he --

1 MS. LEE: No, it wasn't. And it's not part
2 of this lawsuit, because there's no dispute that the
3 communication at issue in this case is that disposition
4 memorandum that he prepared purely pursuant to his
5 prosecutorial duties.

6 JUSTICE GINSBURG: But would have a 1983 case
7 if he were disciplined or disadvantaged in the
8 workplace because of the talk that he gave to the
9 Mexican-American Bar Association in which he criticized
10 DA office policies?

11 MS. LEE: Then our position is, it gets past
12 step one, because it's not normally something that a
13 prosecutor is required to do, and it would be subject
14 to a balancing --

15 JUSTICE KENNEDY: Pickering balancing, I take
16 it.

17 MS. LEE: Correct.

18 JUSTICE SOUTER: But I thought -- correct me
19 if I'm wrong, just as a matter of fact -- I thought his
20 1983 claim listed the speech to the Mexican-American
21 Bar Association as one of the reasons that he was
22 demoted, or whatever it was, transferred.

23 MS. LEE: It was initially alleged, but,
24 through the course of discovery, the focus of it was a
25 disposition memorandum, because by the time he went to

1 the Mexican-American Bar Association, he had already
2 been disciplined, so there is no causation between his
3 public speech to the Mexican Bar Association and the
4 disciplinary actions that were --

5 JUSTICE SOUTER: Well, the --

6 MS. LEE: -- are at issue.

7 JUSTICE SOUTER: -- the focus may have
8 changed, but, I mean, he hadn't dropped the -- he
9 hadn't dropped the claim that that was one of the
10 causes --

11 MS. LEE: Well, in --

12 JUSTICE SOUTER: -- of the --

13 MS. LEE: -- in essence, he did, when we --

14 JUSTICE SOUTER: Did he?

15 MS. LEE: -- when we went to the summary
16 judgment motion. And that's why the district court was
17 very clear that the issue --

18 JUSTICE SOUTER: Okay.

19 MS. LEE: -- in this case was a
20 communication in the disposition memorandum. And that
21 was -- it was undisputed that that was purely pursuant
22 to his prosecutorial duties --

23 CHIEF JUSTICE ROBERTS: The court --

24 MS. LEE: -- and --

25 CHIEF JUSTICE ROBERTS: -- the court of

1 Appeals did --

2 JUSTICE SOUTER: Okay.

3 CHIEF JUSTICE ROBERTS: -- the court of
4 Appeals specifically did not address the Mexican-
5 American Bar Association speech. It focused only on
6 the memorandum, correct?

7 MS. LEE: Correct.

8 JUSTICE KENNEDY: And you concede that's
9 Pickering balancing, anyway.

10 MS. LEE: Well, in -- to the extent that he's
11 alleging that if that's -- "I went to the Mexican-
12 American Bar Association, and I alleged -- or I made
13 statements that there were some improprieties in the
14 district attorney's office," that would probably get
15 past step one and the matter of public concern, and
16 then the question would be whether or not his interest
17 in speaking as a citizen outweighed the interests of
18 the Government.

19 JUSTICE SOUTER: But let me -- let me raise
20 this question. If, in this case, he gets past step one
21 because of the Mexican Bar Association speech, and if,
22 as you suggested in answer to a question a little while
23 ago, that anybody could go public and get at least past
24 step one of Pickering, what is to be gained by the
25 extremely -- well, strike the "extremely" -- what is to

1 be gained by the restrictive view that you take that if
2 he doesn't go to the Bar Association, or doesn't go
3 public, there's no protection at all? In other words,
4 it seems to me that the public is being protected in a
5 way subject to an immediate end run.

6 MS. LEE: Well, I think what Your Honor is
7 really asking is, if the plaintiff in this case had
8 taken his disposition memorandum, and, rather than give
9 it to his supervisor, which what he -- what he was
10 required to do, he went to the public and gave it to
11 them on a pending case, I don't necessarily think that
12 would be protected under Pickering, as well.

13 JUSTICE SOUTER: But what if he simply goes
14 to the public and says, "Look, there's Brady material
15 here, and it should be turned over, and, instead, my
16 boss is telling me to suppress it." That wouldn't be
17 turning over his work product. And I took it, from
18 what you said earlier, that, in that case, you would
19 say at least he gets pasts step one of Pickering for
20 the --

21 MS. LEE: Well, he certainly --

22 JUSTICE SOUTER: -- newspapers --

23 MS. LEE: -- wouldn't be speaking in his
24 capacity as a prosecutor, but that doesn't necessarily
25 mean that his interests would be outweighed by the

1 employer's interest. In --

2 JUSTICE SOUTER: Oh, he might -- he might
3 ultimately lose, just the way, on all issues but one,
4 the employee in Connick lost. That's quite true. But
5 at least --

6 MS. LEE: And --

7 JUSTICE SOUTER: -- there would be a claim to
8 go through the balancing --

9 MS. LEE: Well, in --

10 JUSTICE SOUTER: -- exercise.

11 MS. LEE: -- in some respects, if you're
12 talking about job-required speech that you are -- part
13 of those duties, and the function, is to keep it
14 internally until at least there's some decision by the
15 supervisor, and, rather than do that, you send it to
16 the press or leak that information out, I think a
17 governmental disruption in efficiency can be presumed
18 there. So, I don't think it's as -- I don't think it's
19 as clear that that -- that Mr. Ceballos would have
20 ultimately prevailed under the balancing. I mean, if
21 he had taken the --

22 JUSTICE SOUTER: Yes.

23 MS. LEE: -- the speech externally, I think
24 there -- that he ultimately would have lost, as well --

25 JUSTICE SOUTER: Oh, I understand your point.

1 MS. LEE: -- because there is --

2 JUSTICE SOUTER: You're not saying he would
3 win on Pickering balancing, but he would at least get
4 to the point of going through the balancing exercise.

5 MS. LEE: And ultimately the result would be,
6 there's no protected --

7 JUSTICE SOUTER: Maybe.

8 MS. LEE: -- First Amendment speech.

9 JUSTICE SOUTER: Yes.

10 JUSTICE ALITO: How do you go about
11 determining whether something falls within somebody's
12 job duties? How specifically does that have to be set
13 out?

14 MS. LEE: If it's a function of the person's
15 job -- assigned job duties. So, the -- you look at the
16 speech at issue. And here is -- it's a disposition
17 memorandum that was purely pursuant to what the -- what
18 his duties required. He's -- it's normally a function
19 that the employer would take into consideration for
20 things like promotions --

21 JUSTICE ALITO: And you have to look at --

22 MS. LEE: -- or demotions.

23 JUSTICE ALITO: -- you have to look at a job
24 description? And does it have to be listed
25 specifically in a job description? Could there ever be

1 things that it's understood that are things that any
2 employee ought to be concerned about, such as very
3 serious wrongdoing within the office?

4 MS. LEE: I mean, there could be situations
5 where there's a general code of conduct by all
6 employees; you know, employees who feel that they've
7 been, you know, harassed, sexually harassed, or feel
8 that others are, should report that. But that may not
9 be that person's assigned job duties. In other words,
10 that person is not assigned to investigate and report
11 those type of things.

12 JUSTICE SCALIA: Of course, if --

13 MS. LEE: And --

14 JUSTICE SCALIA: -- if you adopt a principle
15 that every employee ought to -- ought to report to his
16 superiors known wrongdoing by his co-workers, and that
17 that's part of his job duties, you -- then you always
18 cut off the ability of that employee to go public,
19 right? I mean, that's a -- sort of an expanding
20 category, "job duties."

21 MS. LEE: Well, it would be assigned job
22 duties, things that normally the employer would take
23 into consideration for things like terminating or
24 promoting.

25 I'd like to reserve the remainder of my time

1 for rebuttal.

2 CHIEF JUSTICE ROBERTS: Thank you, Ms. Lee.
3 Mr. Kneedler.

4 ORAL ARGUMENT OF EDWIN S. KNEEDLER
5 FOR THE UNITED STATES, AS AMICUS CURIAE,
6 SUPPORTING THE PETITIONERS

7 MR. KNEEDLER: Mr. Chief Justice, and may it
8 please the Court:

9 Much of the work of public employees is
10 performed by speaking or writing, and much of that work
11 concerns matters of public interest. Under the Ninth
12 Circuit's decision, public employees engaged in such
13 work have at least a presumptive First Amendment right
14 to perform their jobs as they see fit.

15 That conclusion rests on a fundamentally
16 mistaken view of the First Amendment. When the
17 Government pays for somebody to do its work, it has an
18 absolute right to control and direct the manner in
19 which that work is performed. That is a basic rule of
20 agency law, and insofar as Federal employees are
21 concerned, it's a basic rule of our constitutional
22 structure. Article II of the Constitution gives the
23 President the power and responsibility to take care
24 that the laws be faithfully executed. Effectuation of
25 that power, and effectuation of the principle of

1 accountability that it embodies, requires that
2 supervisors in the executive branch be able to control
3 and direct the work of their subordinates. The First
4 Amendment, which was adopted just a few years after the
5 Constitution, was not meant to interpose the First
6 Amendment in that relationship between supervisor and
7 subordinate or otherwise to regulate the internal
8 affairs of the executive branch. That is the function
9 of civil service laws adopted by the legislature and
10 internal executive branch directives taking into
11 account the relative costs and benefits of certain
12 types of regulation. And finally --

13 JUSTICE SOUTER: No, you take the position,
14 then, that -- going to the earlier hypothetical that
15 somebody brought up, that, say, in a Brady case, if the
16 --if the Federal prosecutor believes there was Brady
17 material that -- and let's assume he's correct, just to
18 make it a simple case -- that there's Brady material to
19 be turned over, and the U.S. attorney says, "Do not
20 turn the Brady material over," that if the -- if the
21 U.S. -- if the -- if the prosecutor tells this to a
22 court, that he can be disciplined?

23 MR. KNEEDLER: Well, there would, no doubt,
24 be other restrictions. Justice Kennedy mentioned
25 ethical rules. Under the Federal whistle-blower

1 statute --

2 JUSTICE SOUTER: Oh, I'm sure --

3 MR. KNEEDLER: -- there would --

4 JUSTICE SOUTER: -- that's so --

5 MR. KNEEDLER: -- be a restriction.

6 JUSTICE SOUTER: -- but what about, you know,
7 the basic First Amendment --

8 MR. KNEEDLER: The First Amendment would not
9 be the -- would not be the source of protection.
10 Whether there would be some argument that, if the
11 employee could not be fired, it would be an
12 unconstitutional condition to require him to put his
13 job at peril for committing a due process violation or
14 something like that, whether there would be a claim
15 like that, that would be a different matter. But the
16 First Amendment --

17 JUSTICE SOUTER: But why would you recognize
18 a due process violation if you wouldn't recognize a
19 First Amendment violation?

20 MR. KNEEDLER: Because the First Amendment
21 does not address speech that an employee undertakes in
22 the performance of his duties.

23 JUSTICE SOUTER: Well, neither does due
24 process.

25 MR. KNEEDLER: No. No, I was just suggesting

1 there would have to be some unconstitutional condition.

2 Well, the due process --

3 JUSTICE SOUTER: Yes, but to get to the
4 unconstitutional condition, wouldn't you normally look
5 to the First Amendment?

6 MR. KNEEDLER: My point is that the due
7 process -- due process clause does address the conduct
8 at question, which is the requirement that exculpatory
9 material be turned over to the defendant. And so, the
10 question is that the employee would be put in a
11 position where he would -- where he would be instructed
12 not to perform what he understood to be a
13 constitutional violation. I think most civil service
14 laws, most ethical rules, would take care of it. And,
15 as I mentioned, the Federal whistle-blower statute, in
16 2302(b)(9), I think it is, has a provision that
17 protects employees who refuse --

18 JUSTICE KENNEDY: And --

19 MR. KNEEDLER: -- to obey an order --

20 JUSTICE KENNEDY: -- perhaps, 1983, if you go
21 the unconstitutional condition argument, and certainly
22 in 1983 -- or arguably a civil rights prosecution
23 against the senior who ordered --

24 MR. KNEEDLER: Yes, there would be -- there
25 would be those sorts of restrictions. My only point is

1 that the First Amendment is not addressed to speech or
2 writing that an employee undertakes in the -- in the --
3 in the course of his official duties. This --

4 JUSTICE ALITO: But isn't there this -- isn't
5 there this anomaly in the position that you're
6 advocating? It would seem to me that categories of
7 employee speech that are most likely to be disruptive
8 would be public speech that's outside of the employee's
9 duties, or internal speech that is outside of the
10 employee's duties. How much of a -- of a problem is it
11 that employees are bringing First Amendment claims
12 based on largely internal speech that falls within
13 their own job duties?

14 MR. KNEEDLER: I think that would be a huge
15 problem, because it would effectively constitutionalize
16 the day-to-day interactions between supervisors and
17 subordinates within the Government, and put the Federal
18 Courts in charge of overseeing that. Even if these
19 cases might ultimately be disposed of on summary
20 judgment, there would be discovery, there would be the
21 burdens of the litigation. And in a case like this,
22 where the -- where the Government is taking the
23 position that the -- these actions were not even taken
24 against the employee because of this disposition
25 memorandum -- they say they had perfectly valid other

1 reasons -- but this case exemplifies what the problem
2 would be, is that the employee could identify something
3 that he said or did in the course of his duties that
4 involved speech and say, "That's the reason that I was
5 disciplined."

6 JUSTICE ALITO: But are these going to be
7 difficult cases under Pickering balancing? You have
8 the case like this, where the employee, let's say, says
9 to the prosecutor, "I think the case should be
10 dismissed." The prosecutor says, "Well, I'm the
11 supervisor, and I disagree. We're not going to dismiss
12 the case." Typically, the employee wouldn't be
13 disciplined for doing something like that. Now, if the
14 employee persists and, you know, is insubordinate,
15 there would be another basis for taking disciplinary
16 action.

17 MR. KNEEDLER: Well, but in this case, if we
18 look at what the Ninth Circuit said, for example, when
19 it got to step two, it said that the employee could
20 only be disciplined if the -- if the agency could show
21 that there was disruption or reckless disregard for the
22 truth. But when somebody is actually carrying out his
23 job duties --not engaged in outside activities that may
24 reflect back and be disruptive, but engaged in the job
25 duties themselves, the employer has a right to insist

1 on more than that the employee not be disruptive or
2 reckless; he has a right to insist that -- the employer
3 has a right to insist that the employee affirmatively
4 contribute to the work of the office and exercise good
5 judgment. And the -- and the supervisor has to be in a
6 position to make judgments about whether that judgment
7 was good or not.

8 JUSTICE ALITO: Well, is this going to lead
9 to difficult problems in determining what falls within
10 the job duties of a particular employee?

11 MR. KNEEDLER: I don't -- I don't think it --
12 I don't think it will, and certainly no more problems
13 than the -- than this Court has wrestled with, and the
14 lower courts have, in terms of what's a matter of
15 public concern. I think it's a common inquiry to
16 determine what a person's job duties are. And I think
17 it's a very important place to have a clear line, just
18 as there is a clear line with respect to matters of
19 public concern.

20 JUSTICE ALITO: Suppose, in the memo here,
21 the assistant district attorney had said, "I think that
22 this deputy lied, and I think the deputy should be
23 fired." Now, whether the deputy should be fired or not
24 probably isn't within the job duties of this -- of this
25 employee. So, would that be outside of your rule?

1 MR. KNEEDLER: No, I think it would probably
2 be inside the rule. I think -- I would think,
3 particularly for a -- for an assistant DA to make a
4 recommendation about the consequences of illegal
5 conduct would be within his -- within his job duties.

6 I also want to say that this Court's decision
7 in Pickering, and in that line of cases, I think, fully
8 support this, because, as this Court pointed out in
9 Connick, this Court has repeatedly stated that the
10 protection afforded by Pickering is for action taken as
11 a citizen on matters of public concern. That "as a
12 citizen" phrase was reiterated in virtually all of this
13 Court's cases in the area. And the underlying
14 principle is that --

15 JUSTICE STEVENS: But does the Givhan case
16 fall within that?

17 MR. KNEEDLER: Yes. Yes, it does. But all
18 the Court addressed in Givhan was the question of
19 whether, if you take your concerns not publicly to the
20 newspaper, but express them to the -- in that case, the
21 principal, that you don't lose First Amendment
22 protection. But the Court did not address the question
23 of whether those comments were within the scope of the
24 employee's duties. And I think a reading of lower
25 court's decision in Givhan indicates that they were

1 not. She was an English teacher, and she was
2 commenting to the principal about employment practices
3 at the school. That would not have been within the
4 scope of her employment. And then --

5 JUSTICE GINSBURG: But if she was the vice
6 principal, that would be -- then it would come --

7 MR. KNEEDLER: I'm --

8 JUSTICE GINSBURG: -- within your --

9 MR. KNEEDLER: It might be -- it might be
10 closer to that, yes. I think, again, it would depend
11 if she was -- if she was vice principal for
12 administration or something, I think -- I think it
13 clearly would.

14 But the purpose of the Pickering line of
15 cases is to protect employees when they go outside of
16 their -- of their job, that they shouldn't be penalized
17 for having taken a job to be able to participate in
18 public affairs, as the Court put it in Pickering. That
19 does not suggest that the -- that the employee brings
20 the First Amendment into the job workplace and can use
21 it as a shield or a sword in the day-to-day
22 interactions with his supervisors, and to do so would
23 constitutionalize, as I said, the day-to-day
24 operations of employment. And this is a classic
25 example, where somebody wrote a disposition memorandum

1 in the course of --

2 JUSTICE STEVENS: And you're suggesting --

3 MR. KNEEDLER: -- in the course of those
4 activities.

5 JUSTICE STEVENS: -- that a remark made
6 internally could not provide the basis for discipline,
7 but saying exactly the same thing publicly could. I
8 mean -- or vice versa.

9 MR. KNEEDLER: Well, if it's made publicly in
10 the capacity as a citizen, assuming the public -- it
11 isn't a speech that he's making in the course of his
12 duties -- if he writes something to the press, he's
13 speaking in his capacity as a citizen. That doesn't
14 mean that it would be constitutionally protected; it
15 simply means that you get to step two of the Pickering
16 balancing, because he's not carrying --

17 JUSTICE STEVENS: Well, I'm assuming --

18 MR. KNEEDLER: -- out the job duties.

19 JUSTICE STEVENS: -- a case in which it would
20 be constitutionally protected. But you're saying if he
21 says it publicly -- assuming we pass the balancing test
22 -- but if he said the same thing to his boss directly
23 internally, no protection.

24 MR. KNEEDLER: No, that -- at least not if
25 it's part of his job duties. And I would think --

1 JUSTICE STEVENS: Which is a --

2 MR. KNEEDLER: -- ordinarily in that --

3 JUSTICE STEVENS: -- rule that would sort of
4 encourage people to go public rather than --

5 MR. KNEEDLER: No, I mean --

6 JUSTICE STEVENS: -- exhaust their internal
7 remedies.

8 MR. KNEEDLER: Two things about that. When
9 he's saying it internally, he's doing his job. When
10 he's going externally, he may be violating office
11 policies.

12 CHIEF JUSTICE ROBERTS: Thank you, Mr.
13 Kneedler.

14 Ms. Robin-Vergeer.

15 ORAL ARGUMENT OF BONNIE I. ROBIN-VERGEER

16 ON BEHALF OF RESPONDENT

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

19 Petitioners contend that the First Amendment
20 provides no protection when the Government silences or
21 punishes a public employee for speaking up on a matter
22 of vital public importance in the course of performing
23 his job, even if the Government has no legitimate
24 employment reason for doing so. Such a sweeping rule
25 would stifle speech that lies at the very core of the

1 First Amendment. Recognizing Richard Ceballos's claim
2 in this case would not convert every public employment
3 dispute into a constitutional case.

4 CHIEF JUSTICE ROBERTS: I think it's probably
5 a bit much to say that the core of the First Amendment
6 is internal employee grievances or speech. And I think
7 the concern on the other side is that you may -- as a
8 lawyer, you may have a view of what the -- what Brady
9 requires. Your superior may have a different view.
10 And just because that disagreement exists doesn't mean
11 that you have a constitutional right to continue to
12 voice your view when your superior has reached a
13 different decision.

14 MS. ROBIN-VERGEER: I agree with that. The
15 First Amendment doesn't bar the Government from
16 disciplining employees for insubordination or poor job
17 performance or for continuing or persisting in a matter
18 once their supervisor's told them to stop. Where an
19 adverse employment action's motivated by such
20 legitimate employment reasons, there's no First
21 Amendment violation. But the Petitioners here have not
22 claimed any legitimate interest in punishing Ceballos
23 for what he said, nor have they made the case --

24 JUSTICE KENNEDY: Well, their -- the interest
25 they claim that of supervising their employees.

1 MS. ROBIN-VERGEER: That is not correct. In
2 this case, the Petitioners --

3 JUSTICE KENNEDY: I mean, that's the interest
4 that we're concerned with, is of having the Government
5 have the capacity to be able to control the speech of
6 its employees so they could have a consistent policy
7 and so that it can explain to the people what it's
8 doing.

9 MS. ROBIN-VERGEER: They've articulated that
10 as an abstract principle that has no application on the
11 facts of this case, because on the --

12 JUSTICE SCALIA: Well, why --

13 MS. ROBIN-VERGEER: -- facts of -- sorry.

14 JUSTICE SCALIA: Go on. I'll let --

15 MS. ROBIN-VERGEER: On the facts of this --

16 JUSTICE SCALIA: -- let's hear your --

17 MS. ROBIN-VERGEER: -- case, they never claim
18 that Ceballos did anything improper, that he exercised
19 poor judgment, that he was insubordinate. They just
20 said, "We didn't retaliate." That was their defense of
21 this case. And that presents a fact question for the
22 jury.

23 JUSTICE KENNEDY: But you're the one that's
24 asking us to adopt a rule. And I'm suggesting to you
25 that there is an interest that's sacrificed by the rule

1 that you request, and that is the Government's interest
2 in regularity and consistency of its speech. They
3 don't have to claim it on a case-by-case basis. You're
4 the ones that are asking us to make this rule.

5 MS. ROBIN-VERGEER: With respect, I disagree
6 with the characterization, because -- well, there are
7 three reasons why Petitioners proposed per se rule,
8 which would be unwise. And it is they who are asking
9 for a per se exclusion where the Court has not
10 previously adopted a per se exclusion. And the reason
11 why it's unwise is that it will chill speech of
12 paramount public importance by prosecutors and many
13 other public employees. It will force many public
14 employees to go public if they want any chance of
15 constitutional protection, and it will lead to
16 arbitrary and unworkable linedrawing regarding whether
17 an employee's speech falls --

18 JUSTICE SCALIA: Well --

19 MS. ROBIN-VERGEER: -- within his job duties.

20 JUSTICE SCALIA: Because public employee
21 unions are so weak? They're the only strong unions
22 left in the country. I mean, really.

23 [Laughter.]

24 JUSTICE SCALIA: You need the Constitution to
25 protect employees against things of this sort?

1 MS. ROBIN-VERGEER: Absolutely. The Court
2 has recognized, in Pickering and in other cases, that
3 the threat of dismissal from public employment is a
4 potent means of inhibiting speech. Public employees
5 who speak up within their workplaces about police
6 brutality, falsification of evidence, disaster
7 preparedness, and so on, should not be compelled to
8 shade the reports and the recommendations and tell
9 their superiors only what they want to hear or else
10 face reprisal for their candor.

11 JUSTICE SCALIA: No, but neither should a
12 superior be required to get a report from a subordinate
13 that he thinks is way off base, just a result of poor
14 judgment, thinking that there -- that there was a
15 violation here, when there -- when there obviously
16 wasn't, or using facts that were not sufficiently
17 established in order to claim such a violation.
18 Surely, the employer is entitled to say, "On the basis
19 of this report, which you gave me, you're fired."

20 MS. ROBIN-VERGEER: That's absolutely --

21 JUSTICE SCALIA: Or -- you know, or --

22 MS. ROBIN-VERGEER: That's absolutely
23 correct. And if, in this case, that judgment had been
24 made by Ceballos's employer, that he had exercised poor
25 judgment, that he was rash or reckless in his

1 conclusions, then the employer would have had a valid
2 basis for taking an adverse employment action against
3 him. But that is not what happened in this case.

4 CHIEF JUSTICE ROBERTS: Well, but you're just
5 hiding behind the fact that they claimed that it wasn't
6 in retaliation. Your assertion still puts them in the
7 position of having to defend a constitutional claim on
8 a case-by-case basis every time there's a disagreement
9 between a subordinate and a superior about, as in this
10 case, what Brady requires.

11 MS. ROBIN-VERGEER: Well, actually, the
12 disagreement -- there wasn't any disagreement. He came
13 forward and exposed police misconduct. And his
14 supervisors were on his side.

15 CHIEF JUSTICE ROBERTS: There was a
16 disagreement about whether or not his memorandum
17 accurately reflected, in an appropriate way, what was
18 at issue there. There was a disagreement about the
19 content of the allegations.

20 MS. ROBIN-VERGEER: I don't think it's
21 important, for, maybe, purposes of this, to iron this
22 out, but I -- respectfully, I don't agree with that
23 characterization, because, even in the resolution of
24 the grievance internally, the -- what they found in the
25 grievance was that they took no adverse action against

1 him because of what he said --

2 JUSTICE BREYER: That doesn't --

3 MS. ROBIN-VERGEER: -- in connection with
4 this case.

5 JUSTICE BREYER: That isn't the point. I
6 think the point is, at least for -- I think point is
7 who is going to decide whether there was some
8 justification here. And I read this memo. I thought
9 that the DA had a pretty good claim, that the police
10 didn't do anything wrong. And there's also an argument
11 they did. All right. So, who decides that kind of
12 thing? A constitutional court or a State, under its
13 protection laws or whistle-blower statutes?

14 MS. ROBIN-VERGEER: No --

15 JUSTICE BREYER: And the argument that you
16 have to face, I think, is that it will be very
17 disruptive to have constitutional judges dive into
18 this, when there are so many other remedies, and where
19 the very act of their doing it, allowing discovery,
20 allowing court cases, allowing juries, itself, will
21 disrupt the Government. Now, if you say they give you
22 no protection at all, I want to hear what you have to
23 say as to what the standard is to separate the sheep
24 from the goats.

25 MS. ROBIN-VERGEER: Okay. There are a few

1 points embedded in the question, and I'd like to take
2 them one by one.

3 With respect to the standard, the standard
4 is, if the employer makes a judgment that the public
5 employee has not performed his or her job properly or
6 has been insubordinate, so long as that judgment isn't
7 based on a censorial type motive, like, "We don't
8 tolerate criticism of the sheriff's department,"
9 something like that, then the employer's judgment
10 prevails. And I'm not suggesting that a district --
11 Federal district Court has license to second-guess that
12 judgment, so long as that judgment's actually the
13 judgment that was made. I mean, there's a pretext
14 analysis that might be made in this case --

15 JUSTICE BREYER: The only cases that would go
16 into court are cases where the employer says, "I have
17 no reason at all for firing him"?

18 MS. ROBIN-VERGEER: Well, in a case like
19 this, the county never came forward --

20 JUSTICE BREYER: But that's because --

21 MS. ROBIN-VERGEER: -- and said that --

22 JUSTICE BREYER: -- they think they have a
23 better claim on the other part. I mean, if -- even if
24 you're right in this one, I promise you, the next one
25 will come along, and they'll say, "Of course we had a

1 good reason for firing him. One, we didn't fire him
2 for that reason. Two, if we did, we would have been
3 justified," or whatever. So --

4 MS. ROBIN-VERGEER: But --

5 JUSTICE BREYER: -- if your standard is, the
6 only cases that go into court under the First Amendment
7 are cases where the employer says, "I had no basis for
8 doing anything to him whatsoever," then I think there
9 will be few such cases, though you might convince me
10 that that standard --

11 MS. ROBIN-VERGEER: Well --

12 JUSTICE BREYER: -- wouldn't do any harm.

13 MS. ROBIN-VERGEER: -- that's why I said that
14 it would be subject to a pretext analysis. The
15 employer, of course, might come back and -- and, post
16 hoc, come up with a rationale for --

17 JUSTICE SCALIA: But that'll --

18 MS. ROBIN-VERGEER: -- why they did --

19 JUSTICE SCALIA: -- always be --

20 MS. ROBIN-VERGEER: -- what they did.

21 JUSTICE SCALIA: -- the claim. That'll
22 always be the claim. They'll always say, "Oh, yes,
23 you said you did it because of that, but you did it
24 because you're retaliating" --

25 MS. ROBIN-VERGEER: You know --

1 JUSTICE SCALIA: -- "for this or that." I
2 mean --

3 MS. ROBIN-VERGEER: -- we're not operating in
4 uncharted territory here. The rule that the Ninth
5 Circuit has adopted has been the prevailing rule in the
6 Circuits for years. And I just want to clarify
7 something that came up in the last argument, where I
8 cited some very rough statistics about the numbers of
9 cases. There's a rough -- a rough cut at the universe
10 of public employee free-speech cases, of which this
11 type of case, where the speech is part of the job, is
12 only a tiny subset. These cases are not dominating the
13 courts, and you don't have all the litigation that is
14 being --

15 CHIEF JUSTICE ROBERTS: Is that because --

16 MS. ROBIN-VERGEER: -- claimed would occur.

17 CHIEF JUSTICE ROBERTS: -- they're addressed
18 -- is it -- they're addressed under State and Federal
19 whistle-blower laws, or --

20 MS. ROBIN-VERGEER: No, that's -- actually
21 gets me back to the second part of Justice Breyer's
22 question, which is protection. And it's a complete
23 hit-or-miss situation across the country. And just to
24 respond to something that was said about the Federal
25 Whistle-blower Protection Act, that statute has a

1 gaping hole in it, as construed by the Federal Circuit,
2 because the Federal Circuit has construed it to exclude
3 protection for speech that is part of the employee's
4 normal duties. So, in any case that would come up with
5 a Federal employee, leaving aside what judicial
6 remedies are even available for a Federal employee in
7 this area, the Federal employee would be largely
8 unprotected by the Federal Whistle-blower statute. And
9 with respect to what the state of law is across the
10 country, it's complete patchwork. Different types of
11 speech are protected, there's huge holes in coverage.
12 There is no --

13 JUSTICE GINSBURG: What about California,
14 which was the State where this episode occurred? Was -
15 - I think you mentioned that he did not make a claim
16 under the State statute.

17 MS. ROBIN-VERGEER: That's correct. And it's
18 sort of interesting that neither the Petitioners, the
19 United States, or any of the amici have cited a
20 California whistle-blower statute that would have been
21 applicable to this claim. I -- frankly, I think that there
22 was one that potentially might have been applicable,
23 not cited by any of the parties, but the law was in
24 flux, and it really wasn't all that clear. And that's
25 -- and California's probably one of the better States,

1 in terms of whistle-blower protections, compared to --
2 and we're talking about a local government employee,
3 and the odds of protection -- it's just hit or miss
4 across the country.

5 JUSTICE KENNEDY: Are you saying --

6 MS. ROBIN-VERGEER: The --

7 JUSTICE KENNEDY: Are you -- are you saying
8 the California courts would tolerate a situation where
9 a member of the bar told one of his employees to
10 misrepresent to the court?

11 MS. ROBIN-VERGEER: If you're --

12 JUSTICE KENNEDY: The California courts --

13 MS. ROBIN-VERGEER: -- referring back to
14 hypothetical --

15 JUSTICE KENNEDY: The California courts are
16 certainly not tolerating -- and, in fact, this case was
17 heard by a California court, and the -- and the judge,
18 as I read the record -- it's not altogether clear --
19 seemed to agree with the -- with the police officers.

20 MS. ROBIN-VERGEER: The motion to reverse
21 that was heard by a State Court judge was not run --
22 that hearing was not run by Ceballos. It was run by
23 the defense lawyers in that case. And Ceballos's
24 testimony was limited by the prosecution's own
25 objection. So, you can't judge anything from how that

1 disposition came out, whether the State Court judge
2 thought it was -- the police had lied or not lied. And
3 you can't judge anything by the way that hearing was
4 conducted.

5 But I want to return to why it's so important
6 that the Court not shrink First Amendment activity in
7 the workplace. It is of the utmost importance that
8 public employees, who internally report matters of
9 public concern, enjoy First Amendment protection, and
10 for two basic reasons. First, the public needs to have
11 a Government of public servants who do their jobs
12 honestly and with integrity, and not yes-men afraid to
13 tell public officials the bad news. A per se exclusion
14 of First Amendment protection creates a powerful
15 disincentive for deliberation within Government. The
16 last time, I cited an example of a FEMA employee who
17 was punished for saying to a supervisor that FEMA
18 wasn't ready to handle the next hurricane. But the
19 facts of this case are just as compelling, denying a
20 First Amendment protection for prosecutors who expose
21 police misconduct. And his disposition memo wasn't
22 just a prediction about whether -- how a judge would
23 rule on a motion; he exposed police misconduct and it --

24 JUSTICE SCALIA: Well, that's --

25 MS. ROBIN-VERGEER: -- was so --

1 JUSTICE SCALIA: -- that's not -- that's not
2 established. That's not established at all. His
3 supervisor obviously thought he didn't --

4 MS. ROBIN-VERGEER: I'm sorry, I didn't mean
5 to suggest that -- the truth of that allegation may be
6 open to question, but what is not open to question --

7 JUSTICE SCALIA: Yes, but it's a very serious
8 allegation for somebody who's in the position that this
9 employee was to make against police officers. And as I
10 understood the case, the supervisor said, "Wow, I don't
11 want loose cannons around down there who are accusing
12 perfectly honest and respectable police officers of
13 violating the law." Now, that --

14 MS. ROBIN-VERGEER: And --

15 JUSTICE SCALIA: -- hasn't been proven,
16 either. But --

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

18 JUSTICE SCALIA: But that is certainly a
19 possibility. And I do not want to exclude the ability
20 of a supervisor to fire somebody, if that possibility
21 exists, without having to go through extensive
22 litigation.

23 MS. ROBIN-VERGEER: With -- regardless of
24 whether he was ultimately correct or not, there's no
25 question, and there's no serious argument here, that he

1 had a legitimate basis for believing that police
2 misconduct had occurred. He conferred with his
3 supervisors and his colleagues before writing the memo.
4 Everyone agreed that there was a problem with the
5 warrant. And they took his allegations so seriously
6 that they released a defendant who had plead guilty.

7 JUSTICE BREYER: Say it's a --

8 CHIEF JUSTICE ROBERTS: But if --

9 MS. ROBIN-VERGEER: And went to Jail

10 JUSTICE BREYER: -- borderline case --

11 CHIEF JUSTICE ROBERTS: -- none of that were
12 true -- if none of that were true, he could still file
13 his complaint. Presumably it survives a motion to
14 dismiss, and it goes at least to summary judgment. And
15 that's true in every case of a disagreement between a
16 subordinate and a superior.

17 MS. ROBIN-VERGEER: That's true of every
18 public employee government -- excuse me -- public
19 employee speech case, period. Almost all of these
20 cases go to summary judgment. They can't be dismissed
21 at the pleading stage, by and large, because they
22 require factual development. So, all that -- all that
23 this per se rule does is add complexity and a need
24 for greater factual development. It's not the magic
25 bullet that the Petitioners seem to think it is. The

1 Givhan case suggests the unworkability of drawing the
2 First Amendment line as what's part of an employee's
3 job. Conferences between a teacher and her principal
4 take in the same level of generality as writing a
5 disposition memorandum --

6 JUSTICE ALITO: But what about the cases --
7 putting aside the clear-cut case where the employee's
8 statement is either clearly correct or clearly
9 incorrect, but what about the case where the objection
10 to what the employee is doing is the manner of the
11 speech? It's on the matter -- it's on the matter of
12 concern, but the supervisor just thinks that it's being
13 handled in a way that's ham-handed or indiscrete.
14 Aren't they going to -- aren't these cases going to
15 cause terrible litigation problems?

16 MS. ROBIN-VERGEER: No, they won't, and they
17 haven't. If the employee -- employer has a concern
18 about the manner in which it's communicated, that is a
19 valid employment concern. I mean, suppose Ceballos had
20 gone a had a big meeting with --

21 JUSTICE ALITO: But under --

22 MS. ROBIN-VERGEER: -- the sheriff's department -
23 -

24 JUSTICE ALITO: -- then under Pickering --

25 MS. ROBIN-VERGEER: -- and embarrassed them?

1 JUSTICE ALITO: -- the test is going to be
2 whether the manner, which may be difficult to recreate,
3 caused -- how much of a disruption it caused to the
4 operations of the office.

5 MS. ROBIN-VERGEER: These -- you'd think that
6 if there was that type of disruption and hindrance of
7 the way public agencies were carrying out their
8 missions by these kinds of cases, which have been
9 around for a long time, that you'd see citations to
10 them in the Petitioner's brief, in the United States
11 brief. And their silence on this point is both
12 deafening and telling, because, in fact, it has not
13 been the problem that is being posited here, and this
14 is not a new approach that we're talking about.

15 But getting back to the Givhan case,
16 conferences between teachers and principals are a part
17 of the teacher's job, and it's pure formalism to make
18 the protected status of the Givhan teacher's speech
19 turn on whether the employee manual says a teacher has
20 to work to root out race discrimination. Or what if
21 she was a part-time ombudsman who is charged to improve
22 race relations in the school? Under their approach,
23 you know, boom, it's not protected speech anymore, even
24 though the underlying First Amendment value is exactly
25 the same. It also makes it completely subject to

1 manipulation by the employer in making everything a
2 part of an employer -- employee's job, in terms of
3 reporting duties, which --

4 JUSTICE SCALIA: The First Amendment value
5 may be the same, but it -- but what is present is
6 another value. And unless the person is willing to go
7 public, in which case the balancing occurs, and
8 assuming there's no prohibition of it, that other value
9 is a very significant one, the ability of public
10 officials to run their offices.

11 MS. ROBIN-VERGEER: But here's the problem
12 with going public. It's perverse to create an incentive
13 for employees to go public, especially employees in
14 sensitive position -- in a sensitive position. The
15 First Amendment consequences here are especially grave,
16 because Ceballos had no realistic alternative channel
17 for communication open to him. Had he gone to a blog,
18 Web site, podcast, and so on, as Petitioners say in
19 their reply brief, or held a press conference, or gone
20 to Los Angeles Times, and so on, he'd be fired, and
21 he'd lose any First Amendment case that he brought.
22 So, what avenue does a prosecutor who wants --

23 JUSTICE BREYER: But what he has --

24 MS. ROBIN-VERGEER: -- to bring --

25 JUSTICE BREYER: But the argument that I

1 think people are worried about, against you, is, you
2 have a case -- it's actually a wonderful example. Your
3 client thinks that, in the affidavit that the sheriffs
4 gave supporting the warrant, they didn't tell the
5 truth, because they said that whoever was looking into
6 it, you know, said there was a private driveway and
7 that there were tire tracks, and there were no tire
8 tracks, and it wasn't a private driveway. The other
9 side says, "Yes, it was a long road, but sort of like a
10 driveway, and the edge of the -- of the driveway was
11 broken down, and that's what the sheriff's deputies
12 were referring to." I found it a dispute on both
13 sides.

14 MS. ROBIN-VERGEER: Well, you know --

15 JUSTICE BREYER: Now, if, in fact, he's being
16 disciplined for that, the other side is telling you he
17 has a lot of remedies, he has a variety of remedies.
18 Go to the bar associations. Many States have laws, the
19 statutes that protect people under these situations.
20 And why suddenly go to a constitutional court to get
21 the same relief which will short circuit all the other
22 remedies? And if you do, there are going to be
23 thousands of cases less good than yours, and they'll
24 all run to -- to the constitutional court. All right.
25 So, now, what's your reply?

1 MS. ROBIN-VERGEER: There is no baseline
2 level of protection that is available by statute or
3 civil service protections. If the Court recognizes
4 that the speech involved here, exposing Government
5 misconduct and so on, is important for First Amendment
6 purposes, as it has previously recognized, then it's --
7 then it needs to be a baseline level of First Amendment
8 protection. And then if whistle-blower statutes are
9 passed that protect it beyond the baseline level,
10 that's fine. I'm not maligning whistle-blower
11 statutes. But there is no such level of protection
12 that is guaranteed. For someone in his position, if
13 the First Amendment does not protect his speech, it's
14 just not protected.

15 And I want to get back to -- I started to say
16 why it's so important that the speech be protected.
17 It's not just that the public needs to have a
18 Government of public servants, but the Government needs
19 to know how it's operating. How can Government
20 function efficiently and effectively if it does not
21 possess the information it needs to make responsible
22 choices? When an employment decision is actually made
23 because the employee has made a bad judgment and he
24 reached an unwarranted conclusion in his memo, or the
25 manner in which he conveyed it was terribly indiscrete,

1 he publicized in front of the whole sheriff's
2 department, and embarrassed them, when that's an issue,
3 then the employment can respond, and the courts will
4 make quick -- short shrift of those cases, as they do
5 now.

6 JUSTICE ALITO: When --

7 CHIEF JUSTICE ROBERTS: Well, that --

8 JUSTICE ALITO: It --

9 CHIEF JUSTICE ROBERTS: -- was my point
10 earlier. They can't make short shrift of those cases,
11 because they're not going to be thrown out at the
12 pleading stage. They're going to have to progress at
13 least to summary judgment, probably in every case in
14 which an employee is terminated, because now one of his
15 defenses against termination is, "You're violating my
16 First Amendment rights."

17 MS. ROBIN-VERGEER: But, I mean, the Court
18 needs to appreciate that for the universe of public
19 employee free-speech cases, they're mostly decided at
20 summary judgment; they aren't decided on the pleadings.
21 That's already the case. And all that adding a job-
22 duty element to it is, adds complexity and requires
23 more factual development. It -- there's a number of
24 issues here. First of all, what counts as part of an
25 employee's job? Does the speech have to be required by

1 the job, or merely related to the job? How do you
2 judge if the speech meets the test? Do you go by the
3 job description? Common practice? What if the
4 employee's speech is not required by the job, but some
5 independent ethical duty compelled him to come forward
6 --

7 JUSTICE ALITO: If Pickering --

8 MS. ROBIN-VERGEER: -- as is the case here?
9 And, also, what if the employee --

10 JUSTICE SCALIA: Cases involving those
11 questions would have to go to the courts, I assume.
12 But they'd be a small percentage of all the cases that
13 would go to the courts if we adopt your position. I
14 agree, there will still be some cases left that'll have
15 to go to the courts to sort out these questions that
16 you mentioned. But that's going to be a small
17 percentage of the totality.

18 MS. ROBIN-VERGEER: Well, it's already a
19 small percentage of the totality, because cases of this
20 type, which involve speech by a public employee while
21 they're doing their job, however that is formulated,
22 are already a small subset of the universe of public
23 employee --

24 JUSTICE SCALIA: Perhaps --

25 MS. ROBIN-VERGEER: -- cases.

1 JUSTICE SCALIA: -- because it's been
2 unclear, until this Court has spoken to the subject,
3 and especially in light of the dicta in our prior
4 cases, which says that he has to be speaking publicly.
5 The reason for the -- for the -- for the paucity of
6 cases can be, simply, that the law was not clear, and
7 most people thought the way -- the way your opponent in
8 this case thinks.

9 MS. ROBIN-VERGEER: That's incorrect. I
10 mean, most of the Circuits have addressed this
11 question, and virtually all of them are -- have sided
12 with the Ninth Circuit and has -- have refused to draw
13 a bright-line rule when speech has come up as part of
14 the job.

15 And the -- and as -- Justice Scalia, you seem
16 to be referring to the "as a citizen" phrase the Court
17 has used in its opinions. And I want to address that.

18 No decision by this Court has ever turned on the "as a
19 citizen" phrase, and it's always been used in
20 conjunction with "matter of public concern." The most
21 that can be said is the phrase characterizes the facts
22 of the cases in which the Court used it. The Court
23 hasn't addressed whether speech that's part of the job
24 --

25 JUSTICE SCALIA: Yes, but the Court didn't

1 say this guy had blue eyes.

2 MS. ROBIN-VERGEER: Speech --

3 JUSTICE SCALIA: It said he was speaking as a
4 -- that seemed to the Court to be important to its
5 decision.

6 MS. ROBIN-VERGEER: Speech -- and I don't
7 mean to suggest it has no meaning, but "speech as a
8 citizen" means speech that one can readily imagine a
9 concerned citizen engaging in. You can imagine a
10 concerned citizen coming forward to report race
11 discrimination --

12 CHIEF JUSTICE ROBERTS: But that's not --

13 MS. ROBIN-VERGEER: -- in a school.

14 CHIEF JUSTICE ROBERTS: -- the context in
15 which this law developed. It developed, originally --
16 if you were a public employee, you did not have free-
17 speech rights as a citizen. As Justice Holmes said,
18 you know, you might have the right to speak, but you
19 don't have the right to be a policeman. So, the "as a
20 citizen" part didn't come out of happenstance.

21 MS. ROBIN-VERGEER: Right.

22 CHIEF JUSTICE ROBERTS: It was recognizing
23 that when you are speaking "as a citizen,"
24 juxtaposition to "as an employee," then you do have
25 First Amendment rights.

1 MS. ROBIN-VERGEER: But if you look at the
2 way it was used in Pickering, which, of course, is a
3 different case -- but, in Pickering, the Court was
4 emphasizing that public employees, like all citizens,
5 have an interest in speaking on a matter of public
6 concern. The Court, in Connick, suggested that if the
7 prosecutor there had spoken to bring to light actual or
8 potential wrongdoing or breach of public trust, her
9 speech would have presumptively been protected. If she
10 had done that, she'd be speaking in the same capacity
11 that Ceballos spoke here. One can readily imagine a
12 concerned citizen stepping forward to expose Government
13 misconduct. And it can be difficult to sort out in
14 which capacity an employee is speaking. And sometimes
15 an employee can speak in more than one capacity at
16 once.

17 JUSTICE ALITO: If Pickering balancing is
18 done, is there anything special about the situation
19 where the employee's speech is part of the employee's
20 job duties? Is the test applied differently in that
21 situation?

22 MS. ROBIN-VERGEER: It does, because if the
23 employer makes a judgment -- as I said before, if the
24 employer makes a judgment that the employee has carried
25 his job duties poorly, incompetently, insubordinately,

1 and so on, that interest is -- it's either dispositive
2 of the balance, or it's nearly so. And it -- so, from
3 that standpoint, the Court could put a gloss on the
4 Pickering balance that explains or emphasizes that the
5 employer's interests are controlling how the jobs are
6 performed, prevails.

7 But to get back, for a moment, to the --

8 JUSTICE ALITO: No, I'm not sure I understood
9 that answer. So, in this situation, if the employer
10 said that Mr. Ceballos was performing his job poorly,
11 that would be enough to tip the balance in the
12 employer's favor --

13 MS. ROBIN-VERGEER: If that was --

14 JUSTICE ALITO: -- under Pickering here?

15 MS. ROBIN-VERGEER: If that were really the
16 case. In a case like this, it would be clearly
17 pretextual, because not only -- not only was that not
18 the basis that was actually offered, but the employer
19 sided with him initially and released the defendant and
20 said he had a legitimate basis for speaking, and called
21 a meeting with the sheriff's department, and took all
22 these steps to show that they actually sided with him.
23 And only when the sheriff's department accused him of
24 -- as acting like a public defender and said, "We're
25 going to get sued if you don't back us up," then the

1 office changed its position and went against Ceballos.

2 So, in a case like this, it would clearly be
3 pretextual. In another case, however, it would not --
4 presumably there are cases where it would not be
5 pretextual.

6 JUSTICE ALITO: So, basically, the test --
7 the Pickering balancing is the same in this situation
8 as it is in, let's say, the Givhan situation.

9 MS. ROBIN-VERGEER: Well, this case is almost
10 identical to Givhan. The only -- the only thing is
11 that the Court, in Givhan, didn't expressly opine on
12 what capacity in which she was speaking. But it clear
13 that --

14 JUSTICE SOUTER: No, but I --

15 MS. ROBIN-VERGEER: -- a teacher speaking --

16 JUSTICE SOUTER: May I --

17 MS. ROBIN-VERGEER: -- in both capacities --

18 JUSTICE SOUTER: May I interrupt you? I
19 thought you said that, in this case, as distinct from
20 Givhan, there would be cognizable employer interests in
21 incompetence, the truth of what was said, the capacity
22 to do the job without roiling the waters unduly, and so
23 on. And that, I take it, is not necessarily so in a
24 Givhan situation. Or is it?

25 MS. ROBIN-VERGEER: In --

1 JUSTICE SOUTER: Maybe the employer has the
2 same interest in each. I --

3 MS. ROBIN-VERGEER: I think --

4 JUSTICE SOUTER: -- I have --

5 MS. ROBIN-VERGEER: -- the employer had the
6 same interest in both cases. The question in Givhan
7 was the fact that it was an internal report to the
8 employer: Did that matter? Did that reduce its
9 protection? The Court said no. So, the only thing
10 that it would take to make Givhan exactly like this is
11 to put it in the employee manual or make her an
12 ombudsman so it's -- so there's not even room for
13 argument that it was part --

14 JUSTICE SOUTER: No, but in --

15 MS. ROBIN-VERGEER: -- of her job.

16 JUSTICE SOUTER: -- in Givhan, if the
17 employee's assigned duties were all done competently,
18 but she had just gone off the deep end on racial
19 balance or something, the employer would not have had -
20 - if -- so long as it was the -- a private
21 communication like that, I don't know that the employer
22 would have had an interest in saying, "Well, you're
23 incompetent on the subject of racial balance, and
24 therefore I -- you know, I'm going to demote you or
25 fire you." But in the case in which the employee is

1 talking on the subject within the job description, then
2 the employer has got -- I thought you were saying he's
3 got a direct interest in competence, truth, and so on.

4 MS. ROBIN-VERGEER: Yes, that's --

5 JUSTICE SOUTER: Okay.

6 MS. ROBIN-VERGEER: -- that's correct.

7 That's right.

8 Let me turn, just for a second, to -- getting
9 back to the complexity here, and the linedrawing that
10 has to be done. The Petitioner's own hypotheticals
11 underscore the arbitrariness and unworkability of their
12 approach. In -- if you look in the reply brief, at
13 page 13, note 11, they cite, as an example, a county
14 emergency-room doctor who -- and then they put "is not
15 part of their normal duties," to sort of build it into
16 the hypothetical -- would have a right, a First
17 Amendment right, to come forward and talk about
18 inefficiencies in a county emergency room. Whereas,
19 the State health inspector, who finds health code
20 violations in nursing homes do not. The First
21 Amendment value in those situations are the same. And,
22 if anything, it's greater for the county emergency --
23 for the -- for the -- I've said this backwards -- the
24 county emergency-room doctor who's talking about how
25 the -- how the county hospital is operating. There's

1 no difference there. And it's a completely arbitrary
2 linedrawing.

3 Suppose Ceballos had gone outside the chain
4 of command, suppose he had reported to Garcetti that
5 there was police misconduct. It's not clear where that
6 position would -- where their position would lead them.

7 Now it's not part of his normal job duty to go talk to
8 the DA. He's bypassed the chain of command. But it
9 seems that they would say that, "Well, because it was
10 not part of his normal job duty, it -- then it would be
11 protected." And, if so, what message is that sending
12 public employees about whether they should follow their
13 employer's own rules about how you communicate in the
14 workplace and what the chain of command is? It doesn't
15 make any sense to force public employees to go public,
16 as that does more to increase disharmony and disruption
17 in the workplace than having an employee like Ceballos,
18 who followed every rule and every order and instruction
19 regarding how to handle the case and how to communicate
20 within the workplace.

21 Connick said that the First Amendment's
22 primary aim is the full protection of speech upon
23 issues of public concern, as well as the practical
24 realities involved in the administration of a
25 Government office. The proposed rule is inconsistent

1 with that primary aim. It doesn't do anyone any good
2 to have U.S. attorneys and DAs blind-sided by coverups
3 in their office because their employees were afraid to
4 come forward and tell their supervisors the bad news.

5 JUSTICE ALITO: Well, for that reason,
6 they're -- for that reason, they're not likely to --
7 in most instances, they would not be hostile to
8 receiving that kind of information, if it was provided
9 to them.

10 MS. ROBIN-VERGEER: May I answer?

11 CHIEF JUSTICE ROBERTS: Sure.

12 MS. ROBIN-VERGEER: Unfortunately, there's
13 too much evidence, there's too much water under the
14 bridge, that shows that public employees who deliver
15 bad news, and are the unwelcome messenger, do face
16 retaliation in their workplaces. And here, Ceballos
17 told his workplace, his supervisors, that police
18 misconduct had occurred, and that was an unwelcome
19 message, and he was retaliated against for that reason.

20 CHIEF JUSTICE ROBERTS: Thank you, Ms. Robin-
21 Vergeer.

22 Ms. Lee, you have 3 minutes remaining.

23 REBUTTAL ARGUMENT OF CINDY S. LEE

24 ON BEHALF OF PETITIONERS

25 MS. LEE: Thank you, Your Honor.

1 I think that's an important point, Justice
2 Alito. I mean, in this case, it's exactly what
3 happened. The supervisors took Mr. Ceballos's
4 assessment seriously. And the difference was, after
5 they further thought about it, they didn't think --
6 they didn't agree with the proper course of action for
7 the district attorney's office, especially since there
8 was a motion pending, "Let's let the courts decide
9 that." So, if -- where -- I think Plaintiff's
10 suggesting that, but for protecting speech that's
11 required by the duties of employment, employees really
12 would not have much of a right or a remedy if it turns
13 out that the employer believed that maybe they weren't
14 performing their jobs correctly, or, in our case, if
15 the supervisor had considered the speech and said, "You
16 know what? You made a bad judgment call, and we don't
17 think it's entitled to a promotion," that shouldn't
18 give the Plaintiff a constitutional right to challenge
19 that decision. If that -- if the -- if Mr. Ceballos
20 was, in fact, doing his job, that was required of his
21 job, and he was doing it competently, his remedy is not
22 the First Amendment. His remedy is not even -- he
23 doesn't even need a whistle-blower statute for that.
24 He could go through civil service, he could go through
25 a formal grievance procedure, and though -- although

1 State statutes on whistle-blowers do vary, there is no
2 State statute, in my understanding, that covers broadly
3 than what the Ninth Circuit does here --

4 JUSTICE SCALIA: Ms. Lee --

5 MS. LEE: -- which is --

6 JUSTICE SCALIA: -- what do you respond to
7 the argument that this has been the law in a number of
8 Circuits and the sky has not fallen?

9 MS. LEE: Well, the reason that job-required
10 speech may not be -- may not be filed, or basis for
11 First Amendment retaliation, or the reason why we may
12 not have seen that, may simply be because public
13 employees understandably do not believe they're
14 exercising their First Amendment rights when they are
15 simply performing their duties of employment, when
16 they're speaking pursuant to their job duties or
17 writing reports or memorandums pursuant to their job
18 duties. Just because there may not be the significant
19 increase of First Amendment litigation in the public
20 employment context for purely job-required speech does
21 not mean that this Court should not consider this
22 issue.

23 And I disagree with the representation that
24 the facts in this case are identical to Givhan. This
25 Court commented in that decision that Givhan was

1 citizen speech. And I don't necessarily think that --
2 and it -- what -- that -- where our proposal -- our
3 approach would add further complexity to First
4 Amendment litigation in an employment context. It's
5 certainly not a difficult decision -- analysis in this
6 case.

7 CHIEF JUSTICE ROBERTS: Thank you --

8 MS. LEE: Thank you.

9 CHIEF JUSTICE ROBERTS: -- Ms. Lee.

10 The case is submitted.

11 [Whereupon, at 2:00 p.m., the case in the
12 above-entitled matter was submitted.]

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