Case No. 10-55978

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ANGELO **DAHLIA**,
Plaintiff-Appellant,

v.

OMAR **RODRIGUEZ**, individually and as a Lieutenant of the Burbank Police Department; JOHN MURPHY, individually and as a Lieutenant of the Burbank Police Department; EDGAR PENARANDA, individually and as a Sergeant of the Burbank Police Department; JOSE DURAN, individually and as a Sergeant of the Burbank Police Department; CHRIS CANALES, individually and as a Detective of the Burbank Police Department,
Defendants-Appellees,
and
CITY OF BURBANK, a municipal corporation; and TIM STEHR, individually,
Defendants.

Appeal from the U.S. District Court for Central District of California
(Hon. Margaret M. Morrow, United States District Judge)

PETITION FOR REHEARING EN BANC

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RULE 35(b)(1) STATEMENT

Plaintiff-Appellant Angelo Dahlia seeks en banc rehearing because the panel decision conflicts with multiple prior decisions of this Court, most acutely *Robinson v. York*, 566 F.3d 817 (9th Cir. 2009).[1] En banc rehearing is therefore "necessary to secure and maintain uniformity of the court's decisions." F.R.A.P. 35(b)(1)(A). Additionally, en banc rehearing is warranted because the decision involves an issue of exceptional importance and squarely conflicts with decisions of the Third, Fourth, Seventh, and Eighth Circuits regarding the application of the First Amendment to public employees' speech. F.R.A.P. 35(b)(1)(B).

INTRODUCTION

Burbank police officer Angelo Dahlia disclosed to outside agencies the abuse of suspects by his fellow officers and the officers' subsequent threats against Dahlia in order to keep him quiet. As a result of his speech, Dahlia suffered an adverse employment action. Pursuant to 42 U.S.C § 1983, he brought a First Amendment claim for retaliation based on his speech regarding a matter of public concern.

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[1] Other decisions with which the panel opinion conflicts include *Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1071 (9th Cir. 2012); *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1105-06 (9th Cir. 2011); *Anthoine v. North Central Counties Consortium*, 605 F.3d 740, 749-50 (9th Cir. 2010); *Eng v. Cooley*, 552 F.3d 1062, 1071 (9th Cir. 2009); and *Posey v. Lake Pend Oreille School District No. 84*, 546 F.3d 1121, 1129 (9th Cir. 2008).

Under *Garcetti v. Ceballos*, 547 U.S. 410 (2006), a threshold issue in this case is whether Dahlia's communications were made as a citizen or as part of Dahlia's job. *See id.* at 421. The panel decision here, criticizing but reluctantly following the decision of another panel in *Huppert v. City of Pittsburg*, 574 F.3d 696 (9th Cir. 2009), ruled that reporting wrongdoing is, as a matter of law, part of the job of every California police officer; consequently, an officer's report of wrongdoing is categorically unprotected under the First Amendment.

But the overwhelming majority of this Court's post-*Garcetti* jurisprudence correctly treats the scope of a public employee's job duties as a question of fact, to be determined based on the duties an employee is actually expected to perform rather than a boilerplate recitation of job duties. More specifically, this Court held (prior to *Huppert*) in *Robinson v. York*, 566 F.3d 817 (9th Cir. 2009), that the precise question at issue here — whether a California police officer's reporting of illegal activity was part of his job duties — was a question of fact; as a result, an officer's First Amendment retaliation suit survived a claim of qualified immunity. *See id.* at 820-21, 823-24. *Huppert* and the panel decision thus conflict with this Court's case law at both a general and a specific level: as a general matter, they analyze public employees' job duties using a categorical approach this Court has repeatedly eschewed, and they acutely conflict with the holding in *Robinson* that the scope of a police officer's job duties is a question of fact.

This case also involves a matter of exceptional importance. *Huppert* and the panel decision conflict with the decisions of several other circuits, which (like the majority view in this circuit) treat the scope of a public employee's job duties as a question of fact. Additionally, the practical consequence of the *Huppert* rule, applied by the panel here, is that the First Amendment *never* protects the speech of any California police officer who exposes official misconduct to any listener — a rule that will result in a powerful chilling effect on attempts by conscientious officers to speak out about a matter of grave public concern: official misconduct by law enforcement. For all of these reasons, en banc reconsideration is needed.

BACKGROUND

The relevant facts, recounted in detail in the panel opinion, *see Dahlia v. Rodriguez*, No. 10-55978, slip op. at 8804-08 (9th Cir. Aug. 7, 2012) (attached as an Appendix to this petition), can be summarized as follows. During a robbery investigation in December 2007, plaintiff Angelo Dahlia, a detective with the City of Burbank Police Department, witnessed his fellow officers in the Department engaging in unlawful and abusive conduct against suspects, including physical beatings, grasping a suspect around the throat, and placing a gun directly under a suspect's eye. *Id.* at 8804; ER 5-7. Dahlia heard Chief of Police Tim Stehr endorse this type of behavior, exhorting his officers to "beat another [suspect] until they are all in custody." *Dahlia*, slip op. at 8805; ER 8. Troubled by what he had seen and

heard, Dahlia reported the conduct to the lieutenant in charge of the robbery investigation, who rebuffed him. *Dahlia*, slip op. at 8805; ER 7-9. Although Dahlia again urged the lieutenant to intervene, he did not do so, and Dahlia witnessed more beatings in the following days and months. *Dahlia*, slip op. at 8805; ER 7-9.

In April 2008, Internal Affairs began to investigate the department's abuse of suspects and interviewed Dahlia several times. *Dahlia*, slip op. at 8805-06; ER 10. Numerous officers harassed, followed, and threatened Dahlia to keep him from revealing what he knew: At one point Dahlia was ordered to a city park, where he was berated by officers; on another occasion, an officer confronted Dahlia and told him (referring to a prior incident of alleged misconduct), "You know, there's only two people who know what happened, and one of them is dead." *Dahlia*, slip op. at 8806-07; ER 10-13. The persistent threats left Dahlia fearful for his own safety as well as the safety of his family. ER 11. Pressure on Dahlia from other officers intensified as news of a pending federal investigation reached the Department in late 2008. *Dahlia*, slip op. at 8807-08; ER 13-14. In April 2009, Officer Rodriguez called Dahlia into his office, brandished a gun, and stated, "Fuck with me and I will put a case on you, and put you in jail." *Dahlia*, slip op. at 8808; ER 14-15.

Outside the bounds of any official investigation, Dahlia reported this incident to the president of the Burbank Police Officers Association. *Dahlia*, slip op. at 8808; ER 14-15. On May 11, 2009, Dahlia was interviewed by another

police department, the Los Angeles Sheriff's Department, about the December 2007 robbery investigation; at that meeting, Dahlia disclosed the abuses he had witnessed as well as the threats against him. *Dahlia*, slip op. at 8808; ER 15.

On May 15, 2009, four days after his interview with the Los Angeles Sheriff's Department, Dahlia was placed on administrative leave pending discipline, with the consequence that he lost holiday pay, on-call pay, and the opportunity to take an examination for a promotion. *Dahlia*, slip op. at 8808; ER 15. This First Amendment retaliation lawsuit followed. ER 1.

The district court granted a motion to dismiss for failure to state a claim. *See Dahlia*, slip op. at 8809-10. Reluctantly applying *Huppert v. City of Pittsburg*, 574 F.3d 696 (9th Cir. 2009), a panel of this Court affirmed on the ground that Dahlia's speech was unprotected because it was encompassed within his official duties as a matter of law. *See Dahlia*, slip op. at 8817 ("We feel compelled, like the district court, to follow *Huppert*, despite our conclusion that it was wrongly decided and unsupported by the sole authority it relies upon.").

ARGUMENT

The panel decision perpetuates an intra-circuit split created by *Huppert*, conflicts with decisions of other circuits, and, on the exceptionally important issue of public employees' First Amendment rights, applies a rule that will chill all California police officers' speech about official misconduct.

I. The Panel Decision Perpetuates Conflict Within This Circuit's Case Law Over How To Determine Whether A Public Employee's Speech Falls Within His Job Duties.

"[T]he First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Garcetti*, 547 U.S. at 417. *Garcetti* made clear that the "as a citizen" component of this rule is a significant limiting criterion: "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 421. Consequently, when a public employee asserts a First Amendment retaliation claim, one of the crucial threshold questions is whether the statement at issue was made "pursuant to [his] official duties." *Id.*; *see Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009) (identifying this question as the second of five sequential steps in First Amendment analysis of public employee speech).

Though the Court in *Garcetti* did not "articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate," 547 U.S. at 424, the Court nonetheless made clear that this inquiry is not one of formalisms and nomenclature but one of practical substance:

> We reject . . . the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions. The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to

> perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.

Id. at 424-25 (citation omitted).

Following *Garcetti*, this Court has regularly treated the scope of an employee's job duties as a question of fact. *See, e.g.*, *Robinson v. York*, 566 F.3d 817, 823-24 (9th Cir. 2009); *Eng*, 552 F.3d at 1071. This fact question is, in turn, part of a mixed question of law and fact in which the scope of job duties is a question of fact and the constitutional significance of those facts to the First Amendment analysis is a question of law. *See Eng*, 552 F.3d at 1071; *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1129 (9th Cir. 2008); *accord Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1071 (9th Cir. 2012); *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1105-06 (9th Cir. 2011); *Anthoine v. N. Central Counties Consortium*, 605 F.3d 740, 749-50 (9th Cir. 2010). Under these decisions, the extent of an employee's job responsibilities cannot be determined categorically as a matter of law but must instead be analyzed at a practical, concrete level. This treatment is consistent with the Supreme Court's admonition that courts should avoid using "[f]ormal job descriptions" to stand in for a context-specific inquiry into the "the duties an employee actually is expected to perform." *Garcetti*, 547 U.S. at 424-25.

In *Robinson v. York*, this Court considered the case of a Los Angeles County police officer who alleged he was denied a promotion because he testified in a discrimination lawsuit against his department and filed several misconduct reports in which he alleged various types of illegal conduct by fellow officers including battery and excessive force. 566 F.3d at 820-21. The district court denied the defendants qualified immunity, and this Court affirmed. *Id.* at 820. The Court specifically rejected defendants' claim that qualified immunity was appropriate because Robinson's reports were part of his job duties as a matter of law. Rather, the Court held, Robinson's job duties were a disputed question of fact that a court of appeals lacks jurisdiction to adjudicate on appeal from a denial of qualified immunity. *Id.* at 823-24.

But in *Huppert*, a divided panel of this court, considering the job responsibilities of a Pittsburg, California, police officer, broke from *Robinson* and the rest of this Court's post-*Garcetti* jurisprudence, and engaged in precisely the type of formalistic, abstract inquiry *Garcetti* rejected. Pittsburg police officer Ron Huppert had provided information to the district attorney, the FBI, and a county grand jury all investigating corruption within the Department, and he and his partner (also a plaintiff) had also filed a report concerning their investigation into corruption, gambling, and drug activity by members of the Department at a city-owned golf course. *Huppert*, 574 F.3d at 699, 703. Two of the reports (to the DA

and regarding the golf course) were made pursuant to orders the plaintiffs had been given and therefore fell within their duties, *see id.* at 705-06, but the FBI and grand jury disclosures were not the product of any such orders. Instead of engaging in the "practical" inquiry *Garcetti* prescribed to determine whether these communications fell within Huppert's job duties, 547 U.S. at 424, the panel majority reached back to dicta from a seventy-three-year-old California intermediate appellate decision for a job description that the panel majority read as applying broadly to all California police officers:

> The duties of police officers are many and varied. Such officers are the guardians of the peace and security of the community, and the efficiency of our whole system, designed for the purpose of maintaining law and order, depends upon the extent to which such officers perform their duties and are faithful to the trust reposed in them. Among the duties of police officers are those of preventing the commission of crime, of assisting in its detection, and of disclosing all information known to them which may lead to the apprehension and punishment of those who have transgressed our laws. When police officers acquire knowledge of facts which will tend to incriminate any person, it is their duty to disclose such facts to their superiors and to testify freely concerning such facts when called upon to do so before any duly constituted court or grand jury.

Huppert, 574 F.3d at 707 (quoting *Christal v. Police Commission of City and County of San Francisco*, 92 P.2d 416, 419 (Cal. Ct. App. 1939)). Because this broad description classified any reporting of any criminal activity to anyone at any time as inherently a part of a police officer's job, the panel majority ruled that Huppert's communications to the FBI and the grand jury were unprotected. *Id.* at

706-10. Thus, *Huppert* held that for California police officers — in contrast to all other public employees in the Ninth Circuit — the scope of job duties is determined as a matter of law, without reference to "the duties an employee actually is expected to perform." *Garcetti*, 547 U.S. at 424-25.

As the panel in *Dahlia* explained, "[t]he *Christal* decision was barely apposite to the facts presented in *Huppert*," since the California Court of Appeal in *Christal* limited its holding to the question whether police officers subpoenaed to testify before a grand jury could assert their Fifth Amendment privilege and nonetheless retain their jobs. *Dahlia*, slip op. at 8816.[2] But the panel considered itself bound by *Huppert*. The result is two decisions applying a rule of law that conflicts with the majority of this Court's post-*Garcetti* jurisprudence, *see Dahlia*, slip op. at 8819 (noting the intra-circuit conflict), and which four of the five Ninth Circuit judges to consider it would reject. *Compare Dahlia*, slip op. at 8817 (Wardlaw, J., joined by Paez and Rawlinson, JJ.) (opining that *Huppert* was "wrongly decided"), *and Huppert*, 574 F.3d 718-23 (W. Fletcher, J., dissenting), *with Huppert*, 574 F.3d at 706-10 (Tallman, J., joined by Bertelsman, J., of the Eastern District of Kentucky). The intra-circuit conflict is most acute regarding

[2] *Huppert* also cited several other California Court of Appeal decisions quoting the *Christal* dicta; these cases, like *Christal*, had nothing to do with "the classic whistleblower scenario" presented in *Huppert* and *Dahlia*. *Id.* at 8817.

Robinson, which like this case and like *Huppert* involved a California police officer reporting illegal activity. According to the rule of *Huppert* and *Dahlia*, *Robinson* should have come out quite differently: instead of holding that the scope of the officer's job duties was a question of fact that could not be adjudicated on appeal from a denial of qualified immunity, and thus preserving the district court's denial of qualified immunity to the defendants, the *Robinson* panel (under *Huppert*) would have had to declare the plaintiff officer's speech categorically unprotected as a matter of law and reverse the denial of qualified immunity.

Since no petition for en banc rehearing was filed in *Huppert*, this is the full Court's first opportunity to close the rift that decision created in circuit case law and reaffirm what the Supreme Court and most of this Court's decisions have explained: the scope of an employee's job duties requires a fact-specific inquiry in which formal descriptions cannot stand in for practical realities.

II. The Panel Decision Conflicts With The Decisions Of Other Circuits.

Huppert and the panel decision contravene not only decisions of this circuit but those of others as well — as *Huppert* itself acknowledged. *See* 574 F.3d at 708 ("We decline to follow the Third Circuit's decision in *Reilly v. Atlantic City*, 532 F.3d 216 (3d Cir. 2008)."). As this Court noted in 2008, the Third, Seventh, and Eighth Circuits have all held that the scope of job duties is a question of fact. *See Posey*, 546 F.3d at 1128. Since then, the Fourth Circuit has joined them. *See*

Andrew v. Clark, 561 F.3d 261, 267 (4th Cir. 2009) (noting open factual question regarding the plaintiff's job duties and therefore rejecting district court's dismissal, as a matter of law, of a First Amendment retaliation claim).

Although a number of circuits, by contrast, *describe* the job-duty inquiry as a question of law, *see Posey*, 546 F.3d at 1127-28 (citing cases from the Fifth, Tenth, and D.C. Circuits), these circuits do not appear to differ much *in practice* with the majority view within the Ninth Circuit. *See Dahlia*, slip op. at 8820 n.6 ("[E]ven several of the circuits that classify the inquiry as a 'question of law' nevertheless, unlike *Huppert*, undertake a tailored, fact-specific assessment of a plaintiff's professional circumstances."). In the Tenth Circuit, for instance, although *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192 (10th Cir. 2007), characterized the scope-of-job-duties inquiry as one "to be resolved by the district court," *id.* at 1203, the court went on to caution that "we must take a practical view of all the facts and circumstances surrounding the speech and the employment relationship," *id.* at 1204; *see also Deutsch v. Jordan*, 618 F.3d 1093, 1098 (10th Cir. 2010) (recognizing that the question whether an employee is speaking pursuant to his official duties "may turn on resolution of a factual dispute by the jury"). A similar standard prevails in the Fifth and D.C. Circuits. *See Dahlia*, slip op. at 8820 n.6.

These cases suggest that even in circuits employing the "question of law" language, the scope-of-job-duties inquiry is actually a question of fact, and that what is resolved as a matter of law is the *ultimate* question whether the speech is protected under the First Amendment. The same can be said of the Sixth Circuit, which has stated that "the question of whether . . . a public employee's speech is protected [is] one of law," *Fox v. Traverse City Area Pub. Schs. Bd. of Educ.*, 605 F.3d 345, 350 (6th Cir. 2010), but has treated the specific scope-of-job-duties question as one of fact and permitted a claim to proceed on that basis, *see Pucci v. Nineteenth Dist. Court*, 628 F.3d 752, 768 (6th Cir. 2010). These circuits' approach is consistent with the Ninth Circuit's view (excepting, of course, *Huppert* and *Dahlia*). *See Eng*, 552 F.3d at 1071 ("While the question of the scope and content of a plaintiff's job responsibilities is a question of fact, the ultimate constitutional significance of the facts as found is a question of law." (citation and internal quotation marks omitted)); *Posey*, 546 F.3d at 1129.

Thus, *Huppert* and *Dahlia* stand alone, within and without the Circuit. No circuit appears to have taken the extreme position espoused by *Huppert* and applied in this case — *i.e.*, that the responsibilities of an entire job type for an entire state can be defined as a matter of law — and several circuits would clearly reject that position. The inter-circuit conflict presented here is within the power of this Court to resolve and is another reason to rehear this case en banc.

III. The Panel Decision's Broad Ruling Will Chill Crucial Speech About Official Misconduct.

As the *Dahlia* panel explained, *Huppert* not only "conflicts with the Supreme Court's First Amendment public employee speech doctrine," but also "chills the speech of potential whistleblowers in a culture that is already protective of its own." *Dahlia*, slip op. at 8818. "The upshot of *Huppert* is a rule, binding only in our Circuit, that the act of whistleblowing is itself a professional duty of police officers, thus stripping such speech of the First Amendment's protection" as a categorical matter. *Id.* at 8821.

Courageous police officers like Dahlia are in many circumstances the public's best (or even only) available source of information about police corruption and abuse. *See City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam) (noting the important role of public employees in exposing misconduct in their own agencies); *accord Dahlia*, slip op. at 8821-22. "Were [employees] not able to speak on these matters, the community would be deprived of informed opinions on important public issues," *Roe*, 543 U.S. at 82, such as (here) whether the Burbank Police Department is plagued by a culture of violence and impunity that results in the officially-condoned beating, choking and threatening of suspects. Unfortunately, the effect of the *Huppert* rule is to deter precisely this type of important whistleblowing speech on matters of serious public concern. *See Dahlia*, slip op. at 8822 ("*Huppert*'s treatment of the reporting of police misconduct and

corruption as a routine professional duty belies the personal and professional hazards of such acts. If reporting police abuse and misconduct during the course of an internal investigation, or even a federal or third-party investigation, is considered a professional duty, and is thus unprotected speech, *as a matter of law*, it is inevitable that police officers will be even less willing to report misconduct than they are now, particularly regarding their superiors."). For this reason, the panel viewed the *Huppert* rule not just as legally incorrect but also as producing "dangerous" results. *Id.* at 8822. The exceptional importance of this issue is an additional reason en banc resolution is needed.

CONCLUSION

To harmonize circuit law, avoid inter-circuit conflict, and correct a rule that produces serious and troubling results, the Court should grant rehearing en banc.

August 21, 2012

Respectfully submitted,

/s/ Scott Michelman

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CERTIFICATE OF SERVICE

I certify that on August 21, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Scott Michelman

CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULES 35-4 AND 40-1

I certify that pursuant to Circuit Rules 35-4 and 40-1, the attached petition for panel rehearing and rehearing en banc is proportionally spaced, has a typeface of 14 points, and contains 3,713 words.

/s/ Scott Michelman