No. 07-1184
(Consolidated with No. 07-1247)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MICHAEL ANDREW,

Plaintiff - Appellant,

v.

KEVIN P. CLARK (in his Personal Capacity); LEONARD HAMM, Baltimore Police Commissioner (in his Personal and Official Capacities); BALTIMORE POLICE DEPARTMENT; KENNETH BLACKWELL, Deputy Police Commissioner (in his Personal Capacity),

Defendants - Appellees.

On Appeal from the United States District Court
for the District of Maryland at Baltimore

BRIEF FOR AMICI CURIAE PUBLIC CITIZEN, INC.; THE AMERICAN CIVIL LIBERTIES UNION OF MARYLAND; THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION; THE GOVERNMENT ACCOUNTABILITY PROJECT; and THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PLAINTIFF - APPELLANT REQUESTING REVERSAL

Bonnie I. Robin-Vergeer
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

March 3, 2008

Counsel for Amici Curiae

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 26.1 and Federal Rule of Appellate Procedure 26.1, counsel for amici curiae certifies that each amicus organization is either a nonprofit corporation or an incorporated trade association that has no parent corporations and has issued no publicly held stock. Thus, no publicly held company owns ten percent or more of any of the amici organizations' stock.

Amici curiae have separately submitted the form "Disclosure of Corporate Affiliations and Other Interests" required by this Court.

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INTEREST OF AMICI CURIAE

With all parties' consent, amici curiae submit this brief in support of appellant Michael Andrew urging the Court to reverse the decision below and reinstate Andrew's First Amendment claim. Amici share a common interest in promoting free speech protections. They respectfully submit that their experience litigating First Amendment matters, including the scope of protections for government employee speech on subjects of public concern, and their work to secure legislative protections for "whistleblower speech," will enable them to assist this Court in deciding whether Andrew's First Amendment claim should proceed.

Public Citizen, Inc., a nonprofit advocacy organization founded in 1971, has approximately 90,000 members nationwide. Longstanding advocates for strong First Amendment free speech protections, Public Citizen's lawyers have counseled and represented government whistleblowers in court and worked to improve federal statutory whistleblower protections in Congress. Its lawyers represented Richard Ceballos in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), and have followed and analyzed the interpretation and application of that decision in the lower courts.

The American Civil Liberties Union of Maryland is the state affiliate of the American Civil Liberties Union ("ACLU"), a nationwide, nonprofit,

nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding in 1931, the ACLU of Maryland, which is comprised of approximately 14,000 members, has appeared before this Court in numerous free speech cases, both as direct counsel and as amicus curiae, including cases concerning the free speech rights of public employees.

The National Employment Lawyers Association ("NELA") is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of individuals who have been illegally treated in the workplace.

The Government Accountability Project ("GAP") is a non-partisan, nonprofit organization specializing in legal and other advocacy on behalf of "whistleblowers." GAP has a 30-year history of working on behalf of government and corporate employees who expose illegality, gross waste, and mismanagement; abuse of authority; public health and safety dangers; or other institutional misconduct undermining the public interest. GAP has substantial expertise in

protecting employees' free speech and whistleblower rights. As the nation's leading whistleblower protection organization, GAP is often called upon to comment on proposed laws, regulations, policies and reforms.

The Reporters Committee for Freedom of the Press, a voluntary, unincorporated association of reporters and editors, works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance, and research in First Amendment and freedom of information litigation in state and federal courts since 1970.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court dismissed Michael Andrew's First Amendment claim because it understood the Supreme Court in *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 (2006), to rule that a public employee who, because of his employment, learns of government malfeasance and "goes public" after being rebuffed or ignored within his workplace, enjoys no constitutional protection for his speech. The district court was wrong, and its decision must be reversed.

Garcetti held that when a public employee speaks as an employee, rather than as a citizen, he enjoys no First Amendment protection from reprisal by his employer when the employer does not appreciate his message. At the same time, however, the Court reaffirmed that "public employees do not surrender all their First Amendment rights by reason of their employment," 126 S. Ct. at 1957, and that "a citizen who works for the government is nonetheless a citizen." *Id.* at 1958. The Court expressly distinguished between speech by a public employee pursuant to "official duties," which is not protected from an adverse employment action, and expression "as a citizen," which enjoys First Amendment protection. *Id.* at 1960. Accordingly, under *Garcetti*, except for the unusual case in which the employee's job is to communicate to the press or public on his agency's behalf, the government employee who "goes public" with a report of government

malfeasance, corruption, gross mismanagement, and the like, speaks "as a citizen." Thus, his speech gives rise to "the possibility of a First Amendment claim" if his employer retaliates in response to that communication. *Id.* at 1958. Because the employee has spoken as a citizen on a matter of public concern, the burden shifts to the employer to establish, under *Pickering v. Board of Education*, 391 U.S. 563 (1968), "an adequate justification for treating the employee differently from any other member of the general public." *Garcetti*, 126 S. Ct. at 1958.

In dismissing Andrew's First Amendment claim against the Baltimore City Police Department ("BPD"), the district court misunderstood the careful distinction drawn by the Supreme Court between speech "as a citizen" and speech pursuant to official job duties. The district court held that even when a public employee, concerned that his efforts to redress serious wrongs within his agency have been ignored or covered up, steps forward and brings his story to the press, the employee *continues* to speak only as an employee, enjoying no possible constitutional protection from employer reprisal—ever. In so holding, the district court stripped Andrew and, effectively, all public employees, of *any* right under the First Amendment to speak publicly to expose government malfeasance or other matters of public importance to the light of day. The court simultaneously robbed the public of the right to hear these important messages.

STATEMENT OF THE CASE

Throughout early December 2003, Michael Andrew, a 30-year veteran of the BPD and a Major in command of the Eastern District, asked his commanders to investigate the handling of a barricade incident that led to the death of an elderly man, Cephus Smith, shot by police under orders by another commanding officer. J.A. 116, ¶ 14.[1] When no meaningful investigation occurred, Andrew, on his own initiative, wrote a memorandum to appellee Kevin Clark, then-Police Commissioner of the BPD. *Id.* at 116-17, ¶¶ 13, 16-18. The memorandum expressed "serious concerns" regarding whether Smith's shooting was justified and whether the situation had been properly handled. Andrew was disturbed not only by BPD's failure to exhaust peaceful non-lethal options, but by its having placed police officers unnecessarily "in harm's way." *Id.* at 117, ¶ 16; *id.* at 47-48.

When Clark ignored his memorandum, Andrew decided to make the public aware of the Department's mishandling of the barricade incident. Although he did not serve as a BPD media spokesperson, Andrew contacted a reporter at *The Baltimore Sun*, explained the situation, and provided him a copy of his memorandum. *Id.* at 117-18, ¶¶ 20-21. In early January 2004, *The Baltimore Sun*

[1] In its order granting appellees' motion to dismiss, the district court granted Andrew's leave to file his Second Amended Complaint. J.A. 146 n.1. The facts stated herein are drawn from that complaint.

published an article regarding the police shooting, based on Andrew's views, entitled "Tactics of officers faulted in city killing." *Id.* at 118, ¶ 22; *id.* at 32-33.

Following the article's publication, Clark removed Andrew from his Eastern District command, caused him to lose a stipend, and placed Andrew in a job with reduced responsibility and authority. *Id.* at 118, ¶¶ 23-24. Appellees subjected Andrew to an Internal Affairs investigation and later fired him. *Id.* at 118, 120-21, ¶¶ 23, 35, 42.[2] The BPD took these adverse actions because of Andrew's communication to *The Baltimore Sun*. *Id.* at 122, ¶ 45.

ARGUMENT

A PUBLIC EMPLOYEE WHO SPEAKS OUT ON A MATTER OF PUBLIC CONCERN TO THE PRESS OR THE PUBLIC DOES SO "AS A CITIZEN" AND MAY PURSUE A FIRST AMENDMENT CLAIM IF HIS EMPLOYER RETALIATES.

Andrew spoke as a citizen on a matter of undisputed public concern when he contacted a reporter at *The Baltimore Sun* and furnished him a copy of the memorandum he had written to then-Commissioner Clark. Nothing in the Supreme Court's decision in *Garcetti*—or in subsequent cases interpreting it—suggests that, as a matter of law, Andrew's communication to the press was

[2] Subsequently, Police Commissioner Hamm, who replaced Clark, reinstated Andrew's employment but not his command position. The internal charges against Andrew remain pending. J.A. 121-22, ¶¶ 42-43.

not speech by him "as a citizen" about whether the BPD was effectively carrying out its public mission.

A. General Principles

In its seminal decision in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), the Supreme Court recognized that public employees may not "constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest." At the same time, the Court acknowledged that the government's "interests as an employer" in regulating its employees' speech differ from those it possesses in connection with "regulation of the speech of the citizenry in general." *Id.* "The problem," the Court explained, is "to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*; *accord Campbell v. Galloway*, 483 F.3d 258, 266 (4th Cir. 2007).

Government employee speech on topics of public concern enjoys constitutional protection because robust public expression on matters central to effective governance lies at the heart of the First Amendment. "The First Amendment 'was fashioned to assure unfettered interchange of ideas for the

bringing about of political and social changes desired by the people.'" *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citations omitted). "[S]peech concerning public affairs is more than self-expression; it is the essence of self government." *Id.* (citation and internal quotation marks omitted). Affirming "[t]he public interest in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause," *Pickering*, 391 U.S. at 573, the Court in *Pickering* upheld a public school teacher's right to be free from reprisal for writing a letter to the editor on school budget issues. The Court reasoned: "Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." *Id.* at 572.

Police officers like Andrew are similarly likely to have informed opinions to contribute to civic discourse. *Cf. Garrity v. New Jersey*, 385 U.S. 493, 620 (1967) ("[P]olicemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights."). And although the First Amendment safeguards the free-speech rights of public employees, "[t]he 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." *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004).

To that end, the Supreme Court has safeguarded speech by public employees on matters of public concern, often communicated publicly or outside normal channels, and usually on topics relating to the speaker's employment. *See*, *e.g.*, *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977) (public school teacher's relaying of substance of school memorandum regarding teacher dress and appearance to radio station was protected speech); *Perry v. Sindermann,* 408 U.S. 593, 598 (1972) (state college teacher's public criticism of superiors on matters of public concern in testimony before state legislature was protected).

This Court, as well, has unreservedly recognized that government employees who engage in speech on matters of public concern enjoy presumptive protection from employer retaliation (unless, of course, the employer can justify taking action against the employee under the *Pickering* balance). Often, such communications were made publicly or outside the normal chain-of-command. In *Love-Lane v. Martin,* 355 F.3d 766, 777-78 (4th Cir. 2004), for example, this Court held that an assistant principal's protests regarding race discrimination to both public and private audiences were registered "as a citizen speaking on a matter of public concern" and protected by the First Amendment. In *Robinson v. Balog*, 160 F.3d 183, 189 (4th Cir. 1998) (citation omitted), the Court found

public employees' testimony before a governmental board on corrupt misuse of public funds to constitute speech as "citizen[s] upon matters of public concern." And in *Cromer v. Brown*, 88 F.3d 1315, 1325-26 (4th Cir. 1996), the Court ruled that a deputy sheriff engaged in protected speech when he signed a letter sent by a black officers' association to the sheriff complaining about race discrimination in the sheriff's office. Because the officers in *Cromer* expressed concern about the office's inability "to carry out its vital public mission effectively," Cromer and other association members "spoke as citizens, not merely as employees."

Andrew's memorandum, which he gave to *The Baltimore Sun* to kindle a public debate regarding the BPD's handling of the barricade incident, likewise called into question the ability of the BDP "to carry out its vital public mission effectively." The public has a significant interest in receiving "whistleblower speech" such as Andrew's. An essential element of representative government is an informed citizenry with the means to hold officials accountable for actions taken on its behalf. *Cf. NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (an informed citizenry is "vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed"). Individuals best equipped to inform the public of important matters

are often those within government; their speech can be integral to the public's knowledge and oversight of its representative leaders.

Andrew's speech is no exception. It indisputably addressed a matter of public concern, and, under longstanding Supreme Court and Fourth Circuit precedent, was a disclosure by him speaking "as a citizen."

B. The Supreme Court's Decision in *Garcetti* Recognizes That a Public Employee Who Speaks Out to the Press or Public Does So "As a Citizen."

Under sway of its view that Andrew was acting pursuant to his "official responsibilities" when he wrote the memorandum, J.A. 150, the district court concluded that Andrew's later election to "go public" by giving it to the reporter did not "convert[] what is undeniably speech effected pursuant to his employment duties into 'citizen speech' on a 'matter of public concern.'" *Id.* at 151. The court erred in so ruling.

Whether or not Andrew wrote the memorandum pursuant to his official job duties is beside the point. The capacity in which Andrew originally wrote his memorandum, after all, has little bearing on whether he spoke "as a citizen," as required under *Garcetti*, when he later sought to bring the incident and the BPD's failure adequately to investigate the shooting to the attention of the public.

Andrew's complaint alleges that the BPD retaliated against him for "providing the press with his views and concerns regarding the shooting death of Mr. Cyphus Smith," J.A. 122, ¶ 45, *not* that the BPD took adverse action because Andrew wrote a memorandum to Clark. Thus, it is Andrew's *second* communication—a distinct expression intended for publication in the newspaper—that must be evaluated under the standards articulated in *Garcetti* to determine whether Andrew was speaking as a citizen. Although the district court maintained that it could "find nothing in *Garcetti* or in the more persuasively reasoned cases that have interpreted *Garcetti,*" *id.* at 151, to support a distinction between Andrew's internal speech to his superior and his subsequent speech to the reporter, that very distinction was fundamental to the Court's opinion in *Garcetti* and has since been recognized in myriad lower-court cases.

1. In *Garcetti*, the Supreme Court held that Deputy District Attorney Richard Ceballos enjoyed no First Amendment protection from employer retaliation for writing a memorandum to his supervisors. Expressing concern that a police affidavit used to obtain a search warrant contained serious misrepresentations, the memorandum recommended dismissal of the criminal case. The Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment

purposes, and the Constitution does not insulate their communications from employer discipline." 126 S. Ct. at 1960. Because the parties did not dispute that Ceballos had written his memorandum pursuant to his employment duties, the Court had "no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." *Id.* at 1961.

Here, whether Andrew's disclosure of his memorandum to the press can be construed at the pleadings stage, *as a matter of law*, to have occurred pursuant to his official duties should not engender any "serious debate." *Garcetti* was careful to recognize that, although a public employee speaking pursuant to his official duties does not enjoy First Amendment protection from employer reprisal, "a citizen who works for the government is nonetheless a citizen." *Id.* at 1958. Acknowledging that "the First Amendment interests at stake extend beyond the individual speaker," the Court emphasized "the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion." *Id.* It noted that its past approach "acknowledged the necessity for informed, vibrant dialogue in a democratic society" and "suggested . . . that widespread costs may arise when dialogue is repressed." *Id.* at 1959. That Ceballos's memorandum (like Andrew's communication to the

reporter) "concerned the subject matter" of his employment did not matter because "[t]he First Amendment protects some expressions related to the speaker's job." *Id.* Instead, "[t]he controlling factor" was that Ceballos's memorandum, which he (unlike Andrew) did not broadcast publicly, was written "pursuant to his duties as a calendar deputy." *Id.* at 1959-60.

Both the *Garcetti* majority and dissenting opinions distinguished between, on the one hand, (1) public employee expression, such as Ceballos's memorandum, which is communicated pursuant to the employee's official duties and disseminated internally, and, on the other hand, (2) speech by a public employee to the press or the broader public that contributes "to the civic discourse." While the latter enjoys presumptive constitutional protection, the former does not. *Id.* at 1960.[3] Significantly, the Court noted that the Ninth Circuit's ruling that Ceballos's memorandum was constitutionally protected was an attempt to avoid what it perceived to be a "doctrinal anomaly." *Id.* at 1961. Reacting to the prospect of disparate constitutional treatment for the same statements made in different contexts or fora, which also troubled the district court

[3] That a public employee expresses his views exclusively inside his office, which is not the case here, is not dispositive. "Employees in some cases may receive First Amendment protection for expressions made at work," *Garcetti*, 126 S. Ct. at 1959, if they are made outside of the employees' job duties. *See*, *e.g.*, *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 414-16 (1979).

here, J.A. 151-52 & n.4, the Ninth Circuit had suggested that "it would be inconsistent to compel public employers to tolerate certain employee speech made publicly but not speech made pursuant to an employee's assigned duties." *Garcetti*, 126 S. Ct. at 1961 (citing *Ceballos v. Garcetti*, 361 F.3d 1168, 1176 (9th Cir. 2004)). The Supreme Court embraced this distinction, however, as consistent with "the theoretical underpinnings of [the Court's] decisions":

> Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. The same goes for writing a letter to a local newspaper, see *Pickering*, or discussing politics with a co-worker, see *Rankin*. When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees.

Id. (citations omitted).

Rather than disavow the disparate constitutional protection afforded public employees who speak pursuant to their job duties as opposed to those who choose to "go public," the Court responded that the "perceived anomaly" was "limited in scope" because it related only to "expressions an employee makes pursuant to his or her official responsibilities, not to statements or complaints (such as those at issue in cases like *Pickering* and *Connick*) that are made outside the duties of employment." *Id.* In other words, the so-called "anomaly" arises only in the

situation presented here—when an employee's statement on the same subject may be uninsulated from adverse action if made pursuant to his official duties but enjoys presumptive constitutional protection if made publicly.[4]

Garcetti added that if an employer is "troubled by the perceived anomaly," it has "the means at hand to avoid it": By creating an internal forum to encourage employees to voice concerns privately, employers can discourage their employees "from concluding that the safest avenue of expression is to state their views in public." *Id.* Of course, suggestions about how public employers might neutralize their employees' incentives to take the "safe" route and "go public" would have been unnecessary if *Garcetti* had held, as the district court believed, that even when a public employee *publicly* discloses concerns that initially came to light when the employee was performing his job duties, such speech *still* does not qualify as speech "as a citizen." Public employees, in that case, would have no incentive to publicize their concerns because, under the district court's view, once

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[4] Although beside the point here, whether Andrew's memorandum was initially written pursuant to his official duties is a question that seldom would be appropriate for disposition on the pleadings. As *Garcetti* emphasized, inquiry regarding the scope of an employee's duties "is a practical one" not governed by "[f]ormal job descriptions" alone. 126 S. Ct. at 1962. As courts have since recognized, whether public employees made statements pursuant to their job duties is a "fact-intensive" inquiry, *Foraker v. Chaffinch*, 501 F.3d 231, 240 (3d Cir. 2007), requiring "development of the record." *Rohrbough v. Univ. of Colo. Hosp. Auth.*, No. 06-00995, 2006 WL 3262854, at *3 (D. Colo. Nov. 9, 2006).

they had communicated those concerns internally pursuant to their job duties, they would forever lose the capacity to speak on the subject "as citizens." The district court's decision means that, contrary to the framework established in *Garcetti*, if Andrew was acting pursuant to his job duties when he criticized the BPD's conduct to the police commissioner, then Andrew has absolutely no constitutional right to make a "contribution[] to the civic discourse" on the matter. 126 S. Ct. at 1960.

The dissenting Justices in *Garcetti* likewise understood the Court to distinguish between public employee speech pursuant to official job duties (which is unprotected) and public employee speech expressed to the press or the broader public (which remains presumptively protected). Justice Stevens expressed frustration at this very distinction, finding it "senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description" and "perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors." *Id.* at 1963 (Stevens, J., dissenting). Justice Souter likewise noted "the majority's concession of some First Amendment protection when a public employee repeats statements made pursuant to his duties but in a separate, public forum or in a letter to a newspaper." *Id.* at 1965 n.1 (Souter, J., dissenting).

This Court drew the same distinction between speech pursuant to job duties and "going public" in *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000) (en banc), a decision that presaged *Garcetti* in ruling that public employee speech is entitled to First Amendment protection from discipline only if it is not communicated pursuant to the speaker's employment duties. This Court posited two contrasting hypothetical situations:

> [S]uppose an assistant district attorney, at the District Attorney's direction, makes a formal statement to the press regarding an upcoming murder trial—a matter that is unquestionably of concern to the public. It cannot seriously be doubted that the assistant does not possess a First Amendment right to challenge his employer's instructions regarding the content of the statement. *In contrast, when the same assistant district attorney writes a letter to the editor of the local newspaper to expose a pattern of prosecutorial malfeasance, the speech is entitled to constitutional protection because it is made in the employee's capacity as a private citizen* and touches on matters of public concern.

Id. at 407-08 (emphasis added; footnote omitted). Even assuming that Andrew wrote his memorandum pursuant to his official duties, his subsequent communication to *The Baltimore Sun* reporter is analogous to the assistant district attorney who writes a letter to the editor in the *Urofsky* hypothetical. When Andrew gave his memorandum to the reporter, he spoke as a citizen on a matter of public concern, not pursuant to his job duties. *See* J.A. 118, ¶ 21 (Andrew did not serve as media spokesperson for BPD, but provided newspaper a copy of his

memorandum "out of a personal concern for public safety"). At the dismissal stage, the Court must accept as true all well-pleaded allegations in the complaint. *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993).

2. When the district court opined that "the 'internal memorandum' prepared by Andrew never lost its character as speech pursuant to his official duties," J.A. at 152 n.4, the court missed the entire point of the *Garcetti* analysis and framework, as understood by majority and dissenting opinions alike. Under the district court's view, public employees retain *no* possibility of constitutional protection *ever* for publicly communicating serious government misconduct after attempts at protest within the workplace have failed. The court's logic also suggests the peculiar result that, if Andrew had originally addressed his memorandum to *The Baltimore Sun*, instead of Commissioner Clark, his speech would have been protected, although his communication to the newspaper would have been the same.

Oddly, the district court suggested that Andrew's communication to the reporter might have received constitutional protection if it had taken the form of a "letter to the editor." During a hearing, Judge Davis commented: "I think this would be a very different case if he had written a letter to [Mayor] Sheila Dixon, or Mayor O'Malley, or a letter to the editor, perhaps." J.A. 104. The district court

repeated this observation in its opinion: "The 'internal memorandum' was not a mere 'letter to the editor' by a member of the BCPD, even assuming that had Andrew chosen to 'go public' in such manner, doing so would have invigorated his ostensible First Amendment claim." J.A. 152.

Nothing in the Supreme Court's jurisprudence (or that of the lower courts, for that matter) suggests that a government employee must publicize his expression in a particular format for it to count as "citizen speech." *See Garcetti*, 126 S. Ct. at 1961 ("[e]mployees who make public statements outside the course of performing their official duties," such as "writing a letter to a local newspaper" retain potential constitutional protection). To suggest that it could possibly make any difference whether Andrew wrote a "letter to the editor" from scratch; explained his memorandum's concerns orally to the reporter; typed up a letter to the reporter or "the editor" and attached his memorandum; cut and paste the body of his memorandum directly into a "letter to the editor"; or provided the reporter his memorandum with an accompanying explanation, as Andrew alleged, is to elevate form over substance. Here, Andrew engaged in expression that, as alleged in his complaint, went beyond his job duties, stepping forward to publicize concerns he had previously conveyed only within the BPD. From the standpoint of the *Garcetti* "speech as a citizen" threshold, there is no difference between what

Andrew did and the teacher's letter to the editor in *Pickering*, the teacher's relaying of the school memorandum to the radio station in *Mt. Healthy*, or the teacher's public testimony in *Perry*. *See supra* pp. 9-10.

That Andrew knew what he was talking about by virtue of his employment, *see* J.A. 151, is not important for purposes of deciding whether he spoke "as a citizen," *see Garcetti*, 126 S. Ct. at 1959 ("The First Amendment protects some expressions related to the speaker's job."), but is relevant to the *Pickering* balance to be conducted later. The fact that his communication was well-informed and based on decades of experience within the BPD only bolsters Andrew's claim that it was critically important that he alert the community to BPD conduct that might call into question whether it was carrying out its mission safely and effectively. As the Supreme Court has said:

> Underlying the decision in *Pickering* is the recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues. 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.

Roe, 543 U.S. at 82; *see also Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion) ("Government employees are often in the best position to know

what ails the agencies for which they work; public debate may gain much from their informed opinions."); *accord Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996). Given the "importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion," *Garcetti*, 126 S. Ct. at 1958, the Court reaffirmed that "[e]mployees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection." *Id.* at 1961.

C. Lower-Court Decisions Applying *Garcetti* Have Recognized That When a Public Employee Speaks Out to the Press or the Public, He Does So "As a Citizen."

The district court could "find nothing in *Garcetti* or in the more persuasively-reasoned cases that have interpreted *Garcetti*" to support the view that when Andrew "elected to 'go public,'" he "converted" speech pursuant to his employment duties into "citizen speech" on a "matter of public concern." J.A. 151. However, although case law applying *Garcetti* is still developing, a consensus already has emerged that government employees speak "as citizens" when they express their views on matter of public concern to the press, the public, or to high-level officials outside the employees' normal chain-of-command—unless, of course, the factual record demonstrates that the employees' public statements were expressed pursuant to their official duties. *See*, *e.g.*, *Davis*

v. McKinney, --- F.3d ---, 2008 WL 451769, at *11 (5th Cir. 2008) (university audit manager spoke "as a citizen" when she contacted the FBI about possible child pornography on university computers and the EEOC about discriminatory practices relating to university's internet use policy); *Lindsey v. City of Orrick*, 491 F.3d 892, 898 (8th Cir. 2007) (public works director spoke "as a citizen" at city council meeting and during private meeting with mayor when she challenged council's compliance with sunshine law); *Freitag v. Ayers*, 468 F.3d 528, 545-46 (9th Cir. 2006) (corrections officer spoke "as a citizen" when she wrote letters to state senator and contacted inspector general regarding complaints of sexual harassment), *cert. denied*, 127 S. Ct. 1918 (2007); *Reuland v. Hynes*, 460 F.3d 409, 415 n.5 (2d Cir. 2006) (prosecutor not speaking pursuant to employment duties when he was interviewed about his office by magazine reporter), *cert. denied*, 128 S. Ct. 119 (2007). As the Fifth Circuit summed up: "If . . . a public employee takes his job concerns to persons outside the work place in addition to raising them up the chain of command at his workplace, then those external communications are ordinarily not made as an employee, but as a citizen." *Davis*,

2008 WL 451769, at *7; *accord Weintraub v. Bd. of Educ.*, 489 F. Supp. 2d 209, 219 (E.D.N.Y. 2007).[5]

Although the district court cited several court of appeals decisions in claiming that "the more persuasively-reasoned cases" did not support Andrew's contention that he spoke as a citizen when he provided his memorandum to the media, J.A. 151, none, except the Tenth Circuit's decision in *Casey v. West Las Vegas Independent School District*, 473 F.3d 1323 (10th Cir. 2007), discussed *infra* pp. 26-27, even arguably has any bearing on the question here. All the cited cases (except *Casey*, which was a mixed decision) held on a developed record at summary judgment (not on a motion to dismiss, as here) that the public employees expressed themselves pursuant to their official duties. But not one involved

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[5] *See also Meenan v. Harrison*, No. 06-2657, 2008 WL 364392, at *3 (3d Cir. Feb. 12, 2008); *Tokashiki v. Freitas*, 201 Fed. Appx. 391, 394 (9th Cir. Aug. 7, 2006); *Porter v. Intermediate Unit*, No. 06-1145, 2007 WL 2597911, at *10 & n.7 (W.D. Pa. Sept. 5, 2007); *Rush v. Perryman*, No. 1:07CV00001, 2007 WL 2091745, at *4 (E.D. Ark. July 17, 2007); *Drollett v. DeMarco*, No. 3-05CV1335, 2007 WL 1851102, at *5-*6 (D. Conn. June 26, 2007); *Barber v. Louisville & Jefferson Cty. Metro. Sewer Dist.*, No. 3:05-CV-142-R, 2006 WL 3772206, at *6-*7 (W.D. Ky. Dec. 20, 2006); *Benoit v. Bd. of Comm'rs*, 459 F. Supp. 2d 513, 517-18 (E.D. La. 2006); *Thompson v. City of Tucson Water Dep't*, No. 01-53, 2006 WL 3063500, at *11 n.20 (D. Ariz. Oct. 27, 2006); *Rohr v. Nehls*, No. 04-477, 2006 WL 2927657, at *2, *7 (E.D. Wis. Oct. 11, 2006); *Overton v. Bd. of Comm'rs*, No. 05-00186, 2006 WL 2844264, at *2 (D. Colo. Sept. 29, 2006); *Milde v. Hous. Auth. of Town of Greenwich*, No. 3:00CV2423, 2006 WL 2583086, at *7 (D. Conn. Sept. 5, 2006); *Hailey v. City of Camden*, No. 01-3967, 2006 WL 1875402, at *16 (D.N.J. July 5, 2006).

speech to the press or public. *See Haynes v. City of Circleville*, 474 F.3d 357, 364-65 (6th Cir.), *cert. denied*, 128 S. Ct. 5388 (2007); *Mayer v. Monroe Cty. Comty. Sch. Corp.*, 474 F.3d 477, 479-80 (7th Cir.), *cert. denied*, 128 S. Ct. 160 (2007); *Green v. Bd. of Cty. Comm'rs*, 472 F.3d 794, 800-01 (10th Cir. 2007); *Battle v. Bd. of Regents*, 468 F.3d 755, 761 (11th Cir. 2006); *Mills v. City of Evansville*, 452 F.3d 646, 648 (7th Cir. 2006). Indeed, some of these courts went out of their way to distinguish the situation here, where the employee has made his views publicly known. *E.g.*, *Haynes*, 474 F.3d at 364 (that Haynes "communicated solely to his superior" indicates that he was not speaking "as a member of the public writing a letter to the editor as in *Pickering*"); *Green*, 472 F.3d at 800 ("Ms. Green was not communicating with newspapers or her legislators or performing some similar activity afforded citizens . . . .").

The district court was misguided in believing that, in particular, the Tenth Circuit's decision in *Casey* supported its view that Andrew's communication to the press was not protected speech. J.A. 152 n.4. The district court found it significant that the Tenth Circuit determined that a school district superintendent spoke pursuant to her official duties when she reported that the district was not in compliance with federal Head Start regulations to "outsiders," including the school board, and indirectly conveyed that information to federal officials as well.

Id. *Casey* is easily distinguishable. The Tenth Circuit found at summary judgment, on a fully developed record, that Casey's statements to the school board constituted advice to her supervisors pursuant to her official duties and that, as Casey herself *conceded*, her duties as an administrator of a federally funded program required her to report irregularities to federal officials. 473 F.3d at 1329-31, 1334. Unlike the plaintiff in *Casey*, Andrew went to the press to publicize his findings, and his complaint affords no basis to conclude, as a matter of law, that he did so pursuant to his official duties.

The district court likewise found important the Tenth Circuit's contrasting determination that Casey's statements to the state attorney general reporting the school board's alleged violations of open meetings laws was protected citizen speech because, in part, no evidence suggested Casey had been assigned responsibility for the board's meeting practices. J.A. 152 n.4; *see* 473 F.3d at 1332-34. The court emphasized that Casey "was not seeking to fulfill her responsibility of advising the Board when she went to the Attorney General's office," *id.* at 1332, just as Andrew had no responsibility to approach the press. That Casey was not responsible for the issue she reported to the attorney general does not demonstrate, however, that an employee *must* be speaking on a matter unrelated to her employment duties for her speech to merit constitutional

protection. The Tenth Circuit had no need to address the matter, and *Garcetti* said just the opposite. *See* 126 S. Ct. at 1959 ("The First Amendment protects some expressions related to the speaker's job.").

Indeed, other circuits have explicitly held that expression by public employees to the press or outside normal channels was "citizen speech" although the speech concerned subjects on which the courts found the employees had previously spoken pursuant to their job duties. In *Freitag*, for example, the Ninth Circuit held (post-jury verdict) that a correctional officer's internal reports of inmate sexual misconduct and the prison's failure to respond were submitted pursuant to her official duties as a correctional officer. 468 F.3d at 544-46. Nonetheless, the court ruled that Freitag spoke as a citizen when she subsequently wrote letters to a state senator and contacted the state inspector general regarding sexual harassment at the prison. *Id.* at 545-46. Under *Garcetti*, the Ninth Circuit explained, "Freitag does not lose her right to speak as a citizen simply because she initiated the communications while at work or because they concerned the subject matter of her employment." *Id.* at 545. "The critical inquiry is instead whether Freitag engaged in the relevant speech 'pursuant to [her] official duties." With

respect to her contacts with the senator and inspector general, the answer was "No." *Id.*[6]

Following *Freitag*'s reasoning, the Fifth Circuit held in *Davis* (at summary judgment) that, although Davis spoke pursuant to her employment duties when she reported up the chain of command her concerns about the use of pornography on university computers, her reports to the FBI on the same subject and the EEOC on a related matter were nonetheless "not made as an employee" because the evidence reflected that "it was not within an auditor's job function to communicate with outside police authorities or other agencies in an investigation." 2008 WL 451769, at *11. So, too, here, Andrew's complaint states that communicating with the media was not within his job function.

Also analogous is *Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 905, 931 (2008). There the Seventh Circuit held that a police officer's meeting with a prosecutor to discuss the police department's interference with a criminal investigation of the deputy police chief's brother occurred pursuant to his official duties because the officer met with the prosecutor in his

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[6] Because the Ninth Circuit could not assess whether prison guards were expected to air complaints to the Director of the California Department of Corrections, it remanded to the district court to determine whether a letter Freitag wrote to the director was constitutionally protected. 468 F.3d at 546.

capacity as a Vice Control Division officer. *Id.* at 597. Indeed, the court observed that Morales's speech "concerned a case that he was assigned to investigate" and that the Milwaukee Police Department required officers to report all potential crimes. *Id.* at 598. The Seventh Circuit held, nonetheless, that Morales's subsequent deposition testimony on the same subject was "a different story." *Id.*

In that deposition, Morales testified about the same communications in which he previously had engaged pursuant to his official duties (much as Andrew here provided the reporter the memorandum he wrote the police commissioner). The Seventh Circuit had to determine "whether that fact render[ed] his deposition unprotected" and held that it did not. *Id.* Being deposed in a civil suit pursuant to subpoena "was unquestionably not one of Morales' job duties because it was not part of what he was employed to do," *id.*, just as Andrew was not paid to speak to the media. The Seventh Circuit recognized that constitutional protection differed depending on the audience for the employee's message, but concluded that *Garcetti* established this very framework:

> We recognized the oddity of a constitutional ruling in which speech said to one individual may be protected under the First Amendment, while precisely the same speech said to another individual is not protected. Indeed, this is exactly the concern that Justice Stevens voiced in his dissent in *Garcetti* . . . . Despite Justice Stevens' admonishment, *Garcetti* established just such a framework, and we are obliged to apply it. As a result, although we hold that Morales'

> conversation with [the prosecutor] was unprotected speech, his deposition testimony was protected.

Id. (citation omitted); *see also id.* at 604-05 (Rovner, J., concurring in part and dissenting in part) (rejecting defense argument that deposition testimony about unprotected speech is not protected speech).

In sum, both *Garcetti* and lower-court decisions interpreting it establish that a public employee speaks "as a citizen" when he reports a matter of public concern arising within the workplace to the press or the public—unless it is determined on a developed record that he spoke pursuant to his official duties. The district court's dismissal of Andrew's First Amendment claim poses a grave threat to the goals of democratic self-governance enshrined in Supreme Court precedents and is not justified by anything said in *Garcetti*.

CONCLUSION

The district court's judgment should be reversed and Michael Andrew's First Amendment claim reinstated.

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Respectfully submitted,

Bonnie I. Robin-Vergeer
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Counsel for Amici Curiae

RULE 32(a)(7)(C) CERTIFICATE

I hereby certify that the foregoing Brief for Amici Curiae Public Citizen, Inc.; the American Civil Liberties Union of Maryland; the National Employment Lawyers Association; the Government Accountability Project; and the Reporters Committee for Freedom of the Press in Support of Plaintiff-Appellant Requesting Reversal complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief is composed in a 14-point proportional typeface, Times New Roman. As calculated by my word processing software (WordPerfect), the Brief (excluding those parts permitted to be excluded under the Federal Rules of Appellate Procedure and the D.C. Circuit Rules) contains 6,997 words.

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Bonnie I. Robin-Vergeer

CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 3d day of March, 2008, she caused two copies each of the foregoing Brief for Amici Curiae Public Citizen, Inc.; the American Civil Liberties Union of Maryland; the National Employment Lawyers Association; the Government Accountability Project; and the Reporters Committee for Freedom of the Press in Support of Plaintiff-Appellant Requesting Reversal to be served by first-class U.S. mail, postage prepaid, on the following:

Counsel for Appellant:

Howard B. Hoffman, Esq.
Attorney at Law
600 Jefferson Plaza, Suite 304
Rockville, MD 20852

Counsel for Appellees:

William H. Phelan, Esq., Principal Counsel
Karen Stakem Hornig, Esq.
Baltimore City Department of Law
City Hall
100 North Holliday Street
Baltimore, Maryland 21202

_____
Bonnie I. Robin-Vergeer