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Transforming the Public Employee Speech Standard in Posey v. Lake Pend Oreille: More than Meets the Eye

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Transforming the Public Employee Speech Standard in *Posey v. Lake Pend Oreille*: More than Meets the Eye

I. INTRODUCTION

Since the middle of last century, the United States Supreme Court has evaluated speech restrictions imposed by the government on its employees with an evolving standard that balances the interests of government efficiency and free speech. This doctrine has been gradually refined by case law capped by the Court's 2006 decision in *Garcetti v. Ceballos*,[1] crystallizing a three-part inquiry into the protected status of public employee speech under the First Amendment. In its 2008 opinion, *Posey v. Lake Pend Oreille School District No. 84*,[2] the Ninth Circuit addressed a specific implication of the *Garcetti* decision, deciding whether the Supreme Court's latest innovation in its protected status inquiry presented a purely legal question, as historically treated, or a mixed question of fact and law.

In deciding that *Garcetti* transformed the inquiry into a mixed question, the Ninth Circuit significantly shifted the delicate balance established by the High Court over decades, opening the door to prolonged factual trials and increased settlement costs in public employee retaliation claims. The circuit court's twist on the legal review standard of the test bucks an ingrained practice of constitutional safeguarding by the courts in the contours between free speech and its competing interests and threatens to upset the Supreme Court's carefully crafted compromise.

II. FACTS AND PROCEDURAL HISTORY

The case stems from a lawsuit filed by Robert Posey against Lake Pend Oreille School District No. 84, alleging that the School District's elimination of his position constituted retaliation in violation of the First Amendment.[3] In Posey's capacity as a "Security Specialist" for Sandpoint High School, he became concerned about

1. 547 U.S. 410 (2006).
2. 546 F.3d 1121 (9th Cir. 2008).
3. *Id.* at 1123.

what he perceived to be certain inadequacies in the school's safety and security policies and enforcement of these policies.[4] After failing to generate a satisfactory response from the school's principal, Posey expressed his concerns in a letter delivered to several school and district administrators.[5] The letter addressed concerns about various flaws in Sandpoint's policies and the school administration's response to related problems, as well as Posey's personal grievances stemming from his ongoing tension with the school's administration.[6] Following the letter's delivery, Posey met with two of the administrators at his home, outside of school hours, to discuss his concerns.[7]

Sometime later, Posey learned that his current duties would be consolidated, along with several other employees' responsibilities, in a new position.[8] Posey applied for the new position but was not hired, effectively terminating his employment with the School District.[9] Following the School District's grievance and appeal process, which ultimately failed to reinstate him, Posey filed suit in Idaho state court under 42 U.S.C. § 1983, asserting that the District's elimination of his position and failure to rehire him amounted to retaliation for his letter and meeting with school administrators, in violation of the First Amendment.[10] The School District removed the case to Federal District Court and, following discovery, moved for summary judgment.[11] The School District argued that Posey's speech was not protected by the First Amendment because he made the statements pursuant to his duties as "Security Specialist."[12]

The district court agreed and held, as a matter of law in accordance with the United States Supreme Court's decision in *Garcetti v. Ceballos*,[13] that Posey's speech was not protected by the

4. *Id.* at 1123–24.

5. *Id.* at 1124.

6. *Id.*

7. *Id.*

8. *Id.* at 1125.

9. *Id.*

10. *Id.*

11. *Id.*

12. Posey v. Lake Pend Oreille Sch. Dist. No. 84, No. CV05-272-N-EJL, 2007 WL 420256, at *3 (D. Idaho Feb. 2, 2007).

13. 547 U.S. 410 (2006).

First Amendment.[14] According to *Garcetti*, the district court explained, employee statements made "'pursuant to their official duties'" are not constitutionally protected speech.[15] Under this standard, the district court concluded that Posey spoke in his capacity as an employee of the School District.[16] He did not communicate through the newspaper or his legislators, as a private citizen might, and his statements stemmed from the types of activities that he was paid to perform.[17] As Posey's speech was thus unprotected under the First Amendment, pursuant to *Garcetti*, the court granted the School District's motion for summary judgment.[18]

III. SIGNIFICANT LEGAL BACKGROUND

A. The Beginnings of Public Employee Speech Protection

The *Garcetti* standard applied by the district court represents the recent capstone of the United States Supreme Court's First Amendment doctrine on public employee speech. Up until the middle of the twentieth century, public employees enjoyed no recognized constitutional protection from conditions placed upon their employment, including those that restricted constitutional rights, such as free speech.[19] This trend in the Court's jurisprudence changed course in the 1950s and 60s, as reflected in a number of cases that invalidated political affiliation conditions of public employment.[20] In 1967, the Court rejected the theory "that public

14. *Posey*, 2007 WL 420256, at *5.

15. *Id.* at *3 (citing Freitag v. Ayers, 468 F.3d 528, 543–44 (9th Cir. 2006) (quoting Garcetti v. Ceballos, 547 U.S. 410, 421 (2006))).

16. *Id.* at *5.

17. *Id.* (citing Green v. Bd. of County Comm'rs, 472 F.3d 794, 800–01 (10th Cir. 2007)).

18. *Id.*

19. Consider Justice Holmes' famous words, writing for the Supreme Judicial Court of Massachusetts: "[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892), *cited in* Connick v. Myers, 461 U.S. 138, 143–45 (1983). This sentiment symbolized the Supreme Court's law through the early 1950s. *See, e.g.*, Adler v. Bd. of Educ., 342 U.S. 485, 492 (1952) ("If [public employees] do not choose to work on [terms that restrict their freedom of association], they are at liberty to retain their beliefs and associations and go elsewhere.").

20. *See, e.g.*, Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) (determining it was unconstitutional to deny employment on the basis of previous party membership); Wiemann v. Updegraff, 344 U.S. 183 (1952) (invalidating a requirement to deny past affiliation with the Communist party).

employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable . . . ."[21] The following year, the Court applied this general principle to the speech of public employees in the seminal case *Pickering v. Board of Education*.[22]

B. Pickering v. Board of Education

Marvin Pickering, an Illinois high school teacher, was fired for sending a letter to a local newspaper that criticized the school's revenue raising proposals.[23] While recognizing that the government's role as an employer regulating speech differs from its role in regulating the speech of private citizens, the Supreme Court held that public employees do not entirely relinquish their First Amendment rights by virtue of public employment.[24] The Court also emphasized the unique and vital role that public employees play in fostering free and open debate about matters of public importance among an informed electorate—a role that serves the public as a whole and that must be protected from the chilling effects of retaliation.[25]

In deciding cases involving the free speech rights of public employees, the Court instructed, an appropriate balance must be struck "between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[26] Where the *Pickering* Court declined to lay down a discrete standard for judging this delicate balance between individual free speech interests and those of the public employer—instead merely "indicat[ing] some of the general lines along which an analysis . . . should run"[27]—the circuit

21. Keyishian v. Bd. of Regents, 385 U.S. 589, 605–06 (1967).

22. 391 U.S. 563 (1968).

23. *Id*. at 564.

24. *Id*. at 568.

25. *See id*. at 571–72; *see also* San Diego v. Roe, 543 U.S. 77, 82 (2004) ("The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it."). However, the protection of public employee speech is not based solely on the policy of preserving open public discourse. *See* Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410 (1979) (extending the same protection to private statements by public employees on matters of public concern).

26. *Pickering*, 391 U.S. at 568–69.

27. *Id*. at 569.

courts subsequently filled the void with a variety of subtly unique standards.[28]

C. Connick v. Myers

Fifteen years later, the Court revisited this maturing standard in *Connick v. Myers*.[29] Assistant District Attorney Sheila Myers, disgruntled by her supervisor's decision to transfer her to a less desirable assignment, was terminated for circulating a questionnaire among her associates concerning various potential problems in the office working environment.[30] Upon review of the lower court's judgment that Myers was fired in retaliation for her exercise of a constitutionally protected free speech right,[31] the Supreme Court solidified the two-part analysis implied by the *Pickering* Court. First, as a threshold, the Court must determine whether the speech may "be fairly characterized" as touching upon a matter of public concern.[32] Then, if the employee's speech is related to a matter of public concern, the Court must proceed to judge whether the employer had adequate justification to restrict the employee's speech under the balancing inquiry contemplated in *Pickering*.[33]

D. Garcetti v. Ceballos

More than two decades later, the Court's 2006 *Garcetti* decision expanded the test once again, from two parts to three, with the addition of yet another threshold inquiry. The *Garcetti* Court, perhaps relying on the compound language ("as a citizen upon matters of public concern") in *Connick*,[34] effectively split the *Connick* threshold test in two. "[W]hen public employees make

28. *See, e.g.*, Bickel v. Burkhart, 632 F.2d 1251, 1257 (5th Cir. 1980) ("[W]hether a public employee's statements unduly interfere with the efficiency with which governmental services are provided."); Kaprelian v. Tex. Woman's Univ., 509 F.2d 133, 140 (5th Cir. 1975) (whether the employee's exercise of speech "clearly over-balanced" the employee's "usefulness" as an employee) (citing Ferguson v. Thomas, 430 F.2d 852, 859 (5th Cir. 1970)); Smith v. United States, 502 F.2d 512, 517 (5th Cir. 1974) (whether the employee's speech "substantially and materially interferes with the discharge of duties and responsibilities inherent in such employment").

29. 461 U.S. 138 (1983).

30. *Id.* at 140–41.

31. *Id.* at 141–42.

32. *Id.* at 146–47.

33. *Id.* at 146.

34. *Id.* at 147.

statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes . . . ."[35] Thus, following *Garcetti*, the standard for determining whether a government employer's restriction on a public employee's speech violates the First Amendment requires three separate inquiries. First, a court must determine whether the employee spoke pursuant to his official duties, as opposed to speaking as a private citizen.[36] If the employee spoke as a private citizen, the court then must decide whether that speech relates to a matter of public concern.[37] Finally, if both of these thresholds are met, the court must judge whether the employer was justified in restricting the speech, balancing the employer's interests in promoting the effective functioning of its enterprise with the interests of free speech.[38]

This standard represents the Supreme Court's effort to balance two vital, yet competitive, interests: the government employer's interest in promoting the efficient operation of public services and the shared interest of the public employee and the community at large in preserving the value of unfettered speech.[39] The Ninth Circuit's decision in *Posey v. Lake Pend Oreille School District No. 84*[40] signals a material shift in this balancing act.

IV. THE COURT'S DECISION

On review of the district court's summary judgment in favor of the School District, the Ninth Circuit in *Posey* laid out the framework for sustaining a First Amendment retaliation claim: the public employee must show "(1) [t]he employee engaged in constitutionally protected speech, (2) the employer took adverse employment action against the employee, and (3) the employee's speech was a 'substantial or motivating' factor in the adverse action."[41] The combined *Pickering-Connick-Garcetti* test answered the first of these three elements, and, until *Posey*, the court answered it purely as a matter of law before the remaining two elements were

35. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).
36. *Id.* at 421–23.
37. *Connick*, 461 U.S. at 146–47.
38. *Id.*
39. *See Garcetti*, 547 U.S. at 418–19.
40. 546 F.3d 1121 (9th Cir. 2008).
41. *Id.* at 1126 (citing Freitag v. Ayers, 468 F.3d 528, 543 (9th Cir. 2006)).

to be evaluated by the trier of fact.[42] In the opinion of the circuit court, however, the Supreme Court's recent *Garcetti* decision raised the question as to whether the first element remained entirely a question of law.[43]

Specifically, the circuit court focused on the dispute between Posey and the School District as to his job responsibilities. The nature of Posey's job duties was critical to the court's proper analysis of the *Garcetti* threshold questions, and the district court's determination that Posey's speech was made pursuant to those duties ended the inquiry and supported its summary judgment for the School District.[44] The parties, however, disputed whether Posey had any policy-making responsibilities that would support the conclusion that his job duties required his letter and the meeting.[45] In *Garcetti*, the circuit court pointed out, there was no such dispute—both sides conceded that the speech in question was performed pursuant to the speaker's employment responsibilities.[46] In the circuit court's view, the existence of this dispute distinguished Posey's case from *Garcetti*, and required the court to decide whether *Garcetti*'s contribution to the public employee speech standard "transformed" the protected status inquiry "into a mixed question of fact and law."[47]

Looking to its sister courts for guidance, the Ninth Circuit panel recognized a split among other circuits deciding this question:[48] specifically, the Fifth,[49] Tenth,[50] and D.C.[51] Circuits had determined that all three steps of the inquiry into the protected status of speech were matters of law properly decided at summary judgment. The other side of the split is a bit hazier: the Third Circuit clearly has

42. *See id.*

43. *Id.*

44. *Id.* at 1126–27.

45. *Id.* at 1125; *see supra* Part II.

46. *Id.* at 1127 (citing Garcetti v. Ceballos, 547 U.S. 410, 424 (2006)).

47. *Id.*

48. *Id.*

49. *Id.* (citing Charles v. Grief, 522 F.3d 508, 513 n.17 (5th Cir. 2008) (holding that, even if it requires a factual inquiry, the question of whether employee speech is protected is a legal one properly answered at summary judgment)).

50. *Id.* (citing Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1202–03 (10th Cir. 2007) (holding that each of the three steps in the protected speech inquiry, including the *Garcetti* question, is to be resolved by the court and not the trier of fact)).

51. *Id.* at 1128 (citing Wilburn v. Robinson, 480 F.3d 1140, 1149 (D.C. Cir. 2007) (holding that the *Garcetti* inquiry is a question of law for the court to decide and not a question of fact)).

indicated that the *Garcetti* inquiry is a mixed question,[52] along with whom the Seventh Circuit has implicitly agreed;[53] additionally, the Eighth Circuit had concluded, *prior* to *Garcetti*, that the *Pickering* balancing of interests test was a mixed question.[54] The Ninth Circuit panel sided with the Third, Seventh, and Eighth Circuits.[55]

In support of its decision to fall on the "mixed question" side of the debate, the circuit court in *Posey* directed its attention to the "guidance" offered by the Supreme Court in *Bose Corp. v. Consumers Union of United States, Inc.*, for divining the appropriate distinction between questions of fact and law: "[f]acts that can be 'found' by 'application of . . . ordinary principles of logic and common experience . . . are ordinarily entrusted to the finder of fact.'"[56] This guiding principle, in connection with the *Garcetti* Court's seemingly similar recommendation that "'[t]he proper inquiry is a practical one,' requiring more than mere mechanical reference to '[f]ormal job descriptions,'"[57] led the circuit court to conclude that a "factual determination of a plaintiff's job responsibilities will not encroach upon the court's prerogative to interpret and apply the relevant legal rules."[58] Thus, the Ninth Circuit determined that the 2006 *Garcetti*

52. *Id.* (citing Reilly v. City of Atlantic City, 532 F.3d 216, 227 (3d Cir. 2008) ("[W]hether a particular incident of speech is made within a particular plaintiff's job duties is a mixed question of fact and law.")).

53. *Id.* (citing Davis v. Cook County, 534 F.3d 650, 653 (7th Cir. 2008)). The *Posey* court interpreted *Davis* to find "that since 'no rational trier of fact could find' that Davis's speech had been made as a private citizen, summary judgment was appropriate." *Id.* (quoting *Davis*, 534 F.3d at 653).

54. *Id.* (citing Casey v. City of Cabool, 12 F.3d 799, 803 (8th Cir. 1993) ("[A]ny underlying factual disputes concerning whether the speech at issue [is] protected should [be] submitted to the jury.")).

Further, the *Posey* court noted that even within the Ninth Circuit, district courts had reached conflicting conclusions on the issue. *Id.* at 1128 n.4 (comparing Neveu v. City of Fresno, No. CV-F-04-6490, 2007 WL 2330775, at *3 (E.D. Cal. Aug. 13, 2007) (question of law) with Shewbridge v. El Dorado Irrigation Dist., No. CIV. S-05-0940, 2006 WL 3741878, at *7 (E.D. Cal. Dec. 19, 2006) (mixed question), and also citing Clarke v. Multnomah County, No. CV-06-229, 2007 WL 915175, at *12 (D. Or. Mar. 23, 2007) (determining the inquiry to be a question of law but granting summary judgment on the basis that "no reasonable juror could conclude anything but all of plaintiff's communications were pursuant to her official job duties")).

55. *Id.* at 1129.

56. *Id.* (quoting 466 U.S. 485, 501 n.17 (1984)).

57. *Id.* (quoting 547 U.S. 424–25).

58. *Id.* (citing Miller v. Fenton, 474 U.S. 104, 113 (1985) ("An issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question.").

decision transformed the protected status inquiry from a purely legal one into a mixed question of fact and law, with the specific question of the "scope and content" of a public employee's official job duties a question of fact.[59]

V. ANALYSIS

While the Ninth Circuit's holding in *Posey* does nothing to change the substantive nature of the Supreme Court's test, by transforming one of the three questions from purely legal to mixed, it substantially shifts the balance the Court has constructed between the two competing policy interests. This shift is a step backward in the Court's effort to resolve the tension between First Amendment values and government efficiency. First, the decision is based upon a perceived split among the circuits that is not as stark as the Ninth Circuit paints it. Second, the decision runs contrary to analogous standards guiding similar constitutional doctrines. Finally, as a practical matter, the doctrine does little to improve the protection of First Amendment values, while greatly hampering the ability of government employers to operate efficiently.

A. The Circuit Split

The circuit panel in *Posey* relied on the split among its sister circuits as an opportunity to transform the legal standard of the protected status inquiry.[60] Upon closer examination, however, the "split" among the circuits appears more like one outlying circuit, accompanied by misinterpreted language from another circuit and the extension of yet another circuit's logic from an application of a different standard prior to *Garcetti*.

In its interpretation of the Seventh Circuit's position, the *Posey* court relied on *Davis v. Cook County*, which determined that "no rational trier of fact could find" that the speech was made in the capacity of a private citizen.[61] In a vacuum, this phrase seemingly supports the "question of fact" position on the issue, but the surrounding context and ultimate holding imply something different. The court in *Davis* reviewed a summary judgment from the

59. *Id.* at 1129–30.

60. *See supra* notes 49–54 and accompanying text.

61. *Posey*, 546 F.3d at 1128 (quoting Davis v. Cook County, 534 F.3d 650, 653 (7th Cir. 2008).

district court, which found, as a matter of law, that Davis's speech deserved no First Amendment protection.[62] The district court's decision was delivered prior to the Supreme Court's decision in *Garcetti*, but on review, the circuit court applied the new standard and upheld the lower court's summary judgment.[63]

Responding to Davis's argument that the *Garcetti* question should be heard by a jury, the court noted that "'[t]he inquiry into the protected speech is one of law, not fact.'"[64] The subsequent language quoted by the Ninth Circuit in *Posey* is a response to Davis's claim of entitlement to a jury trial, deflating that argument in the alternative by indicating that "no rational trier of fact could find" that her speech was made as a private citizen (even if the question were submitted to a jury). Further, the circuit court in *Davis* then proceeded to analyze the facts surrounding Davis's speech and her job responsibilities under the *Garcetti* test—an exercise the district had never conducted—before ultimately holding that her speech did not satisfy this threshold prong of the protected speech inquiry.[65] Such an analysis by the court would seem strange indeed, had the court not intended to resolve the question as a matter of law.

The *Posey* court cites the Eighth Circuit as further support of the purported split.[66] In *Casey v. City of Cabool*, that court held that "any underlying factual disputes concerning whether the speech at issue [is] protected should [be] submitted to the jury."[67] In the first place, as the Ninth Circuit points out, this case was decided prior to *Garcetti*, and the quoted language consequently refers to the balancing prong of the original *Pickering-Connick* test.[68] *Casey* at best supports an implication that the same logic would extend to the recent *Garcetti* decision—the same form of implication that, coincidentally, the Ninth Circuit rejected in *Posey* by failing to maintain its previous standard of legal review when it determined that the *Garcetti* case transformed the question from one of law to a

62. *Davis*, 534 F.3d at 651; Davis v. Cook County, No. 04 C 8218, 2006 WL 218166, at *6 (N.D. Ill. Jan. 23, 2006).

63. *Davis*, 534 F.3d at 652.

64. *Id.* at 653 (quoting Connick v. Myers, 461 U.S. 138, 148 n.7 (1983)).

65. *Id.*

66. *See supra* note 54.

67. 12 F.3d 799, 803 (8th Cir. 1993) (citing Shands v. City of Kennett, 993 F.2d 1337, 1342 (8th Cir. 1993)).

68. *See id.* at 802–03.

mixed question.[69] Additionally, *since* the *Garcetti* opinion, the Eighth Circuit has had the opportunity to apply its innovation to the public employee speech threshold, and has consistently applied it as a question of law.[70]

Finally, the Third Circuit indeed maintains the position that the *Garcetti* analysis poses a mixed question of fact and law with respect to whether speech is made within the employee's job duties.[71] In sum, what the Ninth Circuit has labeled a "split" among its sister circuits in reality amounts to the Third Circuit as an outlier, with the Seventh Circuit, to the extent its position is clear at all, curiously appearing to side with the Fifth, Tenth, and D.C. Circuits, and the Eighth Circuit consistently interpreting the *Garcetti* addition as a matter of law, despite its approach to the *Pickering-Connick* test prior to *Garcetti*.[72] This tenuous support from only the Third Circuit provides little real strength, especially when considered in light of the Supreme Court's trends in similar doctrines, and the practical policy in advancing goals discussed below.

B. Safeguarding Constitutional Boundaries

Irrespective of the positions of other circuits, the Ninth Circuit's position is difficult to square with the Supreme Court's own

69. *See* Posey v. Lake Pend Oreille Sch. Dist, No. 84, 546 F.3d 1121, 1127, 1129 (9th Cir. 2008) (questioning whether *Garcetti* transformed the protected speech inquiry from its previous status as purely a question of law into a mixed question of fact and law, and then deciding that it did).

70. *See, e.g.*, Davenport v. Univ. of Ark. Bd. of Trs., 553 F.3d 1110, 1113 (8th Cir. 2009) (affirming the finding of the district court, as a matter of law, that plaintiff's speech was made pursuant to his official job duties); Kozisek v. County of Seward, 539 F.3d 930, 937 (8th Cir. 2008) (affirming the district court's ruling that plaintiff's speech was not protected because it was purely job-related); Bradley v. James, 479 F.3d 536, 537–38 (8th Cir. 2007) (evaluating plaintiff's job duties to determine whether his speech was protected under the *Garcetti* threshold); McGee v. Pub. Water Supply Dist. No. 2, 471 F.3d 918, 920–21 (8th Cir. 2006) (interpreting the *Garcetti* decision for the first time in the Eighth Circuit and indicating that its inquiry is a "question of law for the court" (citing Connick v. Myers, 461 U.S. 138, 148 n.7 (1983)).

71. *See* Reilly v. City of Atlantic City, 532 F.3d 216, 227 (3d Cir. 2008) (citing Foraker v. Chaffinch, 501 F.3d 231, 240 (3d Cir. 2007)).

72. In his summary of this same circuit split, JoNel Newman recognizes only the Ninth (*Posey*) and Third Circuits as having decided the *Garcetti* analysis is a mixed question. JoNel Newman, *Will Teachers Shed Their First Amendment Rights at the Schoolhouse Gate? The Eleventh Circuit's Post-*Garcetti *Juriprudence*, 63 U. MIAMI L. REV. 761, 786 n.170 (2009). The Sixth Circuit appears to support the "question of law" view on the issue as well. *See* Haynes v. City of Circleville, 474 F.3d 357, 364 (6th Cir. 2007) (deciding the *Garcetti* analysis with no mention of a mixed question).

doctrinal patterns. First, *Connick* itself makes abundantly clear the Court's position prior to *Garcetti*: "The inquiry into the protected status of speech is one of law, not fact."[73] Further, after recognizing the difficulty in balancing the competing interests inherent in the inquiry, the *Connick* Court emphasized the obligation that it has "to examine for [itself] the statements in issue and the circumstances under which they are made to see whether or not they . . . are of a character which the principles of the First Amendment . . . protect."[74] The Court previously announced this obligation in *New York Times Co. v. Sullivan* and further stressed the importance of the Court's particular role in safeguarding the boundary "'between speech unconditionally guaranteed and speech which may legitimately be regulated,'" to ensure that the judgment does not inappropriately intrude on free expression.[75] "Because of this obligation," the *Connick* Court declares, "we cannot 'avoid making an independent constitutional judgment on the facts of the case.'"[76]

Thus, the Supreme Court has established a clear policy of policing the lines between First Amendment speech rights and other competing interests, answering questions of constitutional protection as a matter of law, not fact. There is no evidence from the Court to suggest that this longstanding mandate should be transformed, except for vague language from *Garcetti* cited by the Ninth Circuit to support its change: "[t]he proper inquiry is a practical one."[77] From this brief phrase, the Ninth Circuit draws a distinction between "concrete and practical" and "abstract and formal," with the former relegated to a question of fact and the latter a question of law.[78] This construction seems to imbue a few selected words with more meaning than intended. The *Garcetti* Court's words were a response rejecting the dissenting opinion writer's notion that, under the majority's new standard, employers could restrict employees' rights by merely concocting "excessively broad job descriptions."[79] The

73. Connick v. Myers, 461 U.S. 138, 148 n.7 (1983).

74. *Id*. at 150 n.10 (quoting Pennekamp v. Florida, 328 U.S. 331, 335 (1946)).

75. 376 U.S. 254, 284–85 (1964) (quoting Speiser v. Randall, 357 U.S. 513, 525 (1958)).

76. 461 U.S. at 150 n.10 (quoting Jacobellis v. Ohio, 378 U.S. 184, 190 (1964) (Brennan, J.)).

77. Garcetti v. Ceballos, 547 U.S. 410, 424 (2006), *cited in* Posey v. Lake Pend Oreille Sch. Dist. No. 84, 546 F.3d 1121, 1129 (9th Cir. 2008).

78. *Posey*, 546 F.3d at 1129.

79. *Garcetti*, 547 U.S. at 424.

inquiry is "a practical one"—that is, the court cannot rely solely on the formal job descriptions of an employee in order to determine the protected status of the speech.[80] Nothing in that reasoning implies that the *Garcetti* Court intended to alter its deeply held commitment to review the protected speech question as a matter of law, and the Ninth Circuit's reliance on this language is therefore misplaced.

C. Practical and Economic Concerns

Finally, practical policy considerations weigh against the Ninth Circuit's transformation. The Supreme Court's construction of the current public employee speech standard is a well-crafted balance between the competing interests of government efficiency and First Amendment free speech values.[81] The government would bear a substantial burden were it subject to the same standard in regulating its employees' speech as it is in regulating private citizen speech. Indeed, the Court's recognition of this burden animates the deference the Court gives to government employers in making employment decisions that restrict free speech.[82] This deference is reflected not only in the substance of the combined protected status test, but also in the review standard under which it is conducted.[83] While the *Posey* court left the substance of the *Pickering-Connick-Garcetti* analysis intact, by transforming the legal review standard to include a question of fact it effectively shifted the balance that the test reflects. The result is a greater social cost, with little free speech benefit.

On the one hand, the shift does little to further protect the interests of free speech. Ignoring the potential difference in outcome between the trier of fact and the court as the interpreter of law deciding the question, the real difference is one of timing and costs, not ultimate outcome. While this may produce some nominal value to plaintiffs who live to fight another day in court, its curb on the chilling effect to speech is likely minimal.

80. *Id.*

81. *See id.* at 417; Connick v. Myers, 461 U.S. 138, 143 (1983); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

82. *See Connick*, 461 U.S. at 143 (noting that the *Pickering* standard and its progeny reflect "the common sense realization that government offices could not function if every employment decision became a constitutional matter").

83. *See id.* at 150 n.10.

On the other hand, the real impact of this shift will be recognized in the public cost of litigation stemming from lawsuits by government employees that will survive summary judgment and proceed to the conclusion of fact-trying. In the form of increased settlement value for retaliation claims, the public will bear the cost of the switch, not to mention the indirect effect it will have on the efficiency of government employers who will base employment decisions on the heightened cost of potential litigation. Under the purely legal review standard, summary judgment is available in cases where the speech at issue is determined by the court to be made pursuant to official job duties. This is the practical benefit of incremental threshold inquiries—they avoid the later questions where unnecessary. In fact, the entire first element of a First Amendment retaliation claim is designed to filter claims before proceeding to the factual inquiry of the last two elements.[84]

The Ninth Circuit panel in *Posey* seemed to recognize the practicality of this reasoning, yet with no explanation, the court rearranged the order of the inquiry elements, switching the typically first threshold of *Garcetti* to the final question of the protected speech inquiry.[85] Perhaps the court realized the practical conundrum of engaging in questions of fact only to return again to purely legal questions that could make the factual questions moot. Now that the court has transformed the *Garcetti* analysis into a mixed question of fact and law, that inquiry must trail the remaining *Pickering-Connick* tests in order to avoid a logistical quandary.

The upshot of this change is a greatly reduced prospect of summary judgment for government employers. Any employee plaintiff can easily create a dispute as to the scope and content of his job responsibilities, thereby forcing a factual inquiry and avoiding summary judgment's procedural safeguard of the government employer's interest in efficiency.[86] Thus, the *Connick* Court's fear has become prophetic: every employment decision risks the prospect of becoming subject to a fact trial as a constitutional matter.[87]

84. *See* Posey v. Lake Pend Oreille Sch. Dist. No. 84, 546 F.3d 1121, 1126 (9th Cir. 2008).

85. *Id*. at 1130–31.

86. This ease is illustrated by *Posey* itself. The court notes that the parties "shifted" their characterizations of Posey's job duties after the "identification of the relevant legal questions at issue in [the] case." *Id*. at 1125 n.1.

87. *See Connick*, 461 U.S. at 143.

VI. CONCLUSION

The Ninth Circuit's transformation in *Posey* alters the protected status inquiry into public employee speech in a way that runs contrary to the weight of circuit court opinion on the issue, current Supreme Court law, and the practical underpinnings of the doctrine. Treating the *Garcetti* analysis as a mixed question of fact and law introduces unpredictable and inconsistent factual interpretation in a way that directly impacts the line between constitutionally protected and unprotected speech. This practice stands in stark opposition to the serious obligation of the courts to preserve the carefully crafted boundaries of competing constitutional interests and risks upsetting a delicate constitutional balance between government and its employees' speech.

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