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WHAT PRICE FREE SPEECH? WHISTLEBLOWERS AND THE *CEBALLOS* DECISION

HEARING

BEFORE THE

COMMITTEE ON GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

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WHAT PRICE FREE SPEECH? WHISTLEBLOWERS AND THE *CEBALLOS* DECISION

THURSDAY, JUNE 29, 2006

HOUSE OF REPRESENTATIVES,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The committee met, pursuant to notice, at 11:51 a.m., in room 2154, Rayburn House Office Building, Hon. Tom Davis (chairman of the committee) presiding.

Present: Representatives Tom Davis, Shays, Platts, Issa, Dent, Schmidt, Waxman, Maloney, Cummings, Kucinich, Clay, Watson, Van Hollen, Ruppersberger, and Norton.

Staff present: Keith Ausbrook, chief counsel; Jim Moore and A. Brooke Bennett, counsels; Rob White, communications director; Andrea LeBlanc, deputy director of communications; Teresa Austin, chief clerk; Sarah D'Orsie, deputy clerk; Phil Barnett, minority staff director/chief counsel; Kristin Amerling, minority general counsel; Michelle Ash, minority chief legislative counsel; Margaret Daum and Kim Trinca, minority counsels; David Rapallo, minority chief investigative counsel; Shaun Garrison and Mark Stephenson, minority professional staff members; Earley Green, minority chief clerk; and Jean Gosa, minority assistant clerk.

Chairman TOM DAVIS. The committee will come to order.

Before we begin the hearing, I want to ask Mr. Shays and Mr. Waxman to join me in putting an important matter on the record.

Mr. Shays.

Mr. SHAYS. Thank you, Mr. Chairman. Because this is a hearing about whistleblower rights, I want to put on the record that Mr. Waxman and I have requested that the chairman issue a subpoena to the Department of Defense for information about Abu Ghraib Prison and allegations of retaliation against Specialist Samuel Provance. Specialist Provance was stationed at the prison in Iraq, and he testified before the National Security Subcommittee about his efforts to report what he had heard about abuses there. I want to thank you, Mr. Chairman, for agreeing to our subpoena request.

On March 7th, Mr. Waxman and I sent a letter to DOD regarding this matter to Secretary Rumsfeld and Director Goss, and another separate, different, letter just to Secretary Rumsfeld. I ask unanimous consent that both letters be made part of this hearing record.

Chairman TOM DAVIS. Without objection.

Mr. SHAYS. We asked for a response by April 21st. Staff has repeatedly called, but to date we have no meaningful engagement from the Department on the subcommittee's request.

Recently we learned the House Armed Services Committee has one of the unredacted documents requested, and we appreciate their help and look forward to their support going forward. But it is critical that our oversight inquiry is being taken seriously by executive branch departments, and that we get timely access to the information we need to do our job.

So again, I thank you. I appreciate, Mr. Chairman, your willingness to proceed in this effort and help us with our oversight. And, obviously, I thank Mr. Waxman for his patience in a request that we both think is meritorious and deserves to be responded to.

Chairman TOM DAVIS. Thank you.

Mr. Waxman.

Mr. WAXMAN. Mr. Chairman, I would like to thank you and Chairman Shays for agreeing to my request to subpoena Defense Secretary Rumsfeld. I would also like to make clear for the record why this subpoena is now necessary.

I've been working on Sergeant Provance's case since last fall. He first came to my attention as a result of press reports that the U.S. Military had allegedly used the children of detainees at Abu Ghraib in order to break the detainees during their interrogation. But rather than investigate Sergeant Provance's claim, the military ignored him, told him he could be prosecuted for not coming forward sooner, and then demoted him and pulled his security clearance. So last December, when the National Security Subcommittee was considering holding a hearing on national security whistleblowers, I requested that Sergeant Provance be invited to testify. That hearing happened on February 14th of this year, and Sergeant Provance was able to fly back from Germany to testify.

Sergeant Provance's testimony was gripping and disturbing. I would like to make an excerpt of the transcript of that hearing part of today's hearing.

Chairman TOM DAVIS. Without objection so ordered.

Mr. WAXMAN. After hearing these serious allegations, I requested that the subcommittee send two letters to the Defense Department requesting documents. The first letter sought information about Sergeant Provance's subsequent claims of abuse at Abu Ghraib, and the second about any retaliation taken against him. Chairman Shays agreed, and on March 7th we sent those letters with a deadline of April 21st. That deadline came and went, and since that date the Defense Department's responses have been absolutely deficient. The Department's response on the abuses of Abu Ghraib have been simply nonexistent. We asked for a host of documents ranging from information about children at Abu Ghraib to drafts and interview notes relating to the Fay/Jones report on detainee abuse. We also asked for an unredacted copy of Sergeant Provance's February testimony to our committee; it turned out the Pentagon redacted parts of it before he testified here.

To this date and after more than 3 months, there has been no substantive response from the Department. No documents have been provided. To their credit, the majority staff followed up nearly a dozen times with telephone calls and e-mails, without success.

On the second request for documents relating to retaliation against Sergeant Provance, the Department took an untenable and ridiculously narrow approach to what it did provide. We asked for

a wide range of documents relating to disciplinary actions taken against Sergeant Provance. We wanted to know why commanders issued a written gag order only to Sergeant Provance; how they became aware of his contacts with the media; and the manner in which they decided to punish him for his actions. The request included all communications, e-mails, papers, and notes from all Department employees.

Last Tuesday, as soon as they found out we were having today's hearing, Department officials finally responded. They produced a total of nine documents, three of which we already had, and three of which were identical except for the signatures. Obviously, the response was completely inadequate.

So, again, I thank Chairman Davis and Chairman Shays for disagreeing to this request. We worked together in a bipartisan manner to refine the language of this subpoena, and as a result, I hope the Pentagon will take a careful look at their actions, go back and review the documents in an honest way and allow us to exercise our constitutional oversight responsibilities effectively.

Thank you, Mr. Chairman.

Chairman TOM DAVIS. Thank you, Mr. Waxman.

You know, when the committee requests information from the executive branch departments and agencies, we try to be reasonable; we try to accommodate the legitimate concerns about the volume and sensitivity of what we're asking for. But if the Department won't even return a call after 3 months and begin that dialog, we really have no choice but to subpoena the material and compel their attention to our request.

In this case, the Armed Services Committee has offered the subcommittee access to some of the material in question, and we appreciate their help. But the Pentagon has documents we need to fully understand: how the soldier was treated after he tried to report; and what he learned about prison abuse in Iraq.

I thank the gentlemen for their work on these whistleblower issues. We're going to continue to work with them, and we're going to get this information we need from the Department of Defense.

I want to welcome everybody again to today's hearing on the recent Supreme Court decision in the case *Garcetti* v. *Ceballos.* In one sense, this case is familiar. Mr. Ceballos prepared a memorandum about activities within the Los Angeles Police Department and the District Attorney's Office, with which his supervisors disagreed, and he subsequently experienced perceived adverse employment actions. But in this case, rather than bringing his lawsuit under statutory whistleblower protections, Mr. Ceballos claimed that his statements should be constitutionally protected by the first amendment.

The Supreme Court disagreed, but only just disagreed in a 5–4 decision written by Justice Kennedy. The court concluded that Mr. Ceballos' statements were not entitled to first amendment protections because they were made pursuant to his official employment duties. This decision was met with some fairly extreme headlines. For example, a New York Times headline read, "Some Whistleblowers Lose Free Speech Protections". The Washington Post reported, "High Court's Free Speech Ruling Favors Government: Public Workers on Duty Not Protected." and the Chicago Tribune re-

ported, "High Court Curbs Free Speech Rights of Public Workers on the Job."

Maybe they have a point, but anytime the papers start announcing wholesale rollbacks of whistleblowers' protections, I get concerned, and so should each member of this committee. And that is why we are here today: to understand what this case decided, the grounds on which it was decided, and what it means for the rights and interests of all whistleblowers, Federal and State.

In my two terms as committee chairman, we've worked hard to improve whistleblowers' rights. It hasn't been an easy process, but we've made some real progress. For instance, Mr. Platts' bill, H.R. 1317, which we passed out of this committee, grants Federal whistleblowers an alternative course of action in the Federal district courts nationwide if their claims of retaliation are not adjudicated quickly. This is a truly landmark advancement for whistleblowers.

This committee also adopted important new protections for those exposing wrongdoing in classified programs, national security whistleblowers. As part of our Bipartisan executive branch Reform Act, H.R. 5112, we gave those entrusted with the Nation's secrets meaningful recourse against subtle forms of retaliation practiced in their closed world, like security clearance revocation.

Whistleblowers often play an important role in exposing government misconduct. Protecting honest, hardworking Federal employees is important to me, and that's why the headlines I mention are troubling.

From a practical standpoint, the decision and the reporting that followed the decision may give whistleblowers the impression that they're better off just taking their problems to the press. Some people might be OK with that, but the real goal should be the creation of a workplace environment where employees feel free to discuss waste, fraud and abuse with employers, and employers feel more comfortable fixing the problem than covering it up. We need better government, not more headlines.

We hope to learn much from today's hearing. For example, why did Mr. Ceballos choose to raise his claim under the first amendment? As a State employee in California, what other avenues were available, and why were they seemingly less attractive? How common is the workplace situation that he faced, and does this arise in other areas of public employment, such as education? And how similar are these experiences to those of Federal employees?

But more than anything, it's important for whistleblowers to know they are still protected from retaliation when they blow the whistle and bring public attention to waste, fraud, and abuse.

It's also important that employers have clear guidelines delineating right and wrong behavior. We will examine whether the *Ceballos* decision accomplished either goal.

In the context of government employees, disagreements about how to do a certain job can have profound public consequences. I'm reminded of Benjamin Franklin saying that for want of a nail, a shoe was lost; for the want of a shoe, a horse was lost; for the want of a horse, the rider was lost—and so on, slain by the enemy.

The inability of government workers to express their concerns about the smallest of issues involving their jobs—the nails—can lead to the greatest of harms: defeat by an enemy. We need to give

appropriate protection to those workers while allowing managers the freedom to manage.

I will now recognize the distinguished ranking member, Mr. Waxman.

[The prepared statement of Chairman Tom Davis follows:]

Opening Statement of Chairman Tom Davis
Government Reform Committee Hearing
"What Price Free Speech?: Whistleblowers and the Ceballos Decision"
June 29, 2006

Good morning, and welcome to today's hearing on the recent Supreme Court decision in the case of Garcetti v. Ceballos ("seh-**BY**-ohs").

In one sense, this case is familiar: Mr. Ceballos prepared a memorandum about activities within the Los Angeles Police Department and the District Attorney's office with which his superiors disagreed, and he subsequently experienced adverse employment actions. But, in this case, rather than bringing his lawsuit under statutory whistleblower protections, Mr. Ceballos claimed that his statements should be constitutionally protected by the First Amendment.

The Supreme Court, however, disagreed – but only just. In a 5-4 decision written by Justice Kennedy, the Court concluded that Mr. Ceballos's statements were not entitled to First Amendment protections because they were made pursuant to his official employment duties.

This decision was met with some fairly extreme headlines. For example:

- A *New York Times* headline read: "Some Whistle-Blowers **Lose** Free Speech Protections."
- The *Washington Post* reported "High Court's Free-Speech Ruling Favors Government; Public Workers on Duty **Not** Protected."
- And, the *Chicago Tribune* reported "High Court **Curbs** Free-Speech Rights of Public Workers on the Job."

Maybe they have a point, but anytime the papers start announcing wholesale rollbacks of whistleblowers' protections, I get concerned – and so should each member of this Committee. And, that is why we are here today: to understand what this case decided, the grounds on which it was decided, and what it means for the rights and interests of all whistleblowers – federal and state.

In my two terms as Committee Chairman, we have worked hard to improve whistleblowers' rights. It hasn't been an easy process, but I think we have made real progress. For instance, Mr. Platts's bill, H.R. 1317, which we passed out of this Committee, grants federal whistleblowers an alternative course of action in the federal district courts nationwide if their claims of

retaliation are not adjudicated quickly. This is a truly landmark advance for whistleblowers. Whistleblowers often play an important role in exposing government misconduct. Protecting honest, hardworking federal employees is important to me, and that's why the headlines I mentioned above were so troubling.

From a practical standpoint, the decision and the reporting that followed the decision may give whistleblowers the impression that they're better off just taking their problems to the press. Some people might be okay with that, but the real goal should be the creation of a workplace environment where employees feel free to discuss waste, fraud, and abuse with employers, and employers feel more comfortable fixing the problem than covering it up. We need better government, not more headlines.

We hope to learn much from today's hearing. For example, why did Mr. Ceballos choose to raise his claim under the First Amendment? As a state employee in California, what other avenues were available, and why were they seemingly less attractive? How common is the workplace situation that Mr. Ceballos faced, and does this arise in other areas of public employment

– such as education? And, how similar are these experiences to those of federal employees?

But, more than anything, it's important for whistleblowers to know they are still protected from retaliation when they blow the whistle and bring public attention to waste, fraud, and abuse. It's also important that employers have clear guidelines delineating right and wrong behavior. We will examine whether the Ceballos decision accomplished either goal.

In the context of government employees, disagreements about how to do a certain job can have profound public consequences. I am reminded of Benjamin Franklin saying that for the want of a nail a shoe was lost, for the want of a shoe a horse was lost, and for the want of a horse the rider was lost, slain by the enemy. The inability of government workers to express their concerns about the smallest of issues involving their jobs -- the nails -- can lead to the greatest of harms, defeat by an enemy. We need to give appropriate protection to those workers while allowing managers the freedom to manage.

We have a number of witnesses here with us today, and we look forward to hearing from each of them. On the first panel, we have Mr. Stephen Kohn ("**CONE**") who is the Chair of the National Whistleblowers Center and also the author of *Concepts and Procedures in Whistleblower Law*; and, Mr. Roger Pilon ("pee-**LON**"), Vice President for Legal Affairs at the CATO Institute.

We have seven witnesses on our second panel, and we will introduce each of them at the start of that panel.

Mr. WAXMAN. Thank you, Mr. Chairman.

The recent Supreme Court in *Garcetti* v. *Ceballos* raises serious issues regarding the first amendment free speech rights of government employees and how statutory whistleblower protections are affected by this decision.

Mr. Ceballos was an attorney for the L.A. County District Attorney's Office. In the course of his duties, he became aware of significant misstatements in an affidavit used to obtain a search warrant. He examined the affidavit, conducted an investigation, and wrote a memorandum to his superiors concluding that the affidavit contained serious misrepresentations, and recommending dismissal of the case. Mr. Ceballos' supervisors decided to proceed with the case, despite his findings.

In the aftermath of these events, Mr. Ceballos claimed he was subjected to a series of retaliatory employee actions, including reassignment, transfer, and denial of promotion. After pursuing other legal remedies, Mr. Ceballos sued his employer for violating his first amendment rights by retaliating against him based on his memorandum.

In its decision, the Supreme Court held that Mr. Ceballos' first amendment rights had not been violated. It found that the first amendment protects the speech of a government employee when that employee is expressing an opinion as a citizen on a matter of public concern, but because Mr. Ceballos' memorandum was written pursuant to his duties as a prosecutor, the court found that he was speaking as an employee, not a citizen. He was, therefore, not protected from retaliation because the first amendment does not prohibit managerial discipline based on an employee's work product.

Leaving aside what Justice Stevens in his dissent called a perverse rule, namely, one that gives employees an incentive to voice their concerns publicly before talking to their superiors, the court noted that government employees are protected and would continue to be protected by Federal and State whistleblower laws.

Unfortunately, I cannot agree with the court. The Merit Systems Protection Board and the Federal circuit court have issued confusing opinions on whether disclosures made in the normal course of an employee's official duties are protected. Government whistleblowers should be protected, and their disclosure of waste, fraud, and abuse should be encouraged. But under this administration and recent precedents, the current statutory protections for Federal whistleblowers have developed gaping loopholes. That's why new Federal legislation is so urgently needed.

To its credit, this committee has acted twice, this Congress, to report new whistleblower protections to the full House. Last fall, we considered H.R. 1317, the Federal Employees Protection of Disclosure Act. This legislation contains a series of important reforms, including reforms that would provide protection to whistleblowers like Mr. Ceballos who disclose wrongdoing in the course of their employment. And earlier this year we passed H.R. 5112, which contained provisions providing whistleblower protections to national security whistleblowers. For the first time, this legislation would provide genuine remedies for these courageous employees.

The Senate has also acted on this issue. As part of this year's defense authorization bill, it has included language substantially similar to H.R. 1317.

Mr. Chairman, we must do all we can in the light of the *Ceballos* decision to ensure that government whistleblowers are protected from retaliation. The legislation that we have reported is a good start, but our efforts will amount to little if they are not taken up by the full House or included in the final conference report.

Thank you, Mr. Chairman.

Chairman TOM DAVIS. I agree, Mr. Waxman. Thank you very much.

[The prepared statement of Hon. Henry A. Waxman follows:]

Opening Statement of
Rep. Henry Waxman, Ranking Minority Member
Committee on Government Reform
Hearing on
"What Price Free Speech? Whistleblowers and the Ceballos Decision"

June 29, 2006

Thank you Mr. Chairman.

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Leaving aside what Justice Stevens in his dissent called a perverse rule – namely, one that gives employees an incentive to voice their concerns publicly before talking to their superiors – the Court noted that government employees are protected, and would continue to be protected by, federal and state whistleblower laws.

Unfortunately, I cannot agree with the Court. The Merit Systems Protections Board and the Federal Circuit Court have issued confusing opinions on whether disclosures made in the normal course of an employee's official duties are protected. Government whistleblowers should be protected, and their disclosure of waste, fraud, and abuse should be encouraged. But under this Administration and recent precedents, the current statutory protections for federal whistleblowers have developed gaping loopholes.

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Finally, Mr. Chairman, I would also like to thank you and Chairman Shays for agreeing today to my request for a subpoena to compel Defense Secretary Rumsfeld to provide key documents relating to a specific whistleblower case. The case involves U.S. Army Sergeant Samuel Provance, a military whistleblower at Abu Ghraib who reported abuses there and was allegedly retaliated against for disclosing unclassified information about these abuses to the press. I understand that we will discuss this further after opening statements, but let me just say that it is arrogant and outrageous that the Defense Department has refused to cooperate with our requests – dismissing them out of hand in some cases – and so I thank you for entertaining and agreeing with my request for a subpoena on this issue.

Thank you Mr. Chairman.

Chairman TOM DAVIS. Mr. Platts.

Mr. PLATTS. Mr. Chairman, I yield to the gentleman from Connecticut.

Mr. SHAYS. Just very briefly, Mr. Chairman—because I have to meet someone and I'll be back—but I think this is an extraordinarily important hearing. When an administration wants more power, you need to make sure three things happen; one, you have a strong Civil Liberties Board, which we don't yet have; second you have a whistleblower process that works; and third, that you have strong congressional oversight. We're doing the strong congressional oversight. We need to improve the whistleblower statute and process, and we need to improve the Civil Liberties Board. And I thank the gentleman for yielding to me. Thank you.

Mr. PLATTS. Thank you, Mr. Shays.

Mr. Chairman, I want to thank you for convening this hearing so we have a better understanding of the *Ceballos* decision and its implication for whistleblowers. I also want to thank you for your longstanding assistance and partnership with me as we try to shore up and expand whistleblower protections for Federal employees who courageously expose waste, fraud, and abuse or threats to the safety of our fellow citizens.

Last year, on September 29th, we passed out of this committee bipartisan legislation that I had introduced, H.R. 1317, the Federal Employee Protection of Disclosures Act, to reinforce and extend protections for Federal employees who blow the whistle on improper actions that undermine our government.

Companion legislation in the Senate, the Senate bill 494 was approved unanimously by the Senate Committee on Homeland Security and Governmental Affairs on May 25th. And just last Thursday, June 22nd, Senators Akaka and Collins successfully incorporated S. 494 into the Senate defense authorization bill.

In the *Ceballos* decision, the Supreme Court held that public employees blowing the whistle in their official duties are not protected by the first amendment. Instead, the speech in their official capacity is protected by whistleblower rights provided by law. In opting not to create a right under the first amendment for whistleblowers, *Ceballos* emphasizes the importance of the strength of existing protections provided by statute.

The *Ceballos* decision is Congress' wake-up call, Mr. Chairman, to strengthen whistleblower protections under the law.

Ceballos means that statutory protections are whistleblowers' one and only shot at due process and protection from retaliation. The decision does not necessarily weaken Federal whistleblower protections, but it certainly demonstrates the importance of reinforcing current protections.

In effect, *Ceballos* tells us that statutory protections are a whistleblower's last and sometimes only recourse to seek protection from retribution. Congress, therefore, has the responsibility to ensure that Federal whistleblower protections are clear, strong, and without loopholes.

I'm hopeful that this hearing will attract more attention to the importance of improving protections for whistleblowers. It is my sincere hope also that this hearing will help us to move quickly to floor consideration of H.R. 1317.

The *Ceballos* decision has sent us a clear message to strengthen whistleblower protections, and I sincerely hope that we listen, and, more importantly, that the House acts on H.R. 1317.

I yield back the balance of my time.

Chairman TOM DAVIS. Well, thank you very much.

Any other Members who have statements for the record? Mrs.—we want to move ahead, but we'll let the Members make brief statements. All Members will have 7 days to submit opening statements for the record.

Ms. Watson was here first.

Ms. WATSON. Thank you so much, Mr. Chairman, for holding this important hearing that addresses issues concerning protecting the employee rights throughout our Nation. And I would like to thank our witnesses for their testimony.

We're here today to discuss the *Garcetti* v. *Ceballos* decision that took place or started right in the district right next to mine in Los Angeles and its impact on whistleblower protection.

In our discussion we'll be working to reassure the Americans that the principles of free speech and equal rights for all that our Nation is built upon will be protected in the workplace.

Whistleblower protection allows Federal employees to make protected disclosures of government information to appropriate parties and not face retaliation for their actions. Federal and State employees rely heavily on the first amendment for whistleblower protection. Our public service employees should be able to defend themselves against retaliation for disclosures made in the course of their official duties. We must work to expand whistleblower protections to Federal employees so that they have the right to work without the fear of retaliation.

Congress must foster an environment that encourages employees to come forward with knowledge of actions or policies detrimental to our democratic values. This vision cannot be realized if workers possessing crucial information are stymied by fear of reprisal or if they are choked by inflexible rules and regulations.

Mr. Chairman, we often forget our government is made up of the people, people who have often chosen a career in government because they have chosen to forego more lucrative careers to serve their country. We must continue to recruit and retain the best and the brightest for government service. In doing so, we must also ensure that they will be protected from scrutiny and embarrassment in the workplace.

I yield back.

Chairman TOM DAVIS. Thank you.

Ms. Norton first.

Ms. NORTON. Thank you, Mr. Chairman. I very much appreciate your not letting too much time go by after the *Ceballos* decision to figure out where Federal employees stand when it comes to whistleblowing. I certainly hope that Justice Kennedy is right when he compares them to our own whistleblower statutes. It's very interesting, given the first amendment basis of the decision.

Mr. Chairman, this is really no time to allow any doubt about whistleblower laws. When they were originally passed, the catch words, "fraud, waste and abuse" I believe most propelled them. But

today I think the most important reason for whistleblower laws really goes to the safety and security of our country.

I want to thank you, Mr. Chairman, for working with me when TSA employees were left out of whistleblower protection in the Federal Employees Protection and Disclosure Act, which we are reporting out. That was not our intent, and that's been corrected, and, most important, considering that we're talking about TSA employees who are the screeners.

Also in that bill, Mr. Chairman, we overturned the Federal circuit's standard, the so-called irrefragable proof standard, and have returned to a substantial evidence standard when it comes to judging whether or not an employee is entitled to come forward without retaliation.

I'm very troubled, though, that the Federal circuit decision stood since 1999. Consider that is precisely the September 11th period, it makes you wonder, it almost makes you shiver, particularly when you realize that only one of I believe 96 such decisions were found to be recognizable by the court in that period. So you have to ask yourself whether or not during that period there was an absolute deterrent for whistleblowers to come forward right when I think most would agree we needed them.

So here now comes the Supreme Court, and I am troubled. I agree with the ranking member that this may be more serious than we'd like to think. At least we need to clarify and get this committee on record, as you are doing today, Mr. Chairman, and discerning whether or not there is anything we need to do.

I understand, you know, the need to make sure that employees do not engage in insubordination, but I can't quite figure out this distinction between going on and speaking publicly and doing what Ceballos did, which is write a memorandum in normal order in order to get the attention of his superiors before they committed what he believed to be an error of the kind you don't want to occur in the criminal justice system. It's very, very troublesome. Apparently, if he had gone out and blown the whistle on them in public, that would have been all right. Very, very hard to understand.

Above all, Mr. Chairman, I want to stress how important protections against retaliation are. When I chaired the EOC, I was very bothered by the practical effect of the retaliation provision, which I understood to be absolutely necessary. The practical effect is you will get a lot of people coming forward with notions of one kind or another that aren't valid because they know at the very least you can't retaliate against them. But it seemed to me there was no way around that; that whatever they come forward with, even if they are frivolous, retaliation certainly is not the response that the agency would want to send out.

And without a retaliation provision that is solid, so that people know that if they work in TSA or in Homeland Security they can risk saying this, if they work in the CIA, they can risk reporting this, without that what you're going to have is people doing more leaks, and you're going to have fewer and fewer people coming forward in any case.

Thank you, Mr. Chairman.

Chairman TOM DAVIS. Thank you very much.

I have Mr. Cummings.

Mr. CUMMINGS. Thank you very much, Mr. Chairman. I'll be brief. I understand the time constraints, but I wanted to just say a few words here, Mr. Chairman.

I'm all too familiar with the vital role whistleblowers play. I'm also familiar with the compelling reasons why we should protect them. Earlier this week, Mr. Souder and I, as Chair and ranking member of the Subcommittee on Criminal Justice, Drug Policy, and Human Resources, held a hearing to examine a Government Accountability Office report on clinical lab safety. That is every single lab, health lab associated with hospitals in this country. I won't get into the details here, but the GAO findings were noteworthy and uncovered serious deficiencies in the way clinical labs across the Nation are inspected, concluding it could not attest to the quality of those labs. To be sure, Ms. Leslie Aaronovitz indicated that she would not be comfortable with having her family rely on results from any clinical lab in this country.

Clearly we must address this situation. I look forward to working with the Centers for Medicare and Medicaid Services and the appropriated accrediting organizations to remedy the problems that GAO uncovered. But we would not have even known to investigate this problem had it not been for this woman named Kristen Turner.

Ms. Turner is what you call a whistleblower. As a clinical technician in Maryland General Hospital in Baltimore, Ms. Turner had been an outspoken critic of the way the hospital's labs were run. She spoke out to supervisors, hospital leadership, and anyone in authority about the dangers of the professional setting in which she worked. Sadly, no one listened. It it was not until Ms. Turner alerted the Baltimore Sun to the horrific conditions at the Maryland General Hospital that people's ears began to perk. And it was later discovered that over 2,000 patients in Maryland General had gotten faulty HIV and Hepatitis C results.

Ms. Turner paid for her efforts with her health and her job. I'm determined to honor her sacrifice. That is why I'm determined not to only address deficiencies in our clinical labs, but to also protect whistleblowers in the public and private sectors.

We are working with accrediting organizations to encourage clinical lab workers like Ms. Turner to come forward by posting signs with confidential hotlines and rigorously investigating reports of wrongdoing. But the argument for protecting would-be government whistleblowers is equally compelling. As with the health care industry, the work of government touches the lives of us all, and we have a vested interest in making sure it is effective and efficient.

Congress to this point has expressed a clear priority for protecting the rights of whistleblowers. As the Supreme Court noted in the case of *Garcetti* v. *Ceballos,* "The dictates of sound judgment are reinforced by the powerful network of legislative enactments, such as whistleblower protection laws and labor codes available to those who seek to expose wrongdoing."

And with that, Mr. Chairman, I look forward to hearing from the witnesses. And we must, we must, protect whistleblowers.

Chairman TOM DAVIS. Thank you.

[The prepared statement of Hon. Elijah E. Cummings follows:]

U.S. House of Representatives
109th Congress

Opening Statement

Representative Elijah E. Cummings, D-Maryland

Full Committee Hearing:
"What Price Free Speech?: Whistleblowers and the Ceballos Decision"
Committee on Government Reform

June 29, 2006

Mr. Chairman,

Thank you for holding this critically important hearing to examine the state of whistleblower protections following the Ceballos (say-BA-yos) decision.

I am all too familiar with vital role whistleblowers play. I am also familiar with the compelling reasons why we should protect them.

Earlier this week, Mr. Souder and I as chair and ranking member of the Subcommittee on Criminal Justice, Drug Policy and Human Resources held a hearing to examine a Government Accountability Office report on clinical lab safety.

I won't get into the details here, but the GAO's findings were noteworthy: It uncovered serious deficiencies in the way clinical labs across the nation are inspected, concluding that it could not attest to the quality of those labs. To be sure, Ms. Leslie Aronovitz, who testified on behalf of the GAO, indicated that she would not be comfortable with having *her* family rely on results from the labs.

Clearly, we must address this situation, and I look forward to working with the Centers for Medicare and Medicaid Services and the appropriate accrediting organizations to remedy the problems that the GAO uncovered.

But, we would not have *even known* to investigate this problem had it not been for one woman, Kristin Turner.

Ms. Turner is what you would call a whistleblower.

As a clinical technician at Maryland General Hospital, Ms. Turner had been an outspoken critic of the way the hospital's labs were run. She spoke out to her supervisors, hospital leadership, and anyone of authority about the dangerous, unprofessional setting in which she worked.

Sadly, no one listened.

It was not until after Ms. Turner alerted The Baltimore Sun to the horrific conditions at Maryland General Hospital that people's ears began to perk up.

By then the situation had become dire: Ms. Turner contracted HIV and Hepatitis C from a malfunctioning piece of equipment that squirted her with infected blood—and when she tried to speak up about it, she was fired.

Ms. Turner paid for her efforts with her health and her job. I am determined to honor her sacrifice, Mr. Chairman.

That is why I am determined to not only address the deficiencies in our clinical labs, but to also protect whistleblowers in the public and private sectors.

We are working with accrediting organizations to encourage clinical lab workers like Ms. Turner to come forward by posting signs with confidential hotlines and rigorously investigating reports of wrongdoing.

But the argument for protecting would-be government whistleblowers is equally compelling. As with the health care industry, the work of government touches the lives of us all, and we have a vested interest in making sure it is effective *and* efficient.

Congress to this point has expressed a clear priority for protecting the rights of whistleblowers.

As the Supreme Court noted in the case of Garcetti v. Ceballos (say-BA-yos): "The dictates of sound judgment are reinforced by the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing."

But clearly, as Mr. Ceballos discovered, current law does not go far enough because it does not include government workers.

That's why I am a cosponsor of the bipartisan "Federal Employee Protection of Disclosures Act" (H.R. 1317). I hope that it will be passed into law, and that it will set the stage for state and local governments to follow suit.

We must do everything in our power to protect government employees who are brave enough to expose wrongdoing—it should not be at the expense of their professional and personal lives.

I look forward to the testimonies of today's witnesses and yield back the balance of my time.

Chairman TOM DAVIS. Mrs. Maloney.

Mrs. MALONEY. Thank you, Mr. Chairman and ranking member.

I think one thing we can all agree on is that the current system is broken and whistleblowers are simply not being protected. The recent Supreme Court decision raises even more questions about who we are going to protect; the whistleblower or the wrongdoer?

I anticipate that we will hear a great deal of commentary today arguing that the reaction to this decision has been overblown and that this case did not strip employees of whistleblower rights. While the impact of the decision may be arguable, the message to potential whistleblowers is loud and clear: Speak out at your own risk.

Too often our system retaliates against whistleblowers rather than thanking them for standing up for what they believe is right. This committee has heard from many of them, including Sibel Edmonds, the former FBI translator who was fired for raising questions about the way the FBI was translating important information about our Nation's security. Her reward for raising these issues included having her security clearance stripped, being fired from her job, and being forced to endure a year-long court battle that has prevented her from having any normal life. Things are so bad with her case that when she testified before this committee, she literally could not tell us anything about her herself, where she was born or what languages she speaks; and sadly, she is not an exception.

We have moved forward with legislation such as H.R. 1317, the Federal Employee Protection of Disclosure Act, that would protect government whistleblowers. But similar legislation failed last Congress, and by all accounts there is strong opposition by the Bush administration to these protections.

I have teamed up with Congressman Ed Markey and others to introduce H.R. 4925, the Paul Revere Freedom to Warn Act. Our legislation would provide the same whistleblower protections that Congress provided to those reporting accounting fraud in the Sarbanes-Oxley Act to all Federal employees, contractors, subcontractors or corporate employees. Passage of either of these bills will send a strong message to whistleblowers that we care, and that they will be protected when they raise serious issues of wrongdoing. Not only is this the right thing to do, we will be a better and safer Nation for it.

And I would like to be associated with the comments of my colleagues on this side of the aisle that raised many important issues, including the fact that, with the way it is now, whistleblowers are not going to come forward; they're not going to speak out because they see that those who do speak out are retaliated against.

I thank the chairman for holding this hearing. I yield back my time.

Chairman TOM DAVIS. Thank you.

Mr. Kucinich.

Mr. KUCINICH. Thank you very much, Mr. Chairman. Welcome to the witnesses, and especially Mr. Ceballos.

In Mr. Ceballos' case, the court found that his speech as an employee—which represented his work product—was not protected from managerial discipline under the first amendment. The court

determined that Mr. Ceballos was speaking as an employee, not as a citizen.

My own personal view is that Mr. Ceballos was speaking to public interest. However, in alerting his superiors and the defense counsel that the affidavit had serious misrepresentations and that the case should be dismissed, in the matter of public interest, there should be protections for employees like Mr. Ceballos, but since it was ruled that the first amendment didn't protect him, then he wasn't protected. This precedent does everyone a disservice.

The Ceballos majority of the court advised Federal Government workers to rely on Federal whistleblower laws, but current whistleblower protections are limited, and Federal whistleblowers may have no protection against retaliation for disclosures made as part of their official duties.

Under current law, the Federal Circuit Court of Appeals has exclusive jurisdiction over whistleblower cases appealed from the Merit Systems Protection Board ruling, yet the Federal Circuit excludes most whistleblower claims, including disclosures made in the course of an employee's official duties.

The *Ceballos* decision leaves Federal employees without a remedy against retaliation for disclosures made in the course of their official duties.

Furthermore, the *Ceballos* decision also sets a precedent for State government employees who relied on the first amendment for whistleblower protections. While most States have enacted some form of whistleblower protections, these laws vary widely. The first amendment has been the most solid protection from retaliation against whistleblowers, and in States without whistleblower laws, the first amendment has been the only protection for State government employees who have disclosed information in the course of their official duties. Such employees no longer have that protection.

A government employee who makes a decision to risk his or her career of future promotions and pay raises to report information about government wrongdoing, and does so in the interest of public welfare, deserves a medal. Instead, he or she is subject to job termination, demotion, harassment and other disincentives to continue working. It is up to all of us to protect these employees and their disclosures which benefit us all.

I believe this hearing will illustrate to us all the desperate need for stronger legislation to close the loopholes in our whistleblower protection laws. These basic protections should be applicable to all Federal employees and all Federal contractors across the board.

Mr. Chairman and Ranking Member Waxman, your work on this committee is so important in furthering whistleblower protection, it's time that Congress stood up for people who are standing up for the public interest. I want to salute everyone who has ever taken a chance in protecting the public interest, everyone who ever knew there was a risk in disclosing something that was otherwise hush-hush. These are the people who make America a great Nation.

Thank you.

Chairman TOM DAVIS. Well, thank you all very much. I appreciate everybody's comments. Again, Members will have 7 days to submit opening statements for the record.

Our first panelists here are Stephen Kohn, who is the Chair of the National Whistleblower Center; and Roger Pilon, who is the vice president for legal affairs at the CATO Institute. We appreciate you being with us and being patient through the opening statements.

If you would just rise with me and raise your right hands. The policy is we swear witnesses in.

[Witnesses sworn.]

Chairman DAVIS. Your entire statements are in the record. I read them both last evening.

You have a light in front of you that turns green when you start, orange after 4 minutes, red after 5. We try to keep as close to time as we can, but I want to make sure you get your salient points out.

Mr. Kohn, we will start with you, and then Mr. Pilon, and then we'll go to questions.

STATEMENTS OF STEPHEN M. KOHN, CHAIR, NATIONAL WHISTLEBLOWERS CENTER; AND ROGER PILON, VICE PRESIDENT FOR LEGAL AFFAIRS, CATO INSTITUTE

STATEMENT OF STEPHEN M. KOHN

Mr. KOHN. Thank you very much, Chairman Davis, members of the committee, for this opportunity.

The *Garcetti* decision places every honest government worker in the United States of America at risk for retaliation simply because they didn't hire a lawyer and filed their concerns with the wrong person; and under *Garcetti,* the wrong person is their own boss. It turns whistleblower rights on their head.

Sitting over toward my right are three persons I've had the honor of representing, or have represented: Sibel Edmonds—you've heard a little bit of her, she exposed security deficiencies at the FBI; Dr. Jonathan Fishbein, who exposed life-threatening drug safety practices at the NIH; Bunnatine Greenhouse, who was the first to document contract violations in the war with Iraq that have hurt taxpayers and small businesses.

Each of these whistleblowers, dismayed, learned of the problems through their official duties. Each went initially through their chain of command. Had the *Garcetti* decision been law, the results of their conduct would be radically different.

I'll give you an example in Mrs. Greenhouse's case. When she wrote on the contract "violation of procedure," the Army Corps didn't know about *Garcetti;* so they said, you didn't have the authority to write on that contract; we're going to demote you. Had they known about *Garcetti,* they would have been a little smarter. They would have said, "Great, Bunni, we loved your comments on the contract. That's part of our official duties. High five. By the way, you're fired." And she would have absolutely no protections, either under the Whistleblower Protection Act or the first amendment.

Garcetti is so illogical that under the first amendment a person who burns the American flag has more constitutional protections than someone who exposes a bribe, reports that the space shuttle may blow up, or does their best to get a FISA warrant on a sus-

pected terrorist that just may want to learn how to fly airplanes but not land them. It turns the whole process on its head.

Justice Kennedy, in a sense to justify the decision, said there is a—in his words a, "powerful network of whistleblower laws." We've evaluated that powerful network. If you would look at chart No. 1, you will see that 58 percent of the States do not protect internal official-duty whistleblowers who lost protection under *Garcetti;* 58 percent, no protection.

If you look at chart 2, what you will see is this protection afforded in the 42 percent of the States that do afford protection is far weaker than the protection under the first amendment. In fact, 95 percent of the States which would protect a Garcetti-type whistleblower, they're weaker protections.

The first amendment was implemented by a law known as 42 U.S.C. 1983, which for years was viewed as the best safety-net whistleblower law in the United States. It is not anymore.

But what is the practical impact? You may ask, so what if they can't be an official-duty whistleblower or report internally. I've been doing whistleblower cases for 22 years and almost every whistleblower starts internally.

We'll have time for one last chart, which is a summary of the last 50 cases in which an employee used 42 U.S.C. 1983 successfully. They're cases with merit. And you will see 86 percent were internal official duty, and only 14 percent were so frustrated as to go outside of the system. The *Garcetti* decision, there is no safety net. It is Congress that must act to fix the problem.

We have made a very simple proposal to the committee, one page that will fix the problem. Thank you very much.

Chairman TOM DAVIS. Thank you very much.

[The prepared statement of Mr. Kohn follows:]

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON GOVERNMENT REFORM

"What Price Free Speech?: Whistleblowers and the Garcetti v. Ceballos Decision"

TESTIMONY OF STEPHEN M. KOHN[1]

June 29, 2006

Chairman Tom Davis, Ranking Minority Member Henry A. Waxman and Honorable Members of the Committee on Government Reform:

Thank you for the opportunity to share my views on the recent Supreme Court decision in *Garcetti v. Ceballos*.[2]

The credo of the National Whistleblower Center is the "Freedom to Tell the Truth." The truth about the safety of the Space Shuttle before it is scheduled to launch, the truth about the financial condition of a corporation where Americans have invested their life savings, the truth about the need for a FISA search warrant when a suspected terrorist is identified.

Before *Garcetti v. Ceballos*, the Supreme Court's precedent supported this credo. The Court had repeatedly reaffirmed the principle that the First Amendment protected "free discussion of governmental affairs" and the "manner in which government is operated or should be operated."[3] Consistent with these principles, in adjudicating public employee First Amendment cases, the Supreme Court premised its analysis on an

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[1] Stephen M. Kohn is the Chair of the Board of Directors of the National Whistleblower Center (www.whistleblowers.org), a partner in the Washington, D.C. law firm of Kohn, Kohn & Colapinto, LLP, and the author of five books on employee whistleblowing, including *Concepts and Procedures in Whistleblower Law* (Greenwood Publishing, 2000). Over the past 22 years Mr. Kohn has specialized in representing public and private sector whistleblowers. In 2006, he was awarded the Daynard Public Interest Visiting Fellowship by the Northeastern University School of Law.

[2] *Garcetti v. Ceballos,* Supreme Court Case No. 04-473, reported in 126 S.Ct. 1951 (2006).

[3] *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

understanding that "government employees are often in the best position to know what ails the agencies for which they work."[4]

Garcetti v. Ceballos represents a radical departure from this long line of cases. In a remarkable holding, the Supreme Court concluded the speech of "public concern" was not protected under the First Amendment.

The *Garcetti v. Ceballos* decision represents the most significant judicial threat to employee whistleblowers in nearly forty years, not only on the basis of its holding, but on the tone it has set for countless lower court rulings.

Legislative action is now necessary.

Background to the *Garcetti v. Ceballos* Case

Garcetti v. Ceballos arose as a typical whistleblower case. Mr. Richard Ceballos, a deputy district attorney for the Los Angeles County District Attorney's Office, in the course of his work, identified a major problem: "serious misrepresentations" in a sworn affidavit.[5]

Mr. Ceballos next did what every honest and dedicated public servant should do: as a matter of routine course he "relayed his findings to his supervisors."[6]

After making his internal disclosures, the *Garcetti v. Ceballos* case took an unfortunate, but familiar path. Instead of welcoming the report, he was "sharply criticized" for his conduct, and later subjected to a retaliatory reassignment by his managers.[7]

The Court of Appeals determined that Mr. Ceballos' internal report to his supervisors was protected under the First Amendment. A sharply divided Supreme Court disagreed, and held that the "First Amendment does not prohibit managerial discipline

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[4] *Waters v. Churchill,* 511 U.S. 661, 674 (1994).

[5] *Garcetti v. Ceballos,* 126 S.Ct. at 1955.

[6] *Id.*

[7] *Id.,* 126 S.Ct. at 1956.

based on an employee's expressions made pursuant to official responsibilities."[8] In other words, under this analysis Mr. Ceballos could be legally disciplined for reporting "serious misrepresentations" contained in a sworn affidavit utilized to obtain a search warrant.

That decision broke with prior Supreme Court precedent[9] and the precedent followed by nearly every other state and federal court[10] that previously interpreted the scope of First Amendment protections for government employees.

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[8] *Id.*, 126 S.Ct. at 1961.

[9] Prior to *Garcetti v. Ceballos* the Court had concluded that public employees could not be compelled to "relinquish their First Amendment rights as a condition of public employment." *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967). In *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968), the Court upheld a First Amendment cause of action under 42 U.S.C.§ 1983 for a public employee discharged for speech "on matters of public concern." In *Givhan v. Western Line Consol. School Dist.,* 439 U.S. 410 (1979), Chief Justice Rehnquist, writing for a unanimous Court, held that "complaints and opinions" "privately expressed" by a public employee to his or her supervisor were also protected under the First Amendment, so long as those complaints constituted matters of public concern. Based on this line of cases, prior to *Ceballos* the vast majority of courts to address the issue protected the type of speech in which Mr. Ceballos had engaged within the district attorneys office. *See, e.g. Garcetti v. Ceballos,* 126 S.Ct. at 1962, footnote (Stevens dissenting).

[10] Some of the decisions which discuss the need to protect internal/"official duty" whistleblowing are: *Lambert v. Ackerley*, 180 F.3d 997, 1002-1008 (9th Cir. 1999) (*en banc*) (discussing cases and protected activity under various antiretaliation laws); *Clean Harbors Environmental Services v. Herman*, 146 F.3d 12 (1st Cir. 1998); *Baker v. Board of Mine Operations Appeals*, 595 F.2d 746 (D.C. Cir. 1978); *Munsey v. Morton*, 507 F.2d 1202 (D.C. Cir. 1974); *Phillips v. Board of Mine Operations Appeals*, 500 P.2d 772, 781-782 (D.C. Cir. 1974), *cert. denied,* 420 U.S. 938 (1974); *U.S. ex rel. Yesudian v. Howard University*, 153 F.3d 731 (D.C. Cir. 1998); and *Bechtel Construction v. SOL*, 50 F.3d 926, 931-933 (11th Cir. 1995).

Although *Garcetti v. Ceballos* was wrongly decided,[11] it is unrealistic to expect the Supreme Court to overturn this decision. It is now up to Congress to ensure that whistleblowers are effectively protected and that public employees have the ability to resolve their concerns about serious misconduct with their government employers.

The Majority Opinion Recognized the Importance of Statutorily Protecting Internal/"Official Duty" Whistleblowers

In *Garcetti v. Ceballos,* the Supreme Court punted to Congress. Justice Kennedy, writing for the five member majority, noted that although internal/"official duty" whistleblowers were not protected under a First Amendment analysis, these employees still "should" be protected under state or federal law.[12] The majority of the Court was under the incorrect impression that such laws already existed.

The five-member majority stated:

> "Exposing governmental inefficiency and misconduct is a matter of considerable significance. . . . [P]ublic employers should, 'as a matter of good judgment,' be receptive to constructive criticism offered by their employees. The dictates of sound judgment are reinforced by the *powerful network of legislative enactments - such as whistle-blower protection laws and labor codes - available to those who seek to expose wrongdoing.*"[13]

No such "powerful network" exists.

The majority opinion cited to the Civil Service Reform Act as an example of one of the major laws constituting the "powerful network." The effectiveness of that law has

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[11] In addition to reversing prior precedent, the majority opinion in *Ceballos* created a standard in which employees have an incentive to avoid reporting concerns through the chain of command, and are encouraged to immediately file whistleblower disclosures to the news media or other entities outside of their workplace. As discussed in the dissenting opinion, this holding is "counterintuitive," to say the least. *Garcetti v. Ceballos,* 126 S.Ct. 1951, 1966-67 (Souter dissenting).

[12] *Id.,* 126 S.Ct. at 1962.

[13] *Id.,* 126 S.Ct. at 1962 (emphasis added).

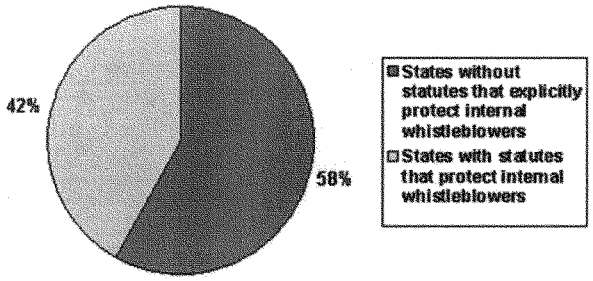
been strongly criticized, and the case law under the CSRA explicitly does not support internal/"official duty" whistleblowing. [14/]

The dissenting opinion reviewed statutes within a small sample of states and explained how the so-called "powerful network" contained numerous loopholes and deficiencies.[15/]

A fifty-state review demonstrates precisely why the "powerful network" does not exist.

First, 58% of state whistleblower laws do not explicitly protect internal/official duty whistleblowers. *See* Table 1 and Chart 1. These statutes do not contain any safety net whatsoever for employees who lost protection under *Garcetti v. Ceballos.*

Chart 1: State Statutes That Do Not Protect Internal Whistleblowers



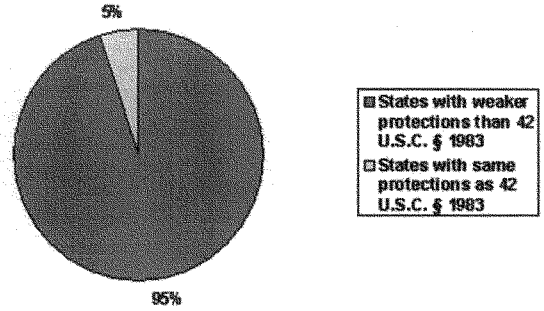
See Table 1

[14/] *Willis v. Department of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998).

[15/] *Garcetti v. Ceballos,* 126 S.Ct. at 1970-71 (Souter dissenting).

Second, of states which provide some protection for internal/official duty whistleblowers, 95% of these states laws provide whistleblowers with less procedural and/or remedial protection than federal statute 42 U.S.C. § 1983 (the statute which prohibited discharge of public employees under the First Amendment). *See* Chart 2.

Chart 2: Substantive State Law Protection for Internal Whistleblowers vs. Protection Under 42 U.S.C. § 1983

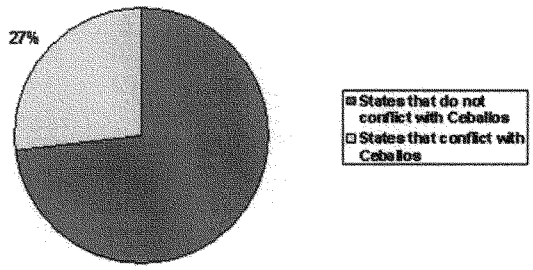


See Table 1

It is no wonder that employees, such as Mr. Ceballos, regularly chose to file claims under section 1983, instead of under state laws.

Finally, of the states which provided some form of protection for internal whistleblowers, six states actually *require* the employees to contact their supervisors as a condition of receiving protection under state law. *See* Chart 3 and Table 2. These statutes not only are inconsistent with the holding of *Garcetti v. Ceballos,* but under *Garcetti,* public employees who follow the state law will lose their First Amendment protections.

Chart 3: Percentage of States with Protection for Internal Whistleblowers whose Statutes Conflict with *Ceballos*



See Table 2

Thus, the "powerful network" alluded to in the majority opinion does not exist.

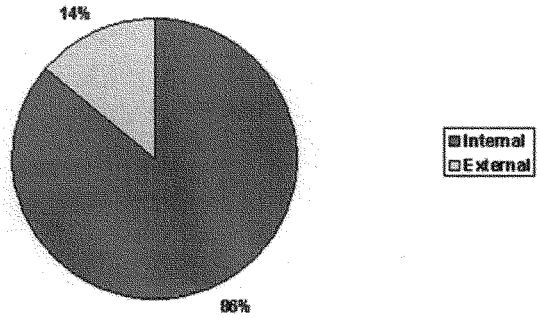
Most Whistleblowers Report Misconduct Internally as Part of their "Official Duty"

The practical impact of the *Garcetti v. Ceballos* cannot be overstated. An analysis of cases decided under both 42 U.S.C. § 1983 (the law utilized by Mr. Ceballos), and under other federal whistleblower laws, demonstrate that the overwhelming majority of whistleblowers initially (and often exclusively) report misconduct to their managers. For all practical purposes, public employees initiate their whistleblowing within their chain-of-command, based on observations made while performing their official duties. Most never having the gumption to go outside of the system.

Table 3 is an analysis of the fifty most recent published cases decided under section 1983 in which the employee whistleblower either won his or her case, or prevailed in a substantive summary judgment decision that was not subsequently overturned. This database demonstrates the following:

86% of all sustained whistleblower claims filed under section 1983 were "internal" complaints. *See* Chart 4 and Table 3.

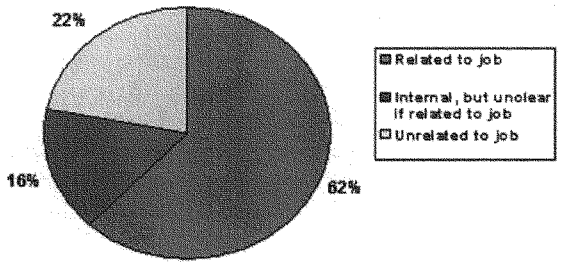
Chart 4: Internal v. External Whistleblowing in 42 U.S.C. § 1983 Cases



See Table 3

Based on a review of the contents of the published decisions, between 62%-78% of all sustained whistleblower cases under section 1983 concerned protected activity directly related to an employee's job duties. *See* Chart 5 and Table 3.

Chart 5: Percent of § 1983 Cases in which Whistleblowing Directly Related to Plaintiff's Job

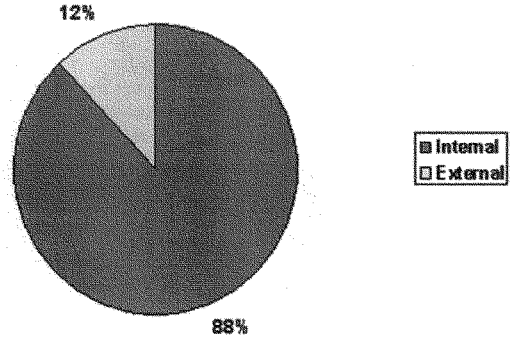


See Table 3

The pattern of protected activities established under 42 U.S.C. § 1983 was, not surprisingly, completely consistent with the patterns identified under other federal whistleblowers statutes.

Table 4 consists of a similar case-by-case analysis of sustained whistleblower cases under twelve other federal whistleblower laws. A review of the 41 most recent decisions in which the employee whistleblower claims were sustained demonstrates that 81% of all whistleblowers were internal/"official duty." *See* Chart 6.

Chart 6: Internal v. External Whistleblowing in Non- § 1983 Federal Whistleblower Cases



See Table 4

Thus, stripping employees of protection from retaliation for reporting internal/official duty whistleblowing will have a devastating impact on the lives and careers of the vast majority of whistleblowers. The subsequent chilling effect on the most honest civil servants will result in both public and private sector misconduct going unreported.

Federal Employees

The First Amendment permits federal employees to obtain highly significant pre-enforcement injunctive relief against federal agencies that violate employees'

constitutional rights.[16] The weakening of First Amendment protections under *Garcetti v. Ceballos* is already being felt. For example, within two days of the Court's ruling in that case, a federal employer filed a motion to dismiss based on *Garcetti v. Ceballos* in a First Amendment federal employee case being handled in my office.

The Civil Service Reform Act/Whistleblower Protection Act of 1989 currently does not protect internal/official duty whistleblowers.[17]

Moreover, the overall framework of procedural and substantive protections afforded employees under the WPA has long been the subject of severe criticism. Even if the law were amended, as currently suggested in a number of pending bills, the majority of federal employee whistleblowers have understandably lost faith in the WPA, and no longer seek protection under its mandates. In fact, the Office of Special Counsel ("OSC"), the main administrative body chartered with protecting employee-whistleblowers, is itself the target of a major law suit by former employees of OSC alleging retaliation.

Although amending the WPA is a positive step, it will not solve the problems created under *Garcetti v. Ceballos* for most public employees - federal or state.

Prior Administrations and Most Judicial Precedents Recognized the Need to Protect Internal/"Official Duty" speech

The *Garcetti v. Ceballos* decision marks a radical departure from the stance taken under the Reagan and George H.W. Bush administrations.

The debate over internal/"official duty" whistleblowing versus external whistleblowing has existed since the inception of whistleblower protection laws. At first blush it would seem counterintuitive that employers would want to force employees to file formal charges with outside agencies (or the press) in order to obtain protection under federal law. However, some unethical employers quickly realized that employee

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[16] *See, Weaver v. USIA,* 87 F.3d 1429, 1433-1435 (D.C. Cir. 1996).

[17] Under the Federal Circuit's decisions in *Willis v. Department of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998) and *Huffman v. Office of Personnel Management*, 263 F.3d 1341 (Fed. 2001), most "internal" whistleblowing is not protected. Specifically, disclosures to an employee's supervisor are generally not protected. Additionally, reports made by an employee in the course of his duty were stripped of protection.

whistleblowers did not fit into the stereotype of a "whistleblower," and that the vast majority of such employees only reported their concerns through the chain-of-command.

Thus, by stripping internal/"official duty" whistleblowers from protection under law, agencies which wanted to cover-up misconduct and create a "chilling effect" on the willingness of employees to disclose serious problems, could utilize an internal/ "official duty" technicality to prevail in court against most employee whistleblowers.

From the start, courts refused to accept this technicality, and blasted attempts by employers to undermine basic common sense. In the first major court decision adjudicating this issue, Judge Malcolm Wilkey, an appeals court judge appointed in 1970 to the U.S. Court of Appeals by Richard Nixon, recognized that protecting internal or "official duty" complaints to supervisors was the "realistically effective channel of communication" for safety complaints, and was deserving of strict protection.[18/]

Prior to the conduct of the Solicitor's office in *Garcetti v. Ceballos,* the executive branch of the United States government regularly recognized the importance of protecting internal/"official duty" whistleblowers under various federal statutes. In a brief filed with the U.S. Supreme Court in May 1986, the Solicitor General of the United States, Mr. Charles Fried, successfully argued against the Supreme Court accepting *certiorari* in an internal whistleblower case. President Reagan's Solicitor General argued that terminating an employee for "internal" complaints violated strong "public policies" and that it was "logical" to protect such disclosures.[19/]

William Brock, Secretary of Labor for President Ronald Reagan expressed the sentiments widely held among employees and employers confronted with this issue:[20/]

> Employees who have the courtesy to take their concerns first to their employers . . . to allow the employer a chance to correct . . . violations without the need for governmental intervention, have as much need for protection as do employees who first go to the government with their concerns.... Employers gain from being given an early opportunity to

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[18/] *Phillips v. Board of Mine Operations Appeals,* 500 F.2d 772, 778 (D.C. Cir. 1974).

[19/] Brief of the United States filed in *Kansas Gas & Electric Co. v. Brock*, No. 85-1403 U.S. Supreme Court (October Term, 1985), p.7, n. 4 and p. 9.

[20/] *Poulos v. Ambassador Fuel Oil Co., 86-CAA-1 (Sec'y Apr. 27, 1987).*

> correct problems without government intervention, and the government is relieved from the need to commit its limited resources investigating and resolving problems that could be informally corrected.
>
> Because the scope of employee protection turns on the need for protection, rather than on vagaries of a selection process that brings some but not other complaints into formal, legal proceedings... I find no principled basis for denying protection to internal employee complaints... Employees who have the courtesy to take their concerns first to their employers... to allow the employer a chance to correct any... violations without the need for governmental intervention, have as much need for protection as do employees who first go to the government with their concerns.

Every subsequent Secretary of Labor (or their designees) continuously and unanimously agreed with Secretary Brock's views of appropriate whistleblower protection in a series of well-reasoned decisions. This includes former Secretaries of Labor Ann D. McLaughlin, Elizabeth H. Dole, Lynn Martin and Robert B. Reich.

On November 13, 2002, an Administrative Review Board appointed by the current Secretary of Labor Elaine Chao discussed internal whistleblowing and how Congress has, in the past, fully supported that concept:

> Congress amended the ERA in 1992 to explicitly cover complaints raised to an employer, in addition to complaints voiced publicly or to a regulatory agency. By expressly extending coverage to internal complaints, Congress effectively ratified the decisions of several United States Courts of Appeals that agreed with the Secretary that the employee protection provision as originally enacted should be interpreted to protect informal complaints raised to an employer. As the court in *Bechtel Const.* explained, coverage of internal complaints "encourages safety concerns to be raised and resolved promptly at the lowest possible level . . . facilitating voluntary compliance with the ERA and avoiding the unnecessary expense and delay of formal investigations and litigation." Stated differently, ERA protection is most effective when it encourages employees to aid their employers in complying with nuclear safety guidelines by raising concerns initially within the workplace.[21/]

[21/] *Williams v. Mason & Hanger Corp.*, 97-ERA-14/18-22 (DOL ARB November 13, (continued...)

The decisions of the U.S. Secretary of Labors over the past 20 years also reflects the judicial interpretations given to nearly every federal whistleblower law by the overwhelming majority of courts. These judicial interpretations have been "endorsed" by Congress on numerous occasions. The two most recent whistleblower laws passed by Congress, the Sarbanes-Oxley corporate whistleblower law and the airline safety whistleblower law, both contain specific Congressional endorsements of internal whistleblowing.

In *Passaic Valley Sewerage Commissioners v. United States Department of Labor,* 992 F.2d 474, 478-479 (3rd Cir. 1993), the U.S. Court of Appeals for the 3rd Circuit explained why internal whistleblowing was protected:

> We believe that the statute's purpose and legislative history allow, and even necessitate, extension of the term "proceeding" to intra-corporate complaints. The whistleblower provision was enacted for the broad remedial purpose of shielding employees from retaliatory actions taken against them by management to discourage or to punish employee efforts to bring the corporation into compliance with the Clean Water Act's safety and quality standards. If the regulatory scheme is to effectuate its substantive goals, employees must be free from threats to their job security in retaliation for their good faith assertions of corporate violations of the statute. Section 507(a)'s protection would be largely hollow if it were restricted to the point of filing a formal complaint with the appropriate external law enforcement agency. Employees should not be discouraged from the normal route of pursuing internal remedies before going public with their good faith allegations. Indeed, it is most appropriate, both in terms of efficiency and economics, as well as congenial with inherent corporate structure, that employees notify management of their observations as to the corporation's failures before formal investigations and litigation are initiated, so as to facilitate prompt voluntary remediation and compliance with the Clean Water Act. Where perceived corporate oversights are a matter of employee misunderstanding, this would afford management the opportunity to justify or clarify its policies.

The court's holding in Passaic Valley reflects basic "common sense." Discouraging employees from discussing concerns with their immediate supervisors undermines the "prompt and voluntary remediation" of most problems.

LEGISLATIVE ACTION

[21/](...continued)
2002) (citations omitted).

Prompt and effective legislative action is necessary in order to correct the loss of legal protections facing all employee whistleblowers in light of the *Garcetti v. Ceballos* decision.

In the past, when courts questioned whether internal whistleblowing was protected under other federal employee protection laws, Congress effectively amended the laws in question to close this loophole. This happened under the 1969 Federal Mine Safety Act and under the Energy Reorganization Act. In both cases, the fact that internal whistleblowing was even questioned by a small minority of judges, led Congress to enact legislation explicitly protecting internal whistleblowing.

Congress has never enacted a uniform national whistleblower protection law. Instead, the First Amendment constituted the minimum federal safety net covering all government employees nationwide. Under the First Amendment, those state and local employees who engaged in whistleblowing on matters of "public concern" could always bring a cause of action under 42 U.S.C. § 1983 (the law utilized by Mr. Ceballos which covers most state and local employees). Additionally, federal employees were (and are) permitted to seek pre-enforcement injunctive relief under the First Amendment in order to protect their right to blow the whistle.

Beyond this safety net exist numerous federal and state laws, none of which provide adequate nation-wide protection to all classes of employees. Each of these laws contains their own definition of protected whistleblower speech. Some of the laws, such as the recently enacted Sarbanes-Oxley Act, explicitly protect internal/official duty speech. Others, such as section 1983 and the WPA, are silent on that matter. The result has been confusion within the workplace. On the state level the matter is just as bad. Some states have no whistleblower protection whatsoever, others have very weak administrative reviews, while not enough offer whistleblowers strong legal protections.

The bottom line: without a legislative response to *Garcetti v. Ceballos*, government employees who report valid concerns regarding the violation of federal laws will not have adequate protection. Those who "speak the truth" and protect the public interest will be at-risk for retaliation. Some will lose their jobs, their careers and their good names simply for disclosing serious misconduct to the wrong person.

Only Congress has the authority to fix this problem. After reviewing every current federal whistleblower law, we strongly recommend the following legislative correction: (1) A uniform federal whistleblower protection law providing a consistent safety net to all public and private sector employees who report violations of federal laws and regulations;

(2) utilization of the procedures recently adopted overwhelmingly by Congress for the protection of corporate whistleblowers under the Sarbanes-Oxley Act. This law both explicitly protects internal/official duty whistleblowers and provides for an efficient and effective administrative review of whistleblower claims.[22/]

Enacting a federal safety net for employees who disclose violations of federal law is the only procedure available to close the dangerous loophole now *binding* on every federal court which reviews a constitutionally-based whistleblower case.

A copy of the proposed legislation is attached.

CONCLUSION

On behalf of the National Whistleblower Center and numerous whistleblowers I have the honor of representing, I applaud the Chairman of this Committee for holding this very important hearing. I also strongly support the following statement made by Chairman Tom Davis in his letter inviting me to testify at today's hearing:

> **To ensure the effective and efficient operation of the United States Government, federal employees must feel free to bring examples of waste, fraud, and abuse to the attention of their superiors.**

The only method available to achieve this goal is to swiftly enact legislation which will truly create the "powerful network" of laws referenced by Justice Kennedy in *Garcetti v. Ceballos.* The patchwork nature of federal whistleblower protections do not work. In light of the *Garcetti v. Ceballos* decision, it is now necessary to enact one law which will protect all whistleblowers from the illogical and harmful results of that decision. Congress has already developed the basic framework for the necessary legislative fix. It now must be fully implemented for whistleblowers.

Thank you for your time and consideration.

Respectfully submitted by:

[22/] Significantly, just this term Congress turned to the procedures set forth in the SOX as a new model for federal employee protections. The Energy Policy Act amended federal law and provided federal employees within the Nuclear Regulatory Commission (NRC) and Department of Energy (DOE) with the same rights that private sector employees had under SOX.

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The National Whistleblower Center is a non-profit, tax-exempt organization specializing in the support of employee whistleblowers. Created in 1988, one of the major goals of the Center is to protect the taxpayers by educating the public about the need to protect employees to disclose government abuse, misconduct and corruption. The Center publishes an educational web page at *www.whistleblowers.org*

Table 1: State by State Analysis of Whistleblower Protection Statutes

State	Public Employee Statute	Statute explicitly covers internal whistleblowers?	Statute as strong as 42 USC § 1983?*
Alabama	Ala.Stat.Ann. §§ 36-26A to -27	NO	NO
Alaska	Alaska Stat. §§ 39.90.100 to -150	NO	YES
Arizona	Ariz. Rev. Stat. Ann. § 38-532	NO	NO
Arkansas	Ark. Code. §§ 21-1-601 to -608	YES	NO
California	Cal. Lab. Code §§ 1102.5 – 1107; Cal. Gov't Code § 8547-8548	NO	NO
Colorado	Colo. Rev. Stat. §§ 24-50.5-101 to -107	YES	NO
Conn.	Conn. Gen. Stat. §§ 31-51m	NO	NO
Delaware	None identified	*n/a*	*n/a*
Florida	Fla. Stat. §§ 112.3187 to 112.31895	NO	NO
Georgia	Ga. Code. Ann. § 45-1-4	YES	NO
Hawaii	Haw. Rev. Stat. §§ 378-61 to -69	YES	NO
Idaho	Idaho Code §§ 6-2101-2109	NO	NO
Illinois	Ill. Comp. Stat. tit.§§ 174/15-35	NO	NO
Indiana	Ind. Code. Ann. § 36-1-8-8	YES	NO
Iowa	Iowa Code Ann. §§ 70A.28; 70A.29	NO	NO
Kansas	Kan. Stat. Ann. § 75-2973	NO	NO
Kentucky	Ky. Rev. Stat. Ann. §§ 61.101-103	NO	NO
Louisiana	La. Rev. Stat. Ann. § 42:1169	YES	NO
Maine	Me. Rev. Stat. Ann. Tit. 26, §§ 831-833; 836-839	YES	NO
Maryland	Md. Code Ann., State Pers. & Pens., § 5-301	NO	YES
Mass.	Mass. Gen. Laws Ann. ch. 149, § 185	YES	YES
Michigan	Mich. Comp. Laws Ann. §§ 15.361-368	NO	NO
Minn.	Minn. Stat. Ann. § 181.931-935	YES	NO
Miss.	Miss. Code Ann. §§ 25-9-171 to -177	NO	NO
Missouri	Mo. Rev. Stat. § 105.055	NO	NO
Montana	Mont. Code. Ann. §§ 39-2-901 to -915	NO	NO
Nebraska	Neb. Rev. Stat. §§ 81-2702 to -2711	YES	NO
Nevada	Nev. Rev. Stat. §§ 281.611-671	NO	NO
New Hampshire	N.H. Rev. Stat. Ann. §§ 275.E:1 – E:7	YES	NO
New Jersey	N.J. Stat. Ann. §§ 34:19-1 to -8	YES	NO
New Mexico	None identified	*n/a*	*n/a*
New York	N.Y. Lab. Law. § 740	YES	NO
North Carolina	N.C. Gen. Stat. Ann. §§ 126.84-88	YES	NO
North Dakota	N.D. Cent. Code §§ 34-11.1-04 - 08	YES	Not specified
Ohio	Ohio Rev. Code Ann. §§ 4113.52	YES	NO
Oklahoma	Okla. Stat. Ann. tit. 74, § 840-2.5	YES	Not specified

Oregon	Or. Rev. Stat. Ann. §§ 659A.200-236	NO	Not specified
Pennsylvania	43 Pa. Stat. Ann. §§ 1421-1428	YES	NO
Rhode Island	R.I. Gen. Laws. §§ 28-50-1 to -5	NO	NO
South Carolina	S.C. Code Ann. §§ 8-27-10 to -50	NO	NO
South Dakota	S.D. Codified Laws § 3-6A-52	NO	NO
Tennesee	Tenn. Code Ann. § 4-18-105	NO	Not specified
Texas	Tex. Gov't Code Ann. §§ 554.001 to .010	YES	NO
Utah	Utah Code Ann. §§ 67-21-1 to -9	NO	NO
Vermont	None identified	*n/a*	*n/a*
Virginia	None identified	*n/a*	*n/a*
Washington	Wash. Rev. Code Ann. §§ 42.41.010 to .902	NO	NO
West Virginia	W. Va. Code Ann. §§ 6C-1-1 to -8	YES	NO
Wisconsin	Wis. Stat. Ann. §§ 230.80 to .89	YES	NO
Wyoming	None identified	*n/a*	*n/a*

*Comparing both substantive and procedural protections with 42 U.S.C. § 1983

Table 1 consists of data from: Practising Law Institute; Victoria L. Donati and William J. Tarnow, Whistleblowers and Other Retaliation Claims, 729 PLI/Lit 1095, 1108 (2005); references from Garcetti v. Ceballos, 126 S.Ct. 1951 (2006); Westlaw search of terms "whistleblower," conscientious employee, and employee /10 protect!; Robert G. Vaughn, State Whistleblower Statutes and the Future of Whistleblower Protection, 51 Admin. L. Rev. 581 (1999).

Table 2: States With Statutes That Protect Internal Whistleblowers, but Conflict with Ceballos.

State	Public Employee Statute*
Colorado	Colo. Rev. Stat. §§ 24-50.5-101 to -107
Maine	Me. Rev. Stat. Ann. Tit. 26, §§ 831-833; 836-839
New Hampshire	N.H. Rev. Stat. Ann. §§ 275.E:1 – E:7
New Jersey	N.J. Stat. Ann. §§ 34:19-1 to -8
New York	N.Y. Lab. Law. § 740
Ohio	Ohio Rev. Code Ann. §§ 4113.52

* Statute requires informing supervisor

Table 2 consists of data from: Practising Law Institute; Victoria L. Donati and William J. Tarnow, Whistleblowers and Other Retaliation Claims, 729 PLI/Lit 1095, 1108 (2005); references from Garcetti v. Ceballos, 126 S.Ct. 1951 (2006); Westlaw search of terms "whistleblower," conscientious employee, and employee /10 protect!; Robert G. Vaughn, State Whistleblower Statutes and the Future of Whistleblower Protection, 51 Admin. L. Rev. 581 (1999).

Table 3: Analysis of Pre - Garcetti v. Ceballos Decisions Under 42 U.S.C. § 1983

Case Cite	Speech Related to Duties? *	Misconduct Internally Reported? **
Slip Copy, 2006 WL 840389 (S.D.Ohio 2006)	No	Yes
411 F.Supp. 2d 1223 (D.Or. 2006)	Yes	Yes
2006 WL 1194206 (D.D.C. 2006)	Yes	Yes
424 F.Supp. 2d 465 (E.D.N.Y. 2006)	Yes	Yes
Slip Copy, 2006 WL 1129382 (E.D.Tenn. 2006)	No	Yes
Slip Copy, 2006 WL 572152 (D.Or. 2006)	Yes	Yes
Slip Copy, 2006 WL 1697009 (N.D.Ill. 2006)	Yes	Yes
444 F.3d 929 (7th Cir. (Wis.) 2006)	Yes	Yes
427 F.Supp. 2d 507 (D.N.J. 2006)	Yes	Yes
Slip Copy, 2006 WL 852066 (D.Puerto Rico 2006)	No	Yes
Slip Copy, 2006 WL 39348 (W.D.Wash. 2006)	No	No
417 F.Supp. 2d 884 (E.D.Mich. 2006)	Yes	Yes
383 N.J.Super. 615 (N.J.Super.A.D. 2006)	No	No
Slip Copy, 2006 WL 278859 (D.Hawai'i 2006)	Yes	Yes
420 F.3d 1293 (11th Cir. (CA) 2005)	Yes	Yes
402 F.3d 225 (1st Cir. (Mass.) 2005)	Yes	Yes
2005 WL 2000716 (D.Vt. 2005)	No	No
2005 WL 1528955 (W.D.Wash. 2005)	Undetermined	Yes
2005 WL 3296268 (W.D.Tex. 2005)	Undetermined	Yes
2005 WL 1586762 (D.Or. 2005)	Undetermined	Yes
414 F.Supp. 2d 834 (N.D.Ill. 2005)	Yes	Yes
2005 WL 2334363 (N.J.Super. 2005)	Undetermined	Yes
2005 WL 2416554 (S.D.Ohio 2005)	Yes	Yes
362 F.Supp. 2d 149 (D.D.C. 2005)	Yes	Yes
2005 WL 3003077 (S.D.Ind. 2005)	Yes	Yes
2005 WL 3455874 (M.D.Ga. 2005)	Yes	Yes
2005 WL 1871115 (W.D.Wash. 2005)	No	No
2005 WL 2562717 (E.D.Cal. 2005)	Yes	Yes
365 F.Supp. 2d 151 (D.Mass. 2005)	Yes	Yes
2005 WL 1253936 (S.D.N.Y. 2005)	Yes	Yes
2005 WL 3276277 (D.D.C. 2005)	Yes	Yes
371 F.Supp. 2d 882 (E.D.Mich. 2005)	No	Yes
2005 WL 1023206 (S.D.N.Y. 2005)	Yes	Yes
124 Fed.Appx. 482 (9th Cir. (OR) 2005)	Undetermined	Yes
404 F.3d 504 (1st Cir. (Mass.) 2005)	No	No
393 F.Supp. 2d 990 (N.D.Cal. 2005)	Undetermined	Yes
2005 WL 736639 (D.D.C. 2005)	Yes	Yes
2004 WL 758299 (S.D.N.Y. 2004)	Yes	Yes
362 F.3d 1 (C.A.1 (Mass.) 2004)	Yes	Yes
2004 WL 1615355 (E.D.Pa. 2004)	Undetermined	Yes
892 So. 2d 800 (Miss 2004)	Yes	Yes
348 F.Supp. 2d 1215 (D. Colo. 2004)	Yes	Yes

367 F.3d 337 (5th Cir. (Tex.) 2004)	Yes	No
2004 WL 2091990 (N.D.Cal. 2004)	Yes	Yes
2004 WL 396608 (Tex. App. 2004)	No	Yes
147 S.W.3d 609 (Tex. App. 2004)	No	No
371 F.3d 503 (9th Cir. (OR) 2004)	Yes	Yes
371 F.3d 928 (7th Cir. (Ind.) 2004)	Yes	Yes
116 Fed.Appx. 80 (9th Cir. (Wash.) 2004)	Undetermined	Yes
2003 WL 22964277 (Tex. App. 2003)	Yes	Yes

* On the basis of the facts in the particular case, the subject of the whistleblowing-related speech reasonably fell within the bounds of what the plaintiff was paid to do.

** On the basis of the facts in the particular case, the misconduct that was the subject of the plaintiff's whistleblowing-related speech was reported to a superior within the organization that employed the plaintiff before being reported to any outside entity.

Table 3 consists of a Westlaw search (using the terms: "42 u.s.c. § 1983" "42 u.s.c.a. § 1983" & whistleblow!) for the 50 most recent state and federal cases decided under § 1983 in which the employee either prevailed on the merits or prevailed in a substantive summary judgment motion that was not subsequently overturned.

Table 4: Analysis of Pre - Garcetti v. Ceballos Decisions Under Federal Whistleblower Statutes

Case Cite	Misconduct Internally Reported? *
438 F.3d 1275 (1st Cir. 2006)	No
434 F.3d 721 (4th 2006)	Yes
423 F.3d 483 (5th Cir. 2005)	Yes
397 F.3d 183 (N.J. 2005)	Yes
364 F.3d 1117 (9th Cir. 2004)	Yes
334 F.Supp.2d 1365 (N.D.Ga., 2004)	Yes
348 F.Supp.2d 1322 (S.D.Fla.2004)	Yes
116 Fed.Appx. 674 (6th Cir. 2004)	Yes
347 F.3d 1086 (9th Cir. 2003)	Yes
59 Fed.Apps. 732 (6th Cir. 2003)	Yes
58 Fed.Appx. 442 (1st Cir. 2003)	Yes
293 F.Supp.2d 1210 (W.D.Wash., 2003)	Yes
298 F.3d 464 (5th Cir. 2002)	Yes
52 Fed.Appx. 490 (1st Cir. 2002)	Yes
234 F.3d 1276 (9th Cir. 2000)	Yes
170 F.3d 83 (1st Cir. 1999)	Yes
63 F.Supp.2d 110 (D.Mass., 1999)	No
995 F.Supp. 889 (N.D.Ill. 1998)	Yes
146 F.3d 12 (1st Cir. 1998)	Yes
152 F.3d 602 (Ill. 1998)	No
113 F.3d 1235 (6th Cir. 1997)	Yes
115 F.3d 1568 (1st Cir. 1997)	Yes
111 F.3d 94 (1st Cir. 1997)	Yes
953 F.Supp. 1085 (E.D.Mo., 1997)	No
132 F.3d 937 (3rd Cir. 1997)	Yes
965 F.Supp.1459 (D.Or., 1997)	Yes
79 F.3d 92 (8th Cir. 1996)	Yes
85 F.3d 89 (2nd Cir. 1996)	Yes
1995 WL 241853 (E.D.La. 1995)	Yes
50 F.3d 926 (11th Cir. 1995)	Yes
89 F.3d 826 (2nd Cir.995)	Yes
26 F.3d 1187 (Mass. 1994)	Yes
38 F.3d 76 (2nd Cir. 1994)	Yes
34 F.3d 1068 (6th Cir. 1994)	Yes
27 F.3d 1133 (6th Cir. 1994)	Yes
983 F.2d 1195 (2nd Cir. 1993)	Yes
8 F.3d 980 (l4th Cir. 1993)	Yes
992 F.2d 474 (3rd Cir. 1993)	Yes
12 F.3d 151 (9th Cir. 1993)	Yes
1993 WL 276787 (N.D.Ill. 1993)	No
987 F.2d 1000 (4th Cir. 1992)	Yes

* On the basis of the facts in the particular case, the misconduct that was the subject of the plaintiff's whistleblowing-related speech was reported to a superior within the organization that employed the plaintiff before being reported to any outside entity.

Table 4 consists of a data gathered from Westlaw searches (using the terms: whistleblow!, "conscientious employee", and/or retaliate!) of cases brought under Federal Whistleblower Statutes, 12 U.S.C. 1831(j), 12 USC 1790(b), 15 USC 2622, 18 USC 1514A, 29 U.S.C. 660(c), 33 U.S.C. 1367, 42 U.S.C. 5851, 49 U.S.C. 2305, 49 U.S.C. 31105, 49 U.S.C. 41713, 49 U.S.C. 42141, of the 41 most recent cases in which employee prevailed on the merits or in which the opinion language supports a finding that employee will prevail on the merits.

PROTECTING HONEST AMERICAN'S ON THE JOB ACT OF 2006

WHEREAS the First Amendment protects speech on matters of public concern, and

WHEREAS employees are often in the best position to know what ails the agencies for which they work, and

WHEREAS the current patchwork nature of federal and state whistleblower protection laws do not adequately protect employee whistleblowers, and

WHEREAS the Congress of the United States has recently adopted realistic procedures necessary to protect employee whistleblowers, and

WHEREAS to ensure the effective and efficient operation of the United States government, and the effective enforcement of federal laws, employee whistleblowers must be adequately protected

BE IT ENACTED by the Senate and House of Representatives of the United States of America:

SECTION 1. SHORT TITLE.

This Act may be cited as the Protecting Honest Americans on the Job Act.

SECTION 2. WHISTLEBLOWER PROTECTION.

a) IN GENERAL - No employer, including, but not limited to, contractors, public or private corporations, subcontractors or agents of an employer, may discharge, demote, harass, blacklist or discriminate against any employee because that employee disclosed what the employee reasonably believes constitutes a violation any federal law or a federal public health and safety requirement-

(1) To a Federal regulatory or law enforcement agency; to any Member of Congress or any committee of Congress; or to a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
(2) has commenced, caused to be commenced, or is about to commence a proceeding, testified or is about to testify at a proceeding, or assisted or participated in or is about to assist or participate in any manner in such a proceeding or in any other action designed to enforce the laws of the United States; or
(3) is refusing to violate or assist in the violation of a federal law, rule, or regulation or engage in any conduct which the covered individual reasonably believes constitutes a violation of any law, or which the employee reasonably believes constitutes a threat to the public health or safety.

(b) PROCEDURES – The process, procedures, and remedies with respect to prohibited acts under subsection (a) shall be governed by sections 1514(b), (c) and (d) of title 18, United States Code. A claim under this Act must be filed within one year of any alleged discriminatory action.

(c) DEFINITIONS.

(1) Employer is defined as an employer under sections 2000e(b) and 2000e-16, of Title 42, United States Code;

(2) Employee shall include any employee, contractor, subcontractor, agent or representative of any employer.

Chairman TOM DAVIS. Mr. Pilon.

STATEMENT OF ROGER PILON

Mr. PILON. Yes, thank you, Mr. Chairman, and thank you for the invitation to be here this morning.

After listening to my colleague and listening to the opening statements, I feel I need to start a little differently than I had originally planned to do. My prepared testimony, if you have had a chance to read it, I think is a rather even-handed treatment of the case.

I will open by saying that the whistleblower issue is very serious, and there are doubtless many, many very important credible whistleblowers out there who are not getting their just day in court. At the same time, we also know there is another side to the matter; and that is, having served at the Office of Personnel Management I've seen it, many whistleblowers are approaching the bodies, either administrative or judicial, with less than meritorious cases.

So we have a balance that we need to strike between the needs of management to run government efficiently on the one hand, and the needs of whistleblowers to bring to the attention of the public things that need to be brought to their attention.

And so let me turn now to your invitation, Mr. Chairman. You raised three concerns in that letter:

No. 1, to help us understand the *Ceballos* case, I will tell you it is not the easiest case in the world to understand. I'll try to make some sense of it this morning.

Second, what effect it has on the statutes. I do not see it as having had any effect whatsoever on the statutory protections, and therefore it seems to me—and this was your third concern, the press reports. It seems to me they were overblown and should be noted as such.

Now, let me turn to the case itself. The ruling that came out of the case was one whereby if an employee is speaking pursuant to his official duties, then he is not speaking as a citizen and therefore has no first amendment protection. By contrast, if he is speaking as a citizen, then possibly he has a first amendment protection if it does not interfere too much with the operations of government that he is there to carry out. That in a nutshell is what the majority held.

The dissent criticized the majority mainly because it had put forth a categorical distinction between speaking as a citizen and speaking as an employee. And it seems to me, that criticism is well founded. What we have in many cases is mixed cases, whereby a citizen—rather, an employee is speaking within the framework of his official duties as an employee, and yet is also speaking as a citizen. And it seems to me the *Ceballos* case was a perfect example of that.

Indeed Justice Souter in his dissent brought that out. And I suspect that the best opinion in the whole series of opinions was that by Justice Breyer, who saw this as indeed a mixed case.

Now, the problem when you get into the kind of standard that was put forward by Justice Souter is that it involves the court in making all kinds of policy and value judgments, which courts are not ordinarily prone to do. For example, he said that the employee should prevail—should not prevail, unless he speaks on a matter

of unusual importance, satisfies high standards of responsibility in the way he does it; and he listed such categories as health and safety, deliberately unconstitutional action, serious wrongdoing and the like. In other words, what you've got now is a call for the court to be ultimately exercising its discretion. And so at the end of the day we've got to ask the question: Who is going to ultimately have the discretion in these matters? Is management going to have the discretion, or is the court going to have the discretion? And what you want to avoid is having a situation whereby all of these cases—and, of course, there are in principle many, many cases that do not end up in the Federal courts to be adjudicated there, or the courts will be swamped with them.

So it seems to me that the best way to go about this, because the first amendment can get you only so far in adjudicating these matters as a matter of principle, where you need to go is with statutory remedies. And as Justice Souter brought out, there are some serious problems—and Mr. Kohn did as well—with the statutory remedies that are out there and are available. That is, of course, a subject for the next panel to address.

We all want these disputes to come out right, but at some point some party is going to have to have the discretion. And the question, it seems to me, for this committee is where are you going to leave that discretion, with the management, or are you going to leave it with the court? Thank you.

Chairman TOM DAVIS. Well, thank you very much.

[The prepared statement of Mr. Pilon follows:]

STATEMENT

of

Roger Pilon, Ph.D., J.D.
Vice President for Legal Affairs
B. Kenneth Simon Chair in Constitutional Studies
Director, Center for Constitutional Studies
Cato Institute

before the

Committee on Government Reform
United States House of Representatives

June 29, 2006

Re: "What Price Free Speech? Whistleblowers and the *Ceballos* Decision"

Mr. Chairman, distinguished members of the committee:

My name is Roger Pilon. I am vice president for legal affairs at the Cato Institute and the director of Cato's Center for Constitutional Studies. I thank you, Mr. Chairman, for inviting me to testify today on the Supreme Court's recent decision in the case of *Garcetti v. Ceballos*.[1] Your letter of invitation states that "the purpose of this hearing is to understand [this decision] regarding First Amendment protection for whistleblowers and how—if at all—this decision affects whistleblower protection."

At the suggestion of committee staff, I will direct my remarks to the *Ceballos* decision rather than to the various federal and state whistleblower statutes. In doing so I will do the best I can to understand the decision, but I should say at the outset that it is not the easiest decision to understand—in either its majority or its three dissenting opinions. Part of the reason for that, as the majority says, is that once one gets past a few broad principles, the inquiries have "proved difficult" due to "the enormous variety of fact situations."[2]

Before I turn to the decision, however, it may be useful to state my general conclusions regarding the issues your letter raises. First, after *Ceballos* it appears that the First Amendment may offer only limited protection to whistleblowers, in part because there may be only so much a judge can do under the amendment to adjudicate these complex cases. Accordingly, if the relationship between the government employer and employee is to be fleshed out further—to protect both the needs of government and the

[1] 126 S. Ct. 1951 (2006).
[2] *Id.* 1958.

rights of employees—it will have to be by statute. That is hardly a novel conclusion, I realize, but I offer it as an antidote to the idea that the disputes at issue lend themselves in any far-reaching way to constitutional as opposed to statutory adjudication.

Second, assuming robust federal and state statutory protections for whistleblowers are in place, this decision, based on the First Amendment, should have no affect on those protections. Thus, third, those media reports you reference that appeared immediately after *Ceballos* came down,[3] suggesting that the decision eviscerated federal and state whistleblower protections, were not accurate. Whether those measures are themselves adequate is of course a separate matter, which I understand the next panel will address.

Let me turn now to the decision. I will first summarize the facts, then look at the Court's opinion, then the dissents, at which point I will make a few observations.

Summary of Facts[4]

Richard Ceballos, a deputy district attorney for the Los Angeles County District Attorney's Office, was asked by a defense attorney to review an affidavit police used for a search warrant. The attorney claimed the affidavit was inaccurate. After investigating the matter, Ceballos agreed. He advised his supervisor, then prepared a disposition memo recommending dismissal of the case. Nonetheless, the prosecution proceeded. At a hearing to challenge the warrant, the defense called Ceballos to testify. The trial judge denied the motion to suppress because he found independent grounds for the warrant. Ceballos claims he was then subjected to a series of retaliatory employment actions. He initiated an employment grievance, which was denied. He then filed a section 1983 claim in U.S. District Court, alleging violations under the First and Fourteenth Amendments.

The District Court granted District Attorney Garcetti's office summary judgment, ruling that the memo was not protected speech because Ceballos wrote it pursuant to his employment duties. The Ninth Circuit reversed, holding that the memo's allegations were protected under the First Amendment.

The Majority's Opinion

Writing for himself, the Chief Justice, and Justices Scalia, Thomas, and Alito, Justice Kennedy reversed the Ninth Circuit's decision, holding that "when public employees make statements pursuant to their official duties, the employees are not

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[3] See, e.g., Fred Barbash, *Supreme Court Limits Whistleblower Lawsuits*, Wash. Post, May 30, 2006 ("[The *Ceballos*] decision enhances the ability of government at all levels to punish employees for speaking out ...."); *All Things Considered* (Nat'l Public Radio broadcast, May 30, 2006) (Melissa Block, host: "Today the Supreme Court made it much more difficult for public employees to bring retaliation claims against their bosses."); id. (Nina Totenberg, reporting: "[The *Ceballos* decision] was a huge loss for the nation's 21 million public employees ....").

[4] Because the case is before the Court on a motion for summary judgment, the facts asserted by the plaintiff are assumed to be true and all inferences are drawn in his favor.

speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[5]

The Court's opinion, at its core, is really quite simple. Following *Pickering v. Board of Education*[6] and cases decided in its wake, "two inquires" guide interpretation.

> The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.[7]

And what counts, in this second case, as an adequate justification for the government's "broader discretion" to restrict or sanction the speech of an employee? The government may do so, the Court says, "when it acts in its role as employer" and the speech "has some potential to affect the entity's operations." Indeed, "government offices could not function if every employment decision became a constitutional matter."[8]

At the same time, "so long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively."[9] Thus, the Court's decisions, Justice Kennedy concludes, "have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions."[10]

Applying those principles to the case at hand, the Court found that the dispositive factor was not that Ceballos expressed his views inside his office rather than publicly, nor that his memo concerned the subject matter of his employment, but that "his expressions were made pursuant to his duties."[11] "Ceballos did not act as a citizen" but as a government employee, subject to "employer control over what the employer itself has commissioned or created."[12]

Were the Court to adopt the rule proposed by the Ninth Circuit, Justice Kennedy continues, managerial discretion would be replaced by judicial supervision:

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[5] Ceballos, *supra* note 1, at 1960.
[6] 391 U.S. 563 (1968).
[7] Ceballos, at 1958.
[8] *Id.*
[9] *Id.*
[10] *Id.* at 1959.
[11] *Id.* at 1959-1960.
[12] *Id.* at 1960.

> When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences. When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny. To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.[13]

Rejecting the notion "that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties," the Court concludes by pointing to the importance of employee speech for good government and to "the powerful network of legislative enactments … available to those who seek to expose wrongdoing."[14]

The Dissents

Justice Stevens dissented briefy. Justice Souter dissented more extensively, joined by Justices Stevens and Ginsburg. And Justice Breyer dissented.

The main criticism each dissent makes concerns what each sees as the Court's "categorical" distinction between speaking as a citizen and speaking in the course of one's employment. As Justice Stevens says: "The proper answer to the question 'whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties,' is 'Sometimes,' not 'Never.'"[15] Citing several prior cases, Justice Souter writes, "the Court realized that a public employee can wear a citizen's hat when speaking on subjects closely tied to the employee's own job…."[16] And Justice Breyer argues that the case at hand "asks whether the First Amendment protects public employees when they engage in speech that both (1) involves matters of public concern and (2) takes place in the ordinary course of performing the duties of a government job."[17] The majority, he continues, answers "never." "That word, in my view, is too absolute."[18]

That criticism is not without merit. In numerous places, the majority's language is categorical, starting with its statement of its holding: "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, …."[19] Again, in applying its holding to the case at hand the majority says that Ceballos "did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case."[20] And again, the majority concludes

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[13] *Id.* at 1961.
[14] *Id.* at 1962.
[15] *Id.*
[16] *Id.* at 1964.
[17] *Id.* at 1973.
[18] *Id.* at 1974. "Our prior cases do not decide what screening test a judge should apply in the circumstances before us, namely when the government employee both speaks about a matter of public concern and does so in the course of his ordinary duties as a government employee." *Id.*
[19] *Id.* at 1960.
[20] *Id.*

that "the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities. Because Ceballos' memo falls into this category, his allegation of unconstitutional retaliation must fail."[21]

At the same time, the majority seems to leave the door open to what might be called "mixed" cases—cases in which the employee is speaking *both* pursuant to his official responsibilities *and* as a citizen on a matter of public concern. Thus, returning to the "two inquiries" with which the Court begins its opinion, if the answer is "yes" as to "whether the employee spoke as a citizen on a matter of public concern," then "the possibility of a First Amendment claim arises."[22] Notwithstanding its categorical language elsewhere in the opinion, the Court here seems to be entertaining a mixed case, for a First Amendment claim might arise where the government does not have an "adequate justification" for its disciplinary action.

But having raised the possibility that the Court did entertain mixed cases, let me offer language by the majority that seems to go the other way:

> 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 or discussing politics with a co-worker. *When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees.*[23]

Does that mean that speaking "pursuant to employment responsibilities" forecloses speaking *in the same breath* as a citizen? As Justice Souter notes, "would anyone deny that a prosecutor like Richard Ceballos may claim the interest of any citizen in speaking out against a rogue law enforcement officer, simply because his job requires him to express a judgment about the officer's performance?"[24] Perhaps the most that can be said on this fundamental but crucial point is that we have not seen the last of this litigation.

Turning to another matter, Justice Souter would adjudicate this and other such cases as follows under a *Pickering* balancing scheme:

> ...the extent of the government's legitimate authority over subjects of speech required by a public job can be recognized in advance by setting in effect a minimum heft for comments with any claim to outweigh it. Thus, the risks to the government are great enough for us to hold from the outset that an employee commenting on subjects in the course of duties should not prevail on balance unless he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it. The examples I have already given indicate

[21] *Id.* at 1961.
[22] *Id.* at 1958.
[23] *Id.* at 1961. (emphasis added)
[24] *Id.* at 1965-1966.

> the eligible subject matter, and it is fair to say that only comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee's favor.[25]

Although that standard does establish a presumption on the side of the government employer, Justice Breyer responds that it not only "fails to give sufficient weight to the serious managerial and administrative concerns that the majority describes," but it also screens out very little, for there are "far too many issues of public concern, even if defined as 'matters of unusual importance.'"[26]

Yet another problem with the Souter standard, however, is that it is an unbridled invitation to the judiciary to make subjective policy and value judgments. In fact, the standard reads rather like something a legislature might use in crafting whistleblower legislation. By contrast, the majority's standard—statements made "pursuant to official duties"—seems more objective. Yet Justice Souter writes that "the majority's position comes with no guarantee against factbound litigation over whether a public employee's statements were made 'pursuant to official duties.'"[27]

What then are we to make of this? In his special concurrence below, Judge Q'Scannlain began his opinion by noting that "for much of this Nation's history, our courts generally accepted then-Judge Holmes's immoderately narrow view of the First Amendment rights of public employees: '[A constable] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.'"[28] The implication of Holmes's observation is that government, as employer, may dictate the terms of employment. Justice Kennedy stated the modern view at the outset of his opinion: "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression."[29] That seems right. But if the balance to be struck between free speech and government power is sometimes difficult to discern in the case of ordinary citizens, it is far more so in the case of government employees, who invariably wear two hats. And the speech rights of CIA agents are surely far different than those of professors at state universities.

The thrust of the majority in *Ceballos* seems to be to reduce the role of the courts in drawing these difficult lines. It is doubtful that the Court drew the line correctly, but neither does it seem that the dissents got it right. When the constitutional material they have at hand is too sparse, courts tend to make policy judgments, on one hand, or leave things as they are, on the other hand. This is a place for legislation to flesh out the relationship between the needs of the people and the rights of government employees, consistent with the idea that citizens do not give up all or their rights when they enter government service.

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[25] *Id.* at 1967.
[26] *Id.* at 1975.
[27] *Id.* at 1968.
[28] Ceballos v. Garcetti, 361 F.3d 1168, 1185 (2004) (O'Scannlain, J., concurring) (quoting McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220 (Mass. 1892)).
[29] Ceballos, *supra* note 1, at 1955.

Chairman TOM DAVIS. Mr. Kohn, you're fairly unequivocal, and you believe that the *Ceballos* decision was wrongly decided. But just playing devil's advocate for a minute, if the court had gone the other way, wouldn't it have given employees the ability to challenge any and all decisions by their superiors without repercussions? What are the limits?

Mr. KOHN. Absolutely not. Essentially the law that the *Garcetti* case reversed was the law followed by almost all courts for almost 30 years, and it is a very simple standard: Is the speech of a matter of public concern? Pure workplace grievances have no constitutional protection, and if it was speech of a matter of public concern, it could be rated high public concern, low public concern.

To the second part of the test, which was a balancing test, the interest in the speech versus the interest in efficiency of government. And that was the test applied in courts pretty much uniformly, with a couple of outliners, for 30 years. It worked pretty well. So it wasn't some type of free speech right for employees on anything; it had to be a matter of public concern.

Chairman TOM DAVIS. OK. We have a lot of discussions here on policy issues, where you come out. And every employee who has a grievance, who has gotten their 2 cents in at the table but didn't get their way, could go out front and that would be very inefficient, wouldn't it?

Mr. KOHN. It would. But there is a second part of the test.

Chairman TOM DAVIS. I mean, obviously waste, fraud and abuse would be unfettered, in terms of their ability to expose those things.

Mr. KOHN. But there was a second part, and the courts dealt with this. The first issue is was the speech even protected. But even if it was, you could still fire any employee, if you would have fired an employee who hadn't engaged in that same type of speech for the same thing. There was no immunity here. So if an employee was incompetent, if an employee showed up late, even if the employee's speech was outrageous in the sense that he pulled out a bull horn in the middle of the workplace, they could be fired. So there was no insurance policy here. They could discipline employees, and they had legitimate controls over what was a matter of public concern.

What occurs here is that employees' rights are cutoff at the start. They could be the best employee in the office, and, simply for writing a memo exposing a serious issue of misconduct that the supervisor wanted to keep hidden, they're fired. And under this decision they're out.

Chairman TOM DAVIS. Even if they keep it in house?

Mr. KOHN. Absolutely. If they keep it in house, they are totally out. If they didn't write that memo to their supervisor, stabbed the supervisor in the back, went running to the press and called a press conference, they're protected.

Chairman TOM DAVIS. And that's a bad decision, if that's where it comes down.

Mr. Pilon, do you agree with that?

Mr. PILON. Well, he said quite a bit so.

Chairman TOM DAVIS. I mean, just talking about it depends—obviously if you write a memorandum to your employer, this is some-

thing that comes across your desk, you feel it is—something is wrong—and you write that memorandum to your employee, you keep it in house; what is the problem?

Mr. PILON. I don't know that the court has given us an answer to that, frankly, and that's part of the problem. I would respond, however, to this idea of a matter of public concern, which I assume you are talking about the *Pickering* standard before that.

The problem there is it still is a difficult line to draw. I mean go from waste, fraud, and abuse on the one hand to a simple employee grievance on the other hand. The employee grievance could itself be a matter of public concern if indeed the resolution of it serves as a precedent for future employee grievance resolutions. And so it is very hard to know whether something is going to be of a matter of public concern or not.

Again, there just are not bright lines here, and we are far better off trying to, it seems to me, address these statutorily, and probably with different statutes pertaining, to say the CIA employee on the one hand versus someone at HHS on the other hand. Because they are very different venues.

Chairman TOM DAVIS. Well, even the public concern issue, which is—I guess could be litigated through time—how do you balance the State's interest in promoting workplace efficiency? That's a line that seems very difficult to draw.

Let me ask you this, Mr. Pilon. It seems the key issue is this notion of "pursuant to their job description" that the court used in *Ceballos*. Do you think this is now what will be litigated, and how do you think this will come out?

Mr. PILON. Yes, it will. And Justice Souter brought out the point that now we are going to see litigation over this fact-bound issue of whatever it is. Moreover, there is the speculation that he put forward in the opinion that we will now take the PD's position description and expand the duties under it and so that everything becomes a matter of activities pursuant to your official duties.

Chairman TOM DAVIS. But I think you both make the point, this begs the statutory solution.

Mr. PILON. Absolutely.

Chairman TOM DAVIS. OK. Mr. Waxman.

Mr. WAXMAN. Thank you, Mr. Chairman. I want to thank both of you for your testimony. Congress and the American people rely on whistleblowers to disclose unlawful activities, waste and abuse, and this committee has learned that instead of being rewarded for this patriotism, government workers face the loss of jobs, livelihood, and reputations. That's what we are trying to deal with, how we can encourage people to come forward without facing sanctions for doing it. And now more than ever, we need whistleblowers to do what we want them to do, to come forward and expose problems within the government.

The Federal courts seem to be steadily eating away at the whistleblower protections. As a practical matter, the *Ceballos* decision leaves whistleblowers with no recourse against harassment, job loss, and other retaliation.

Do you, Mr. Kohn, think that this will have a chilling effect on government employees? Are they going to be fearful as a result of this decision?

Mr. KOHN. There is absolutely no doubt that decision has already had a chilling effect given the type of communications my office has seen. It clearly will. But I'll tell you where the chilling effect—when it will really come in is when you have a workplace and someone actually gets fired or demoted, legally. To understand *Ceballos,* watch the—we have seen this in other areas of the law in which Congress amended the statutes to protect the internal whistleblowers, like the Atomic Energy Act, where one court said oh, you can't go internal. Once you fire someone, you will have such a chilling effect. And if you look at the examples of the three whistleblowers I gave coming in here, what was discovered in the investigations of each of their cases is that those offices had major problems. Those offices had a motive for trying to silence the internal whistleblower. And it will be precisely the dysfunctional or the corrupt office that will benefit from this decision; whereas, if you have an office that's honest and open but those employees are afraid to fully communicate, the honest office will be penalized. The chilling effect will have terrible consequences, both for honest workplaces and benefiting dishonest workplaces.

Mr. WAXMAN. Do you think we need a statutory change? Have you had a chance to review the proposals that have come out of this committee with regard to whistleblower protection?

Mr. KOHN. I have. And I salute the efforts to reform the Whistleblower Protection Act.

That amendment being proposed would partially overturn *Ceballos* under that law. But it doesn't fully do it and it doesn't cover the vast majority of employees who have lost their rights, which is all State and local and Federal employees not covered under WPA.

Also we have used the first amendment very effectively for all Federal employees. And those rights cannot be restored by the WPA amendment. We have proposed a very simple law. It essentially takes a definition of protected activity that's very established, partially from the Sarbanes-Oxley Act and partially from the general laws. It gives a procedural remedy that's realistic, the precise procedural remedy that this Congress gave to employees of the NRC and the Department of Energy this term, and it defines employees consistent with Title 7. If you can file a claim for race, sex, or age discrimination, let your employee file a claim for whistleblower protection.

Those three simple steps would cover and protect this loophole in 99 percent or more of every American workplace across the country.

Mr. WAXMAN. Mr. Pilon, do you—you think we needed statutory changes as well? What would you recommend we do in terms of the statute?

Mr. PILON. One of the things it seems to me that you need to address at the outset, is where did the presumptions lie and who has the burden of proof. You look at Justice Souter in dissent, and he offered one proposal; but it is pretty heavily on the government side, interestingly. He spoke of the government's legitimate authority, and that before an employee could overcome it, he would have to have a complaint that had a certain minimum heft—his words.

I don't know what that language translates out to in any given situation.

Again, so many of these issues are so difficult to deal with, because, as the majority said, they are so fact-dependent. You can lay out some general principles, but once you get beyond that, you are dealing with facts, situations, which vary enormously. And if the court cannot address these because the first amendment is simply too sparse to do it, it may be that Congress is going to be limited as well, because there is so much you can write in the way of statutes that are going to address every agency running from the CIA on the one hand to an ordinary nonintelligence-related office on the other hand.

Mr. WAXMAN. Thank you.

Chairman TOM DAVIS. Thank you. Mr. Dent, any questions?

Mr. DENT. Thank you. Mr. Chairman.

To both panelists, at what point did Mr. Ceballos' activities qualify as part of his job description? When he answered the phone call from the defense counsel or when he went to the site during working hours? Can you give me some insights, sir?

Mr. PILON. Well, I'll start with that. It seems to me that all that he was doing was part of his job description. And it was with—all of it was with matters of public interest.

If anything, this was as clear a mixed case as you could find. I mean, we don't want sheriffs issuing false affidavits in order to obtain a warrant, assuming the facts are as they are reported in the case. We have to assume that because it was up on summary judgment motion.

So I think everything that he was involved in was related to his job description.

Mr. KOHN. And yes, Mr. Dent, I think your question actually exposes one of the gravest deficiencies in the decision, which is what will occur now is endless, useless litigation on what is in or out of a position description and that I mean—and that's going to be carried on for years in summary judgment motion litigation. The Supreme Court found that his writing that memo exposing potential perjury, a misrepresentation in sworn testimony, was part of his duties and he lost protection for his memorandum.

But what is going to happen now is employees will look at their position description, employers will look, and it's going to go on and on.

Mr. DENT. I guess as a followup then, how could Mr. Ceballos have done the same type of followup investigation, made the same recommendation, without having it fall within his job description?

Mr. KOHN. And it is, again, kind of the absurdity of the decision. Had he not written his memo, but had he written a press release and issued it to the Los Angeles Times, he would have been protected under the first amendment.

When employers would want employees to be encouraged to do that without working things out, it makes no sense. But in reality, since most whistleblowers, 99 percent, try to work things out through the chain of command, most won't issue a press release at the first drop of an issue. It is going to have—that's the devastating impact of the decision. But the illogical side of it is why encourage employees to write press releases?

Mr. PILON. I don't see the opinion that way. I don't see it as saying if he had gone with a press release, he would have been protected under the first amendment. I still think that he would have been subject to internal discipline if he had taken perhaps even more discipline.

Mr. DENT. Thank you, Mr. Chairman. I yield back.

Chairman TOM DAVIS. Thank you very much.

Ms. Watson.

Ms. WATSON. My question to Mr. Kohn: Should Mr. Ceballos have quit first and then gone to the press?

Mr. KOHN. Absolutely not. That would reverse employment law back 100 years.

Ms. WATSON. No. My question goes to whether he would have been covered by whistleblower protections?

Mr. KOHN. If he had quit?

Ms. WATSON. Yeah.

Mr. KOHN. If he had quit, the whistleblower protections would be irrelevant because he quit his job. He won't get it back.

Ms. WATSON. Well, what I am going to is that, as an employee doing what he had the authority to do, he made a recommendation, and apparently he was punished for doing his job. What would bring him under the protections as an employee? And the only thing I can figure out from what the two of you have said is he would have to become a citizen.

Mr. KOHN. He could keep his job, but he would have to blow the whistle publicly. In fact, the Supreme Court remanded the case because he also testified in court and the court testimony could be protected under the first amendment. He also spoke, I believe, like at a Bar Association meeting. That public speech could be protected. So there is actually going to be a remand to see whether he actually went outside of his chain of command and whether that was protected.

The problem with the decision, if you look at the statistics, about 85 percent of whistleblowers never go beyond the chain of command, and there they will be the ones who will lose their cases. Some do go outside the chain of command, and they still will be protected.

Ms. WATSON. Well, my great interest here is protecting people who are responsible, and from what I can gather by just a cursory review of what we have here, is that he was doing his job. As a public concern, they are getting ready to prosecute somebody based on the wrong methods of—and maybe false, I don't know—but how could we correct that? And you said you had something that——

Mr. KOHN. It is very simple language that was put into Sarbanes-Oxley. It actually comes from the Atomic Energy Act. It has been applied to some Federal employees already, and it says a "report to a supervisor or a person with the authority to correct the problem." That's it. It is as simple as that.

Ms. WATSON. Then that person would be protected.

Mr. KOHN. That's right. If the employee reports it to their supervisor or——

Ms. WATSON. Once they took that step.

Mr. KOHN. Then they are protected. And that exists in the law, and that's actually the judicial interpretation that's given to most

whistleblower laws—Federal—until this decision, and it has worked.

Ms. WATSON. OK. Thank you.

Chairman TOM DAVIS. Thank you. Ms. Norton.

Ms. NORTON. Thank you very much, Mr. Chairman.

You know, it takes a whole lot of nerve to use the colloquial. To stand up and disagree with agency policy. I am very concerned about this confusing inside/outside distinction. It seems to me that—and let me ask you first this question—that the court didn't have much choice under prior first amendment decisions which is allegiant on the citizen's right to speak out. That part of the decision that it seems to me didn't—I don't think the court would, without striking down a whole bunch of prior authority, could have said otherwise. But I am very confused by trying to envision an example of an employee who might speak out as a citizen but could not speak as—but would not be protected as an employee. I would like both of you to offer me an example of such an employee.

Mr. KOHN. Well, we don't need to go further than Mr. Ceballos.

Ms. NORTON. I am left in total confusion by that one. So I guess I am asking for a law school hypothetical.

Mr. KOHN. What it means is this—and this is now the law under this case. You are an engineer working in NASA. Better yet, you work in a security department in a police agency. Now, there is a case on this with a public employee that was not overturned. The President of the United States is shot. That employee says, "Well, maybe a better shot next time." Words like that. You know, maybe we should—it is a good way to get rid of the President.

The Supreme Court found that employee's speech protected because it was a matter of public concern about the President.

Same employee is reviewing a security analysis of the safety of the President of the United States of America and finds a deficiency that might be embarrassing to their boss but puts the President's life at risk. Reports the deficiency to the boss. That employee can now be fired for that act.

The decision is hard to understand because it makes no common sense. The very first court to look at this whole distinction back in the 1970's said the only way to adjudicate whistleblowers on internal/external is just use common sense. This decision does not make use of common sense and therefore it is very hard to understand.

Ms. NORTON. Yes.

Mr. PILON. I was just going to add that I fully agree that this decision drew the line in a place that is curious, to put it charitably. But that doesn't mean that we know where to draw the line.

Let me flip it around just a little bit. You all have staff. And you know that there is a problem sometimes with disagreements with staff. And how much do you want your staff to be at liberty to speak freely—within the office or outside of the office—on policy differences you may have. There is a point at which managerial control of the message is important. And it's not easy to find how to draw that line in such a way that you are able to keep control of your operation, just as a manager in the government would have to, and yet allow——

Ms. NORTON. Mr. Pilon, you said that you indicated in your response to one of my colleagues, I think in your previous response,

you just said in response to my colleague here that he would have been disciplined either way. Now, assuming in good faith he believed that this was—this evidence was faulty, you know, the facts of the case, what are we suggesting that he should do if he would be disciplined either way?

Mr. PILON. In this particular case?

Ms. NORTON. Yeah.

Mr. PILON. As I said, this particular case was wrongfully decided.

Ms. NORTON. This is not the criminal justice system and it's very disconcerting. Perhaps I am identifying too much with this lawyer. What does he do if he got—conducts his own investigation, writes a memo. I mean, it is, you know, you have to—whenever you see somebody who's done something wrong, then you think, well, he should have done something right, if he had only done so.

Mr. PILON. Mr. Ceballas will be here on the next panel so you can ask him directly.

Ms. NORTON. I will ask no more questions. I will say this: that I don't see how one can avoid—we talk about, like I said in my opening statement, waste, fraud and abuse—I don't see how we can continue to disparage leaks. It does seem to me that disconcern about leaks to the New York Times, the investigations that are now going on on all of these leaks, if you are in one of these agencies with the confusion that we have been having, been able to unravel so far, you do have an alternative. You need to leak it to the press and don't tell anybody.

Now, imagine what that means if we are talking about somebody in the CIA or the FBI or the Homeland Security. So if ever there is any reason to try to come to grips with this problem, it is not, in my judgment, wrong for a waste, for an abuse; it is the security of the United States and the safety of the American people.

Thank you, Mr. Chairman.

Chairman TOM DAVIS. Thank you very much. Mr. Shays.

Mr. SHAYS. Thank you, gentlemen, for being here.

I happen to believe, as I said when I started, that when you give an administration more power, you need to have protections. You need to have strong congressional oversight. We here can't function like a Parliament. We need to function like a separate branch of government. No. 1.

No. 2, I believe that the Civil Liberties Board, recommended by the 9/11 Commission as it's related to the intelligence part of our government, needed to be established which would set up a separate board with certain power, couldn't be replaced by the President, Senate confirms employees in each of our 16 classified agencies, our intelligence agencies.

And the third is strong whistleblower protection. I'm going to react to my limited knowledge of what I heard and read in testimony, and I want you to react to that.

I believe it is incumbent on the Congress of the United States to have a whistleblower protection that works in the nonintelligence side of the equation and works on the intelligence side of the equation. My view would be not necessarily that the court ruled incorrectly here, because I believe that when you work for a government, when you work for a business, you have certain obligations

to the government, to the business. So you can't just say I have freedom of speech; I can say any damn thing I want.

What I then conclude is that if Mr. Ceballos did not think he had protection under the whistleblower statutes, that the whistleblower statutes are what is at fault, not a court decision that said he couldn't use his first amendment rights. That's kind of where my mind is.

And can't this problem simply be solved by just making sure we have a whistleblower statute that works? So I would ask each of you that question.

Mr. PILON. Well, this is one of the questions that the chairman raised in his opening remarks that you will undoubtedly want to put to Mr. Ceballos, namely, why is it that he went the route of the first amendment rather than through a statute, and it may be that there are good legal reasons for that. I don't know what they are.

Mr. SHAYS. But intuitively, do you believe that we should have a process where someone can speak out?

Mr. PILON. Absolutely. It is all part of good government. I mean, you put your finger right on it. On the one hand, you have to have agencies like the FBI and the CIA talking to each other so you don't have September 11th again. And you have to have discipline within those agencies and this means allowing for the free exchange of ideas so that were problems to arise, they will be vetted.

Mr. KOHN. There absolutely must be a statutory fix. Period. The nature and scope of that fix can be debated, but each time a court in the past has issued this type of decision, there was an immediate legislative process.

Mr. SHAYS. That's not really directly answering my question, because the implication of your answer is that a statutory fix that gives him his first amendment rights, and that's not what I am saying.

I am saying, doesn't this really send the message to us that we need to correct—first off, do you think he—let me ask you in particular, Mr. Kohn. Do you think he had the ability to be protected under whistleblower protections, not first amendment protections? And second, if he didn't, is this the issue, then, that we needed—we need to have a better whistleblower statute?

Mr. KOHN. The statute at issue in the case, 41983, is a very good statute. It affords a lot of protection. That's why people use it.

Mr. SHAYS. You are talking about the whistleblower statute.

Mr. KOHN. This is the Federal law that gave employees the right to have their constitutional rights protected. It is a little complex. There was actually a statute underneath the *Ceballos* decision, and they just interpret it in that way.

The core question is when I say "a statutory fix," that doesn't necessarily mean to restore your constitutional rights. It is a statutory fix to protect your whistleblower speech efficiency and effectively period. I don't think—I have a lot of disagreements with the Supreme Court decision, but I don't think it serves anyone's purpose now to re-debate it. We should look at what you need to have a good working whistleblower law, if it's consistent or inconsistent.

Mr. SHAYS. We have two laws. We have one in the nonintelligence, one in the intelligence.

Mr. KOHN. That are being proposed.

Mr. SHAYS. That we have. And the one in the intelligence is not worded properly.

Chairman TOM DAVIS. Mr. Cummings.

Mr. CUMMINGS. Where is the dividing line, according to the court, between the citizen acting and the employee acting? What divides it? Because it seems to me that you can have a situation where one may start out as an employee and end up as a citizen.

Are you following what I am saying? In other words, in the dissent, Justice—one of the justices said something about it. There is some speech that a supervisor would not even want to get out because maybe the supervisor is involved in the process. Now, you know, some fraudulent action or something that may jeopardize the focus that government is supposed to be serving. So you have this person who starts off, I guess he's an employee. He's talking to the supervisor. The supervisor does not act. He keeps going up. It keeps going up. Next thing he knows, like you said a moment ago, he's got to go to the newspaper.

At what point, first of all, is there any consideration under this case for the person who has to go through that process? In other words, say for example, in a hospital where this worker knows that people are getting faulty HIV AIDS results and he tells the supervisor and the supervisor just doesn't do anything. He keeps going up. Next thing you know, you see—or he has to go to a newspaper. What happens? I mean where is the dividing line.

Mr. KOHN. Absolutely. And it is part of the counterintuitive part of the decision. Thirty years ago the Supreme Court decided *Pickering,* which is still good law. In *Pickering,* a teacher wrote a letter to the newspaper about budgetary issues in the school that related to his classroom. That was found to be protected free speech. He could not be fired. That is still good law. So going to the press is still protected activity.

Now you have another Supreme Court decision called *Givhan,* and in that case an employee complained to a supervisor but it wasn't a complaint about anything to do with their particular job. That's still good law.

So if you don't complain about anything you are dealing with at work, or you go to the press, you are still protected. Who isn't? It is that worker who in the course of their employment finds the problem and reports it reasonably through their chain of command.

And the reason that is such a problem for whistleblower protection, that's what 80 to 90 percent of all whistleblowers do. So once you take this very reasonable commonsense protection away, the net result will be most whistleblowers will lose their case. But it is so counterintuitive that it is illogical, and I want to say that it is new.

When President Reagan and his administration confronted this issue when it first came up in the courts, they were—the Solicitor, his Solicitor was on our side on this, Secretary of Labor was on our side. Secretary of Labor Brock, President Reagan's Secretary, here's what he said on this very issue: Employees who have the courtesy to take their concerns first to their employers to allow their employers a chance to correct the violations need as much protection as those employees who first go outside the system.

That was common sense. It must be restored by statute.

Mr. CUMMINGS. One of the things that's so chilling about all of this is when we see the more recent attacks on say for example, the New York Times by the President and others because they provide information to the public. You know, it is when you combine this, what we are talking about here with that, the question is where do we end up? Will we end up in a situation where, say for example, the whistleblower, when they cannot get results for possibly, again, the AIDS test in my district, faulty AIDS test, and then goes to the papers, and if there is some chilling—some kind of clamping down on the newspapers, media, saying you can't report so-and-so and so-and-so, where does all of that end? Where do we go?

Mr. PILON. Could I comment on that, because the Swift program, which you are alluding to, raises the problem that is buried here that we haven't brought out yet; namely, what if there are policy differences between staff and management? The leak in this case apparently came from someone who didn't agree with the policy. And shouldn't management have some authority to address that problem?

Mr. CUMMINGS. But it is a question—and then just this one quick thing—but when you have a situation where management is basically clamping down because management may be a part of the problem, that's what I am getting to. So that's a whole different case.

Mr. PILON. That's a different case.

Mr. KOHN. You have, again, I think hit the nail on the head. It is kind of a catch 22. If you can't complain to your supervisor—or if you do, you lose your protection. You want to go to the press, you have a first amendment right. But if the information you give to the press was classified proprietary Privacy Act violation, you can be investigated for that and fired for improperly leaking. So essentially the net result is confusion and opening valid whistleblowers to retaliation.

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

Chairman TOM DAVIS. Thank you very much. I want to thank this panel.

What we'll do is take a 3-minute break.

[Recess.]

Chairman TOM DAVIS. We will now recognize our second panel. Thank you for staying with us. Mr. Richard Ceballos is the deputy district attorney for Los Angeles County District Attorney's Office; Mr. William Bransford, general counsel, Senior Executive Association; Ms. Mimi Dash, council president of Fairfax Education Association—retired; Lisa Soronen, staff attorney, National School Boards Association; and Miss Barbara Atkin, who is deputy general counsel in Natural Treasury Employees Union.

Mr. Bergstrom, are you testifying? OK. Mr. Richard Bergstrom, the counsel for Morrison & Foerster; and Mr. Joseph Goldberg, representing the American Federation of Government Employees.

Thank you very much for being here. It is our policy, as you know, that we swear you in before you testify. So if you will raise raise your right hands.

[Witnesses sworn.]

Chairman TOM DAVIS. Mr. Ceballos, you started this whole thing. We are going to start with you. And I think you know we try to stay within our 5 minutes. Your entire statement is in the record. So thank you very much.

STATEMENTS OF RICHARD CEBALLOS, DEPUTY DISTRICT ATTORNEY, LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE; WILLIAM BRANSFORD, GENERAL COUNSEL, SENIOR EXECUTIVES ASSOCIATION; MIMI DASH, COUNCIL PRESIDENT, FAIRFAX EDUCATION ASSOCIATION, RETIRED; LISA SORONEN, STAFF ATTORNEY, NATIONAL SCHOOL BOARDS ASSOCIATION; BARBARA ATKIN, DEPUTY GENERAL COUNSEL, NATIONAL TREASURY EMPLOYEES UNION; RICHARD BERGSTROM, COUNSEL, MORRISON & FOERSTER; AND JOSEPH GOLDBERG, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

STATEMENT OF RICHARD CEBALLOS

Mr. CEBALLOS. Good afternoon, Mr. Chairman, members of the committee. Thank you for inviting me to speak today.

Simply because I passed through the doors of my government employer to serve the public does not mean that I should be stripped of my rights as a citizen. Unfortunately, under the recent Supreme Court decision, I think this is what has happened. And while I was on the losing end of the Supreme Court decision, I wasn't the only one that lost. Millions of other Federal, State and local government employees also lost.

They lost their right to protection against retaliation for reporting instances of misconduct, fraud, corruption, and abuse that they witnessed within the course and scope of their employment. But they also lost their right to perform their jobs as citizens. We have a genuine interest in ensuring that their government operates competently, efficiently, and within the law.

In my case, I suffered acts of retaliation simply because I was doing my job. As a deputy district attorney in Los Angeles, I was empowered to prosecute individuals who are charged with crimes. I am often called upon to seek the imprisonment of persons charged with those crimes. Because of this power, I am constitutionally obligated to abide by certain rules of law, evidence, and ethics.

My job is not to win every case or to secure a conviction in every case. My job is to do justice. My job requires that only legally obtained evidence be used in the prosecution.

In the case before the Supreme Court, I discovered that several deputy sheriffs had fabricated evidence, evidence which formed the basis for probable cause for the issuance of a search warrant. After I conducted my investigation, confirmed my investigation with several colleagues in my office and conferring with my supervisors, I prepared a memorandum recommending that the case against the defendants be dismissed because of this constitutional rights violation.

I was further motivated by the then-developing LAPD rampant corruption scandal in which several rogue LAPD officers were ac-

cused of planting evidence, falsifying police reports, testifying falsely in court, and, in one case, shooting an unarmed man in the back.

However, unfortunately, my supervisors at the behest of the sheriff's department, who were concerned of a civil lawsuit being filed against them by the defendants, demanded the case proceed and be prosecuted despite my protests. It was shortly thereafter that I began to suffer acts of retaliation by my employer, from change in job assignments, to change in job location, to the loss of a promotion.

And now according to the Supreme Court, government employers are no longer constitutionally prohibited by the first amendment's prohibition against punishing their employees for speaking out on matters of public concern as long as the disclosure was made pursuant to their job duties.

The first amendment protection will only be afforded if the employee goes outside and holds essentially a press conference on the front steps of a government building. This is a predicament that is as perverse as it is illogical.

But government employees' action will have another option, an option that I'm fearful that most will now take, and that is the option to keep quiet, to look the other way, to feign ignorance of the corruption, the waste, the fraud that they witnessed. And if this occurs, it is not only the employee that loses, it is the public that will lose.

The public will lose their right to know what their government is doing. The public will lose their right to know what their government officials, their elected officials, are doing; whether their taxpayer money is being spent wisely and appropriately or whether it is being wasted; whether their government officials are engaged in corruption or fraud.

This Supreme Court ruling fosters, even encourages, an atmosphere of secrecy in the halls of government, which runs counter to our Nation's open form of government. It protects the corrupt, it protects the lazy, it protects the incompetent. It does not protect—and, to a certain extent, punishing the honest, the hardworking, the diligent government employees.

Mr. Chairman, members of the committee, I urge you to take a leadership role to amend the Whistleblower Protection Act to include protections for employees who disclose instances of abuse, corruption, and misconduct that they witnessed within the course and scope of their job duties.

Your actions in this matter will set forth an example, a positive example for States and other local governments to take similar actions.

I thank you for the opportunity to speak with you today, and I would be happy to answer your questions.

Chairman TOM DAVIS. Thank you very much.

[The prepared statement of Mr. Ceballos follows:]

STATEMENT OF RICHARD CEBALLOS
BEFORE THE COMMITTEE ON GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES
JUNE 29, 2006

Good morning, Mr. Chairman and Members of the Committee. Thank you for inviting me to speak today.

Simply because I pass through the doors of my government employer, to serve the people of my county and my state, does not mean that I should be stripped of my rights as a citizen.

Unfortunately, that is exactly what has occurred to me with the recent decision of the Supreme Court of the United States in *Garcetti v. Ceballos*, No. 04-473 (S. Ct. May 30, 2006).

And while I was the one on the losing end of the Court's decision, I was not the only one who lost. Millions of other federal, state, and local government employees across this country also lost. They lost not only their right to protection against retaliation for disclosing instances of corruption, fraud, waste, and mismanagement that they observe in the course and scope of their employment. They also lost their rights to perform their jobs as citizens, who have a genuine interest in ensuring that their government agencies operate competently, fairly, and within the law.

In my case, I was subjected to adverse employment actions simply for doing my job.

As a deputy district attorney in Los Angeles, empowered to prosecute individuals who have been arrested and charged with criminal offenses, my job often times involves being a part of a process that deprives people of their freedom and sending them to jail or prison for a long time. Because of this power, I am constitutionally obligated to abide by specific rules of law, evidence, and ethics not demanded of other professions. My job is not simply to win a case or to secure a conviction. My job is to seek justice. My profession requires me to make sure that only legally obtained evidence is used to convict a person.

In the particular case before the Supreme Court, I discovered that several deputy sheriffs had fabricated evidence—evidence claimed to establish the "probable cause" necessary for the issuance of a search warrant. My discovery was confirmed by several of my colleagues in the district attorney's office. After conferring with them as well as my supervisors, I prepared a memorandum recommending that the case against these defendants be dismissed because of the constitutional violation. It should be noted that, at that time, I was a 12-year veteran of the Los Angeles County District Attorney's Office and had never made such a recommendation before. I also had a stellar record with the district attorney's office, with repeated "outstanding" performance evaluations by all my supervisors.

However, because the evidence was compelling that these police officers had indeed lied in order to obtain the search warrant, I felt that I was obligated—by the law, legal ethics rules, and by

morality—to make such a recommendation.

I was further motivated to take action by the then-developing "LAPD Rampart Corruption Scandal," in which several rogue Los Angeles police officers were accused of fabricating arrest reports, planting evidence, committing perjury in court, and, in one instance, shooting an unarmed man in the back and paralyzing him. Prior to this time, there was longstanding institutional pressure within the district attorney's office to refrain from questioning the veracity of police officers.

Following orders, I prepared a memorandum, documenting my investigation, legal analysis, opinions, and recommendations. This memorandum was channeled to my supervisors through the regular chain of command in accordance with office policies.

Initially, my memorandum and recommendations were met with approval by my supervisors. In fact, one of my supervisors even ordered the release of one of the defendants from custody pending final resolution of the case. A copy of my memorandum was forwarded to the Los Angeles County Sheriff's Department, which employed the police officers involved in this case. Shortly thereafter, the Sheriff's Department requested a meeting with me and my supervisors.

At this meeting, Sheriff's Department officials essentially branded me as a traitor, accusing me of "acting like a defense attorney or public defender." These officials demanded that my supervisors remove me from any further handling of the criminal case, and that the district attorney's office continue its prosecution of the defendants. The Sheriff's Department officials also noted that if the criminal case was dismissed as I had recommended, their agency would be subject to possible civil action by the defendants. Not wanting to risk alienating the Sheriff's Department, my supervisors agreed to the Sheriff's Department's demands and continued prosecuting the criminal case against the defendants.

My supervisors' change of heart in deciding to prosecute was made firm notwithstanding my protests that they were essentially engaging in prosecutorial misconduct for continuing to prosecute this case at the behest of the Sheriff's Department.

Soon thereafter, I begin to suffer several acts of adverse employment actions, ranging from a demotion or change in job assignment to a transfer in job locations, and, finally, to the loss of a promotion that I had earned.

Now, according to the Supreme Court, government employers are no longer constrained by the First Amendment's prohibition against punishing their employees for speaking out on matters of public concern. Government employers are essentially free to retaliate against an employee for reporting instances of corruption, fraud, waste, or mismanagement, as long as the disclosure was made pursuant to that employee's job duties. First Amendment protection will be afforded, if at all, only if the employee "goes public," such as by holding a public press conference, rather than through the employer's ordinary channels of communication, such as my use of the memorandum that I wrote to my superiors in the course of my job duties.

This ruling creates a predicament for government employees who in the future witness corruption, fraud, waste, or mismanagement in the workplace: either disclose their observations internally by following proper procedure and run the risk that their reports will be met by hostile and unsympathetic supervisors in which case they will not be protected by the First Amendment, or, alternatively, hold a press conference on the front steps of the government building and publicly embarrass government officials to assure themselves First Amendment protection. Being placed in this predicament is as illogical as it is bizarre.

Actually, employees will have another choice, one that public employees are more likely to follow than the two options above: Keep quiet and say nothing. Most employees will simply look the other way and feign ignorance of corruption, waste, fraud, or mismanagement that they witness in their workplace.

And, if this occurs, not only public employees will have lost. More importantly, the public will have lost. The people will have lost their right to know what is happening in their own government; their right to know what their elected and non-elected public officials are doing in government; their right to know if their taxpayer money is being spent properly or being wasted; and their right to know if their public officials are engaged in corrupt or fraudulent conduct.

This Supreme Court ruling fosters, even encourages, an atmosphere of secrecy in the halls of government that runs counter to our nation's open form of governance. It protects the corrupt, the lazy, and the incompetent and punishes the honest, the hardworking, and the diligent. And because it takes away protection for employees who speak as part of their job duties, and leaves that protection in place for other public employees, the Court's ruling means that only relative "know-nothings" will speak out, while those most likely to genuinely know about serious mismanagement or corruption—because they confront misconduct within the scope of their job duties—will keep quiet. It's hard to imagine a more perverse outcome.

Mr Chairman and Members of the Committee, I urge you to take a leadership role to amend the Whistleblower Protection Act ("WPA") of 1989, 5 U.S.C. 1213 et seq. Part II. B. of Justice David Souter's dissenting opinion in my case explains, without dispute from the Court majority, the WPA's many shortcomings. Foremost among them is the need to protect public employees who disclose instances of corruption, fraud, waste, or mismanagement where the disclosure is made in the course their job duties, which is currently unprotected by the WPA. *See Huffman v. Office of Personnel Management*, 263 F.3d 1341 (Fed. Cir. 2001). Your positive actions could also impel state and local governments to improve their whistleblower protections as well.

Thank you again for the opportunity to appear today. I stand ready to help the Committee in any way that I can, and I would be glad to answer any questions that you may have.

NB: The views and opinions expressed in my statement are made in my capacity as a citizen. They do not necessarily reflect the views and opinions of the Los Angeles County District Attorney's Office.

Chairman TOM DAVIS. Mr. Bransford.

STATEMENT OF WILLIAM BRANSFORD

Mr. BRANSFORD. Mr. Chairman, members of the committee, I appreciate the opportunity to testify here this afternoon concerning how current whistleblower protections may have been impacted——

Chairman TOM DAVIS. I think you need——

Mr. BRANSFORD [continuing]. May have been impacted by the recent Supreme Court decision. I serve as senior counsel for the professional association that represents Career Senior Executive Service members and other senior-level Federal officials. SEA is pleased to offer the perspective of the career senior manager regarding whistleblower reform and first amendment protection for Federal employees. The Supreme Court's decision is an invitation to consider change and helps all of us focus on important issues.

Members of the Career SES are uniquely situated because they need strong tools to manage their employees, but they also need protection when they observe and disclose wrongdoing. They themselves can be whistleblowers. But at the same time they need to manage others who claim to have blown the whistle. Hence, from our perspective, the challenge in any reform is to strike a balance where Federal employees are encouraged to report wrongdoing and are assured protection from reprisal, yet at the same time ensures that Federal work force managers have what they need.

The classic nightmare whistleblower scenario for managers occurs when a difficult or vexing employee who seeks whistleblower status becomes so entrenched in his or her position that the employee refuses, in an often subtle and sophisticated manner, to carry out the direction of the supervision, thus effectively sabotaging the project that the whistleblower dislikes. Occasionally, an otherwise problem employee uses whistleblower laws in an attempt to become immune from reasonable supervision redirection. This too ties a supervisor's hands.

On the other hand, we agree that current interpretations of the Federal Whistleblower Protection Act do not adequately defend Federal employees because of interpretations that do not protect whistleblowers when they make disclosures to the supervision, the alleged wrongdoer, when they are just doing their job. This is the same issue that's presented in *Garcetti* v. *Ceballos* and, quite frankly, it's been the rule under Whistleblowers Law One that I have dealt with as a practicing attorney. And under current law if Mr. Ceballos had been a Federal employee, he would not have been protected for his whistleblowing activity or—and, as the Supreme Court found, he was not protected by the first amendment.

Last week, the Senate passed the defense authorization bill which included S. 494, a whistleblower reform statute that is very similar in many respects to H.R. 1317 passed by the—referred out of this committee.

Both of those statutes make significant reforms because they will allow any disclosure to be protected, even when made in the course of an employee's duties. We support that law. We have a couple of concerns about it. But it does three important things that we think helps strike the balance. In addition to expanding the definition of

a disclosure, it also imposes a test that the disclosure has to be reasonably objective. It also says that it excludes policy disputes. And finally, it gives a manager who's accused of reprisal the opportunity to show that the personnel action would have occurred anyway.

We think that those three additions provide balance, and we would support S. 494 and also H.R. 1317 in that respect.

We do have a concern about both H.R. 1317 and S. 494 because they seem to change the process. S. 494 would allow appeals to multiple circuit courts of appeals, which we think would add confusion to an already complex law. H.R. 1317 would create a new right. We think we ought to try this new change in the law and see if the current system of the Special Counsel Merit Protection Board would work better to protect whistleblower rights.

We think—we would recommend and hope that this Supreme Court decision, which invites State legislatures and the Congress to enact whistleblower reform, would in fact encourage the consideration of these whistleblower laws, and perhaps the conference committee and the defense authorization bill would be the place to do that.

With that, I thank you very much for the opportunity to testify this afternoon. I look forward to your questions.

Chairman TOM DAVIS. Thank you very much.

[The prepared statement of Mr. Bransford follows:]

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TESTIMONY

of

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SENIOR EXECUTIVES ASSOCIATION

Before the

HOUSE GOVERNMENT REFORM COMMITTEE

June 29, 2006

The Senior Executives Association (SEA) would like to thank Chairman Davis, Ranking Member Waxman and the members of the Committee on Government Reform for the opportunity to testify before you on current and proposed laws protecting whistleblowers from retaliation, particularly as current protections have been impacted by the Supreme Court's recent decision denying First Amendment constitutional protection to public employees who, in the context of their day-to-day job duties, make disclosures that are in the public interest.

The Senior Executives Association represents the interests of career federal executives in the Senior Executive Service (SES), and those in Senior Level (SL), Scientific and Professional (ST), and equivalent positions. SEA is pleased to offer the perspective of the career Senior Executive regarding whistleblower reform and First Amendment protection for federal employees.

Over the last decade, whistleblower protection for federal employees has eroded because court decisions have limited the impact of the Whistleblower Protection Act. The Supreme Court's decision in Garcetti v. Ceballos further erodes those protections and provides an impetus for Congress to act.

Career Senior Executives are uniquely situated because they need strong tools to manage their employees, but also need protection when they observe and disclose wrongdoing. They themselves can be whistleblowers, but at the same time they need to manage others who claim to have blown the whistle. Hence, from our perspective, the challenge in any whistleblower reform is to strike a balance where federal employees are encouraged to report wrongdoing and are assured of protection from reprisal, yet at the same time to ensure that federal workforce managers have the needed tools to manage effectively.

The classic nightmare whistleblower scenario for managers occurs when a difficult or vexing "whistleblower" employee becomes so entrenched in his or her position that the employee refuses, in an often subtle and sophisticated manner, to carry out the direction of the supervisor, thus effectively sabotaging a project that the whistleblower dislikes. Occasionally, an otherwise problem employee uses whistleblower status to become immune from reasonable supervisory direction. This, too, ties a supervisor's hands.

Reassignment of a vexing and uncooperative employee or efforts to improve poor performance could be considered a violation of the Whistleblower Protection Act (WPA) if the employee makes disclosures asserting some wrongdoing, without regard to whether the employee's allegations are true or accurate. Due to erroneous or incomplete perceptions about the WPA, a whistleblower often is allowed to poison a workplace environment so that over time it becomes increasingly dysfunctional. Even more challenging for a manager is the need to continue to manage the whistleblower who remains in the workplace and who must be evaluated and subjected to workforce rules like all other employees. Unpleasant but necessary management decisions may constitute an additional basis for the whistleblower to claim reprisal.

On the other hand, current interpretations of the Whistleblower Protection Act fail to adequately defend federal employees because these interpretations do not recognize that whistleblowing activity sometimes occurs in the form of disclosures made directly to the person violating the law or engaging in the wrongdoing. Whistleblowing also occurs when the employee is just doing his or her job, the precise issue before the Supreme Court in Garcetti v. Ceballos. Under current law, neither disclosure is protected under the WPA.

The Supreme Court's decision is remarkably similar to interpretations of the Whistleblower Protection Act that have been applicable to federal employees for many years as result of earlier decisions by the United States Court of Appeal for the Federal Circuit. The Supreme Court has held that a disclosure that is just part of a public employee's job is not protected under the First Amendment. This failure to protect the messenger of unwanted news is a major flaw that should be fixed. SEA supports this change. After all, senior managers and executives are often perceived as being whistleblowers themselves, and they need assurances of nonreprisal when higher level managers are told that a particular action is illegal.

The Supreme Court has sent a message to Congress and state legislatures that protection of public employees who disclose wrongdoing is a policy question to be settled by lawmakers. SEA believes that much of the reform that is needed is contained in S. 494, which just last week was included by the Senate as a part of this year's Defense Authorization Bill. Whether S. 494 become law, and in what form, will be resolved in conference.

SEA is generally supportive of S. 494 and applauds the Senate's work in finding a solution to this continuing problem. However, we are very concerned with the provision in the bill that allows appeals of Merit Systems Protection Board decisions in whistleblower cases to multiple Circuit Courts of Appeals, rather than to the Court of Appeals for the Federal Circuit as is the current practice. Laws concerning whistleblower reprisal are already too complicated, and it is sometimes difficult for a federal manager to distinguish between whistleblowers and problem employees. Differing interpretations by different courts of appeals will add to this complexity. The result will be inaccurate and mistaken perceptions about employee job protections which will serve as a deterrent to managers attempting to deal effectively with problem employees.

S. 494 includes a provision not present in the current Whistleblower Protection Act specifically stating that disclosures related to a policy decision are not protected disclosures. The report accompanying S. 494 notes SEA's support of this provision, and states that it provides an important tool to managers so that an employee's mere disagreement with a policy cannot serve as a basis for whistleblower protection.

SEA believes this is an important provision. While a whistleblower is still appropriately protected under S. 494's policy provision if the whistleblower makes a specific disclosure of wrongdoing, if enacted it will allow a fact finder to determine whether a federal employee is disclosing actual wrongdoing as opposed to simply engaging in obdurate, vexing behavior related to important policy questions, disguised as whistleblowing.

The most important feature of the S. 494 is the expansion of the definition of a disclosure to include "any" disclosures. The Court of Appeals for the Federal Circuit has interpreted current law as not protecting disclosures: made only to a wrongdoer, such as an offending supervisor; made in connection with job duties, reiterating previously known information; or information released only to other coworkers. This is designed to change this precedent.

SEA agrees with this important change to the Whistleblower Protection Act. The government must protect an employee who is vigorously disclosing a supervisor's wrongdoing only to that supervisor in the hope that the supervisor will correct the behavior. Failure to do so will encourage employees to expand their "sounding of the alarm." For example, employees who do not receive this protection have often felt it necessary to disclose wrongdoing to the media to receive protection.

Employees who disclose wrongdoing as part of their jobs also need whistleblower protection. While career, nonprobationary employees are protected because they cannot be fired or demoted for just doing their jobs, whistleblower reprisal can often occur quite efficiently with far less serious disciplinary actions like details and reassignments. Also, probationary and temporary employees need protection for disclosing unpleasant news as part of their jobs.

Current whistleblower law allows a manager to avoid a finding of reprisal by showing that a disciplinary action would have occurred anyway despite the presence of whistleblowing activity by an employee. This provision seems to work reasonably well in allowing managers to fulfill their function of managing the federal workforce. The Senate bill contains a provision clarifying a manager's ability to avoid a finding of reprisal by showing that a personnel action would have happened anyway. In addition, the provision discussed above about not protecting policy disclosures seems to us to be a sufficient check on any excesses that might occur as a result of the expansion of protection to encompass "any" disclosure as required in the Senate bill.

In the House, Congressman Platts' work on H.R. 1317, which has been referred out of this Committee, has similar provisions to the Senate bill. However, it does not have S. 494's provision about policy disclosures not being protected. Also, it does call for review of whistleblower decisions only in the Court of Appeals for the Federal Circuit, as recommended by SEA, but it then creates a new right to seek review in federal court if the Office of Special Counsel or the Merit Systems Protection Board does not act timely. SEA opposes any expansion of the procedure under the Whistleblower Protection Act as envisioned by H.R. 1317. MSPB appeals of whistleblower cases now occur in a timely fashion and work reasonably well. A need to bypass the MSPB has not presented itself or been supported by convincing evidence.

In summary, we support some change to the current whistleblower protection laws as they pertain to federal employees. The Supreme Court's recent decision is an invitation to make this change. We believe the Senate's S. 494 provides at least a partial model for this reform. SEA recommends that H.R.1317 be amended to incorporate the features of S. 494, except the provision for a five-year experiment to allow appeals to Circuit Courts of Appeals in addition to the Federal Circuit. We believe this will be a sufficient change to protect whistleblowers and to allow managers the ability to manage effectively.

On behalf of SEA, I thank the Committee for the opportunity to testify on this important topic. We hope to continue to work with your staffs to ensure employees receive strong and appropriate protections when reporting wrongdoing, while ensuring managers are not held powerless during endless legal battles.

Chairman TOM DAVIS. Ms. Dash. Thank you for being with us.

STATEMENT OF MIMI DASH

Ms. DASH. Good afternoon, Chairman Davis and members of the committee.

I come before you today as a retired educator of 30 years, and also my experiences as an advocate for students and teachers through the local association affiliated with the National Education Association, having served in all of those leadership positions.

I am pleased to have the opportunity today to address the committee on the importance of employees having the right to speak freely on issues that they consider of great importance in the workplace.

I would like to give you some examples of areas of concern for educators that I've been aware of and let you know that these are the gray areas that we find a few stumbling blocks.

First and most important is the area of possible child abuse. I'll use the classroom teachers as an example, but there are other educational employees who are exposed to the same kind of conditions. As a teacher, if I were to suspect the possibility of child abuse, I would report my suspicions to the principal. It would be up to the principal to contact Child Protective Services. If for some reason the principal did not make the contact, what would my options be at that point? If I were to contact Child Protective Services directly, that could be considered insubordination. If I were to adhere to the policy of the county level, I would be risking the safety of the child.

As an advocate for children, I would find it impossible to ignore the safety of the child. As a citizen, it is my right, and, in my opinion, my duty to protect the child. As a teacher, I can't imagine it is any less my right or my duty, and yet there appears to be a conflict.

I cannot stress for you the severity of this dilemma. Most teachers would be torn by this situation. Teachers follow rules, and it's very difficult for them to go outside of the rules that are set. I cannot know what choices others would make, but my choice would be clear. By advocating for the children for whom I dedicated my life, I could have risked my career. I continued to work in the school as a substitute and on special projects. I meet with educators through the FEA in monthly meetings.

Another issue that I'm hearing complaints about, with limited action or no action by the school system, is something that we are hearing about nationally; and that is the sick schools. We have many schools in which teachers are chronically ill. Some of those illnesses are quite serious.

I serve on a committee hearing appeals for those denied short-term disability insurance. In one of those cases, an employee could have simply been allowed to transfer to a different location as recommended by her doctor. The school system refused and insisted she could return to work at the same location. Every time she returned to work, she became sick and had to go out on leave again, thus negating the terms of the insurance policy.

Many educators have asked for help, and within the system they get what is called a clean bill of health for their schools, although the illnesses continue. If teachers are getting sick, what about the

long-term and lasting effects on the less highly developed bodies of the children? Going public on this issue could adversely affect the teachers speaking out about the situation, but isn't it not only their right, but also their duty? The expenses that would be incurred by the school system to correct those problems would be enormous and most school systems are ignoring it.

These are only two examples, but there are probably many others. There could be bus safety issues, equipment issues, training issues and more. All of these adversely affect the safety of the educator and the children.

Thank you for your time and attention to this matter and I hope that it can be resolved favorably.

Chairman TOM DAVIS. Thank you very much.

[The prepared statement of Ms. Dash follows:]

Good morning, Chairman Davis and members of the Committee on Government Reform. I am Mimi Dash, retired elementary teacher in Fairfax County Public Schools. I am also the former President of the Fairfax Education Association (FEA) and a former member of the Board of Directors of the Virginia Education Association (VEA) and the National Education Association (NEA). I currently serve on the Fairfax Education Board of Directors as the President of the Fairfax Education Association of Retired Educators.

I am very pleased to have the opportunity to address the committee on the importance of employees having the ability to speak freely on issues of great importance within the workplace. I would like to give you some examples of areas of concern for educators that I have been aware of over my thirty years as a classroom teacher. First and most important is the area of possible child abuse. I will use the classroom teacher as the example, but there are other employees in the education system that might have the same concerns.

As a teacher, if I were to suspect the possibility of child abuse, I would report my suspicions to the principal. It would be up to principal to contact Child Protective Services. If, for some reason, the principal did not make the contact, what would my options be at that point? If I were to contact Child Protective Services directly, that could be considered insubordination. If I were to make the choice to adhere to the county policy, I could be risking the safety of the child. As an advocate for children, I would find it impossible to ignore the safety of the child. As a citizen it is my right, and in my opinion my duty, to protect the child. As a teacher I can't imagine it is any less my right or my duty, and yet, there appears to be a conflict.

I cannot stress the severity of this dilemma. Most teachers would be torn by this situation. I cannot know what choice others would make, but my choice would be clear. By advocating for the children for whom I dedicated my life, I could have risked my career.

I continue to work in the schools as a substitute and on special projects. I meet with educators through FEA at monthly meetings. Another issue I am hearing complaints about with limited or no action by the school system is the idea of "sick" schools. We are hearing examples of this in the news more frequently. We have many schools in which teachers are chronically ill. Some of these illnesses are quite serious. I serve on a committee hearing appeals for those denied short-term disability insurance. In one of those cases, an employee could have simply been allowed to transfer to a different location as recommended by her doctor. The school system refused and insisted she could return to work at the same location. Every time she returned to work, she became sick and had to go out on leave again, thus negating the terms of the insurance policy. Many educators have asked for help and get a "clean bill of health" for their schools although the illnesses continue. If teachers are getting sick, what about the long lasting effects on the less highly developed bodies of the children. Going public on this issue could adversely affect the teachers speaking out about the situation, but isn't it not only their right but also their duty?

These are only two examples but there are probably many others. There could be bus safety issues, equipment issues, training issues and more. Please consider all the many safety issues that face our educators and our children.

Thank you for your time and attention to this issue.

Chairman TOM DAVIS. Ms. Soronen.

STATEMENT OF LISA SORONEN

Ms. SORONEN. Good afternoon, Chairman Davis and committee members.

My name is Lisa Soronen and I am a staff attorney for the National School Boards Association. NSBA represents the Nation's 95,000 school board members serving on 14,500 school boards who are responsible for educating 48.5 million public school children and who employ 6 million people.

I am pleased to testify about the implications of *Garcetti* v. *Ceballos* and request that our written statement be submitted for the record.

Chairman TOM DAVIS. Without objection.

Ms. SORONEN. NSBA filed a brief in *Garcetti* v. *Ceballos* because the Ninth Circuit ruling would have hampered a school district's ability to implement curriculum and would have increased meritless litigation. I would like to offer three lenses to view the implications of this decision: one, the problems that would have resulted if the Supreme Court upheld the Ninth Circuit; two, the many other protections available to school employees that limit arbitrary employment actions; and three, the common sense realities for public schools.

Looking through the first lens, if the court had upheld the Ninth Circuit it would have made all public employees speech made at work on any topic of public concern into a potential constitutional issue. Under these circumstances, local school boards could ultimately lose control of their curriculum as teachers discuss issues of public concern that have little or no relevance to the curriculum, or adopt a perspective contrary to the one of parents and communities acting for their school boards that have been chosen.

A different holding would also make it easy for a poorly performing public employee who is facing an adverse employment action depart to speech on a matter of public concern or manufacture such speech in order to claim that speech is the real reason for the adverse employment action.

Virtually all employees at some point in their employment discuss matters of concern at work, particularly teachers whose job it is to speak. For this reason, if the court had ruled differently, almost every employee facing discipline or termination would at least have a potential first amendment claim. Significantly, constitutional claims give rise to different remedies, including attorneys fees. These remedies may increase the incentives to raise the stakes in employment disputes.

NSBA's concerns are not theoretical. For example, in a case currently on appeal to the Seventh Circuit, an elementary school teacher expressed her personal opinions about the war in Iraq in a classroom discussion. After parents complained, the principal sent a memo asking teachers not to express their personal views on foreign policy in class. Starting well before this incident, numerous parents had complained about the teacher's unfair treatment of students and her poor classroom management skills because of these performance problems. Her contract was not renewed. She

brought a first amendment suit claiming that the district terminated her because of her statements about the Iraq war.

At the other end of the political spectrum,teachers in Michigan had threatened litigation over their supposed first amendment rights to teach intelligent design. Had the Supreme Court ruled differently in *Ceballos,* teachers in cases like these, regardless of their job performance, could express whatever views they had on any topic of public concern in the classroom, and may be able to raise first amendment obstacles to school district decisions.

Although Ceballos has been portrayed almost solely as a whistleblower case, it should be clear that the Ninth Circuit ruling might have protected all speech on any matter of public concern made at work, including teacher classroom speech.

Moreover, what the employee may perceive to be whistleblowing, the employer may perceive as the employee trying to substitute his or her judgment for the employer's judgment. Policies and implementation studies are just that, a matter of judgment, not matters of right versus wrong or legal versus illegal. The court's decision recognizes that sometimes public employees are just acting like other employers trying to get the job done. Had the Supreme Court ruled differently, more routine disagreements between employers and employees could have become constitutional matters.

Let us look to the second lens. School employees have well-established job security protections, including broad first amendment protections. Generally, all school employees are protected against arbitrary disciplinary actions by State statute, principles of due process collective bargaining agreements in most States, and, in the case of teachers, tenure loss. With all of these protections, school boards would be hard pressed to terminate a teacher who complains to the administration about a matter of public concern related to the teacher's official job duties. Public employees may still be protected by the first amendment for speech made at work that relates to their job as long as the speech does not relate to their official job duties.

For example, in 1979 the Supreme Court held in the *Gibbons'* case that a teacher who informed the school principal that she thought the district employment policies and practices were racially discriminatory could be protected by the first amendment, even though her speech was made at work, even though it related to her job. Moreover, public employees who have complained about their employer and want first amendment protection can use public forums such as a local newspaper for addressing their concerns.

And that takes me to the third lens of viewing *Ceballos,* some common sense realities for school systems. Regardless of whether employees bring first amendment complaints, the practical reality is that public employers, particularly school districts, are not likely to summarily fire employees for bringing a valid concern to the employer's attention. Public employers exist to serve the citizens of this country and want to treat employees fairly. School boards have every incentive not to spend their scarce resources arbitrarily punishing school employees who speak out rather than on educating children. This is especially true where public outcry is likely. It is even more true in a genuine whistleblower scenario.

In sum, if the choice is between creating a culture that encourages employees to raise issues about school district operations internally or in creating a culture where employees don't come forward at all or, instead, air issues publicly, clearly the incentives are for public employees to make sure employees feel free and, in fact, feel obligated to discuss their concerns frankly with their employer.

School boards can do this without the first amendment. For all of these reasons, NSBA supports the outcome of *Ceballos* in defining the application of this case. Thank you for this opportunity to testify.

Chairman TOM DAVIS. Thank you very much.

[The prepared statement of Ms. Soronen follows:]

TESTIMONY

on behalf of

THE NATIONAL SCHOOL BOARDS ASSOCIATION

on

What Price Free Speech? Whistleblowers and the *Ceballos* Decision

Before the

Committee on Government Reform

Washington D.C.

June 29, 2006

By

Lisa E. Soronen

Staff Attorney

National School Boards Association

Alexandria, Virginia

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Introduction

The National School Boards Association (NSBA) is a federation of state and school boards associations that represents the nation's nearly 14,500 local school boards. School boards are typically elected (about 97%) and govern their local school systems through the exercise of such functions as setting education and personnel policy for the operation of the school district, determining budget priorities, establishing local standards and providing oversight--while holding themselves accountable to the electorate for how these activities are carried out.

Why did NSBA enter *Garcetti v. Ceballos*?

NSBA filed an *amicus* brief in *Garcetti v. Ceballos*, No. 04-473 (U.S. May 30, 2006) for a number of reasons. First, school boards across the country are the largest of the state and local public employers in the United States and therefore have an interest in all labor and employment decisions affecting public employers at the Supreme Court level. Second, when NSBA surveyed an e-mail group of NSBA's Council of School Attorneys about whether NSBA should participate in *Garcetti v. Ceballos*, we received a large and enthusiastic response from the membership expressing concern about the frequency of litigation over public employee free speech cases in public schools and the detrimental impact of the Ninth Circuit's ruling in this case. Finally, NSBA believed that the Ninth Circuit's ruling in *Garcetti v. Ceballos* was unfavorable to school districts because it could hamper a district's ability to implement a school district's curriculum and could increase meritless litigation.

According to U.S. Supreme Court jurisprudence, public employees' speech is protected by the First Amendment if it passes a two prong test: does the speech (1) address a matter of public concern and (2) does the employee's interest in expressing himself or herself outweigh the government's interest in "promoting workplace efficiency and avoiding a workplace disruption?" In *Connick v. Myers*, 461 U.S. 138 (1982), the U.S. Supreme Court held that speech "as a citizen upon matters of public concern" is protected by the First Amendment while speech "as an employee upon matters only of personal interest" is not. An unanswered question following *Connick v. Myers* was whether an employee can "act as a citizen" when speaking at work on a matter of public concern. In *Garcetti v. Ceballos*, a public employee spoke on a matter of public concern at work about a job-related matter. The Ninth Circuit held that Mr. Ceballos' speech passed the first prong of the above test merely because his speech was on a matter of public concern, regardless of whether he was acting "as a citizen" when speaking. In other words, under the Ninth Circuit's ruling, the possibility of a First Amendment claim arises every time a public employee speaks on a matter of public concern at work.

NSBA was concerned about the Ninth Circuit's holding for two primary reasons. First, if a public school teacher spoke in a classroom about any subject of public concern, his or her speech would be protected by the First Amendment regardless of whether the speech was aligned with or even relevant to the district's curriculum. Second, more public employees who were disciplined or terminated for poor performance would bring First

Amendment claims stating they were really terminated for speaking on a matter of public concern.

Because the media coverage about *Garcetti v. Ceballos* portrayed this case negatively, as limiting employee's whistleblower protections, NSBA became concerned that this case was being perceived too narrowly and inaccurately. Had the U.S. Supreme Court affirmed the Ninth Circuit's decision, a far broader category of speech than speech an employee perceives to be whistleblowing may have been protected by the First Amendment. Moreover, following *Garcetti v. Ceballos*, public employees continue to have broad First Amendment protections related to speech on a matter of public concern – including speech made at work related to an employee's job. Finally, numerous legal and practical realities make it unlikely that school districts will summarily terminate school district employees for speaking at work about matters of public concern related to the employee's official job duties, even if such statements are not protected by the First Amendment.

Classroom speech

The Ninth Circuit holding, which failed to consider whether a public employee was speaking as a citizen when discussing a subject of public concern, basically protected all public employee speech made at work on any topic of public concern, subject to the balancing test articulated in the second prong of the test described above. This holding is particularly problematic for the public schools because teachers are paid primarily to speak in front of a young, impressionable audience and topics of public concern can come up in the public school classrooms on a daily basis. If all speech at a public school on a topic of pubic concern is automatically protected by the First Amendment, school boards could lose control of the curriculum as teachers discuss issues of public concern that have little or no relevance to the curriculum mandated by the school board. Or perhaps worse, under the Ninth Circuit's ruling, teachers could discuss issues of public concern relevant to the curriculum from a perspective with which the school district disagrees, and be protected by the First Amendment.

For example, a health teacher assigned to teach sex education might object to a school district's abstinence-only approach. The school's choice of this curriculum is undoubtedly a subject of public concern. Under the Ninth Circuit's ruling, if the teacher expressed opposition to the abstinence-only policy to students in class and then proceeded to teach about how to use contraceptives, the teacher could assert First Amendment protection if the district disciplined him or her for failing to follow the district's chosen curriculum. While it is likely that the speech in this example would not be constitutionally protected under prong two of the test described above, why should even the possibility of a First Amendment claim arise when teachers, employed to instruct students on the curriculum selected by the school board, fail to do so?

At stake for school boards in *Garcetti v. Ceballos* was the ability of school boards to ensure that students receive the education that they need to be prepared to fully participate in society and the workplace, rather than the education one particular teacher

believes students should be receiving. In a larger sense, what was at stake was the ability of a school board to act as a democracy. The quintessential duty of an elected school board is to decide what will be taught in the local public school. Under the Ninth Circuit's ruling in *Garcetti v. Ceballos*, practically speaking, as long as a teacher is discussing a matter of public concern in the classroom, he or she may get to be the ultimate decision-maker of the school's curriculum, which ultimately undermines the authority of the democratically elected school board.

It is important to understand that NSBA's concerns in *Garcetti v. Ceballos* are not theoretical. For example, in *Mayer v. Monroe County Community School Corporation*, No. 04-1695 (S.D. Ind. Mar. 10, 2006), Ms. Mayer, a teacher, expressed her personal opinions about the war in Iraq in a classroom discussion. After the parents of one student complained, the principal sent a memo asking teachers "not to promote any particular view on foreign policy related to the situation in Iraq." Over the course of the school year, 12 parents complained about the teacher's conduct basically stating that she took a "my way or the highway" approach, she unfairly targeted students she deemed difficult, and she had poor classroom management skills. Eleven of the 12 parents asked that their child be transferred from Ms. Mayer's classroom, yet only one couple complained about Ms. Mayer's speech about the Iraq war. The district did not renew Ms. Mayer's teaching contract because of these performance problems. In spite of this, Ms. Mayer sued claiming the district terminated her because she made statements about the Iraq war which were protected by the First Amendment.

The U.S. District Court for the Southern District of Indiana decided this case before the U.S. Supreme Court decided *Garcetti v. Ceballos*. The *Mayer* court did not follow the Ninth Circuit's approach in *Garcetti v. Ceballos*. Rather, it held that Ms. Mayer was acting as an employee when she was instructing students, rather than a citizen, and therefore her speech was not protected despite the fact that the Iraq war is a matter of public concern. NSBA believes the U.S. District Court reached the right result in its well-reasoned opinion. If the U.S. Supreme Court had adopted the Ninth Circuit's approach in *Garcetti v. Ceballos*, Ms. Mayer's speech may have been protected by the First Amendment. Such a decision would have basically allowed Ms. Mayer, and any other public school teacher, to express whatever views he or she has on any topic of public concern in public school classrooms. Despite the U.S. Supreme Court's ruling in *Garcetti v. Ceballos, Mayer* has been appealed to the U.S. Court of Appeals for the Seventh Circuit.

Endless litigation of First Amendment claims

The Ninth Circuit's holding, which may have protected all public employee speech on any topic of public concern made at the workplace, would have made it easy for any public employee facing an adverse employment action to claim that he or she was being terminated, disciplined, etc. because he or she spoke on a matter of public concern. Stated another way, under the Ninth Circuit's holding every statement of public concern made at work is a possible defense to an adverse employment action.

Virtually all employees at some point in the course of their employment discuss a matter of public concern at work. This is particularly true of teachers who are paid to speak and who in the course of teaching students critical thinking skills may discuss matters of public concern in the classroom. It is likewise true of other school district employees such as teacher's assistants, bus drivers, food service workers, custodian and maintenance employees, etc. Because of this, public employees may even be able to manufacture First Amendment claims when they see "the writing on the wall" that an adverse employment action is likely. In short, had the U.S. Supreme Court upheld the Ninth Circuit's ruling in *Garcetti v. Ceballos*, almost every school employee facing discipline or termination would have been able to assert a First Amendment claim that any statement made on a subject of public concern is in fact the basis for the adverse employment action, as long as the employee alleged a connection between the adverse action and the speech.

Again, it is important to understand that NSBA's concerns are not theoretical that poorly performing employees will point to speech on a matter of public concern, or will create such speech, and claim that it is the real reason they were disciplined or terminated rather than their poor performance. *Mayer v. Monroe County Community School Corporation* is an excellent case-in-point. It strains credibility for Ms. Mayer to claim that the school district failed to renew her contract because of her pro-peace comments about the Iraq war when she received 12 parental complaints about how she treated students and her poor classroom management skills, with 11 parents requesting that their child be transferred from Ms. Mayer's classroom. Another example of a public school teacher who has created numerous First Amendment claims to hide behind his insubordination, poor performance, and personal disputes with school districts is Brian Vukadinovich.[1] Over the past twenty years, Mr. Vukadinovich has filed three lawsuits, against three different school districts claiming he was terminated for speaking on matters of public concern. He lost all three cases and petitioned two of them to the U.S. Supreme Court, who denied *certiorari*.

Garcetti v. Ceballos is much more than a whistleblower case

Garcetti v. Ceballos has been portrayed as a whistleblower case: a deputy district attorney perceives police inaccuracy, reports it to his supervisor who disagrees and takes an adverse employment action after the deputy district attorney testifies for the defense.

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[1] *See Vukadinovich v. Bartels*, 853 F.2d 1387 (7th Cir. 1988) (finding Mr. Vukadinovich's statements in the newspaper "attempting to articulate his private dissatisfaction with his termination [from a basketball coaching position] and the reasons given for it" was not a matter of public concern); *Vukadinovich v. Michigan City Area Sch.*, 978 F.2d 403 (7th Cir.) *cert. denied*, 510 U.S. 844 (1993); (finding that even if Mr. Vukadinovich's criticism of the school board for hiring a particular superintendent were constitutionally protected speech, his speech was not a factor at all in his termination; also finding that Mr. Vukadinovich could be ordered to stay away from school after he was terminated and had no First Amendment right to speak on matters of public concern at the school); *Vukadinovich v. North Newton Sch. Corp.*, 278 F.3d 693 (7th Cir.), *cert. denied*, 537 U.S. 876 (2002) (finding that even if Mr. Vukadinovich's accusations against the superintendent and school board were constitutionally protected, he could not prove that the school board's alleged reasons for terminating him, insubordination and neglect of duty, were pretextual when he was asked five times to comply with a directive, and refused to comply three times and only made half-hearted attempts to comply two times).

NSBA wants to emphasize the fact the Ninth Circuit's ruling would have protected speech on *any* matter of public concern discussed at work, not just a matter of public concern relating to alleged whistleblowers. NSBA's concerns with the Ninth Circuit's ruling, described above, illustrate how this case has implications far beyond employees who perceive themselves as whistleblowers when they discuss issues of public concern with their employers that pertain to the employees' official job duties.

Not all speech made at work of public concern is a complaint—Ms. Mayer was not blowing the whistle on anyone when she discussed her feeling about the Iraq war or even complaining about any matter related to the school district's policies or practices. Likewise, in writing an *amicus* brief in support of the employer in *Garcetti v. Ceballos*, NSBA was not specifically seeking to deny First Amendment to protection to public employees who bring legitimate concerns to their employers that are of public concern. However, the U.S. Supreme Court's "public concern" jurisprudence does not distinguish between statements that may be perceived as whistleblowing and the kinds of statements public school teachers could make in the classroom. For this reason, both kinds of speech would have been protected by the First Amendment under the Ninth Circuit's analysis. NSBA filed an *amicus* brief to address the latter concerns which did not specifically arise in *Garcetti v. Ceballos*. However, as *Mayer v. Monroe County Community School Corporation* illustrates, classroom speech of a public school teacher on a matter of public concern clearly arises in other cases.

Not all employee complaints amount to whistleblowing

NSBA cautions the Committee to look critically at the notion that all employee complaints on matters of public concern which are related to an employee's official job duties will necessarily be whistleblower speech. Speech that the employee may perceive to be whistleblower speech, the employer may perceive as the employee trying to substituting its judgment for the employer's judgment regarding what the employer's policies should be or how they should be implemented.

A reasonable view of *Garcetti v. Ceballos* is that is exactly what happened in the case. Mr. Ceballos believed there were inaccuracies in an affidavit used to obtain a search warrant, and he recommended that the case be dismissed. His supervisor disagreed and proceeded with the prosecution. The warrant was challenged and Mr. Ceballos testified for the defense, but the trial court rejected the challenge. In short, Mr. Ceballos and his supervisor expressed different *judgment* about this case, and interestingly, the trial court agreed with Mr. Ceballos' supervisor's judgment.

Many school district policies and implementation strategies are a matter of judgment—not a matter of right versus wrong or legal versus illegal. The school board decides what policies it will adopt and the school district administration decides how these policies will be implemented. Just because a food service worker complains that he or she does not believe the district is taking adequate steps to prevent food borne illness, it does not mean the school district has not adopted adequate food safety measures or is not implementing them properly. The food service worker's complaints may merely reflect the fact that he

or she believes the district should adopt his or her preferred approach. In short, under the Ninth Circuit's ruling, a public employee's speech that may be nothing more than an employee wanting to substitute his or her judgment for the employer's, may have been protected by the First Amendment.

What First Amendment rights do employees retain after *Garcetti v. Ceballos?*

Garcetti v. Ceballos is one of a number of U.S. Supreme Court cases discussing and defining public employees' First Amendment rights to speak on matters of public concern. This case only considered one narrow aspect of a public employee's free speech rights—those rights when an employee is speaking at work, about work. The case does not entirely deny public employees First Amendment rights to speak at work about job related matters of public concern. Rather, the case limits First Amendment rights speak on matters related to an employee's official job duties.

While all of the implication of this case may not be perceived as fair, the majority's reasoning makes sense. Government employees are hired to do the government's work and hold trusted positions in our society. When they speak out in contravention of the government's policies they can impair the government's ability to function. As the Supreme Court opined, "Restricting speech that owes its existence to a public employee's professional responsibility does not infringe upon any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created."

The following explains in more detail the extensive First Amendment protections that employees retain following *Garcetti v. Ceballos.*

Protection for speech made at work

The Supreme Court explicitly stated in *Garcetti v. Ceballos*, "Employees in some cases may receive First Amendment protection for expressions made at work." To make this point, the Court cited *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 414 (1979). In this case, a junior high English teacher complained to the school principal about employment policies and practices of the school district and the school which she was assigned to teach at, which she perceived to be racially discriminatory. The U.S. Supreme Court held that Ms. Givhan's speech could be protected by the First Amendment despite the fact that it was made at work.

The factual differences between *Givhan* and *Ceballos* drive the different outcomes in the cases and illustrate what kinds of speech made at work about a matter of public concern is still protected by the First Amendment. Questioning the legality of the district's employment practices was not part of Ms. Givhan's official job duties and was therefore protected speech. Advising his supervisors about how to proceed in a pending case was part of Mr. Ceballos' official job duties and therefore was not protected. The U.S. Supreme Court could have overruled *Givhan* and held that an employee can never speak as a citizen at work. By not doing so, the Supreme Court left open numerous instances

where employees can speak about matters of public concern at work which are about work and still be protected by the First Amendment.

Protection for speech made concerning work

The Supreme Court also explicitly stated that "The First Amendment protects some expressions related to the speaker's job." Again the Court cited *Givhan*. In *Givhan*, the teacher was questioning the employment practices of the district and the particular school where she worked. The topic of her complaint was clearly related to her job, but unlike Mr. Ceballos, who was employed to perform the tasks he was speaking about, Ms. Givhan was not employed to implement or assess the employment practices of the district.

This aspect of the Supreme Court's holding in this case is significant. The Court allows employees to retain First Amendment rights to comment on and complain about all aspects of their employer's operations to their employer, as long as the subject of the employee's complaints is not part of their official job duty. While public employees may have much to say about their particular job duties, any minimally observant employee who has any kind of relationship with other co-workers will likely be informed about one, if not many, subjects of public concern related to the employer's operations that have nothing to do with the employee's official job duties. Ms. Givhan is a perfect example. She was not a school board member, a school administrator, a supervisor, or a human resources employee. Therefore, it was unlikely she was in any way involved in the school district's employment decisions. Nevertheless, she had opinions about the district's employment practices.

How broadly or narrowly lower courts view an employee's official job duties will determine how often employee speech is protected by the First Amendment. If lower courts define official job duties very broadly, employee's speech will be protected less often. However, the Supreme Court specifically rejected "the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions." Implicit is this statement is a warning to lower courts that they too cannot restrict employees' rights by looking at an employees' official job duties too broadly. If lower courts follow the Supreme Court's language and define official job duties narrowly, the category of speech protected by the First Amendment may cover much of employee speech about matters of public concern made at work.

Protection for speech made outside of work

The Supreme Court reiterated the holding of *Pickering v. Board of Education of Township High School District, Will County*, 391 U.S, 563 (1968), that "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." In short, public employees who have complaints about their government employer and want to be protected by the First Amendment can do the same thing private citizens can do if they have complaints about

the government: public employees can use public forums such as the local newspaper for addressing the concerns they have with the government.

What practical and legal realities make it unlikely that school districts will summarily terminate school district employees for speaking at work about matters of public concern related to the employee's official job duties even if such statements are not protected by the First Amendment?

There are numerous legal and practical realities which make it unlikely that public employers, particularly school districts, are going to frequently fire public employees for speaking on subjects of public concern about the employee's official job duties *regardless* of whether the employees are protected by the First Amendment or whistleblower laws.

Legal realities

First, public school employees have broad employment protections. For example, teachers are often protected by state statutes[2] and collective bargaining agreements[3] that give them a right to continued employment except under extreme and narrow circumstances, which make discipline and termination difficult. Usually, public school

[2] In almost all states, a combination of state statutory and case law grants tenure to teachers who have been teaching for two or three years. See Education Commission of the States, Teacher Tenure/Continuing Contract Laws: Update for 1998 (1998), *available at* http://www.ecs.org/clearinghouse/ 14/41/1441.htm; EDWIN BRIDGES, MANAGING THE INCOMPETENT TEACHER 2 (Education Resources Information Center 1990). This property right to continuous employment, which is protected by the Fourteenth Amendment of the Constitution, guarantees teachers significant substantive and procedural due process rights in the event of attempted dismissal. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). In terms of substantive rights, local school districts frequently can terminate tenured teachers only under extreme and statutorily defined conditions. *See* Education Commission of the States, *supra*; BRIDGES, *supra*. While these criteria vary by state, typical grounds for dismissal include incompetence, immorality, insubordination, and neglect of duty. *See id.* The procedural rights guaranteed by state statutes and case law likewise vary among jurisdictions. Generally, however, a tenured teacher is entitled to timely and adequate notice of the reasons for dismissal, a fair hearing with legal counsel before the school board, an opportunity to cross-examine witnesses, and an impartial decision based solely on the evidence presented. *See* BRIDGES, *supra*; David M. Pederson, Statutory Dismissal of School Employees, in TERMINATION OF SCHOOL EMPLOYEES: LEGAL ISSUES AND TECHNIQUES 10-1-10-2 (National School Boards Association 1997). Moreover, all states allow teachers to appeal the school board's decisions to some entity—a state court, a tenure commission, the state board of education, etc. *See* Education Commission of the States, *supra*. Many states allow teachers to appeal to the state supreme court, meaning the case could be reviewed four or five times. *See id.*

[3] Approximately two of three states have enacted collective bargaining statutes covering teachers and mandating that local school boards bargain with unions over the terms and conditions of employment. Collective bargaining agreements often establish rights and procedures applicable to disciplining and terminating teachers, which usually exceed the rights set forth in state statutes. *See* Education Commission of the States, State Collective Bargaining Policies for Teachers (June 2002), *available at* http://www.ecs.org/clearinghouse/37/48/3748.htm. Typically, these rights include discipline and dismissal for just cause only, which generally involves progressive discipline, due process requirements prior to and during the disciplinary process, and extensive grievance and arbitration procedures that supplement or displace statutory hearing procedures.

teachers are summarily dismissed only in the most egregious cases. More often, problematic employees go through some form of progressive discipline before being terminated. Whether an employee's speech constitutes "just cause" or whether it would meet the statutory criteria for grounds for dismissal has nothing to do with whether it is protected by the First Amendment. It seems unlikely that a decision-maker in a state where teachers have tenure or just cause protection would rule that a district could terminate a teacher who complained to the administration about a matter of public concern related to the teacher's job duties.

Second, current whistleblower legislation may also protect public employees who want to discuss concerns they have related to their official job duties. The majority opinion in *Garcetti v. Ceballos* discusses a number of whistleblower protections that may have been available to Mr. Ceballos had he pursued them. Meanwhile Justice Souter's dissenting opinion, which Justices Stevens and Ginsburg joined, questions whether whistleblower protections adequately cover public employees in all instances. If eight of America's greatest jurists cannot reach agreement about the ability of whistleblower statutes to adequately protect public employees, perhaps an answer to this question is not yet known. In time, however, the answer will become clearer as public employees bring causes of action under whistleblower statutes, collective bargaining agreements, and tenure laws rather than the First Amendment.

Practical realities

In most instances, public employers, and even private employers, have little incentive to fire an employee just because the employee complains about the employer's operations. Public employers, including school districts, exist to serve the citizens of this country and most public employers want to comply with the law. Public school districts in this country are under immense scrutiny by federal, state, and local media, legislators, and citizens to make sure children are: being educated according state and federal education standards, adequately prepared to compete in the global economy, treated equally, and educated in a safe environment.

Most school districts do not want to spend their scare resources punishing teachers who speak out rather than educating children when the public reaction to such punishment will likely be negative – regardless of whether it is permitted by the First Amendment. In choosing whether to create a culture of either discouraging private communication with employees regarding school district operations, or encouraging public airing of these issues, clearly the balance is with encouraging employees to frankly discuss their concerns with the employer. Moreover, serious teacher shortages exist in certain subject areas and geographic regions, and at minimum, a perception exists that many teachers could make more money working in the private sector. Few school districts could afford to terminate an otherwise well-performing teacher who complained about a matter of public concern related to his of her official job duties.

Taking suggestions from employees is often in the employers best interests and happens at worksites of all kinds every day. If a public employer made a practice of firing

employees who complained about something related to their official job duties, the public employer first, might not have many employees left in a short period of time, and second, probably would have a difficult time recruiting qualified candidates. The public employer/ public employee relationship tends to be a long term ongoing relationship where both parties have an incentive to be respectful of each others opinion regardless of what the First Amendment protects or does not protect.

Conclusion

For all these reasons, NSBA supports the outcome of *Garcetti v. Ceballos*, and we look forward to any future guidance the U.S. Supreme court or lower courts provide in defining the application of this case.

STATEMENT OF BARBARA ATKIN

Ms. ATKIN. Good afternoon, Chairman Davis and all of the members of House Reform Committee.

I am Barbara Atkin, deputy general counsel of the National Treasury Employees Union. I thank you for the opportunity to testify concerning the urgent need for congressional action to strengthen Federal whistleblower protections in the wake of the Supreme Court's decision in *Garcetti* v. *Ceballos.*

NTE participated in that litigation as an amicus. In order to underscore the vital interest that Federal employees have in freely expressing their views on matters of significant public concern and the compelling need of the public to hear those views, NTE represents career civil servants who perform functions critical to the public safety and homeland security or who play a key roll in the formulation of tax policy or the regulation of the financial industry. It is essential that these employees be protected from retaliation when they express their candid, well-informed views on potential threats to the public welfare.

That protection must extend to internal discussions with their supervisors and managers, as well as to external disclosures to Congress, and even to the media.

The Supreme Court, in *Garcetti,* has stripped disclosures made in the course of an employee's duties of any constitutional protection. This speech, however, is precisely the speech that is most vulnerable to suppression by political appointees pursuing their own agenda who are often intolerant of dissent. It is also the speech most critical to the public interest.

NTEU calls on Congress to enact reforms to the Whistleblower Protection Act to protect this speech.

The Federal circuit has held that the Whistleblower Protection Act does not cover disclosures by employees who are performing their normally assigned duties in reporting waste, fraud and abuse. In other words, a NASA safety director or engineer who spots a safety flaw threatening an imminent space shuttle flight and who takes the courageous step of urging his superiors to postpone the flight until the problem is corrected, to the tune of millions of dollars of added expense, cannot now be a protected whistleblower in the eyes of the Federal Circuit because his duties involve overseeing the shuttle's construction. Similarly, an FDA employee who prepares reports to Congress now has no statutory protection if she objects to her superior's insistence on watering down the science or slanting the conclusions to accommodate a politically driven agenda.

Whistleblower legislation cleared by the respective House and Senate committees, H.R. 1317 and S. 494, would close that major loophole and correct other judicially imposed limitations as well.

Last week, the Senate approved S. 494 as an amendment to the fiscal year 2007 Defense authorization bill. NTEU strongly urges the House to accept S. 494 in the upcoming House/Senate conference on the Defense authorization bill.

The pending legislative reforms also provide some additional important protection to other speech left vulnerable by *Garcetti* and by the Federal Circuit; namely, disclosures that amount to mere so-called differences of opinion on debatable policy decisions. S. 494

and H.R. 1317 would protect disagreements over policy decisions that evidence a violation of law or other specific serious wrongdoing. Unfortunately, that leaves unprotected many internal policy disagreements over other key issues. An employee of FEMA, for example, who insists that the agency is poorly led and organized and who provides telling examples of misguided policies would be highly vulnerable to agency censorship and retaliation unless the employee aired his views in public. Only then would he have any protection, and that would arise under the fifth amendment, not the WPA.

The court in *Garcetti* acknowledged this perverse incentive to go public in the first assistance, which no one believes is consistent with good government management. NTEU strongly encourages Congress to explore an option suggested by the Supreme Court in *Garcetti,* the establishment of an internal forum for the expression of dissenting opinions. NTEU has itself negotiated contractual protections for employees at the Food and Drug Administration and the Nuclear Regulatory Commission who express their personal opinions. Regulations and directives at those agencies also provide the right to preserve professional disagreements on the record. Those provisions may serve as a model for adoption government-wide.

In conclusion, I urge Congress to keep the provisions in S. 494 in the final Defense authorization bill.

I thank you for this opportunity to address this important issue on behalf of all of the members of NTEU, and I would be happy to answer any questions.

[The prepared statement of Ms. Atkin follows:]

STATEMENT OF

NATIONAL TREASURY EMPLOYEES UNION

ON

WHAT PRICE FREE SPEECH?: WHISTLEBLOWERS AND THE CEBALLOS DECISION

TO

COMMITTEE ON GOVERNMENT REFORM UNITED STATES HOUSE OF REPRESENTATIVES

JUNE 29, 2006

The National Treasury Employees Union (NTEU) thanks the Committee for this opportunity to address the significant adverse consequences that the Supreme Court's recent decision in Garcetti v. Ceballos, 126 S. Ct. 1951, 2006 U.S. LEXIS 4341, 74 U.S.L.W. 4257 (May 30, 2006), has on federal employees and the public at large. NTEU has a long tradition of fighting to protect the free speech rights of government employees, both in the courts and through the legislative process. NTEU has championed this cause both to protect the rights of the employees it represents to speak out and express dissent and to further the broader public interest in hearing what employees have to say. Safeguarding the rights of federal employees to free speech is essential to the public's interest in averting or uncovering fraud, waste and abuse, and in promoting the public safety as well as the national security.

The Supreme Court's recent Garcetti decision has serious implications for public employees whose conscientious pursuit of their duties lead them to make disclosures of wrongdoing or to express unpopular views, even when such views are expressed internally, through the regular "chain of command." In fact, the perverse result of the decision in Garcetti is to encourage employees to go public with their concerns, in order to secure the protection of the First Amendment, rather than to pursue their concerns internally, where the Court has held that their speech is unprotected.

Further, as described below, the Court's decision in Garcetti makes more urgent the need for reforms to the Whistleblower Protection Act (WPA), to fill the loopholes in protection that the Garcetti decision has created. NTEU, therefore, commends the Committee for its focus on this issue.

Earlier in this Congress, the House Government Reform Committee cleared two bills for floor action, H.R. 1317 and H.R. 5112, that together would resolve the some of the critical deficiencies in current federal whistleblower statutes. These bills have not yet been scheduled for floor action.

Last week, however, the Senate did approve, as an amendment to the FY 2007 Defense Authorization bill, S. 494, the Federal Employees Protection of Disclosures Act. If enacted, S. 494 would make substantial improvements to the protection afforded federal employees under the WPA, and rectify the most of the damage done by the Garcetti decision.

The Union hopes that this hearing will serve as a catalyst for the House to accept the Senate federal whistleblower provision in the upcoming House-Senate conference on the Defense Authorization bill.

The Garcetti decision

In Garcetti, the Supreme Court discussed at length the vital role that federal, state, and local employees play in the public debate on the most important issues of the day. In numerous prior decisions as well, the Court has recognized the important public interest in receiving the "well-informed views" of government employees. Slip op. 7. Indeed, it has acknowledged that public employees are often in the best position to know what ails the agencies for which they work, and their contributions can greatly inform the public debate. Moreover, the importance of the message to the public understanding is often directly correlated to the degree to which the message relates to the employees' duties. The more an employee knows about a particular topic--in many cases because it is the employee's job--the more useful the information will be to the public.

Despite this recognition of the public interest in hearing employees' views, well informed by expertise developed from their professional backgrounds and on-the-job experiences, the Court nevertheless held (in a 5-4 decision) that speech by public employees made pursuant to their official government duties is not entitled to protection under the First Amendment. The precise scope of this holding is, as yet, unclear because the lower courts will have to address the breadth of employees' duties in individual cases and the circumstances under which speech will be deemed "pursuant to" those duties.

At a minimum, however, it is clear at this point that employees who uncover and reveal wrong-doing or risks to the public safety and national security in the course of performing their jobs, or who argue internally in opposition to the "party line," will not be able to invoke constitutional protections should they suffer retaliation. Instead, they will be forced to place their trust exclusively in what the Supreme Court majority called the "good judgment" of their government-employer, which the majority asserted would be "receptive to constructive criticism." Slip op. at 13. In the event that the employer failed to be "receptive," the Court assumed that employees could fall back on what it

naively termed "the powerful network of legislative enactments--such as whistle-blower protection laws and labor codes." Id. As Justice Souter outlined in his dissent, however, and as described below, those protections are grossly inadequate, particularly in the federal sector.

The Supreme Court's faith in a government "receptive to constructive criticism" is demonstrably misplaced.

It is a sad fact of history that in the federal government, as in its local and state counterparts, there have been many occasions in which views that contradict the established orthodoxy have been discouraged or penalized. The suppression of dissenting opinions is often not related to the merits of the views expressed, but is instead driven by motives that are inconsistent with the public interest, such as politics, protection of bureaucratic turf, or even corruption.

Speech in furtherance of employees' duties--speech that perhaps has the most potential of making an informed contribution to the public interest--is also the speech that is the most vulnerable to suppression. Agencies, under the guise of supervisory review or high-level policy review, have been known to tone down messages of potential hazards, or to censor them entirely. Career public servants have seen their reports amended or suppressed because they did not conform to the general policy objectives or political imperatives of the current political appointees heading their respective agencies or other reviewing authorities within the Administration. Those who protest and persist in pressing their conclusions--particularly those who feel compelled to take the dispute to Congress or the media--are prime targets for retaliation.

Dr. David Graham, the scientist with the Food and Drug Administration (FDA) who was directed to soften his conclusions regarding dangerous side effects of the pain drug Vioxx, is only one of many examples. As an associate science director at the Office of Drug Safety at the FDA, Dr. Graham prepared a study in which he concluded that Vioxx had dangerous side effects. He claims that he was pressured by superiors to soften his conclusions, and that he complied only as much as he could to avoid compromising his "deeply held convictions." He was threatened and ostracized by the FDA, as a consequence. The drug manufacturer ultimately withdrew Vioxx from the market when an independent study confirmed Dr. Graham's conclusions.

Andrew Eller, a biologist working on Florida panther-related issues with the U.S. Fish and Wildlife Service, was terminated after accusing his agency of purposely relying on flawed scientific information regarding the Florida panther's likelihood of survival in the face of real estate development. The agency did so, he maintained, in order to facilitate the granting of construction permits to influential developers. The agency has reinstated Eller, conceding that some of his conclusions were correct. It has been alleged that the agency is under severe pressure from its political superiors to accommodate campaign contributors.

John Fitzgerald, an environmental analyst with the U.S. Agency for International Development in 2002, was responsible for monitoring compliance on certain overseas development projects. He attempted to report to Congress legal violations and environmental mismanagement regarding questionable energy projects in Africa, South America and Eastern Europe, but Treasury officials removed the information from his report before it reached Congress. His position was subsequently eliminated.

Richard Foster, Medicare's chief actuary, was responsible for providing cost estimates to Congress regarding several Medicare proposals under debate. Foster estimated that the actual cost of legislation would be 25% to 50% higher than the administration's public estimates but was prevented from providing his finding to Congress by the former Administrator of the Centers for Medicare and Medicaid Services. An investigation by the HHS Office of Inspector General concluded that CMS failed to provide the proper information requested by Congress and that the Administrator had warned Foster that he would be disciplined if he released his disfavored findings.

In short, as these few examples illustrate, those who would report misconduct or voice opinions unpopular with supervisors or managers face very real disincentives to persist. Perversely, the greater the magnitude of the problem and the cost, monetarily or politically, of correcting it, the greater is the risk to the small voice who is urging caution. Not all employees have the courage of Coleen Rowley, the FBI employee who attempted to draw attention within the FBI to its institutional failure to respond to indicators about impending terrorist attacks. The employee who identifies a serious institutional lapse that may have contributed to the nation's vulnerability to a terrorist attack, like the employee who

sees a safety risk threatening an imminent space shuttle flight or the opening of a new nuclear power plant, needs extraordinary courage to persist, once her views are heard and brushed aside. The loss of constitutional protection to this dissent only increases the disincentives. If these employees choose the safer course and remain silent, the cost to the public could be enormous.

The Supreme Court's faith in "powerful" whistleblower protections is also misplaced.

Federal employees will perhaps note the painful irony in the Supreme Court's references to the "powerful network" of whistleblower protections. Although some individual states may have strong whistleblower laws, the federal Whistleblower Protection Act is notoriously inadequate. Indeed, as interpreted by the U.S. Court of Appeals for the Federal Circuit (which holds a monopoly on deciding cases under the WPA), the WPA leaves open precisely the same loopholes that now exist under the First Amendment, in light of the Garcetti decision.

As an initial matter, the WPA, 5 U.S.C. 2302(b)(8), protects only disclosures related to certain types of information: that evidencing a violation of law, rule or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. The court of appeals for the Federal Circuit has held that "mere" differences of opinion on debatable policy decisions do not constitute protected disclosures under the Act. See White v. Dept. of Air Force, 391 F.3d 1377, 1382 (Fed. Cir. 2004).

Similarly, the disclosures of would-be whistleblowers are routinely ruled unprotected because a decision-maker concludes, with the benefit of hindsight, that the alleged mismanagement the employee revealed is not sufficiently "gross"; that the complained-of dangers were described with insufficient specificity; that the identified problems were attributable to a course of action that was "debatable" at the time it was taken; that the waste of funds was not so "significantly" out of proportion to the benefit to the government as to constitute a "gross" waste of funds; or that the violation of law was "trivial."

Further, the Federal Circuit has erected an almost insurmountable barrier for employees to meet to demonstrate

that their disclosures were supported by the requisite "reasonable belief" that one of the narrow categories of wrongdoing has occurred. It requires an employee to establish, based on information known to that employee or readily ascertainable, that the government engaged in such serious errors that its conclusion was not debatable among reasonable people. White v. Air Force, 391 F.3d 1377 (Fed. Cir. 2004); Lachance v. White, 174 F.3d 1378, 1381 (Fed. Cir. 1999), cert. denied, 528 U.S. 1153 (2000).

In addition, as interpreted by the Federal Circuit, the WPA contains the same gaping holes that the Supreme Court's decision in Garcetti has torn out of the First Amendment. Thus, disclosures by employees who are performing their normally assigned duties in reporting waste, fraud, abuse, or public health and safety hazards are not protected under the WPA, according to the Federal Circuit. See Huffman v. Office of Pers. Mgmt., 263 F.3d 1341, 1351-54 (Fed. Cir. 2001); Willis v. Dept. of Agric., 141 F.3d 1139, 1144 (Fed. Cir. 1998). Similarly unprotected are disclosures made to the alleged wrong-doer, including the employee's supervisors. Horton v. Dept. of the Navy, 66 F.3d 279, 282 (Fed. Cir. 1995), cert. denied, 516 U.S. 1176 (1996).

In short, only a very narrow subset of disclosures has the potential of protection under the WPA, as currently interpreted. Disputes over policy generally are specifically excluded, as are disagreements with the employee's supervisor and disclosures made in the course of the employee's duties. The WPA, as presently written and interpreted, provides no protection for employees whose speech the Supreme Court held in Garcetti was not protected by the First Amendment.

Suggested congressional responses

1. **Strengthen the WPA**: It is, first and foremost, critical that the Congress amend the WPA to reverse the narrowing interpretations imposed upon it by the Federal Circuit. NTEU therefore urges that the House join the Senate, which recently passed S.494, the Federal Employee Protection of Disclosure Act, which would, among other things, close the loopholes in protection created by Garcetti.

Thus, S.494 would cover "a disclosure made in the ordinary course of an employee's duties." The proposed legislation would also cover discussions of waste, fraud, and abuse regardless of "prior disclosures." S. 494 would,

therefore, reverse the Federal Circuit's insistence that a disclosure is unprotected if it had previously been made in some other public forum. It also appears that S. 494, with its insistence on coverage of "any disclosure," would cover the most common type of disclosures of wrong-doing: those made to a supervisor or co-worker on the job.

Finally, we note that S. 494 would close several other significant loopholes in the WPA. For example, currently it is a "prohibited personnel practice" to take a "personnel action" against an employee in retaliation for making a covered whistleblower disclosure. See 5 U.S.C. 2302(a),(b)(8),(9). Not every form of retaliation by an agency, however, constitutes a "personnel action" within the meaning of 5 U.S.C. 2302(a)(2)(A).

Currently, an agency decision to investigate an individual for retaliatory reasons is not a "personnel action." Agencies have been known to subject a whistleblower to intensive and repeated investigations, in the hope of turning up some background "dirt" to discredit the employee and, indirectly, undermine the credibility of the information that the employee is disclosing. Adoption of S. 494 would correct this abuse, for it makes it a prohibited personnel practice to conduct an investigation because of protected activity.

Similarly, S. 494 would provide at least limited appeal rights to employees whose security clearances are revoked or denied in retaliation for whistleblowing. It would also end the Federal Circuit's monopoly on the adjudication of cases arising under the WPA. Finally, S. 494 would make it a prohibited personnel practice for an agency to implement or enforce a non-disclosure policy that is inconsistent with the WPA and other laws which protect employee free speech rights, including employees' statutory right to provide information to a member of Congress.

2. Protect internal policy disagreements: A key category of expression that remains highly vulnerable, even under S. 494, is disagreement over policy decisions that might not involve an allegation of an illegal act or specific wrong-doing, as required by the WPA. Garcetti has stripped such internal debate of any constitutional protection, and the WPA (as interpreted by the Federal Circuit) does not cover disagreements over debatable policy decisions. Even S. 494 excludes "communications concerning policy decisions that

lawfully exercise discretionary authority" unless the employee reasonably believes that the disclosure evidences a violation of law or other serious wrong-doing. As a consequence, there is no constitutional or statutory protection for employees who would refuse to be yes-men on policy questions--unless those employees take the dispute into the public arena.

The Supreme Court in Garcetti acknowledged that its holding means that employees may be better protected if they air their views publicly than if they work only internally, through official channels. Slip op. 11-12. Thus, an employee's public expression--in a letter to the editor, press interview, or public speech--will still have the First Amendment protection denied to expression made only to supervisors, in the course of the employee's duties. As a consequence, anyone advising an employee anxious to report a major problem uncovered on the job would have to counsel the employee to consider bringing the debate directly into the public forum, in order to obtain First Amendment protection. Garcetti thus, unfortunately, creates a perverse incentive, counter-productive to basic tenets of good government management, to air disagreements in the public arena.

To address this anomaly, the Supreme Court itself suggested the creation of internal fora for the expression of dissenting opinions. NTEU urges Congress to explore the creation of such institutions through statute and government-wide regulation.

Some preliminary steps have been taken by individual agencies, such as the Nuclear Regulatory Commission and the Food and Drug Administration. Employees at those agencies, represented by NTEU, care deeply about the issues on which they work and look for means to express their opinions and their professional disagreements, without fear of reprisal. Their agencies have agreed to give their employees the right to preserve in the record their professional disagreements of opinion. See 21 C.F.R. 10.70 (FDA); NRC Directive 10.159 (The NRC Differing Professional Opinions Program). NTEU has supplemented those protections with contractually negotiated rights, in order to address employees' feelings of vulnerability when they express their professional opinions. See NTEU-FDA Collective Bargaining Agreement, Art. 5, Sec. 20; NTEU-NRC Collective Bargaining Agreement, Art. 3.9.

NTEU suggests that this Committee investigate adoption of similar protections on a government-wide basis, in addition to

the creation of internal agency fora to hear dissenting opinions.

3. Curb agency tendencies toward unnecessary secrecy: Finally, NTEU urges this Committee to investigate the very disturbing tendency of government agencies to adopt Draconian nondisclosure policies designed to threaten and intimidate employees who would speak publicly, using information that is neither classified nor sensitive, about important issues within their agencies related to the public safety and well-being.

It is NTEU's belief that a governmental culture of secrecy and enforced orthodoxy is increasing. A significant number of agencies, such as those within the Department of Homeland Security, are adopting and enforcing broad and vague nondisclosure policies that effectively chill any employee expression on matters of public concern, even though no classified or other truly sensitive information is disclosed.

At the Bureau of Customs and Border Protection within DHS, for example, employees are barred from disclosing "official information" without proper authority. "Official information" includes "any information that an employee acquires by reason of CBP employment, that he or she knows, or reasonably should know, has not been made available to the general public." The prohibition encompasses information that the agency concedes is neither classified nor law enforcement sensitive.

The breath-taking sweep of this secrecy provision operates to keep out of the public domain the valuable opinions of CBP employees about virtually all aspects of the their employment, including the adequacy of staffing levels and training, as well as flawed initiatives like the agency's "One Face at the Border Program." Indeed, because of the vagueness of the CBP policy, employees engage in self-censorship, and fear speaking publicly on any topic remotely related to their employment, to avoid the risk of disclosing so-called "official information."

Broad nondisclosure policies that require prior permission before speaking to the media are of doubtful constitutionality. See Harman v. City of New York, 140 F.3d 111 (2d Cir. 1998); c.f., Weaver v. U.S. Information Agency, 87 F.3d 1429 (D.C. Cir. 1996). The rise of such policies is

thus a development that requires serious attention by Congress. In the meantime, S. 494 takes some valuable steps in the right direction by requiring nondisclosure policies to outline the statutory rights, obligations, and liabilities of employees.

Again, NTEU thanks the Committee for the opportunity to submit these remarks and ask that they be entered into the official hearing record.

Chairman TOM DAVIS. Thank you very much.

Mr. Bergstrom, thank you for being here.

STATEMENT OF RICHARD J. BERGSTROM

Mr. BERGSTROM. Thank you, Chairman Davis and the other members of the committee, for the invitation to be here today.

I'm a partner with the law firm of Morrison & Foerster, and co-chair of our Labor Employment Group. I work out of our office in San Diego, CA, which, as it turns out, is just a couple hours away from where Mr. Ceballos worked as a deputy district attorney.

I'd like to make three basic points this afternoon concerning the *Garcetti* decision and its impact on Federal and State whistleblowing protection.

First, we believe that, when properly read and understood, *Garcetti* represents a fairly narrow ruling which is unique to the facts presented to the court. As you're aware, only a first amendment claim was presented in the matter; there were no other Federal or State claims at issue before the U.S. Supreme Court. The issue which the Supreme Court addressed was whether a memorandum written by Mr. Ceballos was protected as private citizen speech or was written pursuant to his official duties.

This is the key question. The Supreme Court noted, in addressing this question specifically, that internal complaints of whistleblowing could still constitute protected activity under the first amendment. As has been suggested in prior questions and answers in statements given here today, I would assert that the issue is not one of internal versus external. The court, on page 1959 of its decision, specifically indicated that internal whistleblower complaints would still be protected under the first amendment. The question is whether those whistleblowing activities were made pursuant to the individual's official job duties.

Second, the court also noted that whistleblowing complaints directly relating to an individual's work could also still be protected under the first amendment. In the *Garcetti* matter, however, there are some unique facts. Mr. Ceballos actually testified under oath that it was his job, he was hired to investigate issues relating to whether arrest warrants were properly issued, and he was hired to write advisory memoranda as to those investigations. Based on these narrow facts, with the claim at issue and Mr. Ceballos' admission, the Supreme Court then narrowly interpreted these facts and found that the memorandum was not protected speech, it was not that of a private citizen and so the first amendment did not provide protection.

The second issue is that *Garcetti* is consistent with prior Supreme Court opinions concerning whistleblower protection under the first amendment. Going back to 1968 in the seminal case of *Pickering,* which we've referenced earlier today, the Supreme Court addressed an issue relating to external whistleblowing. A teacher in that case issued a letter to a newspaper complaining about spending practices of the local school board. The Supreme Court in that case found that speech was not part of the teacher's official job duties and was protected. Possibly a more instructive case, given the debate that we've had today, is the *Givhan* case, which was issued 11 years later. In that case, a teacher complained di-

rectly to the school board principal—purportedly her supervisor—about school district policy directly relating to her job, that it was discriminatory. The Supreme Court in that instance was addressing a complaint of internal whistleblowing, which was also job related. The Supreme Court found that this speech was protected. It was not part of the teacher's official job duties. In other words, she was not hired, as Mr. Ceballos was, to conduct an investigation; she was not hired, as Mr. Ceballos was, to write an internal memorandum, as Mr. Ceballos was and admitted under oath.

It's important to note that the Supreme Court actually affirmed the analysis and conclusions in both *Pickering* and *Givhan,* and neither case, the result in neither case would be changed by the holding in the *Garcetti* case today.

The last point I'd like to make is that there are a myriad of statutes and common law rights which protect whistleblowers which are independent from the first amendment.

We've talked about a number of the Federal pieces of legislation today, but with regard to State legislation there are 48 States with whistleblower protection for government employees. There are 45 States that have adopted common law protection for whistleblowers. And specifically in California, which I think is important in this matter since that is where Mr. Ceballos was based, significant protections have been adopted as well.

Under California Labor Code, section 1102.5, both private and public employees are protected from whistleblower activities for reporting violations of Federal and State law. Under California Government Code, section 53298, both city and county employees, such as Mr. Ceballos, again are protected from whistleblowing activities relating to gross mismanagement and abuse of authority.

California has also adopted its own Whistleblower Protection Act which protects State employees. And last, there is a common law claim in California where an employee believes that he or she has been improperly demoted or terminated, the individual can state a claim for wrongful termination in violation of public policy or wrongful demotion in violation of public policy. Based on this network of protections, the courts have the ability to award compensatory, punitive and even criminal penalties.

Now, none of these claims, as we've indicated, were before the Supreme Court, and the record is not clear as to why Mr. Ceballos and his counsel chose not to take advantage of these significant protections. However, what is clear is that the ruling in *Garcetti* is likely to have little impact on these laws. No. 1, *Garcetti,* as I pointed out, is fairly narrow and unique to its facts; and No. 2, the protection provided by the statutes is governed by the express language in the statutes themselves.

Thank you very much for the opportunity to testify today.

[The prepared statement of Mr. Bergstrom follows:]

The Significance of the Supreme Court's Ruling in Garcetti v. Ceballos

Before the Committee on Government Reform

U.S. House of Representatives

June 29, 2006

Daniel P. Westman
Richard J. Bergstrom
Morrison & Foerster LLP

I. INTRODUCTION

Beginning in 1968 with its landmark decision in *Pickering v. Board of Ed of Township High School District 205,* 391 U.S. 563 (1968), the Supreme Court's First Amendment cases have taken the approach of seeking a "balance between the interests of a government 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."

Beginning in the 1970s and continuing through the present, the federal and state legislatures and judiciaries have established numerous legal protections for whistleblowing employees in the government sector. In *Garcetti v. Ceballos*, 126 S. Ct. 1951 (May 30, 2006), the Supreme Court's majority opinion referred to "the powerful network of legislative enactments – such as whistle-blower protection laws and labor codes – available to those who seek to expose wrongdoing."

This memorandum discusses the ruling in *Garcetti v. Ceballos* in the context of the Supreme Court's prior First Amendment decisions, and in the context of other existing federal and state law protections for whistleblowing employees in the government sector that have developed over the last several decades.

II. THE RULING IN GARCETTI v. CEBALLOS IN THE CONTEXT OF PRIOR FIRST AMENDMENT DECISIONS

In *Pickering*, a school teacher was dismissed for publishing a letter in local newspaper that was critical of the school districts spending. In finding that the teacher's speech was protected by the First Amendment, the court took on the task of balancing "the interest of the teacher, 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." *Id.,* 391 U.S. at 596. The court determined that the interest of the school administration in limiting teachers' opportunities to contribute to public debate was not significantly greater than its interest in limiting a similar contribution by any member of the general public. The issue of how the school district used its funding was a matter of public concern about which teachers are likely to have informed opinions. *Id.* at 572. The court held that it was essential that teachers be allowed to speak out freely without fear of retaliatory dismissal. *Id.* As to the school's interest in limiting the teacher's speech, the court reasoned that the teacher was only tangentially and insubstantially involved in the subject matter of his letter. Accordingly, he was speaking as a citizen and not as a teacher and absent any knowingly or recklessly false statements in his publication, the letter could not serve as a basis for termination. *Id.* at 574.

The balancing test set forth in *Pickering* did not lay down a bright line rule that shields government employees in all instances. The court was careful to note that if the school board and the teacher had a closer working relationship, Pickering's statements might not be been protected if the statement jeopardized discipline or harmony in the workplace or if they "in any way either impeded...proper performance of his daily duties...or... interfered with the regular operation of the schools." *Id.* at 573.

First Amendment protection has not been limited to government employees who voiced their concerns publicly like in *Pickering*, but also has been extended to employees who communicate privately with their employer. In *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979), a teacher was dismissed for criticizing the School District's policies, which she thought to be racially discriminatory, in a private meeting with the school's principal. The

court held that the First Amendment does not distinguish between a public employee who arranges to communicate privately with his employer and one who spreads his view before the public. *Id.* at 416. However, the court recognized that statements made in public "may involve different considerations" when applying the *Pickering* balancing test. *Id.* at 415. Public statements generally require the court to look at the content of the speech and determine whether or not it impedes the government's interest in an efficient operation. However, "when a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered." *Id.*

In contrast, an employee's private speech was not protected in *Connick v. Meyers*, 461 U.S. 138 (1983), because the speech did not touch upon a matter of public concern and because it disrupted the activities of the employer. Myers was an Assistant District Attorney for over 5 years in the Parish of New Orleans. *Id.* at 140. When Myers learned that she was going to be transferred to a different section of the criminal court, she voiced strong opposition to her supervisor. She was later informed that despite her objections, she was still scheduled for transfer. Myers then drafted and distributed a questionnaire soliciting the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work on political campaigns. *Id.* at 145. Myers was fired for refusing to accept the transfer and for the disruption caused by the questionnaire, which was considered an act of insubordination. *Id.* at 151. Applying the *Pickering* balancing test, the court found that the questionnaire, with the exception of the inquiry regarding the pressure to work on political campaigns, as a whole, did not raise matters of public concern. *Id.* at 154. Rather, the intent was to "gather ammunition for

another round of controversy with her supervisors," which the court viewed to be a matter of personal interest, rather than a matter of public concern. *Id.* at 148. The court stated that the Government as an employer has wide discretion and control over the management of its personnel and internal affairs. *Id.* at 152. Considering the manner, time, and place in which Myers delivered her questionnaire, the court gave deference to the District Attorney. *Id.*

In another decision regarding a private conversation, in *Rankin v. McPherson*, 483 U.S. 378 (1987), the court ruled in favor of an employee who made a comment regarding a presidential assassination attempt. McPherson was appointed as a deputy in the office of Constable of Harris County, Texas. At the time she was 19 years old and had attended college for a year, studying secretarial science. All employees of the Constable's office carried the title "deputy constable," regardless of their job function. *Id.* at 380. McPherson's duties were purely clerical in nature and she worked in a room to which the public did not have ready access. *Id.* Upon hearing a radio report describing the attempted assassination of President Reagan, McPherson engaged a co-worker in a brief conversation where she commented on the President's policies and said that "if they go for him again, I wish they get him." *Id.* at 381. Another employee heard this comment and immediately reported it to Constable Rankin who then summoned McPherson. McPherson admitted that she made the statement was fired by Rankin. *Id.* at 382.

The court held that the *Pickering* balance test weighed in favor of McPherson because the statement she made was on a matter of public concern, and McPherson's position was so utterly ministerial that the First Amendment interest in protecting her freedom of expression was not outweighed by any serious potential for disrupting the mission of the constable's office. *Id.* at 389. In finding that McPherson's speech was on a matter of public concern, the Court

considered the statement in the context in which it was delivered. The court found that the statement "on the heels of a news bulletin regarding what is certainly a matter of heightened public attention." *Id.* at 386. The inappropriate or controversial nature of the statement "is irrelevant to the question whether it deals with a matter of public concern." *Id.* at 387. In addressing the interest of the government to maintain efficient functioning of the public enterprise, the court found that the statement in no appreciable way affected the speaker's job performance, nor did it discredit the office because there was a low danger of her statement becoming public. *Id.* at 389. The court found that "[at] some point such concerns are so removed from the effective functioning of the public employer that they cannot prevail over the free speech rights of the public employee." *Id.* at 391.

Private communications within a government office were the subject of *Garcetti v. Ceballos.* Ceballos, a supervising district attorney, was contacted by a defense attorney in regard to inaccuracies in an affidavit that was used to obtain a critical search warrant in a criminal case. *Id* at 1955. Ceballos examined the affidavit and determined that it contained serious misrepresentations. Ceballos relayed his findings to his supervisors and followed up with a memo recommending dismissal of the case. *Id* at 1956. The case was pursued despite Ceballos' recommendations. At a hearing on a motion to challenge the search warrant, Ceballos testified for the defense. *Id.* Subsequently, Ceballos claimed that he was subjected to a series of retaliatory employment actions including being demoted, transferred to another courthouse and denied of a promotion. *Id.* Thereafter Ceballos filed a lawsuit for violation of his First Amendment rights.

While finding Ceballos' speech was unprotected, the majority opinion was carefully written to cite with approval the prior decisions in *Pickering, Connick, Givhan* and *Rankin.* The

Court's analysis took the familiar two-part *Pickering* approach. The court first asked whether Ceballos had spoken as a citizen on a matter of public concern.? If so, then the question would becomes whether the government had an adequate justification for treating the employee differently from any other member of the general public. *Id.* at 1958. The court noted that Ceballos' expression of his views inside his office, rather than publicly, was not dispositive of the issue. *Id.* at 1959. The court found that the controlling factor in this case was that Ceballos' expressions were made pursuant to his official duties as a calendar deputy because it was his job to prepare disposition memos. *Id.* at 1960. The court held that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id.* Because the court found that Ceballos' speech was not protected under the First Amendment, the court did not discuss whether or not the government had a substantial interest in restricting his speech. The court did, however, remand the case to the Ninth Circuit to determine whether other speech by Ceballos (*e.g.* his testimony in the pending criminal case and speech at a bar association meeting concerning misconduct in the criminal case) was or was not within his official duties, and thus may constitute private citizen speech. *Id.* at 1962, 1971-1973.

Justice Souter's dissent articulated concern that government employers would be able to restrict their employee's rights by creating excessively broad job descriptions. *Id.* at 1961. Justice Kennedy's majority opinion responded that "[f]ormal 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 not sufficient to demonstrate

that conducting the task within the scope of the employee's professional duties for First Amendment purposes." *Id.*

In sum, *Garcetti v. Ceballos* does not reverse prior First Amendment precedents which protect government employee speech expressed outside and inside the workplace. The ruling applies only to speech which is clearly required as part of an employee's official job duties. In contrast, the employee speech in *Givhan* and *Rankin* was not required as part of their job duties, and therefore was protected by the First Amendment. Those cases were cited with approval in *Garcetti v. Ceballos.*

III. THE GARCETTI v. CEBALLOS RULING IN THE CONTEXT OF OTHER WHISTLEBLOWER PROTECTIONS FOR GOVERNMENT EMPLOYEES

The laws protecting whistleblowers in the government sector have evolved significantly over the last several decades.

Forty-eight state legislatures have enacted whistleblower protection statutes covering government employees.[1]

Congress enacted the Whistleblower Protection Act of 1989 to protect federal government employees who report waste, fraud and abuse.

Thirty-five federal statutes protect whistleblowing employees who raise concerns under those statutes, which may be available to government employees.[2]

The judiciaries of 45 states have recognized common law protections for whistleblowing employees, which may be available to government employees.[3]

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[1] *See* Appendix A, D. Westman and N. Modesitt, Whistleblowing: The Law of Retaliatory Discharge, Second Edition, (BNA Books 2004 & 2005 Supp.), attached hereto.
[2] *See id.*, Appendix C, attached hereto.
[3] *See id,* Appendix D, attached hereto..

The majority opinion in *Garcetti v. Ceballos* referred to "the powerful network of legislative enactments – such as whistle-blower protection laws and labor codes – available to those who seek to expose wrongdoing." Justice Souter's dissent referred to the state and federal whistleblower protections as a "patchwork" with provisions varying from state to state.

What is not a matter of opinion, however, is that Ceballos could have pursued whistleblower remedies under California law. Cal. Govt. Code Ann. § 8547.8 (West 2005); Cal. Lab. Code Ann. § 1102.5 (West Supp. 2006). It is not clear from the record in the *Garcetti v. Ceballos* case why Ceballos chose to pursue First Amendment remedies, rather than remedies under California whistleblower protection statutes. In any event, the Supreme Court's holding that Ceballos had no remedy under the First Amendment has no precedential effect with respect to any claims Ceballos may have under California law.

IV. CONCLUSION

The ruling in *Garcetti v. Ceballos* is consistent with prior Supreme Court precedents under the First Amendment, and does not reverse prior decisions which protect some forms of government employee speech within the workplace. The ruling also has no direct effect on the myriad whistleblower protections available under federal and state statutes, and under state common law.

APPENDIX A

STATE STATUTES PROTECTING PUBLIC SECTOR EMPLOYEES

This appendix summarizes the state statutes that protect whistleblowers employed in the public sector. Some of these statutes also protect employees in the private sector. Those statutes are also listed in Appendix B. The statutes listed in this appendix may be found in the BNA Labor Relations Reporter's Individual Rights Manual at Tabs 541 through 593.

State	*Coverage*	*Protected conduct*	*Nature of violation for which disclosure is protected*	*Procedure and remedy*	*Opportunity to correct required before protections apply*
ALABAMA Ala. Code §36-26A-1 *et seq.* (2003)	State employees	Employee who reports a violation under oath or in the form of affidavit to a public body.	Violation of law, regulation, or rule of the state or political subdivision of the state.	Civil action within two years, relief including back wages, front wages, and compensatory damages.	N/A
ALASKA Alaska Stat. §39.90.100 *et seq.* (2003)	Employees of the state or local government	Employee or person acting on behalf of employee who reports or is about to report a violation to a public body; participates in a court action, investigation, hearing, or inquiry held by a public body. Employee must have reasonable belief and report in good faith.	Violation of any state, federal, or municipal law, regulation, ordinance; danger to public health and safety; gross mismanagement, substantial waste of funds or abuse of authority; a matter accepted for investigation by the office of the ombudsman; interference or failure to cooperate with an audit or other matter within the authority of the legislative budget and audit committee.	Civil action, relief including punitive damages; civil fine not to exceed $10,000.	Employer may require employee to give notice prior to initiating a report; however, the employee is not required to give prior notice if he/she reasonably believes it would not result in prompt action, the activity is already known to the employer, an emergency is involved, or he/she fears reprisal or discrimination if he or she gives notice.

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(Continued)

State	*Coverage*	*Protected conduct*	*Nature of violation for which disclosure is protected*	*Procedure and remedy*	*Opportunity to correct required before protections apply*
ARIZONA Ariz. Rev. Stat. Ann. §38-531 *et seq.* (West 2003)	Employees of the state or local government, except employees of water and electrical municipal corporations	Employee who reports violation to a public body where employee has reasonable belief.	Violation of any law; mismanagement, a gross waste of monies, or an abuse of authority.	Administrative hearing before appropriate personnel board (not mandatory); relief including compensatory damages and attorneys' fees, costs, back pay, general and special damages, full reinstatement, and injunctive relief; violator receives appropriate disciplinary action including dismissal and civil penalty up to $5,000.	N/A
ARIZONA Ariz. Rev. Stat. Ann. §23-1501 (West 2003)	Public sector employees	Refusal to commit violation; disclosure, in a reasonable manner and with reasonable belief, that the employer has committed or will commit violation.	Act or omission that violates or will violate state constitution or statute.	Unspecified tort damages.	N/A
ARKANSAS Ark. Code Ann. §21-1-601 *et seq.* (Michie 2003)	Employees of the state or local government	Employee who reports in good faith to appropriate authority a violation or suspected violation; participates in government proceeding or inquiry; or objects to or refuses to participate in activity employee reasonably believes to be a violation.	Violation or suspected violation that is not of a merely technical or minimal nature of a state statute or regulation, of a political subdivision ordinance or regulation, or of a code of conduct or code of ethics designed to protect the interest of the public or a public employer; waste of public funds, property, or manpower.	Civil action within 180 days of retaliation, relief including, but not limited to, fringe benefits, retirement service credit, compensation for lost wages, benefits, injunction to restrain continued violation, reinstatement to same or equivalent position, and reasonable court costs and attorneys' fees.	Employee must give employer reasonable notice of need to correct the waste or violation.

CALIFORNIA Cal. Gov't Code §8547 *et seq.* (Deering 2003)	Employees of state government or state universities	Employee who reports violation.	Violation of any state or federal law or regulation, fraud, abuse of authority, threat to public health, economically wasteful, gross misconduct, incompetence, or inefficiency.	Employee must file complaint in writing with employer or State Personnel Board with a sworn statement that the complaint is accurate; must file within 12 months of most recent act of reprisal complained of; Administrative hearing before State Personnel Board; violator receives fine not to exceed $10,000 and imprisonment in county jail not to exceed one year. Civil action after filing with State Personnel Board, relief including compensatory, punitive damages, and reasonable attorneys' fees.	N/A
Cal. Gov't. Code §§9149.20 *et. seq.* (Deering 2003)	Any individual appointed by the Governor or employed or holding office in a state agency	Employee who discloses improper governmental activities to a legislative committee. Not protected for disclosures of information prohibited by law.	Violation of any state or federal law or regulation; economically wasteful actions or actions involving gross misconduct, incompetency, or inefficiency.	Civil action, relief not specified.	N/A
Cal. Gov't. Code §53298(a) *et seq.* (Deering 2003)	Local government employees or applicants	Employee who files written complaint of a violation.	Gross mismanagement or significant waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.	Subject to fines, imprisonment, and a civil action for damages, including punitive damages.	N/A

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State	*Coverage*	*Protected conduct*	*Nature of violation for which disclosure is protected*	*Procedure and remedy*	*Opportunity to correct required before protections apply*
Cal. Lab. Code §1102.5 *et seq.* (West 2003)	Public sector employees	Disclosure of violation to government or law enforcement agency where employee has reasonable cause to believe violation has occurred; refusal to participate in an activity that would result in a violation; participating in the protected conduct in any former employment.	Violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.	Civil penalty not to exceed $10,000 for each violation; unspecified damages.	N/A
COLORADO Colo. Rev. Stat. §§24-50.5-101 *et seq.* (2003)	State employees	Employee who discloses violation to any person or testifies about violation before any committee of the general assembly. Not protected if employee knows it to be false or discloses with disregard for the truth or falsity thereof.	Any action, policy, regulation, or practice, including waste of public funds, abuse of authority, or mismanagement.	Administrative hearing before State Personnel Board within 30 days of retaliation; appropriate relief, including, but not limited to, reinstatement, back pay, restoration of lost service credit, and reimbursement for any cost, or attorneys' fees; violator receives mandatory minimum of one-week suspension or equivalent up to and including termination. In certain circumstances employee may bring civil action and may recover damages and costs as determined appropriate by the court.	Employees must make good-faith effort to provide information to supervisor, member of general assembly, or appointing authority before disclosure.

CONNECTICUT Conn. Gen. Stat. Ann. §§31-51m (West 2003)	Employees of the state and any political subdivision of the state	Employee who reports a violation or suspected violation of any state or federal law or regulation to a public body; or an employee that participates in an investigation, hearing, or inquiry held by a public body requesting the employee's participation, or a court action. Not protected if employee knows that the report is false.	Violation of any state or federal law, regulation, any municipal ordinance or regulation, unethical practices, mismanagement, or abuse of authority.	Civil action, within 90 days of exhausting all administrative remedies; relief including reinstatement, back pay, and reestablishment of employee benefits, costs, including reasonable attorneys' fees.	N/A
DELAWARE Del. Code Ann. tit. 29, §5115 (2003)	Employees of the state, school district, county or municipal government	Employee who reports a violation to elected official or Office of Auditor of Accounts. Not protected if employee knows the report is false.	Violation or suspected violation of local, state or federal law or regulation.	Civil action within 90 days, relief including injunction and actual damages.	N/A
DISTRICT OF COLUMBIA D.C. Code Ann. §1-615.51 *et seq.* (2003)	Former or current employees of District government and applicants	Employee who discloses violation, with reasonable belief, to a supervisor or a public body; refuses to comply with an illegal order.	Illegal order is a violation of federal, state, or local law, rule, or regulation; violation of a contract between the District government and District government contractor that is not merely technical or minimal nature; gross mismanagement; waste of public resources or funds; abuse of authority; a substantial and specific danger to the public health and safety.	Civil action within one year, relief including injunction, reinstatement, seniority rights, benefits, back pay and interest, compensatory damages, and reasonable costs and attorneys' fees. Violator subject to disciplinary action including dismissal and civil fine not to exceed $1,000.	N/A

(Continued)

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State	*Coverage*	*Protected conduct*	*Nature of violation for which disclosure is protected*	*Procedure and remedy*	*Opportunity to correct required before protections apply*
FLORIDA Fla. Stat. Ann. §112.3187 *et seq.* (West 2003)	Employees of the state, regional, county, local, or municipal government, or employees of independent contractors engaged in any business or who have entered into a contract with a state agency	Employee who discloses to any agency or federal government entity having the authority to investigate, police, manage, or otherwise remedy the violation or act; however, for disclosures concerning a local government entity the information must be disclosed to a chief executive officer or other appropriate local official; employee participation in any inquiry conducted by a government agency; employee refusal to participate in any prohibited adverse action. Not protected if disclosure made in bad faith or for a wrongful purpose.	Any violation or suspected violation of any federal, state or local law, rule, or regulation that creates and presents a substantial and specific danger to the public's health, safety, or welfare; any act or suspected act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, suspected or actual Medicaid fraud or abuse, or gross neglect of duty.	Administrative hearing, complaint must be made within 60 days of retaliation. Civil action within 180 days after entry of final decision by the local governmental authority or termination of investigation, relief including reinstatement, compensatory damages for lost wages, benefits, or other remuneration, reasonable costs and attorneys' fees, issuance of an injunction, and temporary reinstatement is available pending final outcome of the complaint to all employees except municipal employees. A person who willfully and knowingly discloses records made confidential commits a misdemeanor of the first degree.	N/A
GEORGIA Ga. Code Ann. §45-1-4 (2003)	State employees, except employees of the office of the Governor, the judicial branch, and the legislative branch	Employee who reports a violation to employer. Not protected if employee knows that report was false or acted with willful disregard for its truth or falsity.	Fraud, waste, abuse in or relating to any state program and operation.	Civil action to have the retaliatory action set aside.	N/A

HAWAII Haw. Rev. Stat. Ann. §378-61 *et seq.* (Michie 2003)	Employees of the state or political subdivisions of the state	Employee who reports, or is about to report, to the employer or a public body; or an employee that is requested to participate in an investigation, hearing, or inquiry held by the requesting public body, or a court action. Not protected if employee knows report is false.	Violation or suspected violation of any federal, state, or local law, rule, ordinance, or regulation.	Civil action within two years of retaliation, relief including reinstatement, back pay, fringe benefits, seniority rights, injunctive relief, actual damages, attorneys' fees, and witness fees; the violator shall be fined not less than $500 nor more than $5,000 for each violation.	N/A
IDAHO Idaho Code §6-2101 *et seq.* (Michie 2003)	Employees of the state or political subdivisions of the state; employees of government entities who are eligible to participate in the public employees' retirement system	Employee who reports a violation in good faith to employer; participates in an investigation, hearing, court proceeding, legislative or other inquiry, or other administrative review; or objects to or refuses to carry out a directive that the employee reasonably believes to be a violation. Confidential communications not protected.	As to reporting: violation or suspected violation of a state or federal law, rule, or regulation, existence of waste of public funds, property, or manpower; as to refusing to participate: violation of a state or federal law, rule, or regulation.	Civil action with in 180 days of retaliation, relief including injunctive relief, reinstatement, full fringe benefits and seniority rights, lost wages, benefits, compensatory damages, court costs, and attorneys' fees; civil fine of not more than $500.	Such communications shall be made at a time and in a manner that gives the employer reasonable opportunity to correct the waste or violation.
ILLINOIS 20 Ill. Comp. Stat. §415/19c.1 (2003)	State employees	Employee who discloses a violation with reasonable belief; engages in any related activity.	Violation of law, rule, or regulation; mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety if the disclosure is not specifically prohibited by law.	None specified.	N/A

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State	*Coverage*	*Protected conduct*	*Nature of violation for which disclosure is protected*	*Procedure and remedy*	*Opportunity to correct required before protections apply*
INDIANA Ind. Code Ann. §4-15-10-4 (West 2003)	State employees	Employee who reports a violation in writing, unless employee knows it is false.	Violation of federal law or regulation, state law or rule, or political subdivision ordinance; misuse of public resources.	Administrative appeal.	Employee must disclose to supervisor or appointing authority, unless that person committed violation, and give reasonable time to correct.
IOWA Iowa Code §70A.28 *et seq.* (2003)	State employees	Disclosure of a violation to member of General Assembly, any other public official or law enforcement agency where employee has reasonable belief.	Violation of law or rule, mismanagement, gross abuse of funds, abuse of authority, or substantial and specific danger to public health and safety.	Civil action, relief including reinstatement, with or without back pay, or any other equitable relief the court deems appropriate, including attorneys' fees; injunctive relief; violation of statute is a simple misdemeanor.	N/A
KANSAS Kan. Stat. Ann. §75-2973 (2003)	State employees	Employee who reports a violation to any person, agency, or organization, unless employee knows of falsity or recklessly disregards falsity; discussing operations of agency or other public concerns with members of legislature or auditing agency.	Violation of state or federal law, rules, or regulations.	Administrative hearing with the State Civil Service Board for classified employees within 90 days of alleged violation, violator may be suspended on leave without pay for not more than 30 days, or in the case of repeated violations may require termination and disqualification for state employment for 2 years; relief including costs and attorneys' fees. Civil action for unclassified employees within 90 days of violation, relief including costs	Statute specifically prohibits any requirement of prior disclosure to supervisor.

KENTUCKY Ky. Rev. Stat. Ann. §61.101 *et seq.* (Banks-Baldwin 2003)	Employees of the state and political subdivisions of the state	Employee, or person acting on employee's behalf, who in good faith reports or is about to report a violation or suspected violation to judicial, legislative, or enforcement agencies; or who testifies in an official proceeding. Not protected if employee knows information is false or discloses with reckless disregard for its truth or falsity.	Violation of any local, state, or federal law, statute, executive order, administrative regulation, mandate, rule, or ordinance; or mismanagement, waste, fraud, abuse of authority, or endangerment of public health or safety.	Administrative hearing, remedies not specified. Civil action within 90 days of violation in addition to administrative remedies, relief including reinstatement, injunctive relief, and punitive damages.	Statute specifically prohibits any requirement of prior disclosure to supervisor.
LOUISIANA La. Rev. Stat. Ann. §42:1169 (West 2003)	Public employees	Employee who reports a violation to her agency head, the board, or a person or entity of competent authority or jurisdiction with reasonable belief.	Violations of any provisions of law within the jurisdiction of the board or any order, rule, or regulation, or any other acts of impropriety related to the scope or duties of public employment or public office.	Administrative hearing, relief including reinstatement, lost income and benefits for period of suspension, and compensatory damages.	N/A
La. Rev. Stat. Ann. §23:967 (West 2003)	Public employees	Employee who in good faith discloses or threatens to disclose, provides information or testifies before any public body, or objects or refuses to participate in an employment act or practice that is in violation of the law.	Violation of state law or of environmental law, rule, or regulation.	Civil action; relief includes compensatory damages, back pay, benefits, reinstatement, reasonable attorneys' fees, court costs.	Must first advise employer of the violation.

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State	Coverage	Protected conduct	Nature of violation for which disclosure is protected	Procedure and remedy	Opportunity to correct required before protections apply
MAINE Me. Rev. Stat. Ann. tit. 26, §831 *et seq.* (West 2003)	Employees of the state, political subdivisions of the state, and school employees	Employee, or person acting on behalf of employee, who reports in good faith to the employer or public body with reasonable cause to believe; is requested by public body to participate in an investigation, hearing, or inquiry held by that public body, or in a court action; refuses to carry out a directive that would expose someone to a condition that would result in serious injury or death; is required to and does report suspected neglect, abuse, or exploitation.	Violation of federal or state law or rule; or a practice that would risk the health and safety of the employee or others; or an act or omission of a health care provider that constitutes a deviation from the applicable standard of care.	Administrative hearing before the Maine Human Rights Commission; remedies not specified. Violators may be subject to a fine of $10 for each day of willful violation.	Employee must first bring the violation to the attention of a person having supervisory authority with the employer and has allowed the employer a reasonable opportunity to correct that violation, condition, or practice. Prior notice to an employer is not required if the employee has specific reason to believe that reports to the employer will not result in promptly correcting the violation, condition, or practice.
MARYLAND Md. Code Ann., State Pers. & Pens. §5-301 *et seq.* (2003)	State employees in the executive branch	Employee discloses information with reasonable belief, disclosure of information protected by law may be made to only the Attorney General.	Violation of law; an abuse of authority, gross mismanagement, or gross waste of money; a substantial and specific danger to public health or safety.	Administrative hearing, complaint filed within six months of retaliation, relief including removal of detrimental information from personnel file, appropriate remedial action, reinstatement or promotion, back pay, grant leave or seniority, take appropriate disciplinary action, costs and attorneys' fees.	N/A

MASSACHUSETTS Mass. Gen. Laws Ann. ch. 149, §185 (2003)	Employees of the state or local government	Employee discloses or threatens to disclose a violation of the employer or another employer who the employee's employer has a business relationship with, to a supervisor or public body with reasonable belief; or provides information to, or testifies before, a public body; or objects to, or refuses to participate in, any activity, policy, or practice reasonably believed to be a violation.	Violation of a law, rule, or regulation, which the employee reasonably believes poses a risk to public health, safety, or the environment.	Civil action within two years of violation, all remedies available to common law tort actions, in addition the court may issue temporary restraining orders, temporary injunctive relief, reinstatement, benefits, trebled damages, reasonable attorneys' fees and costs.	Must first bring disclosure to the attention of a supervisor of the employee by written notice and afford the employer a reasonable opportunity to correct the activity. Not required to give opportunity to correct if he is reasonably certain that the policy is known to one or more supervisors of the employer and it is emergency in nature, the employee reasonably fears physical harm as a result of the disclosure, or makes the disclosure to a public body for purpose of providing evidence of a crime.
MICHIGAN Mich. Comp. Laws Ann. §15.361 *et seq.* (West 2003)	Employees of the state or political subdivisions of the state, except state classified civil service employees	Employee reports or is about to report to a public body, unless the employee knows that the report is false; is requested by public body to participate in investigation, hearing, or inquiry of that public body, or a court action; employee must show by clear and convincing evidence that he was about to report.	Violation or suspected violation of a federal, state, or local law, regulation, or rule.	Civil action, within 90 days of the retaliation, relief including reinstatement, back pay, reinstatement of fringe benefits, seniority rights, injunctive relief, actual damages, and attorneys' fees; violator shall be liable for civil fine not more than $500.	N/A

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State	*Coverage*	*Protected conduct*	*Nature of violation for which disclosure is protected*	*Procedure and remedy*	*Opportunity to correct required before protections apply*
MINNESOTA Minn. Stat. Ann. §181.931 *et seq.* (West 2003)	Employees of the state and political subdivisions of the state	Employee reports in good faith; is requested by a public body to participate in an investigation, hearing, or inquiry by a public body; refuses order to perform action employee reasonably believes to be a violation; not protected if employee makes statements knowing that they are false or in reckless disregard of the truth.	Violation or suspected violation of any federal or state law or rule; situation in which the quality of health care services violates a known standard and potentially places the public at risk of harm.	Civil action to recover any and all damages recoverable at law, costs and disbursements, including reasonable attorneys' fees, and may receive injunctive and other equitable relief.	N/A
MISSISSIPPI Miss. Code. Ann. §25-9-171 *et seq.* (2003)	Employees of the state or local government	Employee reports or provides information in good faith to a state investigative body, including Attorney General, State Auditor, and Ethics Committee. Not protected if employee knowingly and intentionally provides false information to a state investigative body.	Violation of any federal or state law or regulation; or is an abuse of authority, results in substantial abuse, misuse, destruction, waste, or loss of public funds or public recourse; a substantial and specific danger to the public health or safety; or discrimination based on race or gender.	Administrative hearing, damages including back pay and reinstatement, injunctive relief, compensatory damages, court costs and reasonable attorneys' fees. Each member of an agency's governing board or authority may be found individually liable for a civil fine of up to $10,000.	N/A

MISSOURI Mo. Rev. Stat. §105.055 (2003)	State employees	Employee who discloses violation or discusses the operation of agency with state auditor or members of legislature. Not protected if employee knew information was false, the information is confidential, or the disclosure relates to the employee's own violations, mismanagement, gross waste of funds, abuse of authority, or endangerment of the public health or safety.	Violation of any law, rule, or regulation; or mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety.	Administrative hearing filed within 30 days of the retaliation, violator may be suspended up to 30 days without pay, or forfeiture of position in cases of willful or repeated violations; board may modify or reverse agency's action and order appropriate relief for the employee.	Statute specifically prohibits any requirement of prior disclosure to supervisor.
MONTANA Mont. Rev. Code Ann. §39-2-901 *et seq.* (Smith 2003)	Public employees	Employee who reports violation or refuses to execute a direction that is a violation.	Violation of public policy, defined as a policy concerning public health, safety, or welfare that is established by constitutional provision, statute, or administrative rule.	Employee must exhaust employer's internal grievance procedures prior to filing a civil case; relief includes lost wages and fringe benefits, interest, punitive damages.	N/A
NEBRASKA Neb. Rev. Stat. §81-2701 *et seq.* (2003)	Employees of any governmental unit excluding courts, the legislature, the governor, and interstate instrumentalities	Employee who reports with reasonable belief to Public Counsel or any elected state official; employee who provides information or testimony pursuant to an investigation or hearing held under the State Government Effectiveness Act.	Violation of any law, an action that results in gross mismanagement or gross waste of funds, or creates a substantial and specific danger to public health or safety.	Administrative hearing, relief including back pay, or other relief as it deems appropriate, including attorneys' fees.	N/A

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State	*Coverage*	*Protected conduct*	*Nature of violation for which disclosure is protected*	*Procedure and remedy*	*Opportunity to correct required before protections apply*
NEVADA Nev. Rev. Stat. §281.611 *et seq.* (2003)	Employees of the state or local government	Employee who reports a violation.	Violation of any state law or regulation, local ordinance, abuse of authority, substantial and specific danger to the public health or safety, or gross waste of public money.	Administrative hearing with a hearing officer of the department of personnel who may issue an order directing the proper person to cease retaliation. Retaliation must occur within 2 years from date of disclosure.	N/A
NEW HAMPSHIRE N.H. Rev. Stat. Ann. §275-E:1 *et seq.* (2003)	Employees of the state or local government	Employee who reports a violation in good faith; participates in any investigation, hearing, or inquiry; or refuses to execute a directive that is a violation.	Violation of any federal, state, or local law or rule.	Administrative hearing with the commissioner of labor, after any grievance procedure or similar process available at the employee's place of employment, remedies including reinstatement, back pay, fringe benefits, and seniority rights, or injunctive relief.	Employee must first bring the alleged violation to the attention of a supervisor and allow the employer reasonable opportunity to correct, unless the employee has specific reason to believe that reporting such a violation would not result in prompt correction.

NEW JERSEY N.J. Stat. Ann. §34:19-1 *et seq.* (West 2003)	Employees of the state, county, municipality, or any other political subdivision of the state	Employee who discloses, or threatens to disclose, a policy of the employer or employer with whom the employee's employer has a business relationship, to a supervisor or public body with reasonable belief; provides information to any public body conducting an investigation, hearing, or inquiry; or objects, or refuses to participate in, any activity that the employee reasonably believes is a violation, is criminal, or is incompatible with public policy concerns of public health and environmental protection; not protected if employee's action was without basis in law or fact.	Violation of law, rule, or regulation; or improper quality of patient care by an employee licensed or certified in the health care professional.	Civil action within one year of retaliation, remedies including all remedies available in common law tort actions, as well as other legal or equitable relief including injunctive relief, reinstatement of employee, lost wages and benefits, court costs and attorneys' fees, and punitive damages; violator may be fined no more than $1,000 for first violation and not more than $5,000 for each subsequent violation.	Employee must bring the complaint to the attention of a supervisor of the employee by written notice, and afford the employer reasonable opportunity to correct the activity; not required where employee is reasonably certain the activity is known to one or more supervisors of the employer or where the employee reasonably fears physical harm as a result of the disclosure; however, exceptions apply to only emergency situations.

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State	*Coverage*	*Protected conduct*	*Nature of violation for which disclosure is protected*	*Procedure and remedy*	*Opportunity to correct required before protections apply*
NEW YORK N.Y. Civ. Serv. Law §75-b (McKinney 2003)	Any public employee, except judges or justices of the unified court system and members of the legislature	Employee who in good faith discloses a violation to a governmental body.	Violation of law, rule, or regulation that creates and presents a substantial and specific danger to the public health or safety; or that the employee reasonably believes constitutes an improper governmental action that violates any federal, state, or local law, rule, or regulation.	Administrative hearing or arbitration if employment contract requires; relief including reinstatement with back pay; and in the case of arbitration may take any other appropriate action as is permitted. Civil action, if not subject to administrative hearing or arbitration, within one year of retaliation; relief including injunctive relief, reinstatement of the employee, reinstatement of benefits and seniority rights, compensation for lost wages and benefits, and court costs and attorneys' fees.	Prior to disclosure employee shall have made a good faith effort to provide the appointing authority or designee a reasonable time to take appropriate action unless there is imminent and serious danger to public health and safety.
N.Y. Lab. Law §740 (McKinney 2003)	Public sector employees	Employee who discloses or threatens to disclose to a supervisor or to a public body; provides information to or testifies before any public body conducting an investigation, hearing, or inquiry; objects to or refuses to participate in a violation.	Activity, policy, or practice of the employer that creates and presents a substantial and specific danger to the public health or safety; violation of any state or federal law, rule, or regulation.	Civil action within one year of retaliation; relief includes injunctive relief, reinstatement, restoration of fringe benefits, back pay, costs, and attorneys' fees.	Employee must bring violation to the attention of a supervisor and allow employer a reasonable opportunity to correct violation.

et seq. (2003)		or other appropriate authority, where employee has reasonable belief; reports to public bodies about matters of public concern, or refuses to carry out a directive that may constitute a violation or poses a threat to public safety; not protected if employee knows or has reason to believe that the report is inaccurate.	resources; substantial and specific danger to the public health and safety; or gross mismanagement, gross waste of monies, or gross abuse of authority.	reinstatement of fringe benefits and seniority rights, costs, reasonable attorneys' fees, and for willful violations, treble damages.	appropriate authority.
NORTH DAKOTA N.D. Cent. Code §34-11.1-04 *et seq.* (2003)	Employees of the state and local government, except elected officials in the state or in a political subdivision, members of the legislative council staff, persons holding an appointive statutory office, one deputy or principal assistant and one secretary for each elected or appointive official, and all members of the	Employee who reports to his/her respective agency head, a state's attorney, the attorney general, or an employee organization.	Job-related violation of local, state, or federal law, rule, regulation, or ordinance; job-related misuse of public resources.	Violation is a class B misdemeanor.	N/A

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State	*Coverage*	*Protected conduct*	*Nature of violation for which disclosure is protected*	*Procedure and remedy*	*Opportunity to correct required before protections apply*
NORTH DAKOTA N.D. Cent. Code §34-01-20 *et seq.* (2003)	Public sector employees	Reporting a violation or suspected violation to an employer, governmental body, or law enforcement official in good faith; being requested by a public body or official to participate in an investigation, hearing, or inquiry; refusing to perform an action that the employee believes, and has an objective basis in fact for so believing, to be a violation.	Any violation of a federal, state, or local law, ordinance, regulation, or rule.	Civil action within 180 days of alleged violation; relief includes reinstatement, back pay, fringe benefits, temporary or permanent injunctive relief, costs, and attorneys' fees. Employee must exhaust any available administrative process, including available grievance procedures under a collective bargaining agreement, employment contract, or public employee procedures. Employee also has the option to file a claim with the state department of labor.	N/A

OHIO Ohio Rev. Code Ann. §4113.51 *et seq.* (Anderson 2003)	Employees of state or agency or instrumentality of the state, municipal corporation, county, town, school district, or other political subdivision or agency or instrumentality thereof	Notifying supervisor or other responsible officer of the employer of a violation; notifying supervisor or other responsible officer of the employer of a fellow employee's violation; reporting a violation to any appropriate public official or agency with regulatory authority; making inquiry or acting to determine accuracy of information to make report.	As to notifying employer of violation, it is the violation of any state or federal statute or any ordinance or regulation of a political subdivision that is a criminal offense likely to cause imminent risk of physical harm, a hazard to public health or safety, or is a felony, and that the employer has the authority to correct; as to making a report to a public official, it is a violation of state laws regarding air pollution, solid and hazardous waste, safe drinking water, or water pollution control that is a criminal offense; as to notifying employer of fellow employee matters, it is a violation of state or federal statute, ordinance or regulation of a political subdivision, work rule or company policy that is a criminal offense likely to cause imminent risk of physical harm, a hazard to public health or safety, or is a felony.	Civil action within 180 days of retaliatory action; relief includes injunctive relief, reinstatement, back pay, fringe benefits, costs, reasonable attorneys' fees, witness fees, and in the case of deliberate violations, the court may award back pay with interest.	Statute specifically requires employee to report violation to supervisor or other responsible officer of the employee's employer. First report may be oral, but employee must also provide written report. If the employer does not correct the violation or make a reasonable and good faith effort to correct the violation within 24 hours after the oral notification or the receipt of the written report, whichever is earlier, the employee may file a written report with the prosecuting authority of the county or municipal corporation where the violation occurred, with a peace officer, with the inspector general if within the inspector general's jurisdiction, or with any other appropriate public official or agency that has regulatory authority.

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State	*Coverage*	*Protected conduct*	*Nature of violation for which disclosure is protected*	*Procedure and remedy*	*Opportunity to correct required before protections apply*
OKLAHOMA Okla. Stat. tit. 74, §840-2.5 *et seq.* (2003)	State employees	Employee who discloses public information of a violation; reports violations with reasonable belief; or discusses the operations and functions of the agency with the Governor, members of Legislature, or other person in a position to investigate or initiate corrective action. Not protected if employee knows information to be false, or knowingly and willingly discloses with reckless disregard for its truth or falsity.	As to disclosure, violation of state constitution or law or rule; as to reports, violation of the state constitution, state or federal law or rule or policy; mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety.	Administrative hearing with Oklahoma Merit Protection commission, must file an appeal within 60 days of the alleged violation; corrective action for violator may include suspension without pay, demotion or discharge; any employee found in violation shall be put on probation for 6 months; employee who knowingly and willfully violates shall forfeit his or her position and be ineligible for appointment to or employment in a position in state service for a period of at least one year and no more than five years.	Specifically allows employee to engage in the protected conduct without giving prior notice to the employee's supervisor or anyone else in the employee's chain of command.

Or. Rev. Stat. §659A.200 *et seq.* (2003)	state or an agency or political subdivision, public corporation employees, and public contractor employees	discloses any information with reasonable belief; reports criminal activity by any person, causes a complaint to be filed against any person, has cooperated with law enforcement conducting a criminal investigation, brought a civil proceeding against an employer, or testifies before a civil proceeding, criminal trial, the Legislative Assembly or any of its committees. Not protected if employee knows information to be false, or discloses with reckless disregard for the truth or falsity.	law, rule, or regulation by the state, agency, or political subdivision; mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health and safety.	action following hearing.	requiring any employee to give notice prior to making any disclosure, except that a supervisor can require that an employee inform the supervisor as to official legislative requests for information to the agency or the substance of testimony made, or to be made, by the employee to legislators on behalf of the agency or subdivision. Employees must report to supervisor or designated official if employee reasonably believes that a person is subject to a felony or misdemeanor warrant for arrest.
PENNSYLVANIA 42 Pa. Cons. Stat.Ann. §1421 *et seq.* (West 2003)	Employees of the state or local government	Employee or person acting on behalf of employee who in good faith reports or is about to report a violation to employer; discloses violation to employer, or appropriate authority; is requested to participate in an investigation, hearing, inquiry, or court action.	Violation that is not of a merely technical or minimal nature of any federal or state law or regulation, or of code of ethics designed to protect interest of public or employer; abuse, misuse, destruction, or loss of funds or resources.	Civil action within 180 days of retaliation, relief including reinstatement, back pay, full reinstatement of fringe benefits and seniority rights, actual damages, attorneys' fees, witness fees, and costs; violator receives civil fine not to exceed $500 and suspension for up to six months for person who acted with the intent to discourage the disclosure of criminal activities.	N/A

State	*Coverage*	*Protected conduct*	*Nature of violation for which disclosure is protected*	*Procedure and remedy*	*Opportunity to correct required before protections apply*
RHODE ISLAND R.I. Gen. Laws §28-50-1 *et seq.* (2003)	Employees of the state or municipality	Employee who reports or is about to report to a public body a violation that the employee knows or reasonably believes has occurred or is about to occur; is requested to participate in an investigation, hearing or inquiry held by that public body; refuses to violate or assist in the violation. Not protected if knowingly false report made.	Violation or potential violation of federal, state, or local law, regulation, or rule.	Civil action within 3 years of retaliation, relief including reinstatement, back pay, fringe benefits and seniority rights, actual damages, costs, and attorneys' fees.	N/A
SOUTH CAROLINA S.C. Code Ann. §8-27-10 *et seq.* (Law. Co-op. 2003)	Employees of the state or local government	Employee who in good faith files written report of intentional violation with employer or appropriate public body with authority over possible violation. Not protected if employee makes unfounded report or report amounts to a mere technical violation and not made in good faith.	Violation of federal or state law or regulation or a political subdivision ordinance or regulation, or code of ethics that is not merely technical or of a minimum nature; action resulting in substantial abuse, misuse, destruction, or loss of substantial funds or public resources.	Non-jury civil action within one year after reporting the violation and after the employee exhausts all available grievance or other administrative remedies, relief including reinstatement, lost wages, actual damages not to exceed $15,000, reasonable attorneys' fees not to exceed $10,000 for any trial and $5,000 for any appeal. If employee's report results in saving of any public money, employee is entitled to 25% of public funds saved up to	If a report is made to an entity other than the public body employing the person making the report, the employing body must be notified as soon as practicable by the entity that received the report.

SOUTH DAKOTA S.D. Codified Laws §3-6A-52 (Michie 2003)	State employees	Employee who reports a violation through the chain of command of the employee's department or to the attorney general's office.	Violation of state law.	Administrative hearing, employee may file grievance with the career service commission if there has been a retaliation; relief not specified.	N/A
TENNESSEE Tenn. Code Ann. §50-1-304 (2003)	Employees of the state, local governments, and municipalities	Employee who refuses to participate in, or refuses to remain silent about, a violation. Frivolous lawsuits not protected.	Violation of criminal or civil code of the state or U.S.; or any regulation intended to protect the public health, safety, welfare.	Civil action, relief including reasonable attorneys' fees and costs.	N/A
TEXAS Tex. Gov't Code Ann. §554.001 *et seq.* (Vernon 2003)	Employees of the state and political subdivisions of the state, except independent contractors	Employee who reports a violation in good faith to an appropriate law enforcement authority.	Violation of state or federal statute, local government ordinance, or a rule adopted under a statute or ordinance.	Administrative hearing, employee must initiate action within 90 days under the grievance or appeal procedures of the employing state or local governmental entity. Civil action within 90 days of violation and at least 60 days after initiating administrative procedures, relief including injunctive relief, actual damages, court costs, reasonable attorneys' fees, reinstatement to former position or equivalent position, back pay, reinstatement of fringe benefits and seniority rights; compensatory damages are capped. Supervisor who violates is liable for a civil penalty not to exceed $15,000.	N/A

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State	*Coverage*	*Protected conduct*	*Nature of violation for which disclosure is protected*	*Procedure and remedy*	*Opportunity to correct required before protections apply*
UTAH Utah Code Ann. §67-21-1 *et seq.* (2003)	Employees of the state, political subdivisions of the state, or agency	Employee or person acting on employee's behalf who reports a violation in good faith; participates in an investigation, hearing, court proceeding, legislative or other inquiry, or other form of administrative review; objects to or refuses to carry out a directive that the employee reasonably believes violates a law, rule, or regulation. Employer may not restrict employees' ability to document the existence of a violation.	Existence of any waste of public funds, property, or manpower, or a violation or suspected violation of any federal, state, or local law, rule, or regulation.	Civil action within 180 days of the retaliation, relief including injunctive relief or actual damages, reinstatement at the same level, back pay, reinstatement of fringe benefits and seniority rights, costs, including reasonable attorneys' fees and witness fees; violator is liable for a civil fine of not more than $500.	N/A

WASHINGTON Wash. Rev. Code Ann. §42.40.010 *et seq.* (West 2003)	State employees	Employee who reports a violation in good faith to the State Auditor. Not protected for furnishing knowingly false information.	Violation of federal or state law or rule, if the violation is not merely technical or of minimal nature; a gross waste of public funds or resources; a substantial and specific danger to the public health or safety.	Report to auditor within one year of violation. Administrative hearing or civil action; in administrative hearing, relief including injunctive, reinstatement with or without back pay, and other relief as the administrative law judges see fit, except that damages for humiliation and mental suffering shall not exceed $10,000. Violator may receive civil penalty up to $3,000 and suspension without pay for up to 30 days, at minimum the violator shall have a letter of reprimand in his or her file.	N/A
Wash. Rev. Code Ann. §42.41.010 *et seq.* (West 2003)	Local government employees	Employee who reports a violation in good faith to appropriate governmental body, including the county prosecuting authority.	Violations of federal, state, or local law or rule; abuse of authority; substantial and specific danger to the public health or safety; or a gross waste of public funds.	Administrative hearing, must give written notice to local government within 30 days of retaliation, relief including reinstatement with or without back pay, injunctive relief, costs, and reasonable attorneys' fees; violator may receive civil penalty up to $3,000 and suspension or dismissal.	A local government may require, except in the case of emergency, that before an employee provides information to a person or entity who is not a public official, the employee provide a written report to the local government.

(Continued)

(Continued)

State	*Coverage*	*Protected conduct*	*Nature of violation for which disclosure is protected*	*Procedure and remedy*	*Opportunity to correct required before protections apply*
WEST VIRGINIA W. Va. Code §6C-1-1 *et seq.* (2003)	Employees of the state or local government	Employee or person acting on employee's behalf who reports or is about to report in good faith violations to the employer or to appropriate public bodies; is requested to participate in an investigation, hearing or inquiry held by an appropriate authority or in a court action.	Violations that are not technical or minimal of any federal or state law or regulation, or of code of ethics designed to protect interest of public or employer; substantial abuse, misuse, destruction or loss of federal, state, or local funds or resources.	Civil action within 180 days of retaliation, relief including reinstatement and actual damages, back pay, reinstatement of fringe benefits and seniority rights, costs and attorneys' fees; civil fine not to exceed $500; suspension of violator for up to six months.	N/A
WISCONSIN Wis. Stat. Ann. §230.80 *et seq.* (West 2003)	State employees, not including person employed by office of governor, courts, or legislature, person whose immediate supervisor is assigned to an executive salary group or university senior executive salary group	Disclosure of criminal activity to law enforcement agency; disclosure of violation to any person; unless employee anticipates that disclosure is likely to result in receipt of anything of value by employee's immediate family; testifying or assisting in any proceeding by another employee. Not protected if employee knowingly makes an untrue statement.	Violation of any state or federal statute, rule, or regulation; mismanagement, abuse of authority, substantial waste of public funds, or a danger to public health and safety.	Administrative hearing within 60 days after retaliation, relief including reinstatement with or without back pay, transfer within same governmental unit, expungement of adverse material from personnel file, reasonable attorneys' fees; violator may receive notice placed in personnel file, letter of reprimand, suspension, or termination.	Employee must disclose information in writing to supervisor, and ask commission to which government agency report should be made and disclose information solely to that agency before disclosing to any other person.

WYOMING Wyo. Stat. Ann. §9-11-102 *et seq.* (Michie 2003)	State employees who work an average of 20 hours or more per week during any six-month period, not including independent contractors	Employee who reports a violation in good faith, in writing, to the employer with reasonable belief; participates or is requested to participate in any investigation, hearing or inquiry held concerning a violation; has refused to carry out a directive; refuses to carry out a directive that is beyond scope, terms and conditions of employment that would expose that employee or an individual to a condition likely to result in serious injury or death, after having sought correction by employer.	Violation of federal or state law, regulation, code, or rule; condition or practice that would put at risk the health or safety of the employee or any other individual; fraud, waste, or gross mismanagement in state government office.	Civil action within 90 days of retaliation, after exhausting all administrative remedies, relief limited to reinstatement, back pay, reinstatement of benefits, costs and reasonable attorneys' fees. Employee found to have knowingly made a false report shall be subject to disciplinary action by the employer, up to and including dismissal.	Employee must first bring the violation to the attention of a person having supervisory authority over the employee and allow the employer a reasonable opportunity to correct; prior notice does not apply if the employee reasonably believes that the report may not result in prompt correction; in that case the employee shall report the violation to the department or agency director of the state entity with which he is employed.

APPENDIX C

FEDERAL STATUTES PROTECTING EMPLOYEES

This appendix sets forth the federal civil rights, environmental, public health, and workplace safety statutes that protect employees who report violations of these statutes. While most of these statutes are primarily designed to cover private sector employees, some are sufficiently broad that they may also be interpreted to cover public sector employees. As to public sector employees, however, sovereign immunity issues frequently arise that may preclude coverage, even where the statute appears by its wording to protect public sector employees. Practitioners are advised to carefully research judicial interpretations of the following statutes to determine whether any remedies for public sector employees may exist under these statutes.

Finding List of Statutes Discussed in the Table Below, by Name of Statute (in alphabetical order)

- Age Discrimination in Employment Act (ADEA)
- Asbestos Hazard Emergency Response Act
- Asbestos School Hazard Detection Act
- Clean Air Act (CAA)
- Commercial Fishing Industry Vessel Act
- Comprehensive Environmental Response, Compensation Liability Act (CERCLA)
- Department of Defense Authorization Act of 1984
- Department of Defense Authorization Act of 1987
- Employee Retirement Income Security Act (ERISA)
- Energy Reorganization Act (ERA)
- Equal Employment Opportunity Act (Title VII)
- Fair Labor Standards Act (FLSA)
- False Claims Act (FCA)

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(Continued)

Family and Medical Leave Act (FMLA)
Federal Deposit Insurance Act
Federal Employers' Liability Act (FELA)
Federal Mine Safety & Health Act (FMSHA)
Federal Railroad Safety Act
Federal Water Pollution Control Act
Hazardous Substances Release Act
Health Insurance for the Aged and Disabled, Examination and Treatment for Emergency Medical Conditions and Women in Labor Act
International Safe Container Act
Jury Selection and Service Act
Longshoremen's & Harbor Workers' Compensation Act
Migrant and Seasonal Agricultural Worker Protection Act
Occupational Safety & Health Act (OSHA)
Public Health Service Act
Records and Reports on Monetary Instruments Transactions Act
Safe Drinking Water Act
Sarbanes-Oxley Act
Solid Waste Disposal Act
Surface Mining Control & Reclamation Act
Surface Transportation Assistance Act
Toxic Substances Control Act
Vessels and Seamen Act
Wendell H. Ford Aviation Investment and Reform Act (AIR 21)

Finding List of Statutes Discussed in the Table Below, by Agency Responsible for Enforcement (in alphabetical order)

Department of Labor

- Asbestos Hazard Emergency Response Act
- Clean Air Act
- Comprehensive Environmental Response, Compensation Liability Act (CERCLA)
- Energy Reorganization Act
- Federal Water Pollution Control Act
- Hazardous Substances Release Act
- International Safe Container Act
- Longshoremen's & Harbor Workers' Compensation Act
- Migrant and Seasonal Agricultural Worker Protection Act
- Occupational Safety & Health Act (OSHA)
- Safe Drinking Water Act
- Sarbanes-Oxley Act
- Solid Waste Disposal Act
- Surface Transportation Assistance Act
- Toxic Substances Control Act
- Wendell H. Ford Aviation Investment and Reform Act (AIR 21)

Department of Defense

- Department of Defense Authorization Act of 1984
- Department of Defense Authorization Act of 1987

Equal Employment Opportunity Commission

- Age Discrimination in Employment Act (ADEA)
- Equal Employment Opportunity Act (Title VII)

Federal Mine Safety & Health Review Commission

- Federal Mine Safety & Health Act

National Railroad Adjustment Board

- Federal Railroad Safety Act

Secretary of Interior

- Surface Mining Control & Reclamation Act

Statute	*Substantive Protection*	*Agency Responsible for Enforcement*	*Procedures and Remedies*
Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621 *et seq.* (2000). • Section 623 contains the antiretaliation provision. Section 626 contains the procedures and remedies.	Retaliation prohibited for opposing unlawful practice, testifying, participating or assisting in enforcement proceedings.	Equal Employment Opportunity Commission	Administrative investigation (complaint must be filed with EEOC within 180 or 300 days of alleged discrimination), which may result in prosecution by EEOC or by employee in U.S. District Court (suit must be filed within 2 years, or 3 years for willful violations). Damages include reinstatement, backpay, liquidated damages for willful violations, and attorneys' fees.
Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. §2641 *et seq.* (2000). • Section 2651 contains the antiretaliation provision.	Retaliation prohibited for reporting asbestos in schools to any person, including state or federal government.	Department of Labor	Administrative investigation (90 days to file complaint), action may be brought by Secretary of Labor on employee's behalf in U.S. District Court. Damages include reinstatement and backpay.
Asbestos School Hazard Detection Act of 1980, 20 U.S.C. §3601 *et seq.* (2000). • Section 3608 contains the antiretaliation provision.	Retaliation prohibited, by state or local educational agencies receiving federal assistance to remove asbestos, against employees who bring asbestos problem in schools to attention of public.	None	None

Clean Air Act (CAA), 42 U.S.C. §7401 *et seq.* (2000). • Section 7622 contains the antiretaliation provision.	Retaliation prohibited for commencing proceedings, or for testifying, assisting, or participating in enforcement proceedings.	Department of Labor	Administrative hearing before ALJ (30 days to file complaint), review by Secretary of Labor, appeal to U.S. Court of Appeals. Damages include reinstatement, backpay, compensatory damages, and costs and expenses of witness and attorneys' fees.
Commercial Fishing Industry Vessel Act, 46 U.S.C. §2101 *et seq.* (2000). • Section 2114 contains the antiretaliation provision.	Retaliation prohibited for reporting or preparing to report violations of maritime safety laws or regulations, or refusing to perform duties likely to cause serious injury to the seaman or others.	None	Employee may bring civil action in U.S. District Court for reinstatement, backpay, and costs and attorneys' fees (not to exceed $1,000).
Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §9601 *et seq.* (2000). • Section 9610 contains the antiretaliation provision.	Retaliation prohibited for providing information to state or federal government, filing or testifying, or causing to be filed or testified in enforcement proceedings.	Department of Labor	Administrative investigation by Secretary of Labor (30 days to file complaint), including opportunity for public hearing, appeal to U.S. Court of Appeals. Damages include reinstatement, and a sum equal to the aggregate amount of all costs and expenses (including the attorneys' fees) assessed against violator.

(Continued)

Statute	*Substantive Protection*	*Agency Responsible for Enforcement*	*Procedures and Remedies*
Department of Defense Authorization Act of 1984, 10 U.S.C. §1587 (2000).	Retaliation prohibited against civilian employees of Department of Defense for disclosing violations of laws, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety.	Department of Defense	Administrative investigation by Secretary of Defense, who has authority to correct adverse employment actions.
Department of Defense Authorization Act of 1987, 10 U.S.C. §2409 (2000).	Retaliation prohibited against employees of defense contractors who disclose substantial violations of law relating to defense contracts to Members of Congress or authorized representatives of agencies, Departments of Defense or Justice.	Department of Defense	Administrative investigation by Inspector General of agency. Unless frivolous, shall order reinstatement, back pay, benefits, payment of an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witness fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint.
Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001 *et seq.* (2000). • Section 1140 contains the antiretaliation provision.	Retaliation prohibited for giving information, testifying, or being about to give or testify in any inquiry or proceeding relating to the Welfare and Pension Plans Disclosure Act.	None	Civil action in U.S. District Court for reinstatement, backpay, and attorneys' fees.

Energy Reorganization Act of 1974 (ERA), 42 U.S.C. §5801 *et seq.* (2000). • Section 5851 contains the antiretaliation provision.	Retaliation prohibited for commencing proceedings, or for testifying, assisting, commencing, causing to be commenced, or participating in enforcement proceedings.	Department of Labor	Review by Secretary of Labor (180 days to file complaint), appeal to U.S. Court of Appeals. Damages include reinstatement, backpay, compensatory damages, costs and expenses, and attorneys' fees.
Equal Employment Opportunity Act, (Title VII), 42 U.S.C. §2000e *et seq.* (2000). • Section 2000e-3(a) contains the antiretaliation provision.	Retaliation prohibited for "opposing" unlawful practice, making a charge, or testifying, participating, or assisting in enforcement proceedings.	Equal Employment Opportunity Commission	Administrative investigation (180 or 300 days to file charge with EEOC), which may result in prosecution by EEOC or by employee in U.S. District Court (within 90 days of notice of right to sue). Damages include reinstatement, backpay, attorneys' fees, and other equitable relief. Fine of not more than $1,000 and/or not more than one year in prison.
Fair Labor Standards Act (FLSA), 29 U.S.C. §215(a)(3) (2000).	Retaliation prohibited for filing complaint, testifying or being about to testify, in proceedings, or serving or being about to serve on industry committee.	None	Civil action in state or federal court for reinstatement, promotion, backpay, an equal amount of liquidated damages, and attorneys' fees. Violator may receive fine of no more than $10,000 or imprisonment up to six months.

(Continued)

Statute	*Substantive Protection*	*Agency Responsible for Enforcement*	*Procedures and Remedies*
False Claims Act (FCA), 31 U.S.C. §3729 *et seq.* (2000). • Section 3730(h) contains the antiretaliation provision.	Retaliation prohibited for investigating, initiating, testifying, or providing assistance in any action filed or to be filed.	None	Civil action in U.S. District Court for make whole relief, including reinstatement, two times the amount of backpay, interest on the backpay, an equal amount of liquidated damages, special damages, attorneys' fees and costs.
Family and Medical Leave Act (FMLA), 29 U.S.C. §2611 *et seq.* (2000). • Section 2615 contains the antiretaliation provision.	Retaliation prohibited for opposing unlawful practices, filing a charge or instituting a proceeding, giving or being about to give information in connection with any inquiry or proceeding, or testifying or preparing to testify in any inquiry or proceeding.	None	Civil action in state or federal court for reinstatement, backpay, promotion, actual monetary losses up to a sum equal to 12 weeks of wages or salary, an equal amount in liquidated damages, interest on these damages, attorneys' fees and costs. Complaints can also be brought to the Secretary of Labor for investigation and litigation.

Federal Deposit Insurance Act, 12 U.S.C. §1811 *et seq.* (2000). • Section 1831j contains the antiretaliation provisions.	Retaliation prohibited against employees of depository institutions for providing information to any Federal Banking agency or to the Attorney General regarding a possible violation of law or regulation, or gross mismanagement, gross waste of funds, abuse of authority, substantial and specific danger to public health and safety. Retaliation prohibited against employees of banking agencies for providing information to a bank or banking agency or to the Attorney General.	None	Civil action (within two years) in U.S. District Court for reinstatement or compensatory damages, other appropriate remedies.
Federal Employers' Liability Act (FELA), 45 U.S.C. §51 *et seq.* (2000). • Section 60 contains the antiretaliation provision.	Retaliation prohibited for providing information regarding death or injury of employee.	None	Civil action in U.S. District Court within three years of violation. Fine of not more than $1,000, imprisonment not more than one year.

(Continued)

Statute	*Substantive Protection*	*Agency Responsible for Enforcement*	*Procedures and Remedies*
Federal Mine Safety & Health Act (FMSHA), 30 U.S.C. §801 *et seq.* (2000). • Section 815 contains the antiretaliation provision.	Retaliation prohibited for commencing proceedings, or for testifying or assisting in enforcement proceedings.	Federal Mine Safety & Health Review Commission	Administrative hearing before ALJ (60 days to file complaint), review by Federal Mine Safety & Health Review Commission, appeal to U.S. Court of Appeals. Damages include reinstatement, backpay, and attorneys' fees.
Federal Railroad Safety Act, 49 U.S.C. §20101 *et seq.* (2000). • Section 20109 contains the antiretaliation provision.	Retaliation prohibited for complaints regarding enforcement of federal railroad safety laws, testifying in enforcement proceedings, or refusal to work under hazardous conditions; identity of employees who make disclosures required to be kept confidential.	National Railroad Adjustment Board	Administrative investigation that must be completed within 180 days. Damages include reinstatement, backpay, costs, witness fees, attorneys' fees, and punitive damages not to exceed $20,000.
Federal Water Pollution Control Act of 1972, 33 U.S.C. §1251 *et seq.* (2000). • Section 1367 contains the antiretaliation provision.	Retaliation prohibited for filing, instituting, or causing to be filed or instituted any proceeding, or for testifying in enforcement proceedings.	Department of Labor	Administrative hearing before ALJ (30 days to file complaint), review by Secretary of Labor, appeal to U.S. Court of Appeals. Damages include reinstatement, backpay, compensatory damages, and attorneys' fees.

Hazardous Substances Release Act, 42 U.S.C. §9601 *et seq.* (2000). • Section 9610 contains the antiretaliation provision.	Retaliation prohibited for providing information, initiating proceedings, or for testifying in enforcement proceedings.	Department of Labor	Administrative hearing (30 days to file complaint), appeal to U.S. Court of Appeals. Damages include reinstatement, backpay, compensatory damages, and attorneys' fees.
Health Insurance for Aged and Disabled, Examination and Treatment for Emergency Medical Conditions and Women in Labor, 42 U.S.C. §1395dd (2000).	Retaliation prohibited by a participating hospital that penalizes or takes adverse action against a qualified medical person or physician because the person or physician refuses to authorize the transfer of an individual with an emergency medical condition that has not been stabilized, or against any hospital employee because the employee reports a violation of a requirement of the statute.	None	Civil action within two years of the adverse action. Damages are those available for personal injury under the law of the state in which the hospital is located, and appropriate equitable relief.
International Safe Container Act, 46 U.S.C. app. §1501 *et seq.* (2000). • Section 1506 contains the antiretaliation provision.	Retaliation prohibited for reporting existence of unsafe container or violation of Act to Secretary of Transportation.	Department of Labor	Administrative investigation by Secretary of Labor (60 days to file complaint), who may file action in U.S. District Court seeking appropriate relief, including reinstatement and backpay.

(Continued)

Statute	*Substantive Protection*	*Agency Responsible for Enforcement*	*Procedures and Remedies*
Jury Selection and Service Act of 1968, 28 U.S.C. §1861 *et seq.* (2000). • Section 1875 contains the antiretaliation provision.	Retaliation prohibited for jury service in federal courts.	None	Employees may apply to the U.S. District Court, which may appoint counsel for employees. Damages include reinstatement and backpay.
Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.* (2000). • Section 948a contains the antiretaliation provision.	Retaliation prohibited for having sought workers' compensation, or for testifying in proceedings.	Department of Labor Benefits Review Board	Administrative hearing before ALJ. Damages include reinstatement and backpay.
Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §1801 *et seq.* (2000). • Section 1855 contains the antiretaliation provision.	Retaliation prohibited against migrant workers who, with just cause, file complaint or testify in proceedings, or who exercise any other right under the Act.	Department of Labor	Administrative investigation by the Secretary of Labor (180 days to file complaint), who may bring a civil action in U.S. District Court for reinstatement, backpay, and other damages.
Occupational Safety & Health Act of 1970, 29 U.S.C. §651 *et seq.* (2000). • Section 660 contains the antiretaliation provision.	Retaliation prohibited for filing complaint, testifying in enforcement proceedings, or exercise of any other rights under OSHA (includes limited right to refuse to work).	Department of Labor	Administrative investigation (30 days to file complaint), action may be brought by agency on employee's behalf in U.S. District Court. Damages include reinstatement and backpay.

Public Health Service Act, 42 U.S.C. §201 *et seq.* (2000). • Section 300a-7 contains the antiretaliation provision.	Retaliation prohibited for participation in, or refusal to participate in, sterilization, abortion, or research, on religious or moral grounds.	None	None
Records and Reports on Monetary Instruments Transactions, 31 U.S.C. §5311 *et seq.* (2000). • Section 5328 contains the whistleblower protection provisions.	Retaliation prohibited for providing information to the Secretary of the Treasury, the Attorney General, or any federal supervisory agency regarding a possible violation by the financial institution or nonfinancial trade or business, or any director, officer, or employee of the financial institution or nonfinancial trade or business.	None	Civil action; court may order reinstatement, compensatory damages.
Safe Drinking Water Act, 42 U.S.C. §300f *et seq.* (2000). • Section 300j-9 contains the antiretaliation provision.	Retaliation prohibited for commencing proceedings, or for testifying, assisting, or participating in enforcement proceedings.	Department of Labor	Administrative hearing before ALJ (30 days to file complaint), review by Secretary of Labor, appeal to U.S. Court of Appeals. Damages include reinstatement, backpay, compensatory damages, and attorneys' fees. If Secretary's order is ignored, Secretary may file suit in U.S. District Court.

(Continued)

Statute	*Substantive Protection*	*Agency Responsible for Enforcement*	*Procedures and Remedies*
Sarbanes-Oxley Act of 2002 (civil whistleblower provision only), 18 U.S.C.A. §1514A (West Supp. 2004).	Retaliation prohibited for providing information, assisting investigation, filing a complaint, or testifying, participating, or assisting in a proceeding relating to federal fraud laws.	Department of Labor	Administrative hearing before ALJ (90 days to file complaint), review by the Secretary of Labor (who has delegated authority to the Administrative Review Board), appeal to U.S. Court of Appeals. If 180 days pass after filing complaint and no final decision has been issued, claims may be brought in federal district court. Damages include reinstatement, backpay, compensatory damages, attorneys' fees, and costs.
Solid Waste Disposal Act, 42 U.S.C. §6901 *et seq.* (2000). • Section 6971 contains the antiretaliation provision.	Retaliation prohibited for commencing proceedings, or for testifying, assisting, or participating in enforcement proceedings	Department of Labor	Administrative hearing before ALJ (30 days to file complaint), review by Secretary of Labor, appeal to U.S. Court of Appeals. Damages include reinstatement, backpay, compensatory damages, attorneys' fees, and costs.
Surface Mining Control & Reclamation Act of 1977, 30 U.S.C. §1201 *et seq.* (2000). • Section 1293 contains the antiretaliation provision.	Retaliation prohibited for filing complaint or testifying in enforcement proceedings.	Secretary of Interior	Administrative hearing (30 days to file complaint), review in U.S. Court of Appeals. Damages include reinstatement, backpay and attorneys' fees.

Surface Transportation Assistance Act, 49 U.S.C. §31100 *et seq.* (2000). • Section 31105 contains the antiretaliation provision.	Retaliation prohibited for filing a complaint or instituting any proceeding relating to violations of motor vehicle safety rules, testifying in such proceeding, or refusing to operate unsafe vehicle.	Department of Labor	Administrative investigation by Secretary of Labor (180 days to file complaint), appeal to U.S. Court of Appeals following a hearing. Damages include reinstatement, back pay, compensatory damages, and attorneys' fees. If Secretary's order is ignored, Secretary may file suit in U.S. District Court.
Toxic Substances Control Act, 15 U.S.C. §2601 *et seq.* (2000). • Section 2622 contains the antiretaliation provision.	Retaliation prohibited for commencing proceedings, or for testifying, assisting, or participating in enforcement proceedings.	Department of Labor	Administrative hearing before ALJ (30 days to file complaint), review by Secretary of Labor, appeal to U.S. Court of Appeals. Damages include reinstatement, backpay, compensatory damages, and attorneys' fees. If Secretary's order is ignored, Secretary may file suit in U.S. District Court.
Vessels and Seamen Act, 46 U.S.C. §2101 *et seq.* (West Supp. 2003). • Section 2114 contains the antiretaliation provision.	Retaliation prohibited for reporting or preparing to report violations of maritime safety laws or regulations, or refusing to perform duties likely to cause serious injury to the seaman or others.	None	Civil action in U.S. District Court for reinstatement, backpay, and costs and attorneys' fees (not to exceed $1,000).

(Continued)

Statute	*Substantive Protection*	*Agency Responsible for Enforcement*	*Procedures and Remedies*
Wendell H. Ford Aviation Investment and Reform Act (AIR 21), 49 U.S.C. §42121 (2000).	Retaliation prohibited for providing information to employer or federal government, filing or being about to file a proceeding about a violation, or testifying or assisting in such a proceeding.	Department of Labor	Administrative investigation by Secretary of Labor (90 days to file complaint), including opportunity for hearing on the record, appeal to U.S. Court of Appeals. Damages include reinstatement, backpay, compensatory damages, costs and expenses, and attorneys' fees. If a claim is frivolous or brought in bad faith, employer may be awarded reasonable attorneys' fees not to exceed $1,000.

D

APPENDIX D

COMMON LAW PUBLIC POLICY PROTECTIONS FOR WHISTLEBLOWERS

; appendix sets forth a state-by-state analysis of whether the courts of the urisdictions in the United States (including the District of Columbia, Puerto), and the Virgin Islands) have held, or stated in *dicta,* that they would recog- a public policy cause of action, and whether the public policy exception in ı jurisdiction has been extended to protect whistleblowers. At the time of this ing, 45 of 53 jurisdictions have recognized public policy claims of one form nother. With the exception of four states (Arkansas, Idaho, South Dakota, Wisconsin), the public policy claim sounds in tart rather than contract. Forty ;dictions have extended the public policy doctrine to protect whistleblowers er circumstances that may vary significantly:

- Some jurisdictions (e.g., Texas) protect only passive whistleblowers who refuse to commit criminal violations.
- Other jurisdictions (e.g., California, Illinois, and New Jersey) protect many forms of passive, active, internal, and external whistleblowing about violations of both civil and criminal law.

Thus, practitioners must be careful to understand the specific contours of public policy exception under the law of the applicable jurisdiction. For that on, the discussion below mentions not only representative cases in which courts have recognized public policy causes of action, but also representative s in which the courts have declined to (1) recognize public policy causes ction; (2) protect whistleblowing under any circumstances; or (3) protect ain types of whistleblowing.

Some states have enacted whistleblower protection statutes in addition to gnizing common law causes of action in favor of whistleblowers. This ap- lix sets forth only common law protections under state law. State statutes ecting whistleblowers are set forth in Appendix A (protections for public or employees) and Appendix B (protections for private sector employees). es discussing the interplay between common law and statutory whistleblower ections in specific jurisdictions are also discussed below, when such cases arisen.

ALABAMA

No public policy exception has been recognized.

- *Wright v. Dothan Chrysler Plymouth Dodge, Inc.,* 658 So. 2d 428 (Ala. 1995) (upholding right of employer to discharge employee and stating

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that it is the function of the legislature, not the courts, to create a public policy exception to the employment-at-will doctrine);

- *Hoffman-LaRoche v. Campbell,* 512 So. 2d 725, 2 IER Cases 739 (Ala. 1987) (upholding the lower court's judgment for the employee, however stating that the court had repeatedly refused to recognize the public policy exception);
- *Dykes v. Lane Trucking, Inc.*, 652 So. 2d 248 (Ala. 1994) (affirming summary judgment for the employer and refusing to carve out a public policy exception to the employee-at will doctrine); and
- *Grant v. Butler,* 590 So. 2d 254, 6 IER Cases 1612 (Ala. 1991) (not allowing claim where employee reported allegedly unsafe conditions under federal Occupational Safety and Heath Act).

However, the Alabama legislature has made it illegal for an employer to terminate an employee for requesting workers' compensation benefits. *See* ALA. CODE §25-5-11.1 (2003). That statute has been construed to allow causes of action for constructive discharge.

- *Ex parte Breitsprecher,* 772 So. 2d 1125, 16 IER Cases 557 (Ala. 2000).

ALASKA

Alaska courts have not rejected a public policy exception, but they have encompassed it within the implied covenant of good faith and fair dealing.

- *Knight v. American Guard & Alert, Inc.,* 714 P.2d 788 (Alaska 1986) (recognizing claim for breach of covenant of good faith for security officer who claimed he was fired in retaliation for informing pipeline operator of alcohol use and drug abuse of another security officer);
- *Luedtke v. Nabors Alaska Drilling, Inc.,* 768 P.2d 1123, 4 IER Cases 129 (Alaska 1989) (upholding discharge of employees for failing to submit to urine analysis screening although court recognized strong public policies supporting employee privacy), *appeal after remand,* 834 P.2d 1220, 7 IER Cases 834 (Alaska 1992);
- *Cameron v. Beard,* 864 P.2d 538, 145 L.R.R.M. 2553 (Alaska 1993) (upholding verdict in favor of employee and holding that a general release of workers' compensation claims does not also release retaliatory discharge claims; finding that constructive discharge should be distinguished from the public policy exception to the employment-at-will doctrine; and recognizing that a small minority of jurisdictions have defined it as a breach of an implied contractual duty not to discharge an employee for an act done in the public interest); and
- *Lincoln v. Interior Regional Housing Authority,* 30 P.3d 582, 17 IER Cases 1638 (Alaska 2001).

ARIZONA

In 1996, the Arizona legislature passed the Employment Protection Act, which creates a cause of action in favor of employees who are terminated in retaliation for disclosing violations of Arizona's Constitution or statutes. *See* ARIZ. REV. STAT. ANN. §23-1501(3)(c)(ii) (West 2004), and related discussion in Appendices A and B. The Employment Protection Act is the exclusive remedy for wrongful termination in violation of public policy.

- *Cronin v. Sheldon,* 195 Ariz. 531, 991 P.2d 231, 15 IER Cases 1345 (1999).

The Arizona courts had previously recognized the public policy cause of action and extended its protection to whistleblowers in some circumstances.

- *Wagenseller v. Scottsdale Memorial Hospital,* 147 Ariz. 370, 710 P.2d 1025, 1 IER Cases 526 (1985) (recognizing public policy claim based on indecent exposure laws for employee who refused to "moon" co-workers in skit on company outing);
- *Vermillion v. AAA Pro Moving & Storage,* 146 Ariz. 215, 704 P.2d 1360, 119 LRRM 2337 (Ariz. Ct. App. 1985) (recognizing claim for employee allegedly dismissed for refusing to participate in theft);
- *Wagner v. City of Globe,* 150 Ariz. 82, 722 P.2d 250, 1 IER Cases 501 (1986) (recognizing claim by employee terminated from the police force because he refused to conceal the illegal arrest and detention of a citizen and was instrumental in having the citizen brought before a magistrate); and
- *Murcott v. Best Western International, Inc.,* 198 Ariz. 349, 9 P.3d 1088, 16 IER Cases 1277 (Ariz. Ct. App. 2000) (internal whistleblowing protected).

— *But see Garber v. Embry-Riddle Aeronautical University,* 259 F. Supp. 2d 979, 14 AD Cases 518 (D. Ariz. 2003) (denying reconsideration of dismissal of the employee's whistleblower claim filed under the Arizona Whistleblower Statute, ARIZ. REV. STAT. ANN. §23-1501(3)(c)(ii), because the employee's claim was barred by the statute's one-year limitations period); and *Galati v. America West Airlines, Inc.,* 69 P.3d 1011, 20 IER Cases 42 (Ariz. Ct. App. 2003) (upholding dismissal of employee's claim because ARIZ. REV. STAT. ANN. §23-1501(3)(c)(ii) applies only to violations of Arizona law and does not apply to disclosures of violations of federal provisions, statutes, or regulations).

ARKANSAS

Arkansas has recognized the public policy exception (as a contractual theory, not a tort theory) and has extended it to protect whistleblowers in some circumstances.

- *Island v. Buena Vista Resort,* 103 S.W.3d 671 (Ark. 2003) (finding that public policy of the State of Arkansas is violated when an at-will employee

is terminated for rejecting a solicitation to engage in prostitution, and employee had a valid claim of wrongful discharge if she was terminated for refusing her supervisor's sexual propositions); and

- *Sterling Drug, Inc. v. Oxford,* 294 Ark. 239, 743 S.W.2d 380, 3 IER Cases 1060 (1988) (recognizing public policy claim for employee suspected of disclosing employer's submission of false and incomplete pricing data during negotiations for a government contract).

— *But see Ball v. Arkansas Department of Community Punishment,* 10 S.W.3d 873 (Ark. 2000) (denying employee's claim of retaliatory discharge because employee's claim that she was fired in retaliation for "blowing the whistle" on parole hearing procedures did not allege violation of any specific statute).

CALIFORNIA

California has recognized a public policy exception that protects whistleblowers under some circumstances.

- *Tameny v. Atlantic Richfield Co.,* 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330, 1 IER Cases 102 (1980) (finding public policy claim stated by employee who refused to engage in antitrust violations);
- *Garcia v. Rockwell International Corp.,* 187 Cal. App. 3d 1556, 232 Cal. Rptr. 490 (1986) (indicating employee can maintain a tort action for retaliatory discipline against employer where disciplinary action less than termination has been taken against the employee in retaliation for the employee's whistleblowing activities);
- *Semore v. Pool,* 217 Cal. App. 3d 1087, 266 Cal. Rptr. 280, 5 IER Cases 129 (1990) (claim stated by employee who refused to submit to drug testing);
- *Green v. Ralee Engineering Co.,* 19 Cal. 4th 66, 960 P.2d 1046, 78 Cal. Rptr. 2d 16, 14 IER Cases 449 (1998) (finding that a fundamental public policy based on disclosure of violation of federal aviation regulation could serve as the foundation of an employee's tort action for retaliatory discipline);
- *Phillips v. Gemini Moving Specialists,* 63 Cal. App. 4th 563, 74 Cal. Rptr. 2d 29, 13 IER Cases 1587 (1998) (recognizing public policy claim by employee who complained about the employer setting off the employee's debts from wages due to the employee without the employee's authorization); and
- *Gardenhire v. Housing Authority,* 85 Cal. App. 4th 236, 101 Cal. Rptr. 2d 893, 17 IER Cases 32 (2000) (finding that public employee entitled to bring an action for retaliation even though the public employee reported improprieties internally to her employer and not externally to a separate government agency or law enforcement agency).

— *But see Foley v. Interactive Data Corp.,* 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373, 3 IER Cases 1729 (1988) (explaining that public policy claim stated where claim is based on firmly established policy that benefits

the public generally; however, no claim recognized for employee who was allegedly discharged for reporting prior criminal investigation of co-employee); *Turner v. Anheuser-Busch, Inc.*, 7 Cal. 4th 1238, 32 Cal. Rptr. 2d 223, 9 IER Cases 1185 (1994) (internal company policies not sufficient to support public policy claim); *Luck v. Southern Pacific Transportation Co.*, 218 Cal. App. 3d 1, 267 Cal. Rptr. 618, 5 IER Cases 414 (1990) (not recognizing tort claim for employee who refused to submit to drug testing applying *Foley* criteria); *Daly v. Exxon Corp.*, 55 Cal. App. 4th 39, 63 Cal. Rptr. 2d 727, 12 IER Cases 1531 (1997) (not recognizing public policy claim for wrongful discharge for an employee who complained about unsafe working conditions where the employee's employment contract was for a fixed term and had expired); and *Jersey v. John Muir Medical Center*, 97 Cal. App. 4th 814, 118 Cal. Rptr. 2d 807, 18 IER Cases 888 (2002) (not recognizing tort claim recognized for nursing assistant who refused to dismiss assault claim against patient because the right to bring such a suit could have been expressly waived).

COLORADO

The Colorado Supreme Court has adopted the public policy exception to the at-will employment doctrine that extends to some whistleblowing activity.

- *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 105, 7 IER Cases 77 (Colo. 1992) (upholding the decision for the employee when the employer fired the employee for refusing to perform acts in violation of federal law).

Martin Marietta expanded Colorado's public policy exception to include instances in which the employer discharged the employee after the employee complain about practices that did not violate a statute, but did violate public policy. However, to fall within the exception, the employee must demonstrate that the employer was aware or reasonably should have been aware that the employee's action was based on the employee's reasonable belief that the action ordered by the employer was illegal, against public policy, or violative of the employee's legal rights as a worker.

- *Rocky Mountain Hospital & Medical Service v. Mariani*, 916 P.2d 519, 11 IER Cases 1153 (Colo. 1996) (determining that Colorado State Board of Accountancy Rules of Professional Conduct were sufficient to establish public policy for the purposes of a wrongful discharge claim);
- *Jones v. Stevinson's Golden Ford*, 36 P.3d 129, 17 IER Cases 865 (Colo. Ct. App. 2001) (recognizing claim for employee allegedly terminated for refusing to sell unnecessary car repairs, based on policy expressed in Colorado consumer protection statutes), *cert. denied* (2001); and
- *Cronk v. Intermountain Rural Electric Association*, 765 P.2d 619, 3 IER Cases 1049 (Colo. Ct. App. 1988) (recognizing public policy claim for public utility employees who refused to testify untruthfully before regulatory commission).

— *But see Coors Brewing Co. v. Floyd*, 978 P.2d 663, 14 IER Cases 1232 (Colo. 1999) (refusing to expand the public policy exception to include a

situation in which an employee performed the illegal act required by his or her employer, and then the employer allegedly fired the employee to cover up the employer's complicity in the crime); *Crawford Rehabilitation Services, Inc. v. Weisman,* 938 P.2d 540, 12 IER Cases 1671 (Colo. 1997) (state regulations regarding rest breaks not a sufficient basis for public policy claim); and *Corbin v. Sinclair Mktg., Inc.,* 684 P.2d 265, 116 LRRM 3223 (Colo. Ct. App. 1984) (not allowing public policy claim when a statute provides the employee with a wrongful discharge remedy).

CONNECTICUT

The common law public policy exception may no longer extend to whistleblowers because the intermediate Connecticut appellate courts have ruled that the exclusive remedy is provided by the Connecticut whistleblower protection statute. As discussed in Appendices A and B, the Connecticut legislature passed an act entitled "Protection of employee who discloses employer's illegal activities or unethical practices." CONN. GEN. STAT. ANN. §31-51m (West 2003). This law makes it illegal for an employer to "discharge, discipline or otherwise penalize any employee because the employee, or a person acting on behalf of the employee[] reports . . . a violation or a suspected violation of any state or federal law or regulation or any municipal ordinance . . . or because an employee is requested by a public body to participate in an investigation, hearing or inquiry held by that public body, or a court action." *Id.* §31-51m(b).

Furthermore, Section 31-51m provides the exclusive remedy for wrongful discharge of both public and private employees for "whistleblowing," and any alternative, common-law cause of action is precluded.

- *Campbell v. Town of Plymouth,* 811 A.2d 243 (Conn. App. Ct. 2002) (finding that plaintiff-employee's claim was time barred because he did not file within the 90-day limitations period.) The courts have found that the statute protects employees when the employees adequately demonstrate the causal connection between the whistleblowing and the statutory violation:
- *Arnone v. Town of Enfield,* 2001 Conn. Super. LEXIS 2009 (July 23, 2001) (holding that the municipal employee had a valid claim against the city under the whistleblower statute because he adequately estabilished a causal connection between his filing a complaint with the state's department of Environmental Protection and his termination 15 months later); and
- *L'Altrella v. Weight Watchers International,* CV 950334348, 1998 Conn. Super. LEXIS 845 (Mar. 16, 1998) (finding that employee made a valid claim under the whistleblower statute when she was terminated after refusing to engage in conduct that allegedly violated the Connecticut Antitrust Act).

— However, the Connecticut state courts do not extend the protection of the whistleblowing statute to employees who intend to, but never actually make certain allegations, or who do not publish their findings in a public forum. *See Tyszkiewicz v. Aaron Manor, Inc.,* CV 970081800S, 1998 Conn. Super. LEXIS 1650 (June 9, 1998) (refusing to protect employee

when the employee only intended to, but never did engage in, reporting health code violations by employer); *Burnham v. Karl & Gelb, P.C.,* 252 Conn. 153, 16 IER Cases 1 (2000) (upholding summary judgment in employer's favor because the plaintiff-employee failed to report her suspicions to a public body).

For the history of the case law before enactment of the whistleblower statute, see *Sheets v. Teddy's Frosted Foods, Inc.,* 179 Conn. 471, 427 A.2d 385, 115 LRRM 4626 (1980) (public policy claim recognized for employee who complained about food packaging violations); and *Girgenti v. Cali-Con Inc.,* 15 Conn. App. 130, 544 A.2d 655 (1988) (finding public policy claim stated by discharged theater employee allegedly fired after he called police and turned on the lights, causing the theater to empty, because he feared there was an intruder in the projection room).

DELAWARE

Delaware has recognized a tort cause of action for wrongful discharge in violation of public policy.

- *Schuster v. Derocili,* 775 A.2d 1029, 17 IER Cases 1159 (Del. 2001) (allowing claim based on public policy expressed in state antidiscrimination statute).

The public policy cause of action may extend to whistleblowers who are terminated in violation of a specifically legislated public policy.

- *Shearin v. E.F. Hutton Group, Inc.,* 652 A.2d 578, 9 IER Cases 1317 (Del. Ch. 1994) (recognizing that legal counsel allegedly fired for refusing to violate her ethical duties stated a cause of action).

— However, Delaware does not recognize a public policy exception for termination of a private sector employee for whistleblowing concerning internal financial and business practices. *See Lord v. Souder,* 748 A.2d 393, 16 IER Cases 373 (Del. 2000).

As discussed in Appendix A, the Delaware legislature has protected public employees fired or threatened after exposing the wrongdoing of their government employer. *See* DEL. CODE ANN. tit. 29, §5115(b) (2003) ("No public employee shall be discharged, threatened or otherwise discriminated against with respect to the terms or conditions of employment because that public employee reported, in a written or oral communication to an elected official, a violation or suspected violation of a law or regulation promulgated under the law of the United States, this State, its school districts, or a county or municipality of this State unless the employee knows that the report is false.").

DISTRICT OF COLUMBIA

The District of Columbia has recognized a public policy cause of action that extends to whistleblowers in some circumstances. The public policy exception

protects employees who are terminated in violation of a "clear showing, based on some identifiable policy that has been 'officially declared'" in a statute or municipal regulation, or in the Constitution.

- *Carl v. Children's Hospital,* 702 A.2d 159, 13 IER Cases 563 (D.C. 1997) (en banc) (reversing the dismissal of employee's claim that she had been terminated in retaliation for publicly opposing tort reform measures);
- *Adams v. George W. Cochran & Co.,* 597 A.2d 28, 6 IER Cases 1392 (D.C. 1991) (finding that discharged at-will employee may sue for wrongful discharge when the sole reason for the discharge is the employee's refusal to drive a vehicle without a current inspection sticker required by municipal regulation);
- *Washington v. Guest Services, Inc.,* 718 A.2d 1071, 14 IER Cases 643 (D.C. 1998) (claim stated by employee allegedly discharged for complaints about sanitary violations);
- *Fingerhut v. Children's National Medical Center,* 738 A.2d 799, 17 IER Cases 1139 (D.C. 1999) (claim allowed even if whistleblower participates in unlawful conduct later reported); and
- *Liberatore v. Melville Corp.,* 168 F.3d 1326, 14 IER Cases 1545 (D.C. Cir. 1999) (embryonic whistleblower protected when threatens to report violations of law).

FLORIDA

No common law public policy cause of action has been recognized in Florida.

- *Smith v. Piezo Technology & Professional Administrators,* 427 So. 2d 182, 117 LRRM 3378 (Fla. 1983) (recognizing only narrow implied right of action in favor of employees terminated in retaliation for filing workers' compensation claim).

As discussed in Appendices A and B, the Florida legislature has enacted statutory causes of action in favor of both public and private employees. The Whistleblower's Act makes it illegal for a government agency or an independent contractor to dismiss or discipline an employee for disclosing to any investigating authority, both internal or external, violations of agency rules or regulations, federal, state, or local laws, or acts of gross mismanagment, malfeasance, misfeasance, or neglect of duty. FLA. STAT. ANN. §112.3187(4)-(6) (West 2004). In addition, the Private Sector Whistleblower Act penalizes any private employer for taking retaliatory personnel action against an employee who has disclosed or threatened to disclose in writing to any appropriate governmental agency, an employer's activity, policy, or practice that violates a law, rule, or regulation. *Id.* §448.102(1). Furthermore, the Act also protects private employees who are fired after either participating or testifying before any appropriate governmental agency concerning the employer's alleged violation or objected to or refused to participate in the employer's activity or practice that violated a law, rule or regulation. *Id.* §448.102(2)-(3). While the statute offers broad protection, the statute clearly states that it applies only to protect the employee when the employee has

"in writing brought the activity, policy, or practice to the attention of a supervisor or the employer and has afforded the employer a reasonable opportunity to correct the activity, policy or practice." *Id.* §448.102(1).

The Florida courts have chosen to read the Whistleblower Act protecting public employees broadly.

- *Irven v. Department of Health & Rehabilitation Services,* 790 So. 2d 403, 405-06, 17 IER Cases 888 (Fla. 2001) (reinstating jury verdict in favor of employee who was fired after she complained in writing interdepartmentally and to her superiors concerning the propriety of an agency decision; the court wrote that the "[Whistleblower] Act is remedial and should be given a liberal construction."); and
- *Martin County v. Edenfield,* 609 So. 2d 27, 8 IER Cases 71 (Fla. 1992) (reversing lower court because the lenient treatment of a co-perpetrator could be used as evidence to infer a violation of the Whistleblower's Act).

The Florida courts have also broadly interpreted the Private Employee Whistleblower Act.

- *Golf Channel v. Jenkins,* 752 So. 2d 561, 15 IER Cases 1574 (Fla. 2000) (recognizing that plaintiff had a valid claim because the Act requires the employee to give the employer written notice and a chance to cure prior to disclosing to a public body only in the case of disclosures of statutory or regulatory breaches, not when an employee refuses to perform an employer's illegal activity).

GEORGIA

No public policy cause of action is recognized.

- *Eckhardt v. Yerkes Regional Primate Center,* 561 S.E.2d 164, 18 IER Cases 1302 (Ga. Ct. App. 2002) (refusing to extend public policy protection to the circumstances and affirming the dismissal of employees' claim that they were wrongfully terminated following their internal reporting that the employer was creating a public health risk by transporting monkeys that were highly contagious with a virulent Herpes B virus);
- *Reilly v. Alcan Aluminum Corp.,* 272 Ga. 279, 528 S.E.2d 238, 16 IER Cases 211 (2000);
- *Jellico v. Effingham County,* 471 S.E.2d 36 (Ga. Ct. App. 1996) (affirming dismissal of a public employee's claim of constructive wrongful termination after employee resigned because his supervisor certified certain buildings for habitation after the employee had refused to certify those same buildings due to code violations, because this type of discharge was not contemplated by the legislature); and
- *Evans v. Bibb Co.,* 178 Ga. App. 139, 342 S.E.2d 484 (1986) (refusing to create a public policy exception for employee alleging wrongful discharge for filing workers' compensation claim).

HAWAII

Hawaii has recognized the public policy exception.

- *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625, 115 LRRM 4817 (1982) (court recognized public policy claim for an employee discharged to prevent the employee from participating in an antitrust investigation); and
- *Mathewson v. Aloha Airlines, Inc.*, 919 P.2d 969, 152 LRRM 2986 (Haw. 1996) (employee's termination because he had allegedly been blacklisted by a union was contrary to the clear public policy against "blacklisting" and discrimination in the hiring, tenure or other conditions of employment with regard to the nonmembership in a labor organization).

The Hawaii courts have extended the public policy exception to include whistleblowing under some circumstances.

- *Smith v. Chaney Brooks Realty, Inc.*, 10 Haw. App. 250, 865 P.2d 170, 175, 10 IER Cases 1111 (1994) (reversing summary judgment for employer when employee claimed that employer fired him in retaliation for his inquiry into a paycheck deduction);
- *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 88 FEP Cases 387 (9th Cir. 2002) (applying Hawaii law and denying employee's retaliation claim stating that there was no causal connection between his filing a claim of sexual harassment and his termination 18 months later; stating that the public policy exception applies to actions against an employer by an at-will employee who was discharged for performing an important public obligation such as whistleblowing or refusing to violate a professional code of ethics); and
- *Morishige v. Spencecliff Corp.*, 720 F. Supp. 829, 4 IER Cases 1271 (D. Haw. 1989) (public policy exception may apply to employee who was allegedly discharged due to objections to his employer's violation of liquor laws and building codes).

— *But see Pagdilao v. Maui Intercontinental Hotel*, 703 F. Supp. 863, 3 IER Cases 1628 (D. Haw. 1988) (finding no free speech claim for employee who allegedly used obscenities in public setting).

IDAHO

Idaho has recognized a public policy exception (as a contractual theory, not a tort theory) that extends to whistleblowers in some circumstances.

- *Thomas v. Medical Center Physicians, P.A.*, 61 P.3d 557 (Idaho 2002) (finding that reporting another physician's misconduct fell under the public policy exception because the conduct alleged by the physicians was unlawful, and it involved the health and welfare of the public);
- *Crea v. FMC Corp.*, 135 Idaho 175, 16 P.3d 272, 17 IER Cases 112 (2000) (recognizing claim for employee allegedly terminated for disclosing that employer had caused contamination that threatened ground water);

- *Hummer v. Evans,* 129 Idaho 274, 923 P.2d 981, 12 IER Cases 122 (1996) (determining that employee was protected for letter written in response to subpoena in criminal sentencing proceeding); and
- *Ray v. Nampa School District No. 131,* 120 Idaho 117, 814 P.2d 17 (1991) (recognizing claim for employee allegedly terminated for reporting building code violations).

— *But see Edmondson v. Shearer Lumber Products,* 139 Idaho 172, 75 P.3d 733, 20 IER Cases 632 (2003) (finding that employee did not have a cause of action against a private sector employer who terminated the employee because of the exercise of the employee's constitutional right of free speech due to the fact that in the private sector, state or federal constitutional free speech cannot, in the absence of state action, be the basis of a public policy exception in wrongful discharge claims).

ILLINOIS

Illinois has recognized the public policy exception.

- *Kelsay v. Motorola, Inc.,* 74 Ill. 2d 172, 384 N.E.2d 353, 115 LRRM 4371 (1978) (public policy claim recognized for an employee discharged for filing workers' compensation claim).

The Illinois Supreme Court has extended the public policy doctrine to protect whistleblowers.

- *Palmateer v. International Harvester Co.,* 85 Ill. 2d 124, 421 N.E.2d 876, 115 LRRM 4165 (1981) (referring to whistleblowers as "citizen crime-fighters");
- *Brandon v. Anesthesia & Pain Management Associates, Ltd.,* 277 F.3d 936, 18 IER Cases 412 (7th Cir. 2002) (recognizing claim based on federal rather than Illinois criminal statutes);
- *Vorpagel v. Maxwell Corp. of America,* 333 Ill. App. 3d 51, 775 N.E.2d 658, 19 IER Cases 209 (2002) (allowing cause of action in favor of employee allegedly terminated for telling state attorney's office about supervisor's admission about crime unrelated to work), *appeal denied,* 202 Ill. 2d 664 (2002);
- *Vance v. Dispatch Management Service,* 122 F. Supp. 2d 910, 15 IER Cases 1776 (N.D. Ill. 2000) (recognizing claim by employee who sought court protective order against threatening co-employee);
- *Stebbings v. University of Chicago,* 312 Ill. App. 3d 360, 726 N.E.2d 1136, 17 IER Cases 1079 (2000) (allowing claim of employee who raised concerns about radiation safety);
- *Fredrick v. Simmons Airlines, Inc.,* 144 F.3d 500, 13 IER Cases 1729 (7th Cir. 1998) (allowing plaintiff's claim even though complaints were made publicly instead of through internal channels); and
- *Bourbon v. Kmart Corp.,* 223 F.3d 469, 16 IER Cases 1032 (7th Cir. 2000) (stating that whistleblower need only have a reasonable belief that law was violated and need not prove actual legal violation).

— *But see Arres v. IMI Cornelius Remcor,* 333 F.3d 812, 20 IER Cases 1866 (7th Cir. 2003) (not recognizing claim for employee allegedly terminated for attempting to follow federal immigration law because federal statute contained no antiretaliation provision, and Illinois law would not imply a remedy); *Buckner v. Atlantic Plant Maintenance, Inc.,* 694 N.E.2d 565, 13 IER Cases 1607 (Ill. 1998) (upholding a former supervisor's motion to dismiss because employee allegedly fired for seeking workers' compensation benefits could bring a retaliatory discharge claim against only the employer); *Jacobson v. Knepper & Moga, P.C.,* 185 Ill. 2d 372, 706 N.E.2d 491, 14 IER Cases 1160 (1998) (not recognizing claim for attorney terminated for disclosing allegedly unlawful debt collection practices of law firm); *Barr v. Kelso-Burnett Co.,* 106 Ill. 2d 520, 478 N.E.2d 1354, 120 LRRM 3401 (1985) (not recognizing cause of action for retaliatory discharge); *Shearson Lehman Bros., Inc. v. Hedrich,* 266 Ill. App. 3d 24, 639 N.E.2d 228, 9 IER Cases 1826 (1994) (not allowing claim where only employee's personal issues regarding compensation involved); *Eisenbach v. Esformes,* 221 Ill. App. 3d 440, 582 N.E.2d 196 (1991) (not allowing claim where employee allegedly was terminated for filing a lawsuit against his employer); and *Balla v. Gambro, Inc.,* 584 N.E.2d 104, 7 IER Cases 1 (Ill. 1991) (affirming summary judgment for employer because in-house counsel who are terminated for whistleblowing activities are not protected under the public policy exception because attorneys already have an ethical obligation under the Model Rules of Professional Conduct to reveal information necessary to prevent a client from committing a crime).

INDIANA

Indiana has recognized the public policy exception, beginning with cases in which employees alleged they had been terminated for filing workers' compensation claims.

- *Frampton v. Central Ind. Gas Co.,* 297 N.E.2d 425, 115 LRRM 4611 (Ind. 1973) (recognizing public policy claim for employee discharged for filing workers' compensation claim); and
- *Dale v. J.G. Bowers, Inc.,* 709 N.E.2d 366, 14 IER Cases 1833 (Ind. Ct. App. 1999).

Indiana has gradually expanded the public policy doctrine to protect passive whistleblowers who allege they were terminated for refusing to commit unlawful acts.

- *McGarrity v. Berlin Metals, Inc.,* 774 N.E.2d 71, 19 IER Cases 889 (Ind. Ct. App. 2002) (protecting employee who refused to misstate company's financial position, potentially in violation of tax laws); and
- *McClanahan v. Remington Freight Lines, Inc.,* 517 N.E.2d 390, 2 IER Cases 1888 (Ind. 1988) (recognizing claim for employee fired for refusing to drive truck exceeding state weight limit).

— However, the Indiana courts have not extended the public policy exception to active whistleblowers. *See Hamann v. Gates Chevrolet, Inc.*, 723 F. Supp. 63, 4 IER Cases 890 (N.D. Ind. 1989), *aff'd*, 910 F.2d 1417, 5 IER Cases 1099 (7th Cir. 1990); *Morgan Drive Away, Inc. v. Brant*, 489 N.E.2d 933, 1 IER Cases 961 (Ind. 1986) (not recognizing claim for employee allegedly terminated for filing small claims suit against employer); *Campbell v. Eli Lilly & Co.*, 413 N.E.2d 1054, 115 LRRM 4417 (Ind. Ct. App. 1980) (not allowing claim for whistleblowing about safety of pharmaceutical products); and *Lawson v. Haven Hubbard Homes, Inc.*, 551 N.E.2d 855, 5 IER Cases 285 (Ind. Ct. App. 1990) (not recognizing claim for employee who was terminated for filing for unemployment compensation).

IOWA

Iowa has recognized a public policy exception in some whistleblowing situations.

- *Fitzgerald v. Salsbury Chemical, Inc.*, 613 N.W.2d 275, 16 IER Cases 994 (Iowa 2000) (reversing summary judgment for employer, and finding that employee was fired in violation of public policy in favor of truthful testimony because employer fired him because it believed he would testify in favor of a former co-worker in the co-worker's wrongful discharge case); and
- *Smuck v. National Management Corp.*, 540 N.W.2d 669, 11 IER Cases 33 (Iowa Ct. App. 1995) (recognizing claim against employer for violation of public policy for terminating employee for refusing to assist the defendant-employer in a scheme to defraud federal subsidy program).

— *But see Zyblut v. Harvey's Iowa Management Co., Inc.*, No. 03-1752 (8th Cir. Mar. 25, 2004) (no constructive discharge claim available to alleged whistleblower); *Gaston v. Restaurant Co.*, 260 F. Supp. 2d 742, 91 FEP Cases 1411 (N.D. Iowa 2003) (granting summary judgment for employer because workers' compensation claim was not the determinative factor in the employer's decision to terminate employee); *Born v. Blockbuster Videos, Inc.*, 941 F. Supp. 868, 12 IER Cases 154 (S.D. Iowa 1996) (no free speech right in private sector employment protected employees discharged for violating no-dating rule); and *Benishek v. Cody*, 441 N.W.2d 399 (Iowa Ct. App. 1989) (no cause of action where employee was terminated for unsubstantiated suspicion of theft).

For the historical evolution of the case law, *see Abrisz v. Pulley Freight Lines, Inc.*, 270 N.W.2d 454, 115 LRRM 4777 (Iowa 1978) (stating in *dicta* that public policy exception would be created in an appropriate case); and *Springer v. Weeks & Leo Co.*, 429 N.W.2d 558, 3 IER Cases 1345 (Iowa 1988) (recognizing claim for wrongful discharge when pursuing workers' compensation).

KANSAS

Kansas has recognized the public policy exception.

- *Murphy v. City of Topeka-Shawnee County Department of Labor Services,* 6 Kan. App. 2d 488, 630 P.2d 186, 115 LRRM 4433 (1981) (recognizing claim for employee who filed workers' compensation claim).

The public policy doctrine has been extended to protect whistleblowers in some circumstances.

- *Palmer v. Brown,* 242 Kan. 893, 752 P.2d 685, 3 IER Cases 177 (1988) (announcing the whistleblower exception that creates a tort of wrongful termination when an employee is terminated in retaliation for the good-faith reporting of a co-worker's or employer's serious infraction of rules, regulations, or law pertaining to public health, safety, and the general welfare);
- *Coleman v. Safeway Stores, Inc.,* 242 Kan. 804, 752 P.2d 645, 3 IER Cases 170 (1988) (extending *Murphy* to recognize a public policy claim for employees covered by a collective bargaining agreement);
- *Flenker v. Williamette Industries, Inc.,* 967 P.2d 295, 14 IER Cases 913 (Kan. 1998) (protecting employee for workplace safety complaints);
- *Connelly v. State Highway Patrol,* 271 Kan. 944, 26 P.3d 1246 (2001) (protecting employees who reported violations of highway inspection laws);
- *Prager v. State Department of Revenue,* 271 Kan. 1, 20 P.3d 39 (2001) (Kansas taxation statutes were sufficient basis for pubic policy claim); and
- *Hysten v. Burlington Northern Santa Fe Railway Co.,* 85 P.3d 1183 (Kan. 2004) (recognizing claim for employee allegedly terminated for exercising rights under Federal Employers Liability Act).

— *But see Goodman v. Wesley Medical Center, L.L.C.,* 276 Kan. 586, 78 P.3d 817, 20 IER Cases 933 (2003) (affirming summary judgment for the employer on employee's retaliatory discharge claims because the Kansas Nurse Practice Act could not be the basis for a public policy exception to the employment-at-will doctrine because it did not have sufficiently definite or specific rules).

KENTUCKY

Kentucky has recognized a narrow public policy exception.

- *Firestone Textile Co. Division, Firestone Tire and Rubber Co. v. Meadows,* 666 S.W.2d 730, 1 IER Cases 1800 (Ky. 1983) (claim recognized for employee who filed workers' compensation benefits).

In some cases the Kentucky courts have extended the public policy exception to whistleblowing activity.

- *Northeast Health Management, Inc. v. Cotton,* 56 S.W.3d 440, 18 IER Cases 208 (Ky. Ct. App. 2001) (upholding jury verdict in favor of employees who alleged wrongful discharge after refusing to testify on employer's behalf in matter unrelated to work).

— *But see Zumot v. Data Management Co.,* No. 2002-CA-002454, 2004 WL 405888 (Ky. Ct. App. Mar. 5, 2004) (not recognizing claim for employee who reported owner's allegedly fraudulent practices to owner's business partners); *Boykins v. Housing Authority of Louisville,* 842 S.W.2d 527, 8 IER Cases 1 (Ky. 1992) (affirming summary judgment for the employer who terminated employee for filing suit against the employer on a matter not related to employment); *Nelson Steel Corp. v. McDaniel,* 898 S.W.2d 66, 10 IER Cases 737 (Ky. 1995) (finding that Kentucky law does not recognize a public policy exception based on an employee's filing of workers' compensation claims against prior employer); and *Grzyb v. Evans,* 700 S.W.2d 399, 1 IER Cases 1125 (Ky. 1985) (not allowing common law claim for employee allegedly terminated based on sex discrimination because of adequacy of statutory remedies).

LOUISIANA

Louisiana has recognized a very limited public policy exception.

- *Cabrol v. Town of Youngsville,* 106 F.3d 101, 12 IER Cases 950 (5th Cir. 1997) (stating that an at-will public employee may not be discharged for exercising his First Amendment right to freedom of expression, but finding for employer because employee was a private employee with no property interest in her employment position);
- *Moore v. McDermott, Inc.,* 494 So. 2d 1159 (La. 1986) (recognizing retaliatory discharge claim for employee who had pursued workers' compensation claim).

— However, Louisiana does not extend the public policy exception to passive whistleblowers in the private sector who are fired for refusing to perform an illegal activity. *See Wusthoff v. Bally's Casino Lakeshore Resort, Inc.,* 709 So. 2d 913, 914–15 (La. Ct. App. 1998) (The court explained that *Gil v. Metal Service Corp.,* 412 So. 2d 706, 115 LRRM 4460 (La. Ct. App. 1982) had denied the employee's claim when he was terminated for refusing to perform an activity he believed was illegal, and had stated, "[b]road policy considerations creating exceptions to employment at will and affecting relations between employer and employee should not be considered by this court.").

MAINE

Maine has yet not recognized the public policy exception.

- *Finn v. Maine State Employees Association,* No. CV-86-414, 1991 Me. Super. LEXIS 127 (1991) (finding that the courts had not adopted the

public policy exception and granting summary judgment in favor of employer on employee's claims that he was wrongfully terminated for his refusal to violate the professional and ethical obligations of his profession);

- *Larrabee v. Penobscot Frozen Foods, Inc.*, 486 A.2d 97, 100, 118 LRRM 2489 (Me. 1984) (the highest court of Maine did not adopt a public policy exception even though in *dicta,* it stated that "[w]e do not rule out the possible recognition of such a cause of action when the discharge of an employee contravenes some strong public policy"); and
- *Linnell v. Camden Yacht Club,* No. CV-84-1214, 1987 Me. Super. LEXIS 68 (1987) (granting employer's motion for summary judgment and stating that Maine has not recognized the tort of wrongful discharge as an exception to the employee-at-will doctrine).

— *But see Smith v. Heritage Salmon, Inc.,* 180 F. Supp. 2d 208 (D. Me. 2002) (suggesting that Maine's highest court might recognize a public policy claim, but holding that no claim exists for employees who refuse to carry out instructions they believe to be illegal).

MARYLAND

Maryland has recognized a limited public policy exception in the whistleblowing context.

- *Adler v. American Standard Corp.*, 291 Md. 31, 432 A.2d 464, 115 LRRM 4130 (1981) (recognizing tort of abusive or wrongful discharge, but finding that employee's allegations that he was terminated to cover up corporate misconduct failed to identify a specific public policy).

— However, under Maryland law, a claim for wrongful discharge must be based on a "clear mandate of public policy," and provide a remedy for an otherwise unremedied violation of public policy. *Porterfield v. Mascari II, Inc.,* 374 Md. 402, 434, 823 A.2d 590, 19 IER Cases 1967 (2003) (holding that Maryland law has not recognized a clear public policy mandate protecting the right to consult with an attorney in a civil setting so as to give rise to a cause of action for wrongful discharge). Maryland courts have found a mandate of public policy sufficiently clear in only two limited circumstances: (1) where an employee has been discharged for refusing to violate the law; or (2) where an employee has been fired for exercising a specific legal right or duty. *Szaller v. American National Red Cross,* 293 F.3d 148, 18 IER Cases 1232 (4th Cir. 2002). Thus, the public policy exception does not protect internal whistleblowers who report suspected criminal activity to co-employees or supervisors, but do not report to the appropriate law enforcement or judicial official, although external whistleblowers would be protected. *Wholey v. Sears, Roebuck & Co.,* 370 Md. 38, 803 A.2d 482, 18 IER Cases 1313 (2002) (determining that clear statutory public policy exists that protects employees from termination for reporting suspected criminal activities to the appropriate law enforcement authorities, but not employees who make only internal reports).

MASSACHUSETTS

Massachusetts has recognized the public policy exception and has extended its protection to whistleblowers in some circumstances.

- *Derose v. Putnam Management Co.,* 398 Mass. 205, 496 N.E.2d 428, 1 IER Cases 1672 (1986) (finding that public policy protects an employee who is dismissed for refusing to follow his employer's instructions to give false testimony);
- *Flesner v. Technical Communications Corp.,* 410 Mass. 805, 575 N.E.2d 1107, 6 BNA Cases 1530 (1991) (Massachusetts has a public policy of encouraging cooperation with ongoing state or federal criminal investigations, which protects employees who participate in investigations);
- *Shea v. Emmanuel College,* 425 Mass. 761, 682 N.E.2d 1348, 13 IER Cases 308 (1997) (employee who reports suspected criminal activity to her supervisors, but who does not make a report to public authorities, is protected by public policy exception); and
- *Hutson v. Analytic Sciences Corp.,* 860 F. Supp. 6, 9 IER Cases 1420 (D. Mass. 1994) (the federal district court determined that the Massachusetts Supreme Judicial Court would approve consideration of federal law as a potential source of well-defined important public policy of the Commonwealth).

— However, the public policy exception has been allowed only in situations where an employee has been terminated for: (1) asserting a legally guaranteed right (e.g., filing a workers' compensation claim); (2) fulfilling a legal duty (e.g., serving on a jury); (3) refusing to commit an illegal act (e.g., committing perjury); or (4) cooperating with an investigation of the employer by law enforcement. *Wright v. Shriners Hospital for Crippled Children,* 412 Mass. 469, 589 N.E.2d 1241, 7 IER Cases 553 (1992) (holding that employee's reporting of an "internal matter" cannot be the basis for a public policy exception to the at-will rule). *See also Upton v. JWP Businessland,* 425 Mass. 756, 682 N.E.2d 1357, 13 IER Cases 305 (1997) (determining that no clearly established public policy exists that requires employers to refrain from demanding adult employees work long hours); *Korb v. Raytheon Corp.,* 410 Mass. 581, 574 N.E.2d 370, 6 IER Cases 1002 (1991) (determining that state constitutional right of free speech did not protect employee of defense contractor who advocated publicly reducing the defense budget); *Mistishen v. Falcone Piano Co.,* 36 Mass. App. Ct. 243, 630 N.E.2d 294, 9 IER Cases 550 (1994) (not recognizing claim for employee who complained internally about product safety); and *GTE Products Corp. v. Stewart,* 421 Mass. 22, 653 N.E.2d 161, 10 IER Cases 1507 (1995) (not recognizing claim for in-house counsel where no clear professional duty identified).

MICHIGAN

Michigan has recognized the public policy exception in the whistleblowing context.

- *Suchodolski v. Michigan Consolidated Gas Co.*, 412 Mich. 692, 695, 316 N.W.2d 710, 115 LRRM 4449 (1982) (in some situations the discharge of an at-will employee may be so contrary to public policy as to be actionable; however, the employee's allegations regarding alleged accounting irregularities did not rise to the level of violations of public policy).

The Michigan Whistle-Blowers' Protection Act (WPA) discussed in Appendices A and B, however, preempts a wrongful discharge tort claim based on an employer's violation of the state's public policy for protecting whistleblowers.

- *Dudewicz v. Norris-Schmid, Inc.*, 443 Mich. 68, 503 N.W.2d 645, 8 IER Cases 1158 (1993) (holding public policy claim is sustainable only where there also is not an applicable statutory prohibition against discharge in retaliation for the conduct at issue).

MINNESOTA

Minnesota has adopted a whistleblower protection statute that applies to public and private sector employees, as discussed in Appendices A and B. *See* MINN. STAT. ANN. §181.932 (West 2004). The statute may have "displaced" the common law tort action for wrongful discharge. *Piekarski v. Home Owners Savings Bank, F.S.B.*, 956 F.2d 1484 (8th Cir. 1992) (stating that Minnesota does not recognize a common law action for discharge based on refusal to violate a law that exists independently of the action under the whistleblower statute).

The Minnesota courts had recognized the public policy doctrine before enactment of the whistleblower protection statute.

- *Phipps v. Clark Oil & Refining Corp.*, 408 N.W.2d 569, 2 IER Cases 341 (Minn. 1987) (recognizing claim for employee who alleged he was terminated for refusing to violate the federal Clean Air Act).

MISSISSIPPI

Mississippi has recognized a limited public policy exception that protects some whistleblowers. The Supreme Court of Mississippi found "at least two" forms of protected activity: (1) where an employee refuses to participate in an "illegal act"; and (2) where an employee reports "illegal acts" of his or her employer.

- *McArn v. Allied Bruce-Terminix Co.*, 626 So. 2d 603, 8 IER Cases 1314 (Miss. 1993); and
- *Willard v. Paracelsus Health Care Corp.*, 681 So. 2d 539, 12 IER Cases 142 (Miss. 1996) (finding that public policy tort claim is independent tort giving rise to punitive damages).

— However, federal courts applying the *McArn* exception have consistently held that it does not protect activity other than the reporting of, or refusal to commit, criminal acts. *Howell v. Operations Management International, Inc.*, 77 Fed. Appx. 248 (5th Cir. 2003) (citing cases).

MISSOURI

The Missouri intermediate appellate courts have recognized a limited public policy exception and have extended its protection to whistleblowers in some cases.

- *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 2 IER Cases 768 (Mo. Ct. App. 1985) (finding that employee discharged for threatening to report employer's violation of federal regulations requiring treatment and testing of eyeglass lenses had sufficiently stated claim under public policy exception);
- *Beasley v. Affiliated Hospital Products,* 713 S.W.2d 557, 1 IER Cases 601 (Mo. Ct. App. 1986) (holding cause of action stated under public policy exception when employee alleged she was discharged for refusing to fix a raffle);
- *Kirk v. Mercy Hospital Tri-County,* 851 S.W.2d 617, 8 IER Cases 522 (Mo. Ct. App. 1993) (determining that employee who reported improper patient care stated a claim although employee did not rely on a direct violation of a law or regulation);
- *Clark v. Beverly Enterprises-Missouri, Inc.*, 872 S.W.2d 522, 9 IER Cases 270 (Mo. Ct. App. 1994) (determining that cause of action stated under public policy exception when employee in good faith reported patient mistreatment to an appropriate authority);
- *Porter v. Reardon Machine Co.*, 962 S.W.2d 932, 14 IER Cases 890 (Mo. Ct. App. 1998) (stating that employee who made internal report of unsafe working environment was not required to also make external report or prove that discharge was explicitly prohibited by statute; however, employee failed to show that employer violated a constitutional provision, statute, regulation, or clear mandate of public policy); and
- *Brenneke v. Department of Missouri, Veterans of Foreign Wars of United States of America,* 984 S.W.2d 134, 14 IER Cases 992 (Mo. Ct. App. 1998) (internal complaints by whistleblower protected).

— *But see Link v. K-Mart Corp.*, 689 F. Supp. 982, 3 IER Cases 979 (W.D. Mo. 1988) (not recognizing public policy exception for employee who reported misuses and thefts to employer since employee had not implicated any statute, regulation or constitutional provision); and *Faust v. Ryder Commercial Leasing & Servs.*, 954 S.W.2d 383, 13 IER Cases 226 (Mo. Ct. App. 1997) (not recognizing public policy exception for employee who reported manager's suspected criminal activity to that manager only and not to an appropriate internal or external authority).

MONTANA

The Montana Supreme Court has expressed reluctance to recognize a public policy exception.

- *Keneally v. Orgain,* 186 Mont. 1, 606 P.2d 127, 115 LRRM 4576 (1980) (stating in *dicta* that public policy claim is recognized; however, no cause of action for salesman employee who complained that employer was not properly servicing products sold by employee).

In 1987, the Montana Legislature passed the Montana Wrongful Discharge from Employment Act of 1987, which incorporates the public policy doctrine, and provides that it is the exclusive remedy. MONT. CODE ANN. §§39-2-901 to 915. *See Solle v. Western States Insurance Agency, Inc.,* 2000 Mont. 96, 299 Mont. 237, 999 P.2d 328, 16 IER Cases 364 (2000).

NEBRASKA

Nebraska has recognized a public policy exception and has indicated that this protection would be extended to whistleblowing in some circumstances.

- *Ambroz v. Cornhusker Square Ltd.,* 226 Neb. 899, 416 N.W.2d 510, 2 IER Cases 1185 (1987) (finding that discharge of an at-will employee for refusing to submit to a polygraph examination violated public policy);
- *Schriner v. Meginnis Ford Co.,* 228 Neb. 85, 421 N.W.2d 755, 3 IER Cases 129 (1988) (starting in *dicta* that action for wrongful discharge exists when an at-will employee acting in good faith reports to his employer a suspected violation of criminal code; however, in this case employee could not maintain cause of action for wrongful discharge as he did not have reasonable cause to believe that his employer had violated odometer fraud statutes);
- *Simonsen v. Hendricks Sodding & Landscaping Inc.,* 5 Neb. App. 263, 558 N.W.2d 825 (1997) (finding that *prima facie* case of termination in violation of public policy stated where employee refused to violate criminal law by driving a truck with defective brakes); and
- *Jackson v. Morris Communications Corp.,* 265 Neb. 423, 657 N.W.2d 634, 19 IER Cases 1256 (2003) (determining that employee discharged for filing a workers' compensation claim stated a claim because the substantive rights created by Nebraska's workers' compensation act present a clear mandate of public policy).

— *But see Malone v. American Business Information,* 262 Neb. 733, 634 N.W.2d 788, 7 WH Cases 2d 659 (2001) (not recognizing public policy exception for employee who complained about unauthorized withholding of wages because Nebraska's wage payment law is remedial in nature, does not contain criminal penalties, does not limit employer's right to discharge at-will employees, and thus does not declare an important public policy); and *Blair v. Physicians Mutual Insurance Co.,* 242 Neb. 652, 496 N.W.2d 483, 8 IER Cases 562 (1993) (not recognizing public policy claim available for employee terminated for alleged drug distribution).

NEVADA

Nevada has recognized a limited public policy exception.

- *Hansen v. Harrah's,* 100 Nev. 60, 675 P.2d 394, 115 LRRM 3024 (1984) (recognizing public policy exception for employee who filed workers' compensation claim).

The public policy exception has been extended to cover whistleblowers in some circumstances.

- *D'Angelo v. Gardner,* 107 Nev. 704, 819 P.2d 206, 6 IER Cases 1545 (1991) (recognizing public policy claim where employer dismissed employee for refusing to work under conditions unreasonably dangerous to that employee); and
- *Allum v. Valley Bank of Nevada,* 114 Nev. 1313, 970 P.2d 1062, 14 IER Cases 1244 (1998) (stating that recovery for retaliatory discharge may not be had on a "mixed motives" theory, thus employee must demonstrate that his protected conduct was proximate cause of his discharge; employee need only prove that he reasonably suspected, in good faith, that employer participated in illegal conduct; employee need not prove that employer explicitly gave employee the choice of participating in the illegal activity or losing his job).

— *But see Wiltsie v. Baby Grand Corp.,* 105 Nev. 291, 774 P.2d 432, 4 IER Cases 638 (1989) (finding that internal whistleblower allegedly discharged for reporting illegal activity of his supervisor to his employer could not recover for retaliatory discharge because employee chose to report the activity to his employer rather than to the appropriate authorities); and *Wayment v. Holmes,* 112 Nev. 232, 912 P.2d 816, 11 IER Cases 983 (1996) (not recognizing tortious discharge claim for attorney who reported to the district attorney that a claim being prosecuted was frivolous because attorney discharged ethical duty at that point, but attorney's continued argument with district attorney about how to handle the case was insubordination).

NEW HAMPSHIRE

New Hampshire has recognized the public policy exception, and under some circumstances it has been extended to protect whistleblowers.

- *Porter v. City of Manchester,* No. 2003-099, 2004 WL 1078139 (N.H. May 14, 2004) (recognizing specifically tort claim for wrongful termination in violation of public policy; allowing employee to pursue constructive termination claim where employee alleged he was forced to quit after harassment by supervisor who issued press release characterizing plaintiff as "disgruntled" employee; employee had complained about alleged abuses in welfare department);

- *Cloutier v. Great Atlantic & Pacific Tea Co.,* 121 N.H. 915, 436 A.2d 1140, 115 LRRM 4329 (1981) (recognizing public policy exception for employee allegedly discharged for complaining about lack of security and refusing to jeopardize safety by making nightly cash deposits);
- *Cilley v. New Hampshire Ball Bearings, Inc.,* 128 N.H. 401, 514 A.2d 818, 1 IER Cases 521 (1986) (holding that claim stated by plaintiff who refused to lie to the company president to cover for another company official); and
- *Bliss v. Stow Mills, Inc.,* 146 N.H. 550, 786 A.2d 815, 17 IER Cases 1248 (2001) (recognizing claim for truck driver allegedly terminated for safety complaints).

— *But see Short v. School Administration Unit No. 16,* 136 N.H. 76, 612 A.2d 364 (1992) (not recognizing tortious discharge claim because public policy does not protect the refusal to criticize a supervisor who opposes the views of a public employer); and *MacDonald v. Tandy Corp.,* 983 F.2d 1046 (1st Cir. 1993) (public policy exception not recognized for employee fired after being suspected of thievery and subsequently cooperating with theft investigation because no causal link was shown between termination and the cooperation, and cooperation with theft investigation did not immunize employee from findings of the investigation).

NEW JERSEY

New Jersey has recognized the public policy exception and extended its protection to whistleblowing activity in some cases.

- *Pierce v. Ortho Pharmaceutical Corp.,* 84 N.J. 58, 417 A.2d 505, 1 IER Cases 109 (1980) (recognizing public policy theory, but not in circumstance of this case where doctor refused to continue research on infant drug);
- *Kalman v. Grand Union Co.,* 183 N.J. Super. 153, 443 A.2d 728, 115 LRRM 4803 (1982) (recognizing claim for an employee discharged for refusing to violate state pharmacy regulations);
- *Potter v. Village Bank of N.J.,* 225 N.J. Super. 547, 543 A.2d 80, 3 IER Cases 1076 (1988) (stating that bank president and CEO who reported bank director's suspected involvement in laundering drug money to law enforcement officials were protected from retaliatory discharge by the public policy exception); and
- *Ballinger v. Delaware River Port Authority,* 172 N.J. 586, 800 A.2d 97, 18 IER Cases 1336 (2002) (recognizing claim for police officer allegedly discharged for reporting suspected criminal activity, even though he also asserted a claim under the New Jersey Conscientious Employee Protection Act).

— *But see Warthen v. Toms River Community Memorial Hospital,* 199 N.J. Super. 18, 488 A.2d 229, 118 LRRM 3179 (1985) (finding no claim for nurse who refused to perform procedure on moral grounds); *House v. Carter-Wallace, Inc.,* 232 N.J. Super. 42, 556 A.2d 353, 4 IER Cases

587 (1989) (determining that internal whistleblowing not protected, only making reports to external authorities); *Hennessey v. Coastal Eagle Point Oil Co.*, 129 N.J. 81, 609 A.2d 11, 7 IER Cases 1057 (1992) (determining that wrongful discharge claim not available to oil refinery employee who was in a safety-sensitive position and who was fired for failing random urine test because public policy supporting safety outweighs any public policy supporting individual privacy rights); *Chelly v. Knoll Pharmaceuticals,* 295 N.J. Super. 478, 685 A.2d 498, 12 IER Cases 624 (1996) (determining that difference in medical judgment regarding the timing of disclosure of clinical trial information to the FDA, no matter how well-grounded, does not form a sufficient basis for wrongful discharge cause of action); and *Maw v. Advanced Clinical Communications, Inc.*, 846 A.2d 604, 21 IER Cases 471 (N.J. 2004) (not recognizing claim for employee who refused to sign allegedly unenforceable noncompetition agreement).

NEW MEXICO

New Mexico has recognized the public policy exception and in some cases has extended its protection to whistleblowers.

- *Vigil v. Arzola,* 102 N.M. 682, 699 P.2d 613, 2 IER Cases 377 (1983) (recognizing public policy exception for employee who reported unauthorized use of federal monies to employer), *rev'd on other grounds,* 687 P.2d 1038, 2 IER Cases 394 (N.M. 1984), *overruled on other grounds,* 108 N.M. 643, 777 P.2d 371 (1989);
- *Chavez v. Manville Products Corp.*, 108 N.M. 643, 777 P.2d 371, 4 IER Cases 833 (1989) (finding that employee who was allegedly discharged for refusing to engage in political lobbying for his employer stated a claim under the public policy exception);
- *Michaels v. Anglo American Auto Auctions, Inc.*, 117 N.M. 91, 869 P.2d 279, 9 IER Cases 420 (1994) (recognizing public policy exception for employee who filed a claim for workers' compensation benefits); and
- *Weidler v. Big J. Enterprises,* 124 N.M. 591, 953 P.2d 1089 (N.M. Ct. App. 1997) (recognizing public policy exception for employee who raised workplace safety concerns; employee had to prove that employer had either suspicion or actual knowledge of protected activity).

— *But see Silva v. American Federation of State, County and Municipal Employees,* 131 N.M. 364, 37 P.3d 81, 18 IER Cases 552 (2001) (determining that public policy exception is available only to at-will employees, not to employees with remedy available under collective bargaining agreement).

NEW YORK

New York has consistently declined to create a common law tort of wrongful or abusive discharge.

- *Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 448 N.E.2d 86, 115 LRRM 4953 (N.Y. 1983) (not recognizing public policy claim for employee allegedly discharged for complaint of improprieties);
- *Leibowitz v. Bank Leumi Trust Co. of New York,* 548 N.Y.S.2d 513, 4 IER Cases 1786 (N.Y. App. Div. 1989) (not recognizing public policy exception for employee who reported illegal activities because she failed to allege any violation of laws that presented a "substantial and specific danger to the public health or safety"); and
- *Horn v. New York Times,* 100 N.Y.2d 85, 790 N.E.2d 753, 19 IER Cases 1262 (N.Y. 2003) (not allowing claim for breach of implied-in-law obligation for physician who was employed by nonmedical employer and who refused to disclose patient confidential information without patient consent; refusing to extend *Wieder v. Srala* discussed below).

New York has created a narrow exception to the at-will employment doctrine by adopting a cause of action for breach of an implied-in-law obligation.

- *Wieder v. Skala,* 80 N.Y.2d 628 (N.Y. 1992) (not recognizing public policy exception for attorney discharged by firm for his insistence that a second attorney's misconduct be reported as required by governing disciplinary rules; however, attorney stated claim for breach of contract based on implied-in-law obligation in the relationship with the firm because the attorney's performance of professional services for the firm's clients as a duly admitted member of the Bar was at the very core of the relationship with the firm, and the firm's efforts to prevent compliance with applicable rules of professional conduct would subvert the central professional purpose of the relationship with the firm).

NORTH CAROLINA

North Carolina has adopted a narrow public policy exception that may extend to whistleblowers in some circumstances.

- *Sides v. Duke University,* 74 N.C. App. 331, 328 S.E.2d 818, 1 IER Cases 512 (1985) (recognizing claim for employee allegedly discharged for testifying truthfully in medical malpractice action against employer), *overruled on other grounds by Kurtzman v. Applied Analytical Industries, Inc.,* 347 N.C. 329, 493 S.E.2d 420, 13 IER Cases 798 (1997);
- *Coman v. Thomas Manufacturing Co.,* 325 N.C. 172, 381 S.E.2d 445, 4 IER Cases 987 (1989) (finding that public policy exception stated by employee who refused to comply with employer's instructions to violate federal safety regulations); and
- *Amos v. Oakdale Knitting Co.,* 331 N.C. 348, 416 S.E.2d 166, 7 IER Cases 714 (1992) (recognizing claim for employee fired for refusing to work for less than the statutory minimum wage).

— *But see Guy v. Travenol Laboratories, Inc.,* 812 F.2d 911, 1 IER Cases 1553 (4th Cir. 1987) (not recognizing public policy exception to the at-will employment doctrine unless an employee was terminated for refusing

to give perjured testimony); *Daniel v. Carolina Sunrock Corp.*, 335 N.C. 233, 436 S.E.2d 835 (1993) (not allowing claim for employee allegedly terminated for expressing willingness to testify in co-worker's favor when no testimony given because co-worker's case settled); *Haburjak v. Prudential Bache Securities, Inc.*, 759 F. Supp. 293 (W.D.N.C. 1991) (not allowing claim for employee allegedly terminated for disclosing insider trading violations), *aff'd*, 23 F.3d 402 (4th Cir. 1994); and *Considine v. Compass Group USA, Inc.*, 145 N.C. App. 314, 551 S.E.2d 179, 18 IER Cases 300 (2001) (in-house counsel who discovered and reported employer's alleged unlawful billing practices in connection with government contracts failed to state a claim because employee's complaint failed to allege the nature of the employer's conduct and how that conduct violated North Carolina's public policy).

NORTH DAKOTA

The North Dakota whistleblower statute, discussed in Appendices A and B is the exclusive remedy for whistleblowers.

- *Vandall v. Trinity Hospitals*, 2004 ND 47, 676 N.W.2d 88, 20 IER Cases 1835 (2004).

North Dakota had previously recognized a limited public policy exception.

- *Krein v. Marian Manor Nursing Home*, 415 N.W.2d 793, 2 IER Cases 1188 (N.D. 1987) (recognizing claim for employee allegedly discharged for seeking workers' compensation);
- *Ressler v. Humane Society of Grand Forks*, 480 N.W.2d 429, 7 IER Cases 152 (N.D. 1992) (determining that public policy prohibited employer from discharging employee in retaliation for honoring subpoena and informing employer she was prepared to testify contrary to employer's interest in a criminal proceeding); and
- *Ghorbanni v. North Dakota Council on Arts*, 2002 N.D. 22, 639 N.W.2d 507, 18 IER Cases 571 (2002) (action for retaliatory discharge in violation of public policy is a tort).

— *But see Jose v. Northwest Bank of North Dakota, N.A.*, 1999 N.D. 175, 599 N.W.2d 293, 15 IER Cases 892 (1999) (stating that public policy, which must be evidenced by a constitutional or statutory provision, does not recognize a claim for retaliatory discharge for employees who participated in internal investigations).

OHIO

Ohio has recognized a public policy exception to the at-will employment doctrine.

- *Greeley v. Miami Valley Maintenance Contractors, Inc.*, 49 Ohio St. 3d 228, 551 N.E.2d 981, 5 IER Cases 257 (1990) (public policy claim

recognized for employee who was discharged because child support payments were withheld from wages; distinguishing *Phung v. Waste Management, Inc,* 23 Ohio St. 3d 100, 491 N.E.2d 1114, 2 IER Cases 786 (1986), in which the court held that no public policy exception would be recognized absent a very clear public policy), *overruled in part by* Tulloh v. Goodyear Atomic Corp., 584 N.E. 2d 729, 7 IER Cases 309 (Ohio 1992), *overruled by* Painter v. Gray, 639 N.E.2d 51 (Ohio 1994).

The public policy exception has been extended to protect whistleblowers in some circumstances.

- *Kulch v. Structural Fibers, Inc.,* 78 Ohio St. 3d 134, 677 N.E.2d 308, 12 IER Cases 1484 (1997) (finding that claim for wrongful discharge stated by employee who reported unsafe working conditions to OSHA based on public policy expressed in the federal OHSA statute; claim stated by same employee based on public policy in Ohio's Whistleblower Act if employee strictly complied with Act's requirements; remedies available for violations of Whistleblower Act and for wrongful discharge based on public policy of Whistleblower Act are cumulative, but employee is not entitled to double recovery);
- *Pytlinski v. Brocar Products, Inc.,* 94 Ohio St. 3d 77, 760 N.E.2d 385, 18 IER Cases 487 (2002) (recognizing claim for employee allegedly terminated for workplace safety complaints);
- *Sabo v. Schott,* 70 Ohio St. 3d 527, 639 N.E.2d 783 (1994) (recognizing claim for employee terminated for testifying truthfully);
- *Jenkins v. Parkview Counseling Center Inc.,* 2001 Ohio 3151, 17 IER Cases 484 (Ohio Ct. App. 2001) (employee protected for filing lawsuit over wages);
- *Powers v. Springfield City Schools,* 14 IER Cases 172 (Ohio Ct. App. 1998) (whistleblower may pursue claim based on retaliatory denial of promotion);
- *Bidwell v. Children's Medical Center,* 13 IER Cases 896 (Ohio Ct. App. 1997) (employee protected for reporting co-worker's threats against her);
- *Chapman v. Adia Services, Inc.,* 116 Ohio App. 3d 534, 688 N.E.2d 604, 13 IER Cases 656 (1997) (recognizing claim for employee who consulted attorney about possible lawsuit against employer's customer);
- *Stephenson v. Litton Systems, Inc.,* 97 Ohio App. 3d 125, 646 N.E.2d 259, 10 IER Cases 759 (1994) (determining that employee protected for reporting to police that employer was intending to drive automobile while intoxicated); and
- *Delaney v. Skyline Lodge, Inc.,* 95 Ohio App. 3d 264, 642 N.E.2d 395, 76 FEP Cases 547 (1994) (recognizing claim for employee terminated for complaining about restaurant manager's check-padding), *appeal not allowed,* 70 Ohio St. 3d 1465, 640 N.E.2d 527 (1994).

— *But see Sorensen v. Wise Management Services, Inc.,* 2003 Ohio 767, 19 IER Cases 1161 (Ohio Ct. App. 2003) (not recognizing claim for employee terminated for refusing to perform order that employee was unsure violated Medicaid); *Roberts v. Alan Ritchey, Inc.,* 962 F. Supp. 1028, 12

IER Cases 1449 (S.D. Ohio 1997) (not recognizing claim based on presumption of innocence where employee terminated after arrest for DUI but before acquittal); *Seta v. Reading Rock, Inc.*, 100 Ohio App. 3d 731, 654 N.E.2d 1061 (1995) (not recognizing claim for employee discharged for failing mandatory drug test); *Thomas v. Mastership Corp.*, 108 Ohio App. 3d 91, 670 N.E.2d 265, 12 IER Cases 382 (1995), (determining that employee did not prove casual connection between termination and inquiries to IRS about tax issues), *cause dismissed*, 75 Ohio St. 3d 1415, 661 N.E.2d 762 (1996); and *Contreras v. Ferro Corp.*, 73 Ohio St. 3d 244, 652 N.E.2d 940, 10 IER Cases 1754 (1995) (not recognizing public policy exception for employee who reported illegal inventory diversion because employee's claim would have been based on Ohio's Whistleblower Act and employee had not satisfied the reporting requirements of that Act).

OKLAHOMA

Oklahoma has recognized a limited public policy exception and has extended its protection to whistleblowers under some circumstances.

- *Burk v. K-Mart Corp.*, 770 P.2d 24, 4 IER Cases 182 (Okla. 1989) (responding to a certified question but without reference to a specific fact pattern, that the Oklahoma Supreme Court recognized a limited public policy exception to the employment-at-will doctrine in cases where the discharge was contrary to a clear mandate of public policy);
- *Groce v. Foster*, 1994 OK 88, 880 P.2d 902, 9 IER Cases 1287 (1994) (recognizing claim for employee allegedly terminated for filing lawsuit against employer's customer for work-related injury);
- *Wilson v. Hess-Sweitzer & Brant, Inc.*, 1993 OK 156, 864 P.2d 1279, 9 IER Cases 40 (1993) (recognizing claim for constructive termination where employee was terminated after receiving subpoena in co-workers workers' compensation lawsuit);
- *Todd v. Frank's Tong Service, Inc.*, 1989 OK 121, 784 P.2d 47, 4 IER Cases 1535 (1989) (truck driver protected for refusing to drive allegedly unsafe truck);
- *Bishop v. Federal Intermediate Credit Bank of Wichita*, 908 F.2d 658, 5 IER Cases 870 (10th Cir. 1990) (employee protected for testimony at congressional hearing); and
- *Tyler v. Original Chili Bowl, Inc.*, 934 P.2d 1106 (Okla. Ct. App. 1997) (concluding that claim stated by internal whistleblower who told supervisors about violations of Food, Drug, and Cosmetic Act).

— *But see Barker v. State Insurance Fund*, 2001 OK 94, 40 P.3d 463, 18 IER Cases 1840 (2001) (determining that complaints about personal opinions regarding mismanagement not protected, even though internal complaints implicating pubic policy may be protected); and *Wheless v. Willard Grain & Feed, Inc.*, 1998 OK 84, 964 P.2d 204, 14 IER Cases 275 (1998) (not recognizing public policy exception for employee who falsified

environmental regulatory reports required by state statute because public policy commitment to environmental safety and protection is not advanced by an employee who participates in violating a state statute and keeps silent concerning the violation, even when his motivation is fear of being discharged).

OREGON

Oregon has recognized the public policy exception and extended its protection to whistleblowers in some circumstances.

- *Nees v. Hocks,* 272 Or. 210, 536 P.2d 512, 115 LRRM 4571 (1975) (recognizing claim for employee allegedly discharged for serving on jury);
- *McQuary v. Bel Air Convalescent Home, Inc.,* 69 Or. App. 107, 684 P.2d 21, 120 LRRM 3129 (1984) (finding a nursing supervisor stated a cause of action for wrongful discharge when she asserted that she had been terminated for threatening to report patient abuse to state authorities);
- *Delaney v. Taco Time International, Inc.,* 297 Or. 10, 681 P.2d 114, 1 IER Cases 367 (1984) (recognizing claim for employee terminated for refusing to sign false statement about morals of former employee);
- *McCool v. Hillhaven Corp.,* 97 Or. App. 536, 777 P.2d 1013, 4 IER Cases 1026 (1989) (determining that employee protected for attempting to comply with nursing home regulations; remedy under whistleblower statute not exclusive);
- *Dalby v. Sisters of Providence in Oregon,* 125 Or. App. 149, 865 P.2d 391, 9 IER Cases 56 (1993) (determining that pharmacy employee protected against constructive discharge for objecting to alleged violations of state drug inventory regulations);
- *Anderson v. Evergreen International Airlines, Inc.,* 131 Or. App. 726, 886 P.2d 1068, 10 IER Cases 309 (1994) (recognizing claim for employee terminated for refusing to agree to alleged violations of federal airline regulations);
- *Banaitis v. Mitsubishi Bank, Ltd.,* 129 Or. App. 371, 879 P.2d 1288, 9 IER Cases 1481 (1994) (holding that public policy exception does not require that a specific statute have been violated, and discharge of bank employee for refusing to disclose customer's confidential financial information fell within the societal obligation exception to the at-will employment rule);
- *Howard v. Waremart, Inc.,* 147 Or. App. 135, 935 P.2d 432, 12 IER Cases 1188 (1997) (that employee health and safety complaints protected);
- *Thorson v. State ex rel. Department of Justice,* 171 Or. App. 704, 15 P.3d 1005, 17 IER Cases 90 (2000) (finding that employee protected for refusing to make false allegation of sexual harassment against co-worker); and
- *Dunwoody v. Handskill Corp.,* 185 Or. App. 605, 60 P.3d 1135, 19 IER Cases 825 (2003) (recognizing claim for employee employed pursuant to a contract who was discharged for complying with a subpoena in a criminal trial).

— *But see Babick v. Oregon Arena Corp.*, 333 Or. 401, 40 P.3d 1059, 18 IER Cases 593 (2002) (not recognizing claim for security guards allegedly terminated for lawfully arresting disruptive audience members); *Downs v. Waremart,. Inc.*, 137 Or. App. 119, 903 P.2d 888, 10 IER Cases 1817 (1995) (not allowing claim for employee allegedly terminated for asking for a lawyer during police theft investigation), *aff'd in part, rev'd in part on other grounds*, 324 Or. 307, 926 P.2d 314, 12 IER Cases 324 (1996); *Elliott v. Tektronix, Inc.*, 102 Or. App. 388, 796 P.2d 361 (1990) (not allowing claim for employee who contended employer had breached employment contract); *Patton v. J.C. Penney Co.*, 75 Or. App. 638, 707 P.2d 1256, 120 LRRM 3131 (1985) (not allowing claim for employee allegedly discharged for refusing to end social relationship with co-worker), *aff'd in part, rev'd in part on other grounds*, 301 Or. 117, 719 P.2d 854, 112 LRRM 2445 (1986); *Sieverson v. Allied Stores Corp.*, 97 Or. App. 315, 776 P.2d 38, 4 IER Cases 785 (1989) (holding that employee who claimed she was terminated in retaliation for reporting employee abuse did not state a claim since reporting suspected wrongdoing within a private corporation does not involve interest of public importance); and *Campbell v. Ford Industries, Inc.*, 274 Or. 243, 546 P.2d 141, 115 LRRM 4837 (1976) (not recognizing claim where employee asserted rights as shareholder to view corporate records related to alleged corporate improprieties).

PENNSYLVANIA

Pennsylvania has recognized a public policy exception that extends to whistleblowers in limited circumstances.

- *Rothrock v. Rothrock Motor Sales, Inc.*, 2002 Pa. Super. 303, 810 A.2d 114, 19 IER Cases 214 (2002) (recognizing public policy claim by employee who refused to talk subordinate out of filing for workers' compensation);
- *Shick v. Shirey*, 552 Pa. 590, 716 A.2d 1231, 14 IER Cases 480 (1998) (finding that the termination of an at-will employee for filing a workers' compensation claim is a violation of public policy);
- *Field v. Philadelphia Electric Company*, 388 Pa. Super. 400, 565 A.2d 1170 (1989) (recognizing public policy exception where an employee was discharged because he performed a statutorily imposed duty to report violations involving nuclear materials);
- *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363, 115 LRRM 4592 (3d Cir. 1979) (recognizing claim for employee allegedly discharged for refusing to take lie detector test);
- *Hoopes v. City of Chester*, 473 F. Supp. 1214 (E.D. Pa. 1979) (stating in *dicta* that employee demoted for testifying truthfully in criminal proceeding would have had a public policy claim if employee had pleaded such a claim); and
- *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. 28, 386 A.2d 119, 115 LRRM 4690 (1978) (recognizing public policy claim for employee allegedly discharged for serving on jury).

— *But see Spierling v. First American Home Health Services, Inc.*, 1999 Pa. Super. 222, 737 A.2d 1250, 16 IER Cases 308 (1999) (not recognizing public policy claim for employee claiming she was fired for reporting suspected Medicare fraud by her employer); *Holewinski v. Children's Hospital of Pittsburgh*, 437 Pa. Super. 174, 649 A.2d 712 (1994) (no protection for whistleblowing under Pennsylvania public policy doctrine); *Clark v. Modern Group Ltd.*, 9 F.3d 321, 8 IER Cases 1803 (3rd Cir. 1993) (no protection for whistleblowing under Pennsylvania public policy doctrine); *McCartney v. Meadowview Manor, Inc.*, 353 Pa. Super. 34, 508 A.2d 1254 (1986) (not recognizing public policy claim for employee allegedly fired for seeking employment with competitor of employer); and *Geary v. U.S. Steel Corp.*, 456 Pa. 171, 319 A.2d 174, 115 LRRM 4665 (1974) (not recognizing claim for employee allegedly terminated for complaining internally about product safety).

PUERTO RICO

Puerto Rico has recognized an exception to employment at-will for employees fired in violation of constitutional rights, but has not extended this protection to whistleblowers more generally.

- *Arroyo v. Rattan Specialties, Inc.*, 117 D.P.R. 35 (1986) (holding that an employee may not be fired in violation of his constitutional rights);
- *Negron v. Caleb Brett U.S.A., Inc.*, 212 F.3d 666 (1st Cir. 2000) (finding that a chemist was protected by Puerto Rico's *Arroyo* exception to employment at-will because her constitutional right to privacy could be violated if she were required, by her employer, to falsify lab records); and
- *In re El San Juan Hotel Corp.*, 149 B.R. 263 (D.P.R. 1992) (refusing to extend public policy protection to employee allegedly terminated for disclosing illegal acts).

However, the Puerto Rico wrongful discharge statute has been held to be the exclusive remedy for claims for wrongful discharge in violation of public policy. *See Hopgood v. Merrill Lynch Pierce, Fenner & Smith*, 839 F. Supp. 98 (D.P.R. 1993), *aff'd*, 36 F.3d 1089 (1st Cir. 1994); and *Alvarado Morales v. Digital Equipment Corp.*, 669 F. Supp. 1173 (D.P.R. 1987), *aff'd*, 843 F.2d 613 (1st Cir. 1988).

RHODE ISLAND

Rhode Island has indicated a willingness to apply the public policy exception in certain cases, but has not clearly extended protection to whistleblowers.

- *Volino v. General Dynamics*, 539 A.2d 531, 3 IER Cases 306 (R.I. 1988) (indicating that public policy cause of action might be recognized to protect whistleblower, but finding that absenteeism was true reason for termination); and

- *Cummins v. EG & G Sealol, Inc.*, 690 F. Supp. 134, 3 IER Cases 705 (D.R.I. 1988) (interpreting *Volino*, public policy claim recognized when employee is discharged for exposing employer conduct that is contrary to statutorily enacted public policy).

— *But see Dudzik v. Leesona Corp.*, 473 A.2d 762, 120 LRRM 3452 (R.I. 1984) (employee who complained of an improper assignment had no cause of action because the employment was at-will).

SOUTH CAROLINA

South Carolina has recognized a limited public policy exception that extends to some forms of whistleblowing.

- *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 337 S.E.2d 213, 1 IER Cases 1099 (S.C. 1985) (recognizing claim for an employee allegedly discharged for obeying subpoena to attend state administrative hearing);
- *Culler v. Blue Ridge Electric Co-op., Inc.*, 309 S.C. 243, 422 S.E.2d 91, 15 IER Cases 238 (S.C. 1992) (determining that employee would have been protected if employee had proved termination for refusing to make political contributions);
- *Garner v. Morrison Knudsen Corp.*, 318 S.C. 223, 456 S.E.2d 907, 10 IER Cases 819 (S.C. 1995) (recognizing public policy in favor of employee who voluntarily testified about conditions in nuclear plant); and
- *Stiles v. American General Life Ins. Co.*, 335 S.C. 222, 516 S.E.2d 449, 15 IER Cases 238 (S.C. 1999) (holding that at-will employee with contract specifying 30-day notice provision for termination may maintain public policy cause of action).

— *But see Lawson v. South Carolina Department of* Corrections, 340 S.C. 346, 532 S.E.2d 259 (S.C. 2000) (refusing to extend public policy protection to individual who reported irregularities in company hiring process to managers); *Miller v. Fairfield Communities, Inc.*, 299 S.C. 23, 382 S.E.2d 16, 4 IER Cases 997 (S.C. Ct. App. 1989) (not recognizing claim for employee allegedly terminated for refusing to have spouse resign employment with competitor), *cert. dismissed*, 302 S.C. 518, 397 S.E.2d 377 (1990); *Merck v. Advanced Drainage Systems, Inc.*, 921 F.2d 549, 6 IER Cases 102 (4th Cir. 1990) (finding no claim for employee who refused to certify that pipe satisfied industry standards); and *Smalley v. Fast Fare Inc.*, 4 IER Cases 105 (D.S.C. 1988) (not recognizing public policy claim recognized for employee who was allegedly discharged for informing superior of discrepancies in cash inventory because it concerned an internal matter and was not clearly violative of public policy).

SOUTH DAKOTA

South Dakota has recognized a public policy exception (as a contractual theory, not as a tort theory) that protects whistleblowers in some circumstances.

- *Dahl v. Combined Insurance Co.*, 2001 SD 12, 621 N.W.2d 163, 17 IER Cases 389 (2001) (whistleblowing for the public good, such as reporting missing insurance premiums, is protected under the public policy exception);
- *Lau v. Behr Heat Transfer System Inc.*, 150 F. Supp. 2d 1017 (D.S.D. 2001) (stating public policy exception would cover an employee who was allegedly fired for requesting FMLA leave); and
- *Johnson v. Kreiser's Inc.*, 433 N.W.2d 225, 3 IER Cases 1767 (S.D. 1988) (applying public policy exception to employee who refused to aid employer in illegal conversion of corporate property to his own personal use; cause of action sounds in contract, not tort).

— *But see Peterson v. Glory House of Sioux Falls*, 443 N.W.2d 653, 4 IER Cases 912 (S.D. 1989) (not recognizing claim for employee allegedly terminated for warning resident of halfway house about potential sexual harassment bv another resident).

TENNESSEE

Tennessee has recognized a limited public policy exception that protects whistleblowers in some circumstances.

- *Chism v. Mid-South Milling Co., Inc.*, 762 S.W.2d 552, 3 IER Cases 1846 (Tenn. 1988) (tracing the development of Tennessee's exception to the employment at-will doctrine where the employer violates a clear public policy);
- *Guy v. Mutual of Omaha Insurance Co.*, 79 S.W.3d 528, 18 IER Cases 1459 (Tenn. 2002) (holding that public policy protects employees who report fraudulent activity by insurance agents; claim not preempted by Tennessee whistleblower statute);
- *Crews v. Buckman Laboratories International Inc.*, 78 S.W.3d 852, 18 IER Cases 1246 (Tenn. 2002) (in-house counsel protected for reporting general counsel's lack of Tennessee license to practice law);
- *Reynolds v. Ozark Motor Lines, Inc.*, 887 S.W.2d 822, 10 IER Cases 100 (Tenn. 1994) (truck driver protected for refusing to violate state laws on safety);
- *Moskal v. First Tennessee Bank*, 815 S.W.2d 509, 6 IER Cases 1080 (Tenn. Ct. App. 1991) (employee protected for reporting banking irregularities); and
- *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441, 117 LRRM 2789 (Tenn. 1984) (recognizing claim for employee who filed for workers' compensation benefits).

— *But see Moore v. Averitt Express, Inc.*, 19 IER Cases 303 (Tenn. Ct. App. 2002) (refusing to extend public policy exception to situation where an employee was allegedly fired for whistleblowing statements he made before his employment commenced); *Deiters v. Home Depot U.S.A., Inc.*, 842 F. Supp. 1023, 9 IER Cases 923 (M.D. Tenn. 1993) (no cause of action for employee terminated for filing suit against employer); and *Bloom v.*

General Electric Supply Co., 702 F. Supp. 1364, 3 IER Cases 1842 (M.D. Tenn. 1988) (finding that employee who alleged she was discharged after her husband began work for competitor of employer failed to state a claim under the public policy exception because no public policy was evidenced by constitutional or statutory provision).

TEXAS

Texas has recognized a narrow public policy exception that protects only passive whistleblowers who refuse to engage in criminal activity.

- *Sabine Pilot Service, Inc. v. Hauck,* 687 S.W.2d 733, 119 LRRM 2187 (Tex. 1985) (recognizing claim for sailor allegedly dismissed for refusing to pump bilges of ship in waters where law prohibited such pumping);
- *Johnston v. Del Mar Distributing Co., Inc.,* 776 S.W.2d 768 (Tex. App. 1989) (recognizing public policy claim for employee who inquired with the federal authorities concerning legality of shipment of firearms by employer);
- *Higginbotham v. Allwaste, Inc.,* 889 S.W.2d 411 (Tex. App. 1994) (recognizing claim for employee allegedly terminated for refusing to prepare inaccurate documents to submit to internal auditor who would then use them to file statements with the SEC); and
- *Morales v. SimuFlite Training International, Inc.,* 132 S.W.3d 603, 21 IER Cases 379 (Tex. App. 2004) (recognizing claim for employee allegedly terminated for refusing to violate federal aviation regulations).

— *But see Mayfield v. Lockheed Engineering & Sciences Co.,* 970 S.W.2d 185 (Tex. App. 1998) (refusing to extend *Sabine Pilot* to protect individuals reporting potentially illegal activity to higher management); *Wornick Co. v. Casas,* 856 S.W.2d 732, 8 IER Cases 1058 (Tex. 1993) (no claim for employee allegedly terminated because of knowledge that employer had committed crime); *Austin v. HealthTrust, Inc.-The Hosp. Co.,* 967 S.W.2d 400, 13 IER Cases 1707 (Tex. 1998) (finding no protection for employees who report unlawful workplace conduct); *Thompson v. El Centro Del Barrio,* 905 S.W.2d 356 (Tex. App. 1995) (public policy doctrine does not extend to whistleblowing); *Hancock v. Express One International, Inc.,* 800 S.W.2d 634 (Tex. App. 1990) (finding no protection for employee who refused to violate statute containing only civil penalties, but no criminal penalties); *Guthrie v. Tifco Industries,* 941 F.2d 374, 7 IER Cases 284 (5th Cir. 1991) (not recognizing claim for employee allegedly terminated for refusing to violate noncriminal customs regulations); and *Winters v. Houston Chronicle Publishing Co.,* 795 S.W.2d 723, 5 IER Cases 1185 (Tex. 1989) (refusing to extend *Sabine Pilot* exception to employee who was allegedly fired for reporting co-workers' illegal activity to employer).

UTAH

Utah has recognized a narrow public policy exception that extends to some types of whistleblowing.

- *Hodges v. Gibson Products Co.,* 811 P.2d 151 (Utah 1991) (recognizing claim for employee terminated based on knowingly false theft allegation);
- *Peterson v. Browning,* 832 P.2d 1280, 7 IER Cases 801 (Utah 1992) (affording public policy protection to employee who was allegedly asked to falsify tax records contrary to Missouri tax laws; Utah public policy could be found in law of another state or federal law);
- *Heslop v. Bank of Utah,* 839 P.2d 828, 7 IER Cases 1279 (Utah 1992) (determining that employee protected for internal complaints about violations of state banking law).

— *But see Rackley v. Fairview Care Centers, Inc.,* 2001 UT 32, 23 P.3d 1022, 17 IER Cases 895 (Utah 2001) (stating that public policy did not require nursing home employees to notify residents of arrival of funds; administrative regulations not a sufficient basis for public policy claim); and *Fox v. MCI Communications Corp.,* 931 P.2d 857, 12 IER Cases 769 (Utah 1997) (finding no public policy protection for employee who reported co-workers' allegedly criminal conduct to employer where no significant public harm might have resulted).

VERMONT

Vermont has recognized a limited public policy exception.

- *Payne v. Rozendaal,* 147 Vt. 488, 520 A.2d 586, 1 IER Cases 800 (1986) (discharge solely on basis of age is contrary to public policy).

— *But see Dulude v. Fletcher Allen Health Care, Inc.,* 174 Vt. 74, 807 A.2d 390, 18 IER Cases 1724 (2002) (refusing to find a violation of public policy where a nurse was terminated for allegedly improper medicating practices, even if the practices were in fact proper); and *Madden v. Omega Optical Inc.,* 165 Vt. 306, 683 A.2d 386, 11 IER Cases 1606 (1996) (finding no public policy claim for employee allegedly terminated for refusing to sign an unenforceable noncompetition agreement).

VIRGIN ISLANDS

The courts for the Virgin Islands have recognized a limited public policy exception that has not yet been extended to whistleblowing.

- *Claytor v. Chenay Bay Beach Resort,* 79 F. Supp. 2d 577, 15 IER Cases 1568 (D.V.I. 2000) (not allowing public policy claim based on policy expressed in Virgin Islands Wrongful Discharge Act);

- *Moore v. A.H. Riise Gift Shops,* 659 F. Supp. 1417, 2 IER Cases 157 (D.V.I. 1987) (recognizing claim where public policy based on statute requiring employers to rehire disabled employees); and
- *Robinson v. Hess Oil Virgin Islands Corp.,* 19 V.I. 106 (D.V.I. 1982) (recognizing claim for employee discharged based on the results of a negligently conducted polygraph test).

VIRGINIA

Virginia has recognized a narrow public policy exception.

- *Bowman v. State Bank of Keysville,* 229 Va. 534, 331 S.E.2d 797, 1 IER Cases 437 (1985) (recognizing claim for employees allegedly dismissed for exercising statutory rights as shareholders of employer); and
- *Anderson v. ITT Industries Corp.,* 92 F. Supp. 2d 516, 16 IER Cases 494 (E.D. Va. 2000) (recognizing claim for employee allegedly terminated for refusing to falsify resumes in connection with bid for government contract).

— However, the Virginia Supreme Court has not recognized a "generalized, common-law 'whistleblower' retaliatory discharge type claim." *Dray v. New Market Poultry Products, Inc.,* 258 Va. 187, 191, 518 S.E.2d 312, 15 IER Cases 938 (1999) (no claim recognized for poultry worker allegedly terminated for complaining about unsanitary conditions contrary to state sanitation laws). In order to have a viable wrongful termination claim the plaintiff must invoke a specific statute conferring rights or duties upon plaintiff. According to the Virginia Supreme Court, there are only three circumstances where it has concluded that the claims were sufficient to constitute a common law action for wrongful discharge under the public policy exception: (1) where an employer violated a policy enabling the exercise of an employee's statutorily created right; (2) when the public policy violated by the employer was explicitly expressed in the statute and the employee was clearly a member of that class of persons directly entitled to protection enunciated by the public policy; and (3) where the discharge was based on the employees refusal to engage in a criminal act. *Rowan v. Tractor Supply Co.,* 263 Va. 209, 559 S.E.2d 709, 18 IER Cases 788 (2002) (not allowing claim based on policy against obstruction of justice, where employee was allegedly terminated for refusing to abandon criminal assault charge against co-worker); *Lawrence Chrysler Plymouth Corp. v. Brooks,* 251 Va. 94, 465 S.E.2d 806, 11 IER Cases 523 (1996) (not recognizing claim for employee allegedly terminated for refusing to repair automobile in unsafe manner).

WASHINGTON

Washington has recognized a public policy exception that has been extended to protect whistleblowers in certain cases.

- *Hubbard v. Spokane County,* 146 Wash. 2d 699, 50 P.3d 602, 18 IER Cases 1564 (2002) (finding that public policy exception prohibits firing an employee for arguing with his employer about the legality of granting a building permit);
- *Ellis v. City of Seattle,* 142 Wash. 2d 450, 13 P.3d 1065, 17 IER Cases 1 (2000) (extending public policy protection to employee who refused to disable a fire alarm system because he reasonably believed it would be illegal to do so);
- *Gardner v. Loomis Armored, Inc.,* 128 Wash. 2d 931, 913 P.2d 377, 11 IER Cases 993 (1996) (finding that an employee who violated company policy intended to protect employees' lives by leaving his armored truck and aiding a woman during a bank robbery was protected by the public policy exception, according to four-prong test); and
- *Thompson v. St. Regis Paper Co.,* 102 Wash. 2d 219, 685 P.2d 1081, 1 IER Cases 392 (1984) (recognizing claim for employee allegedly dismissed for attempting to ensure compliance with the Foreign Corrupt Practices Act).

— *But see Awana v. Port of Seattle,* 89 P.3d 291 (Wash. Ct. App. 2004) (not recognizing claim for employees of contractor to Port of Seattle, where employees attempted to sue Port of Seattle directly even though employees not employed by Port of Seattle); *Vargas v. State,* 116 Wash. App. 30, 65 P.3d 330 (2003) (refusing to recognize wrongful termination claim for individual allegedly fired from state agency for selling drugs from his home, as there is no clear public policy against terminating individual for acts during nonwork hours); *Sedlacek v. Hillis,* 145 Wash. 2d 379, 18 IER Cases 425 (2001) (no claim for associating with disabled person); and *Farnam v. CRISTA Ministries,* 116 Wash. 2d 659, 807 P.2d 830 (1991) (not recognizing claim where nurse's report of lawful removal of terminally ill patient's feeding tube was based on personal ethics).

WEST VIRGINIA

West Virginia has recognized the public policy exception, and in some cases has extended protection to whistleblowers.

- *Tiernan v. Charleston Area Medical Center, Inc.,* 212 W. Va. 859, 575 S.E.2d 618 (2002) (recognizing public policy protection for employee statements about unsafe nursing practices of employer medical center);
- *Kanagy v. Fiesta Salons, Inc.,* 208 W. Va. 526, 541 S.E.2d 616, 17 IER Cases 345 (2000) (holding that public policy exception protects employee providing true information about her supervisor's unlicensed practice of cosmetology to state officials);
- *Lilly v. Overnight Transportation Co.,* 188 W. Va. 538, 425 S.E.2d 214, 8 IER Cases 267 (1992) (recognizing claim for driver who refused to operate vehicle with unsafe brakes);

- *Page v. Columbia Natural Resources, Inc.,* 198 W. Va. 378, 480 S.E.2d 817, 13 IER Cases 944 (1996) (employee protected for testifying in legal proceeding);
- *McClung v. Marion County Commission,* 178 W. Va. 444, 360 S.E.2d 221 (1987) (recognizing claim for employee who sued for overtime wages);
- *Wiggins v. Eastern Associated Coal Corp.,* 178 W. Va. 63, 357 S.E.2d 745 (1987) (allowing claim by mine foreman allegedly fired for refusing to operate mine under unsafe conditions);
- *Harless v. First National Bank in Fairmont,* 162 W. Va. 116, 246 S.E.2d 270, 115 LRRM 4380 (1978) (recognizing claim for employee allegedly dismissed for voicing concerns over violation of consumer credit laws); and
- *Collins v. Elkay Mining Co.,* 371 S.E.2d 46, 3 IER Cases 801 (W. Va. 1988) (recognizing public policy claim for employee who refused to falsify safety reports).

— *But see Birthisel v. Tri-Cities Health Services Corp.,* 188 W. Va. 371, 424 S.E.2d 606, 8 IER Cases 199 (1992) (finding that no clear public policy supports a claim of wrongful termination by a social worker allegedly fired for refusing to review patient charts on ethical grounds).

WISCONSIN

Wisconsin has recognized a public policy exception (as a contractual theory, not a tort theory) that has been extended to protect whistleblowers under some circumstances.

- *Strozinsky v. School District of Brown Deer,* 2000 WI 97, 237 Wis. 2d 19, 614 N.W.2d 443, 16 IER Cases 879 (Wis. 2000) (finding public policy exception where employee was allegedly terminated for attempting to comply with tax laws by making deductions from compensation checks) (citing *Brockmeyer v. Dun & Bradstreet,* 113 Wis. 2d 561, 335 N.W.2d 834, 115 LRRM 4484 (Wis. 1983) (public policy claim sounds in contract, not in tort));
- *Hausman v. St. Croix Care Center,* 214 Wis. 2d 655, 571 N.W.2d 393, 13 IER Cases 995 (Wis. 1997) (refusing to find general whistleblower exception, but finding that public policy protects nursing home employees who report abuse or neglect as required by statute);
- *Kempfer v. Automated Finishing, Inc.,* 211 Wis. 2d 100, 564 N.W.2d 692, 12 IER Cases 1686 (Wis. 1997) (upholding claim for employee terminated for refusing to drive truck because he did not have valid commercial driver's license);
- *Wilcox v. Niagara of Wisconsin Paper Corp.,* 965 F.2d 355, 7 IER Cases 812 (7th Cir. 1992) (recognizing claim for employee who refused to work Saturday and Sunday when employee worked late previous two days);
- *Winkelman v. Beloit Memorial Hospital,* 168 Wis. 2d 12, 483 N.W.2d 211, 7 IER Cases 686 (Wis. 1992) (finding that nurse protected for refusing to work in hospital unit in which she was unqualified to work); and

Wandry v. Bull's Eye Credit Union, 129 Wis. 2d 37, 384 N.W.2d 325 1986) (finding employee protected for refusing to reimburse empl loss on forged check that employee's supervisor approved).

But see Bammert v. Don's Super Valu, Inc., 2002 WI 85, 254 W 347, 646 N.W.2d 365, 18 IER Cases 1480 (Wis. 2002) (refusing to e public policy exception to employee who was allegedly fired beca her husband's participation in arrest of her boss's wife); *Batteries LLC v. Mohr,* 244 Wis. 2d 559, 628 N.W.2d 364, 17 IER Cases 1269 2001) (not recognizing claim for employee who refused to repay al overpayment of expense reimbursement); *Bushko v. Miller Brewin* 134 Wis. 2d 136, 396 N.W.2d 167 (Wis. 1986) (finding that employe complained about policies regarding plant safety, hazardous waste d state a cause of action); and *Ward v. Frito-Lay, Inc.,* 95 Wis. 2d 37 N.W.2d 536, 115 LRRM 4320 (Wis. Ct. App. 1980) (recognizing policy exception in *dicta;* however, no claim was stated by employe was discharged for relationship with co-worker).

WYOMING

Vyoming has adopted a public policy exception limited to employees rs' compensation claims.

McLean v. Hyland Enterprises, Inc., 2001 WY 111, 34 P.3d 12 IER Cases 183 (2001) (citing *Griess v. Consolidated Freightways of Delaware,* 776 P.2d 752, 4 IER Cases 839 (Wyo. 1989) (publi icy claim is recognized for employees who file workers' compen claims)) (refusing to extend public policy exception to protect indiv who complained about allegedly unsafe working conditions becaus had a potential administrative remedy).

But see Horne v. J.W. Gibson Well Service Co., 894 F.2d 1194, Cases 69 (10th Cir. 1990) (recognizing limited public policy exc in *Griess, supra;* declining to apply that exception to employe refused to submit to a drug test because employers' attempts to a safe workplace did not violate the public policy of Wyoming); *v. Crimson Enterprises, Inc.,* 777 P.2d 73, 4 IER Cases 914 (Wyo. (no claim recognized for whistleblowing); and *Allen v. Safeway Inc.,* 699 P.2d 277, 120 LRRM 2987 (Wyo. 1985) (not recognizing policy tort claim for employee allegedly discharged due to discrimi because separate remedies existed).

The CHAIRMAN. Well, thank you very much.

Mr. Goldberg.

STATEMENT OF JOE GOLDBERG

Mr. GOLDBERG. Chairman Davis, Mr. Waxman, and members of the committee, thank you for both the opportunity to testify today and also for the work your committee has done and continues to do on the issue of whistleblower protections.

Now, I essentially abandoned the remarks that I was going to make here today. I represent the American Federation of Government Employees, the largest Federal employee labor union. We represent over 200,000 employees.

There is nothing this committee can do concerning the *Garcetti* opinion. It is a first amendment analysis which obviously is outside the purview of this committee's jurisdiction. However, the *Garcetti* decisionmakes obvious the need for statutory whistleblower protection, which is within the purview of this committee.

The Whistleblower Protection Act, which we use daily at the American Federation of Government Employees to protect our employees, to that extent which they can be protected, essentially is a dead letter. The decisions of the U.S. Court of Appeals for the Federal Circuit have limited the plain language of the Whistleblower Protection Act to a surreal set of circumstances. So the Whistleblower Protection Act as to Federal employees essentially no longer exists. It's up to this committee to repair the damage done to the Whistleblower Protection Act by the Court of Appeals for the Federal Circuit.

We commend the chairman and this committee for its work in H.R. 1317, which is attempting to repair that damage.

Thank you very much.

[The prepared statement of Mr. Goldberg follows:]

STATEMENT BY

JOE GOLDBERG
SSISTANT GENERAL COUNSEL FOR LITGATIC
ICAN FEDERATION OF GOVERNMENT EMPLC

BEFORE

IE HOUSE GOVERNMENT REFORM COMMITTI
OVERSIGHT HEARING

REGARDING

PRICE FREE SPEECH?: WHISTLEBLOWERS A
CEBALLOS DECISION"

ON

JUNE 29, 2006

:. Chairman and Committee Members: My name is Joe Goldberg, and I am ısistant General Counsel for Litigation for the American Federation of ɔvernment Employees, AFL-CIO (AFGE). I appreciate the opportunity to test today's hearing regarding the current state of whistleblower protections that any of the over 600,000 federal employees represented by AFGE depend on ɔvide protection when they report wrongdoing and excessive waste. I will als ɔcuss the limitations the courts have placed on whistleblower rights, the ımbers of federal employees who are excluded from whistleblower protection ıd how active oversight of the Office of Special Counsel is imperative to feder ıployees. AFGE firmly believes that Congress should continue the work it ha ıgun to ensure that disclosures made by public employees reporting fraud, ıste, and abuse are protected.

ɜballos has a limited impact on federal workers.

ıe Supreme Court's decision in **Garcetti v. Ceballos**, 547 U.S. ___ (2006) ha ɔught much needed attention to the obstacles public employees who blow th ıistle on wrongdoing encounter. However, AFGE's analysis is that this case ıes not greatly impact most government workers. The Ceballos decision is ıited to public employees whose communications are unprotected by statute. ıe court held "that when public employees make statements pursuant to their ficial duties," the employees are not protected by the First Amendment. For ample, if an employee's job is to report safety hazards to a supervisor, these ports are not protected from employer retaliation by the First Amendment. O ɜ other hand, this case does not apply to statements made outside of an ıployee's duties. If the same employee instead disclosed safety hazards to t ıblic, these communications would be protected by the First Amendment.

ıis case does not change statutory protections, such as the Whistleblower otection Act (WPA) and labor laws. In fact, the Supreme Court specifically ıted in this opinion:

> The dictates of sound judgment are reinforced by the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing. See, *e.g.*, 5 U.S.C. §2302(b)(8).

Ceballos, the employee was not in a job covered by federal whistle-blower ws. His only possible protection was the First Amendment. Fortunately, mos FGE members are covered by whistleblower laws designed to protect federal il servants. Ceballos does not change this protection, nor does it change the otection enjoyed by union officials when speaking in their role as union officia employee rights via the grievance process of any other statutory protections eech.

ıistleblower protection law and its limitations in protecting federal ıployees.

e main statutory protection covering whistleblowers is the WPA, set forth is ! 5.C. §2302(b)(8), which forbids federal agencies from:

> Engage(ing) in reprisal for whistleblowing i.e....any disclosures of information by the employee or applicant that he or she reasonably believes evidences a **violation of a law, rule or regulation; gross mismanagement; gross waste of funds; an abuse of authority;** or a substantial and specific **danger to public health or safety.**

cording to this statute, the employee must prove that she or he made a ›tected disclosure and that management took a personnel action in retaliatic the disclosure. Huffman v. Office of Personnel Management, 263 F. 3d 13 ɜd.Cir. 2001). The scope and implementation of these whistleblower laws is ıtter of great concern. In Huffman and other cases the Federal Circuit Court peals has interpreted whistleblower protections very narrowly.

e decision in Ceballos will have far less of an effect on whistleblower policy ın judicial interpretation of the WPA that has weakened its effectiveness at ›tecting employees who come forward to report wrongdoing. Judicial cisions have limited protection for many disclosures. Communications mad a part of an employee's **normal duties are not protected.** Id. At 1354. ›wever, if an employee reports wrongdoing outside of normal work channels ɜ disclosure can be protected. Id. In addition, the Federal Circuit ruled in ıffman that communications to the wrongdoer are not protected. For examp ı supervisor is doing something illegal or grossly wasteful, an employee's mmunications about this behavior to that supervisor are not protected. Also, mmunications entirely about whether specific activity is legal are not protect ıly if the communication reveals something previously unknown about the tivity itself, can the communication be protected. For example, if the public ows that the agency is dumping trash in a river but does not know that this mping is illegal, communications to the media stating that the dumping is ›gal are not protected. However, if the public is not aware of the dumping aı s harmful to public health, communications to the media about the dumping ght be protected.

ıny of the loopholes in whistleblower protection were addressed by S. 494, ı ›deral Employee Protection of Disclosures Act which passed in the Senate a amendment to the 2007 National Defense Authorization Act. The result of veral years of bipartisan cooperation between the bill's sponsors, Homelanc ›curity and Governmental Affairs Committee Chairman Susan Collins and ıking member Daniel Akaka, S. 494 is a comprehensive advancement of ıistleblower rights. The bill applies WPA protections to "any" lawful

mmunication of misconduct. If enacted, the Federal Employee Protection of sclosures Act would in part stop any potential application of the Ceballos cision to federal employees, open access to the courts for whistleblowers, giv e Merit Service Protection Board (MSPB) the authority to hear cases when an nployee alleges that their security clearance was revoked or suspended in taliation for whistleblowing, and stops federal courts from creating requiremer tside the scope of federal law before a federal employee is protected under tl PA. The legislation also allows whistleblowers to disclose classified ormation to Congress under certain conditions. AFGE calls upon Congress t tain this essential bill during the conference process so that it is enacted into v.

emaining Issues in Whistleblower Protections: Transportation Security fficers, national security employees and the Office of Special Counsel.

ntire categories of federal employees are specifically excluded from most nistleblower protections. AFGE applauds this Committee for reporting out day H.R. 1317, the Federal Employee Protection of Disclosures Act, and takir e first step to restore whistleblower protections and a portion of the other right rrently denied over 42,000 Transportation Security Officers (TSOs) working i e Transportation Security Administration (TSA). Congress clearly intended th SOs should be fully covered by whistleblower protections by originally requirin at the TSA adopt the FAA personnel system, which expressly incorporates Ti whistleblower protections, including provisions for investigation and forcement. 49 U.S.C. §40222(g)(2)(A).

owever, TSA has argued before the MSPB and the U.S. Court of Appeals tha e FAA system and its whistleblower protections do not apply to TSOs due to atutory note within the Aviation and Transportation Security Act (ATSA). Pub w 107-71. The footnote states that "notwithstanding any other provision of w," the TSA administrator may "employ, appoint, discipline, terminate, and fix e compensation, terms, and conditions of employment of Federal service for rport screeners...and] shall establish levels of compensation and other nefits for individuals so employed." Public Law 107-71, §111(d). Without th ervention of Congress or the courts, TSA has failed to provide whistleblower otections to TSOs, and has disciplined and fired employees who had the urage to expose flaws in TSA management and airport screening operations

nlike other federal employees, TSOs do not have an individual right to appeal e MSPB for an independent, neutral review of whether negative job actions ere unlawful retaliation for protected disclosures. The provisions of H.R. 1317 sure that TSOs can now bring those claims before the MSPB, the same right orded to other DHS employees. TSA has taken the position that it is not und by the Rehabilitation Act of 1973, and has fired and failed to hire person th a disability (including diabetes and epilepsy) regardless of their actual abili perform the duties of a TSO. If enacted into law, H.R. 1317 would also provi

ɔOs protection from certain discriminatory practices, including discrimination c
e basis of an actual or perceived disability. However, H.R. 1317 does not
ldress the other rights denied TSOs, including the other prohibited practices c
U.S.C. §2302(b). TSA has refused to recognize the right of TSOs to join
ıions, the veterans' preference or to follow the policies of the Office of
ersonnel Management as do other federal agencies. TSOs face disciplinary
tion—up to termination--for merely taking approved leave. TSOs are on the
ɔnt line of protecting the public in the most-used forms of transportation
cluding travel by air and rail, and the time is long overdue to restore the labor
ıhts Congress intended that they enjoy. AFGE calls upon Congress to
ımediately enact legislation restoring full rights to TSOs

addition to TSOs, federal employees specifically excluded from the Whistle-
ɔwer Protection Act include uniformed military personnel in the Armed Forces
ıd employees of the Central Intelligence Agency, the Defense Intelligence
ɟency, the Defense Mapping Agency, the Federal Bureau of Investigation, the
ɔvernment Accountability Office and the National Security Agency. Because
ese employees do not have a right to third-party review of their complaints of
taliation for disclosures of illegal activities or waste, the very agency the
nployee accuses of retaliation stands as sole arbiter of its own actions. For
ıtional security whistleblowers, the ultimate act of retaliation is revocation of tl
nployee's security clearance. Once they have lost their security clearance, aı
nployee's career within an agency is over, and other job opportunities are
aced in jeopardy.

ɔngress must act to extend whistleblower protections to national security
ɔrkers by enacting legislation such as S. 2285, the Whistleblower
npowerment, Security and Taxpayer Protection Act, introduced by Senator.
ank Lautenberg in the Senate, and H.R. 5112, the Executive Branch Reform
t of 2006, introduced by Ranking Member Henry Waxman, House Governme
eform Committee and Federal Workforce and Agency Organization
ıbcommittee Ranking Member Danny Davis. Both bills extend whistleblower
otections to employees of the FBI and other intelligence agencies and broade
cess to jury trials for federal employees. This Committee's approval of H.R.
12 in April of this year was a great step in the right direction for whistleblowe
ılicies. AFGE looks forward to working with Congress to ensure that these tw
ls are enacted into law.

nce 2004, the head of the OSC, Scott Bloch, has taken numerous steps to
wart the rights of federal employees and trample on the rights of his own
nployees at OSC. In April 2004, Bloch, the principal protector of federal civil
rvice rights and federal whistleblowers, sent a gag order to his own staff whic
ely violates the Whistleblower Protection Act. The order stated that "the
ɔecial Counsel has directed that any official comment on or discussion
...sensitive internal agency matters with anyone outside OSC must be
ıproved in advance..." Bloch also forbade his staff from discussing anti-

crimination policy with outsiders, including other federal employees and encies asking for guidance. Corrective action for all prohibited personnel actices has dropped roughly by half over the last two years. AFGE believes ere is a correlation between the steep decline in enforcement of whistleblower otections for federal workers and the actions of the head of the OSC.

rrent policies of the OSC have caused serious harm to numerous federal ployees. Our demand is simple: that the head of the OSC carry out the ssion of the agency as required by law, including respecting the work of caree iff with extensive experience in investigating whistleblower retaliation claims. thout the cooperation and good faith action of the OSC, whistleblower otection laws are rendered far less effective than Congress intended. creased Congressional oversight of the OSC is vital to ensure the true intent c ngress—that federal whistleblowers be protected from retaliation—is a eaningful reality for federal workers.

eballos is the latest in a long series of judicial decisions that have greatly rrowed protections under the WPA. Even though Ceballos does not apply to deral employees, the chilling effect of yet another judicial decision weakening her than strengthening whistleblower protections will take its toll as federal ployees weigh whether disclosures of illegal activity and excessive waste are rth the risk of retaliation by supervisors that can range from making their worl es miserable to costing them their job and career. AFGE applauds the mmittee for holding this hearing, and looks forward to working with both the use and Senate to enact laws that advance whistleblower protections.

at concludes my statement. I will be happy to respond to any questions.

Chairman TOM DAVIS. Thank you very much.

Ms. Dash, let me start with you. What is within a teacher's job description? Because that's central through the whole case. Can you—you're a veteran and a leader and a professional.

Ms. DASH. Anything and everything that is asked of us.

Chairman TOM DAVIS. So reporting abuse is clearly within that?

Ms. DASH. Yes, but reporting it to the principal. It's limited to the supervisor.

Chairman TOM DAVIS. Reporting environmental hazards would be obviously part of it?

Ms. DASH. Correct.

Chairman TOM DAVIS. OK.

Ms. DASH. The problem lies with where it goes after that if nothing happens at the next level.

Chairman TOM DAVIS. Commenting on curriculum, that would also be part of the duty, wouldn't it? Or would it not? Is that where it gets fuzzy?

Ms. DASH. I guess it depends on how courageous you are.

Chairman TOM DAVIS. You'd think they would want your input, right?

Ms. DASH. You would, wouldn't you?

Chairman TOM DAVIS. Ms. Soronen, let me ask you the same question.

Ms. SORONEN. Justice Kennedy, in writing the majority opinion, specifically states, we reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions.

That I think is a specific admonishment to a lower court that they likewise cannot create excessively broad job descriptions to limit an employee's rights.

I guess how this issue will play out will be ultimately determined by a lower court and the Supreme Court, if they ever take a case, defining what exactly an employee's job duties means under this case. The majority was clear, it was to be defined narrowly.

I think of teachers, teaching job duties in the classroom are clearly a part of their official job duties. Reporting things like abuse and neglect, which might be the obligation of all school listed employees, or commenting on air quality and the like are probably not part of a teacher's official job duties. But I guess that's for the lower courts to decide. The Supreme Court spoke resoundingly on the fact that job descriptions are to be defined narrowly.

Chairman TOM DAVIS. OK. Thank you. I've been summoned to the floor, but Mr. Issa is going to take over questioning for our side, and I know Ms. Watson has some questions.

Ms. WATSON. I want to thank all the panelists. And I still have a bit of confusion. There's been reference made to H.R. 1317, and then reference made to Senate bill 494. Let me—I notice that Mr. Khon is no longer in the audience, but let me ask Mr. Goldberg, how would H.R. 1317 and S. 494 apply to the case under consideration, or the Supreme Court decision?

Mr. GOLDBERG. Again, the statutory revisions contemplated by Congress in H.R. 1317 and S. 494 would repair the Whistleblower Protection Act, which essentially, as I said in my testimony, is a dead letter. One of the ways it would do this is explicitly recognize

that the type of input that an employee can make internally would explicitly be protected. And when an employee such as a NASA employee on the space shuttle, an engineer on the space shuttle reports to a supervisor what he believes to be a deadly threat to health and safety, that explicit complaint—which is covered by that person's job description—would be protected activity.

Again, perversely now, the very experts that we rely on and that we've hired to do the job are not protected when they express their professional opinion on matters of life and death. And H.R. 1317 and S. 494 would go a long way toward repairing that gaping hole in the Federal Whistleblower Protection Act.

Ms. WATSON. Well, my question is, was this particular case brought to court under the wrong provision, because it had to do with first amendment? If these two bills become the law, then they would cover Mr. Ceballos?

Mr. GOLDBERG. Actually, they probably would not. What we have are two different methods of trying to protect whistleblowing, both the constitutional method, which is the *Garcetti* decision, and the statutory method. Now again, when the Supreme Court has spoken, as the highest court in the land, as to the first amendment, the scope of the first amendment, there's nothing this committee can do to affect that. But there are statutory protections that this committee certainly can invoke and legislate that would protect the same whistleblowing activity.

So essentially you would have two different methods of enforcing the whistleblower protection; one, constitutional. Now, we have heard the limits of that in *Garcetti* and in various comments today. The second is a statutory protection, which was not involved in *Garcetti,* and that is what this committee can do in its amendments to the Federal Whistleblower Protection Act.

Ms. WATSON. Well, could *Garcetti* be taken back to court if these two passed?

Mr. GOLDBERG. The short answer——

Ms. WATSON. This went up to the highest court, but it was an interpretation of the protection of the first amendment?

Mr. GOLDBERG. That is correct. And the case has been—as I understand it, the case has been remanded to a lower court. As to the addition of a subsequent Federal law to the previous discipline involved in that case, that would be the ex post facto application of a subsequent law, which might be problematic.

Ms. WATSON. Mr. Bergstrom.

Mr. BERGSTROM. Ms. Watson, just to clarify, we have three buckets of employees seeking protection for whistleblowing activities; you have Federal employees, you have your State or local government employees, and then you have your private sector employees. And I think to—not to get overly bogged down in the legal intricacies of your question, but I think that the bills which are proposed would be amendments to protections which would apply to a Federal employee. In this instance Mr. Ceballos was an employee of the county of Los Angeles. So the easy answer to your question is no, it wouldn't have any affect on Mr. Ceballos.

Ms. WATSON. Well, I have a great amount of interest because, No. 1, I am a Representative from Los Angeles County; No. 2, I know of the case; and No. 3, Mr. Ceballos made reference to an-

other case where under Federal law to be able to mediate the actions of those involved. And what I'm trying to get through here is where then do we address a new policy that would have an impact on a person in the county of Los Angeles or any other county in the United States? What would we have to do, Mr. Goldberg, to give him the protections?

Mr. GOLDBERG. Again, I represent Federal employees, and there are certain limits to the power of the U.S. Congress to protect a State employee; however, as long as that employee could be brought under the purview of, say, the Commerce Clause, by passing Federal legislation, then it is possible for the Federal Government to effect and essentially grant statutory whistleblower protection rights to State employees, but it would be a question of federalism versus States rights.

Ms. WATSON. Let me just ask this if I might, Mr. Chair. Could the Federal Government then require all States to relook at their whistleblower laws under the situation concerning *Garcetti?*

Mr. GOLDBERG. That's certainly possible. And it is also, again, certainly possible that the Federal Government could pass a law that would—the Federal law would cover the whistleblower protections of State and municipal government employees.

Ms. WATSON. That might be a direction to go in, that we could initiate here at the Federal level?

Mr. GOLDBERG. That's correct. But again the Supreme Court has shown itself somewhat conversant with the limits of Federal power vis-a-vis purely State activities. So the Congress would have to be careful to indicate the interstate aspects of the protections that it seeks to expand to State or municipal employees.

Ms. WATSON. Well, what we could do—and this is to the Chair—is that we might want to have certain States to take a look at their whistleblower protections relative to the *Garcetti* decision that really addresses Federal employees. This case is brought to us—this is a county employee, and we're discussing it here under a Federal framework. And so it might be something that we could address by having States look at these laws and see if there is an application to their own employees.

Mr. GOLDBERG. That's certainly correct. And of course Federal money to flow down through the States and to the municipalities, and that may be a method of using Federal authority to grant certain statutory rights that the Supreme Court did not feel emanated from the Constitution, but that the Federal Congress believes are in the best interests of the citizens of the United States to grant to State or municipal employees.

Mr. ISSA [presiding]. The gentlelady's time is up.

Mr. Bransford, you seem to want to weigh in.

Mr. BRANSFORD. Yes, I wanted to address Ms. Watson's question.

If S. 494 or H.R. 1317 were to pass and if Mr. Ceballos was a Federal employee, he would be protected, in my opinion. And if the Congress were to pass either version of those laws, I think it would serve as a good leadership example to the States to pass similar whistleblower protections.

Ms. WATSON. But he is not a Federal employee.

Mr. BRANSFORD. It wouldn't protect him, but it would protect Federal employees engaged in similar behavior who are not now protected.

Ms. WATSON. And I'm trying to get to how—we're discussing this case, which is local to the State of California and the county of Los Angeles.

Mr. BRANSFORD. I think it is mostly up to the State of California.

Mr. ISSA. The gentlelady did a great job. I would have let you go on longer.

I've got just a couple of questions, and if you'd like a second round, we can come back until the bell rings for the vote.

I think, Mr. Ceballos, I'd like to sort of set one thing straight. You're presently working for the county of Los Angeles?

Mr. CEBALLOS. Yes.

Mr. ISSA. You're continuing to pursue your case?

Mr. CEBALLOS. Yes.

Mr. ISSA. Although you've gone a long way, you're here today testifying before Congress, your own time, your own dime, as I understand?

Mr. CEBALLOS. Correct.

Mr. ISSA. I guess the question is why? Many people in your situation, with your education, your talents, your capability, very portable, would have simply moved on. Why do you stay there doing the job you're doing?

Mr. CEBALLOS. Well, I ask myself that question I think almost every day. I think simply because I know I'm doing the right thing. Back then I knew I was doing the right thing, and I continue to believe I'm doing the right thing. And I think it's important that public employees feel that when they are acting in the best interests of their employer and the public, that they be afforded the protection to act in that best interest. And even though there is nothing that this panel can do that will change what has already occurred to me or change this decision, if it helps future government employees then I will do everything I can to help in that regard.

Mr. ISSA. Well, sir, often in Washington we quote this, you know, where do I go to get my reputation back. You don't have that problem. Your reputation is intact inspite of all the trials and tribulations that you've gone through. So I would certainly—this committee supports and continues to promote the ability of people to break through the bureaucracy and report wrongdoing for the benefit of all the people of the United States. So I commend you for staying with it. Like I said, I had to ask why you did it. As a Californian, we're both Californians, you know, I applaud that you are staying on the job. Now I'm San Diego. And if you ever decide to move to another county, you know, we could use some good people.

Sorry, my ranking member here and I constantly try to figure out whether in fact Los Angeles—San Diego is what Los Angeles was when people went there.

I do have one more sort of critical question. Why did you decide to raise this as a first amendment claim rather than a claim under statutory whistleblowers? That, to a great extent, is what elevated you to the Supreme Court.

Mr. CEBALLOS. Right. I think at the time myself and my lawyers felt that the first amendment provided us with the means and the

protections to address our grievances and pursue our remedies. At the time we did not believe that the California law—which is, frankly, better than most other States—provided the means and the protection. And it's still not clear if it does that.

Mr. ISSA. Well, let me explore a slightly different line that probably broadens the question a little bit. As we look at conferencing our legislation and trying to have the best—and particularly for Mr. Goldberg—it is unlikely that this Congress is going to try to reach down and usurp all States rights on the whistleblower. It hasn't been a tendency and I don't think it should be. I don't think the ranking gentlelady would think that we should preempt because when you start preempting, you never know when it will end. However, so many actions in States do involve moneys of the Federal Government and in effect on Federal moneys being spent.

Would you say that a narrowly crafted statute that would apply Federal whistleblowers, if that specific action had a direct link to the prosecution of Federal dollars—and I'll just give you an example so that at least we can work in that rhetorical sense. If, for example, a law enforcement officer, State law enforcement officer like yourself or a policeman were prosecuting using Federal dollars on a State case—let's say gang violence—and that in fact it was going to lead to a waste of those dollars, do you think it would be appropriate for us to include that in our legislation such that the Federal interest would occur in the sense that a State whistleblower would be in fact effectively reporting the loss of Federal dollars or the misspending of specifically Federal dollars? If that link can be made, do you think that would be appropriate and effective in helping to bring some common denominator that other States may choose to follow?

Mr. GOLDBERG. Certainly that could be an approach. I would not recommend—I don't think my organization would recommend a preemption of State law, but—as we have the 50 States as a laboratory—but certainly the Federal law could provide a floor and an independent cause of action regardless of an individual State's law, especially if it involved Federal dollars. But preemption of State law, I understand, is probably not at the forefront of this committee's intent at this time, but it's not required either and we're not suggesting it.

Mr. ISSA. OK. One final question, and I'd like to make sure the gentlelady has time before we trot to our vote.

Mr. Bergstrom, in light of the Supreme Court decision, how would you advise a client to pursue a similar claim today? In other words, same facts, Supreme Court decision there, what remedies would you choose based on what's available, and then you can hypothecate whether some of this becomes law.

Briefly, so the gentlelady gets her question.

Mr. BERGSTROM. Absolutely. I will just be direct and to the point. It would depend, of course, on which category the employee falls into, because as we've discussed, the framework of laws that protect whistleblower activities depend on whether you're Federal, State or private sector. Assuming that you are a California State public sector employee, you could take advantage of California Labor Code, section 1102.5, which protects both private and public sector employees for reporting violations of Federal or State law.

That claim in and of itself also specifically protects reports that are made by a government employee internally to his or her supervisor, which is one of the suggestions that was made earlier today.

So I would suggest that, as to California, it's well on its way, as many other States are, with adequate whistleblower protections. California also has its own independent Whistleblower Protection Act, which protects State employees, and then it has a separate procedure which protects city and county employees under Government Code, section 53298.

And last, the employee certainly, if they were demoted, as Mr. Ceballos has asserted that he was, or if they were terminated, as some employees assert that they are, in response to making a whistleblower complaint, then they would have a common law claim for wrongful termination or wrongful demotion in violation of public policy.

Mr. ISSA. Now as a San Diego non-lawyer to a San Diego lawyer, you didn't mention the fact that when Mr. Ceballos protected or attempted to protect somebody from an incarceration when in fact they should not have been incarcerated, in his opinion, he was protecting somebody from a wrongful imprisonment, from a denial of federally protected civil rights. Would you consider that in fact in this case, because it was law enforcement trying to prevent a wrongful breach of somebody's federally protected civil rights—we have a right not to be wrongfully imprisoned— that had any merit that would have brought it to the Supreme Court with a different outcome?

Mr. BERGSTROM. That may be a question better asked to Mr. Ceballos' counsel at the time. Honestly it is not an issue that I had considered previously.

Mr. ISSA. Thank you.

The gentlelady.

Ms. WATSON. Thank you very much, Mr. Chairman.

I just wanted to say to Mr. Ceballos, it was courageous of you to come here, and I commend you, because what we would like to have is more honesty in government. And I'm very familiar with the case that you reference. We watched it very closely. It wasn't in my district, but at one time it was in my school district—I was on the school board then. I was very interested in the comments of the two people representing educational organizations. And I would say to you, I think it's been remanded down to another court.

Mr. CEBALLO. Ninth Circuit.

Ms. WATSON. What are you seeking? What kind of relief and remedy are you seeking?

Mr. CEBALLOS. I think we're waiting to hear from the Ninth Circuit to see what they want us to do.

Ms. WATSON. If you will leave your card here with the staff, I would appreciate it. I'd like to get in touch with you privately.

Mr. CEBALLOS. I will.

Ms. WATSON. Thank you very much, panelists.

Mr. ISSA. And I would like to thank, once again, all the panelists.

The record will stay open for 5 legislative days so that you may include additional extraneous materials. And if you don't mind, if there are any questions from people who were not able to be here,

they'll be submitted to you in writing. And with that, we stand adjourned.

[Whereupon, at 2:17 p.m., the committee was adjourned.]

[The prepared statement of Hon. Jon C. Porter and additional information submitted for the hearing record follow:]

STATEMENT FOR THE RECORD
CONGRESSMAN JON C. PORTER (R-NV-3)
"What Price Free Speech? : Whistleblowers and the Ceballos Decision"
June 29, 2006

:hairman, I would like to thank you today for holding this very important hearing to the witnesses, thank you for taking time out to testify. I look forward to hearir testimony.

:ecent Ceballos decision has called into question the rights of whistleblowers. ;y, our Committee examines to what effect that decision has on existing law and :ctions afforded to federal employees.

Whistleblower Protection Act is clear in its intent and purpose. The goal is to urage our federal employees to work honestly without fear of retaliation or rebuk their supervisors. The ability of employees to feel the freedom to report incidenc ɔvernment illegality, waste, and corruption is an important part of helping rnment itself to function. As Chairman of the Federal Workforce and Agency nization Subcommittee of our Government Reform Committee, I understand full the importance of whistleblowers to the oversight of government organizations. I the progress of my Subcommittee's various investigations into federal illegality h due to statements by employees who have witnessed waste to the American ıyer and fraud to the federal system.

n, Mr. Chairman, I thank you for holding this hearing and look forward to hearing ɜstimonies.

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GARCETTI ET AL. *v.* CEBALLOS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04–473. Argued October 12, 2005—Reargued March 21, 2006—Decided May 30, 2006

Respondent Ceballos, a supervising deputy district attorney, was asked by defense counsel to review a case in which, counsel claimed, the affidavit police used to obtain a critical search warrant was inaccurate. Concluding after the review that the affidavit made serious misrepresentations, Ceballos relayed his findings to his supervisors, petitioners here, and followed up with a disposition memorandum recommending dismissal. Petitioners nevertheless proceeded with the prosecution. At a hearing on a defense motion to challenge the warrant, Ceballos recounted his observations about the affidavit, but the trial court rejected the challenge. Claiming that petitioners then retaliated against him for his memo in violation of the First and Fourteenth Amendments, Ceballos filed a 42 U. S. C. §1983 suit. The District Court granted petitioners summary judgment, ruling, *inter alia,* that the memo was not protected speech because Ceballos wrote it pursuant to his employment duties. Reversing, the Ninth Circuit held that the memo's allegations were protected under the First Amendment analysis in *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.,* 391 U. S. 563, and *Connick* v. *Myers,* 461 U. S. 138.

Held: When public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. Pp. 5–14.

(a) Two inquiries guide interpretation of the constitutional protections accorded public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. See *Pickering, supra,* at 568. If the answer is no, the em-

ployee has no First Amendment cause of action based on the employer's reaction to the speech. See *Connick, supra,* at 147. If the answer is yes, the possibility of a First Amendment claim arises. The question becomes whether the government employer had an adequate justification for treating the employee differently from any other member of the general public. See *Pickering, supra,* at 568. This consideration reflects the importance of the relationship between the speaker's expressions and employment. Without a significant degree of control over its employees' words and actions, a government employer would have little chance to provide public services efficiently. Cf. *Connick, supra,* at 143. Thus, a government entity has broader discretion to restrict speech when it acts in its employer role, but the restrictions it imposes must be directed at speech that has some potential to affect its operations. On the other hand, a citizen who works for the government is nonetheless still a citizen. The First Amendment limits a public employer's ability to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. See *Perry* v. *Sindermann,* 408 U. S. 593, 597. So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively. See, *e.g., Connick, supra,* at 147. Pp. 5–8.

(b) Proper application of the Court's precedents leads to the conclusion that the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities. Because Ceballos' memo falls into this category, his allegation of unconstitutional retaliation must fail. The dispositive factor here is not that Ceballos expressed his views inside his office, rather than publicly, see, *e.g., Givhan* v. *Western Line Consol. School Dist.,* 439 U. S. 410, 414, nor that the memo concerned the subject matter of his employment, see, *e.g., Pickering,* 391 U. S, at 573. Rather, the controlling factor is that Ceballos' expressions were made pursuant to his official duties. That consideration distinguishes this case from those in which the First Amendment provides protection against discipline. Ceballos wrote his disposition memo because that is part of what he was employed to do. He did not act as a citizen by writing it. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance. Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. Cf. *Rosenberger* v. *Rector and Visitors*

of Univ. of Va., 515 U. S. 819, 833. This result is consistent with the Court's prior emphasis on the potential societal value of employee speech and on affording government employers sufficient discretion to manage their operations. Ceballos' proposed contrary rule, adopted by the Ninth Circuit, would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business. This displacement of managerial discretion by judicial supervision finds no support in the Court's precedents. The doctrinal anomaly the Court of Appeals perceived in compelling public employers to tolerate certain employee speech made publicly but not speech made pursuant to an employee's assigned duties misconceives the theoretical underpinnings of this Court's decisions and is unfounded as a practical matter. Pp. 8–13.

(c) Exposing governmental inefficiency and misconduct is a matter of considerable significance, and various measures have been adopted to protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions. These include federal and state whistle-blower protection laws and labor codes and, for government attorneys, rules of conduct and constitutional obligations apart from the First Amendment. However, the Court's precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job. Pp. 13–14.

361 F. 3d 1168, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion. SOUTER, J., filed a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined. BREYER, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–473

GIL GARCETTI, ET AL., PETITIONERS *v.* RICHARD CEBALLOS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May 30, 2006]

JUSTICE KENNEDY delivered the opinion of the Court.

It is well settled that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick* v. *Myers,* 461 U. S. 138, 142 (1983). The question presented by the instant case is whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties.

I

Respondent Richard Ceballos has been employed since 1989 as a deputy district attorney for the Los Angeles County District Attorney's Office. During the period relevant to this case, Ceballos was a calendar deputy in the office's Pomona branch, and in this capacity he exercised certain supervisory responsibilities over other lawyers. In February 2000, a defense attorney contacted Ceballos about a pending criminal case. The defense attorney said there were inaccuracies in an affidavit used to obtain a critical search warrant. The attorney informed Ceballos that he had filed a motion to traverse, or chal-

lenge, the warrant, but he also wanted Ceballos to review the case. According to Ceballos, it was not unusual for defense attorneys to ask calendar deputies to investigate aspects of pending cases.

After examining the affidavit and visiting the location it described, Ceballos determined the affidavit contained serious misrepresentations. The affidavit called a long driveway what Ceballos thought should have been referred to as a separate roadway. Ceballos also questioned the affidavit's statement that tire tracks led from a stripped-down truck to the premises covered by the warrant. His doubts arose from his conclusion that the roadway's composition in some places made it difficult or impossible to leave visible tire tracks.

Ceballos spoke on the telephone to the warrant affiant, a deputy sheriff from the Los Angeles County Sheriff's Department, but he did not receive a satisfactory explanation for the perceived inaccuracies. He relayed his findings to his supervisors, petitioners Carol Najera and Frank Sundstedt, and followed up by preparing a disposition memorandum. The memo explained Ceballos' concerns and recommended dismissal of the case. On March 2, 2000, Ceballos submitted the memo to Sundstedt for his review. A few days later, Ceballos presented Sundstedt with another memo, this one describing a second telephone conversation between Ceballos and the warrant affiant.

Based on Ceballos' statements, a meeting was held to discuss the affidavit. Attendees included Ceballos, Sundstedt, and Najera, as well as the warrant affiant and other employees from the sheriff's department. The meeting allegedly became heated, with one lieutenant sharply criticizing Ceballos for his handling of the case.

Despite Ceballos' concerns, Sundstedt decided to proceed with the prosecution, pending disposition of the defense motion to traverse. The trial court held a hearing on the motion. Ceballos was called by the defense and

recounted his observations about the affidavit, but the trial court rejected the challenge to the warrant.

Ceballos claims that in the aftermath of these events he was subjected to a series of retaliatory employment actions. The actions included reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion. Ceballos initiated an employment grievance, but the grievance was denied based on a finding that he had not suffered any retaliation. Unsatisfied, Ceballos sued in the United States District Court for the Central District of California, asserting, as relevant here, a claim under Rev. Stat. §1979, 42 U. S. C. §1983. He alleged petitioners violated the First and Fourteenth Amendments by retaliating against him based on his memo of March 2.

Petitioners responded that no retaliatory actions were taken against Ceballos and that all the actions of which he complained were explained by legitimate reasons such as staffing needs. They further contended that, in any event, Ceballos' memo was not protected speech under the First Amendment. Petitioners moved for summary judgment, and the District Court granted their motion. Noting that Ceballos wrote his memo pursuant to his employment duties, the court concluded he was not entitled to First Amendment protection for the memo's contents. It held in the alternative that even if Ceballos' speech was constitutionally protected, petitioners had qualified immunity because the rights Ceballos asserted were not clearly established.

The Court of Appeals for the Ninth Circuit reversed, holding that "Ceballos's allegations of wrongdoing in the memorandum constitute protected speech under the First Amendment." 361 F. 3d 1168, 1173 (2004). In reaching its conclusion the court looked to the First Amendment analysis set forth in *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.,* 391 U. S. 563 (1968), and

Connick, 461 U. S. 138. *Connick* instructs courts to begin by considering whether the expressions in question were made by the speaker "as a citizen upon matters of public concern." See *id.*, at 146–147. The Court of Appeals determined that Ceballos' memo, which recited what he thought to be governmental misconduct, was "inherently a matter of public concern." 361 F. 3d, at 1174. The court did not, however, consider whether the speech was made in Ceballos' capacity as a citizen. Rather, it relied on Circuit precedent rejecting the idea that "a public employee's speech is deprived of First Amendment protection whenever those views are expressed, to government workers or others, pursuant to an employment responsibility." *Id.*, at 1174–1175 (citing cases including *Roth* v. *Veteran's Admin. of Govt. of United States*, 856 F. 2d 1401 (CA9 1988)).

Having concluded that Ceballos' memo satisfied the public-concern requirement, the Court of Appeals proceeded to balance Ceballos' interest in his speech against his supervisors' interest in responding to it. See *Pickering*, *supra*, at 568. The court struck the balance in Ceballos' favor, noting that petitioners "failed even to suggest disruption or inefficiency in the workings of the District Attorney's Office" as a result of the memo. See 361 F. 3d, at 1180. The court further concluded that Ceballos' First Amendment rights were clearly established and that petitioners' actions were not objectively reasonable. See *id.*, at 1181–1182.

Judge O'Scannlain specially concurred. Agreeing that the panel's decision was compelled by Circuit precedent, he nevertheless concluded Circuit law should be revisited and overruled. See *id.*, at 1185. Judge O'Scannlain emphasized the distinction "between speech offered by a public employee acting *as an employee* carrying out his or her ordinary job duties and that spoken by an employee acting *as a citizen* expressing his or her personal views on disputed matters of public import." *Id.*, at 1187. In his

view, "when public employees speak in the course of carrying out their routine, required employment obligations, they have no *personal* interest in the content of that speech that gives rise to a First Amendment right." *Id.*, at 1189.

We granted certiorari, 543 U. S. 1186 (2005), and we now reverse.

II

As the Court's decisions have noted, for many years "the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Connick,* 461 U. S., at 143. That dogma has been qualified in important respects. See *id.*, at 144–145. The Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern. See, *e.g.*, *Pickering, supra*, at 568; *Connick, supra*, at 147; *Rankin* v. *McPherson,* 483 U. S. 378, 384 (1987); *United States* v. *Treasury Employees,* 513 U. S. 454, 466 (1995).

Pickering provides a useful starting point in explaining the Court's doctrine. There the relevant speech was a teacher's letter to a local newspaper addressing issues including the funding policies of his school board. 391 U. S., at 566. "The problem in any case," the Court stated, "is to arrive at a balance between the interests of the teacher, 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." *Id.*, at 568. The Court found the teacher's speech "neither [was] shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or

to have interfered with the regular operation of the schools generally." *Id.*, at 572–573 (footnote omitted). Thus, the Court concluded that "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." *Id.*, at 573.

Pickering and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. See *id.*, at 568. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. See *Connick, supra*, at 147. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. See *Pickering*, 391 U. S., at 568. This consideration reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.

To be sure, conducting these inquiries sometimes has proved difficult. This is the necessary product of "the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors . . . to furnish grounds for dismissal." *Id.*, at 569. The Court's overarching objectives, though, are evident.

When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. See, *e.g.*, *Waters* v. *Churchill*, 511 U. S. 661, 671 (1994) (plurality opinion) ("[T]he government as employer

indeed has far broader powers than does the government as sovereign"). Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services. Cf. *Connick, supra,* at 143 ("[G]overnment offices could not function if every employment decision became a constitutional matter"). Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.

At the same time, the Court has recognized that a citizen who works for the government is nonetheless a citizen. The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. See *Perry* v. *Sindermann,* 408 U. S. 593, 597 (1972). So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively. See, *e.g.*, *Connick, supra,* at 147 ("Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government").

The Court's employee-speech jurisprudence protects, of course, the constitutional rights of public employees. Yet the First Amendment interests at stake extend beyond the individual speaker. The Court has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion. *Pickering* again provides an instructive example. The Court characterized its holding as rejecting the attempt of school administrators to "limi[t] teachers' opportunities to contribute to public debate." 391 U. S., at 573. It also noted that teachers are "the members of a community most likely to have informed and

definite opinions" about school expenditures. *Id.*, at 572. The Court's approach acknowledged the necessity for informed, vibrant dialogue in a democratic society. It suggested, in addition, that widespread costs may arise when dialogue is repressed. The Court's more recent cases have expressed similar concerns. See, *e.g.*, *San Diego* v. *Roe*, 543 U. S. 77, 82 (2004) *(per curiam)* ("Were [public employees] not able to speak on [the operation of their employers], 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" (citation omitted)); cf. *Treasury Employees*, 513 U. S., at 470 ("The large-scale disincentive to Government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said").

The Court's decisions, then, have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions. See, *e.g.*, *Rankin*, 483 U. S., at 384 (recognizing "the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment"). Underlying our cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to "constitutionalize the employee grievance." *Connick*, 461 U. S., at 154.

III

With these principles in mind we turn to the instant case. Respondent Ceballos believed the affidavit used to obtain a search warrant contained serious misrepresentations. He conveyed his opinion and recommendation in a memo to his supervisor. That Ceballos expressed his

views inside his office, rather than publicly, is not dispositive. Employees in some cases may receive First Amendment protection for expressions made at work. See, *e.g.*, *Givhan* v. *Western Line Consol. School Dist.*, 439 U. S. 410, 414 (1979). Many citizens do much of their talking inside their respective workplaces, and it would not serve the goal of treating public employees like "any member of the general public," *Pickering*, 391 U. S., at 573, to hold that all speech within the office is automatically exposed to restriction.

The memo concerned the subject matter of Ceballos' employment, but this, too, is nondispositive. The First Amendment protects some expressions related to the speaker's job. See, *e.g.*, *ibid.*; *Givhan*, *supra*, at 414. As the Court noted in *Pickering:* "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 operation 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." 391 U. S., at 572. The same is true of many other categories of public employees.

The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy. See Brief for Respondent 4 ("Ceballos does not dispute that he prepared the memorandum 'pursuant to his duties as a prosecutor'"). That consideration—the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case—distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline. We hold 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.

Ceballos wrote his disposition memo because that is

part of what he, as a calendar deputy, was employed to do. It is immaterial whether he experienced some personal gratification from writing the memo; his First Amendment rights do not depend on his job satisfaction. The significant point is that the memo was written pursuant to Ceballos' official duties. Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. Cf. *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 833 (1995) ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes"). Contrast, for example, the expressions made by the speaker in *Pickering*, whose letter to the newspaper had no official significance and bore similarities to letters submitted by numerous citizens every day.

Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.

This result is consistent with our precedents' attention to the potential societal value of employee speech. See *supra*, at 7–8. Refusing to recognize First Amendment claims based on government employees' work product does not prevent them from participating in public debate. The employees retain the prospect of constitutional protection for their contributions to the civic discourse. This prospect

of protection, however, does not invest them with a right to perform their jobs however they see fit.

Our holding likewise is supported by the emphasis of our precedents on affording government employers sufficient discretion to manage their operations. Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission. Ceballos' memo is illustrative. It demanded the attention of his supervisors and led to a heated meeting with employees from the sheriff's department. If Ceballos' superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action.

Ceballos' proposed contrary rule, adopted by the Court of Appeals, would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business. This displacement of managerial discretion by judicial supervision finds no support in our precedents. When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences. When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny. To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.

The Court of Appeals based its holding in part on what it perceived as a doctrinal anomaly. The court suggested 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. See 361 F. 3d, at 1176. This objection misconceives the theoretical underpinnings of our 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*, 391 U. S. 563, or discussing politics with a co-worker, see *Rankin*, 483 U. S. 378. When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees.

The Court of Appeals' concern also is unfounded as a practical matter. The perceived anomaly, it should be noted, is limited in scope: It relates only to the 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. If, moreover, a government employer is troubled by the perceived anomaly, it has the means at hand to avoid it. A public employer that wishes to encourage its employees to voice concerns privately retains the option of instituting internal policies and procedures that are receptive to employee criticism. Giving employees an internal forum for their speech will discourage them from concluding that the safest avenue of expression is to state their views in public.

Proper application of our precedents thus leads to the conclusion that the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities. Because Ceballos' memo falls into this category, his allegation of unconstitutional retaliation must fail.

Two final points warrant mentioning. First, as indi-

cated above, the parties in this case do not dispute that Ceballos wrote his disposition memo pursuant to his employment duties. We thus have 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. We reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions. See *post*, at 4, n. 2 (SOUTER, J., dissenting). 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.

Second, JUSTICE SOUTER suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. See *post*, at 12–13. There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

IV

Exposing governmental inefficiency and misconduct is a matter of considerable significance. As the Court noted in *Connick*, public employers should, "as a matter of good judgment," be "receptive to constructive criticism offered by their employees." 461 U. S., at 149. The dictates of sound judgment are reinforced by the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to

expose wrongdoing. See, *e.g.*, 5 U. S. C. §2302(b)(8); Cal. Govt. Code Ann. §8547.8 (West 2005); Cal. Lab. Code Ann. §1102.5 (West Supp. 2006). Cases involving government attorneys implicate additional safeguards in the form of, for example, rules of conduct and constitutional obligations apart from the First Amendment. See, *e.g.*, Cal. Rule Prof. Conduct 5–110 (2005) ("A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause"); *Brady* v. *Maryland,* 373 U. S. 83 (1963). These imperatives, as well as obligations arising from any other applicable constitutional provisions and mandates of the criminal and civil laws, protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions.

We reject, however, the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties. Our precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job.

The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 04–473

GIL GARCETTI, ET AL., PETITIONERS *v.* RICHARD CEBALLOS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May 30, 2006]

JUSTICE STEVENS, dissenting.

The proper answer to the question "whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties," *ante,* at 1, is "Sometimes," not "Never." Of course a supervisor may take corrective action when such speech is "inflammatory or misguided," *ante,* at 11. But what if it is just unwelcome speech because it reveals facts that the supervisor would rather not have anyone else discover?*

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* See, *e.g., Branton* v. *Dallas,* 272 F. 3d 730 (CA5 2001) (police internal investigator demoted by police chief after bringing the false testimony of a fellow officer to the attention of a city official); *Miller* v. *Jones,* 444 F. 3d 929, 936 (CA7 2006) (police officer demoted after opposing the police chief's attempt to "us[e] his official position to coerce a financially independent organization into a potentially ruinous merger"); *Delgado* v. *Jones,* 282 F. 3d 511 (CA7 2002) (police officer sanctioned for reporting criminal activity that implicated a local political figure who was a good friend of the police chief); *Herts* v. *Smith,* 345 F. 3d 581 (CA8 2003) (school district official's contract was not renewed after she gave frank testimony about the district's desegregation efforts); *Kincade* v. *Blue Springs,* 64 F. 3d 389 (CA8 1995) (engineer fired after reporting to his supervisors that contractors were failing to

As JUSTICE SOUTER explains, public employees are still citizens while they are in the office. The notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment is quite wrong. Over a quarter of a century has passed since then-Justice Rehnquist, writing for a unanimous Court, rejected "the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly." *Givhan* v. *Western Line Consol. School Dist.*, 439 U. S. 410, 414 (1979). We had no difficulty recognizing that the First Amendment applied when Bessie Givhan, an English teacher, raised concerns about the school's racist employment practices to the principal. See *id.*, at 413–416. Our silence as to whether or not her speech was made pursuant to her job duties demonstrates that the point was immaterial. That is equally true today, for it is senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description. Moreover, it seems perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors.

While today's novel conclusion to the contrary may not be "inflammatory," for the reasons stated in JUSTICE SOUTER's dissenting opinion it is surely "misguided."

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complete dam-related projects and that the resulting dam might be structurally unstable); *Fox* v. *District of Columbia*, 83 F. 3d 1491, 1494 (CADC 1996) (D. C. Lottery Board security officer fired after informing the police about a theft made possible by "rather drastic managerial ineptitude").

SUPREME COURT OF THE UNITED STATES

No. 04–473

GIL GARCETTI, ET AL., PETITIONERS *v.* RICHARD CEBALLOS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May 30, 2006]

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, dissenting.

The Court holds 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." *Ante*, at 9. I respectfully dissent. I agree with the majority that a government employer has substantial interests in effectuating its chosen policy and objectives, and in demanding competence, honesty, and judgment from employees who speak for it in doing their work. But I would hold that private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection.

I

Open speech by a private citizen on a matter of public importance lies at the heart of expression subject to protection by the First Amendment. See, *e.g.*, *Schenck* v. *Pro-Choice Network of Western N. Y.*, 519 U. S. 357, 377 (1997). At the other extreme, a statement by a government em-

ployee complaining about nothing beyond treatment under personnel rules raises no greater claim to constitutional protection against retaliatory response than the remarks of a private employee. See *Connick* v. *Myers,* 461 U. S. 138, 147 (1983). In between these points lies a public employee's speech unwelcome to the government but on a significant public issue. Such an employee speaking as a citizen, that is, with a citizen's interest, is protected from reprisal unless the statements are too damaging to the government's capacity to conduct public business to be justified by any individual or public benefit thought to flow from the statements. *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.,* 391 U. S. 563, 568 (1968). Entitlement to protection is thus not absolute.

This significant, albeit qualified, protection of public employees who irritate the government is understood to flow from the First Amendment, in part, because a government paycheck does nothing to eliminate the value to an individual of speaking on public matters, and there is no good reason for categorically discounting a speaker's interest in commenting on a matter of public concern just because the government employs him. Still, the First Amendment safeguard rests on something more, being the value to the public of receiving the opinions and information that a public employee may disclose. "Government employees are often in the best position to know what ails the agencies for which they work." *Waters* v. *Churchill,* 511 U. S. 661, 674 (1994).

The reason that protection of employee speech is qualified is that it can distract co-workers and supervisors from their tasks at hand and thwart the implementation of legitimate policy, the risks of which grow greater the closer the employee's speech gets to commenting on his own workplace and responsibilities. It is one thing for an office clerk to say there is waste in government and quite another to charge that his own department pays full-time

salaries to part-time workers. Even so, we have regarded eligibility for protection by *Pickering* balancing as the proper approach when an employee speaks critically about the administration of his own government employer. In *Givhan* v. *Western Line Consol. School Dist.,* 439 U. S. 410 (1979), we followed *Pickering* when a teacher was fired for complaining to a superior about the racial composition of the school's administrative, cafeteria, and library staffs, 439 U. S., at 413–414, and the same point was clear in *Madison Joint School Dist. No. 8* v. *Wisconsin Employment Relations Comm'n,* 429 U. S. 167 (1976). That case was decided, in part, with reference to the *Pickering* framework, and the Court there held that a schoolteacher speaking out on behalf of himself and others at a public school board meeting could not be penalized for criticizing pending collective-bargaining negotiations affecting professional employment. *Madison* noted that the teacher "addressed the school board not merely as one of its employees but also as a concerned citizen, seeking to express his views on an important decision of his government." 429 U. S., at 174–175. In each case, the Court realized that a public employee can wear a citizen's hat when speaking on subjects closely tied to the employee's own job, and *Givhan* stands for the same conclusion even when the speech is not addressed to the public at large. Cf. *Pegram* v. *Herdrich,* 530 U. S. 211, 225 (2000) (recognizing that, factually, a trustee under the Employee Retirement Income Security Act of 1974 can both act as ERISA fiduciary and act on behalf of the employer).

The difference between a case like *Givhan* and this one is that the subject of Ceballos's speech fell within the scope of his job responsibilities, whereas choosing personnel was not what the teacher was hired to do. The effect of the majority's constitutional line between these two cases, then, is that a *Givhan* schoolteacher is protected when complaining to the principal about hiring policy, but a school personnel officer would not be if he protested that

the principal disapproved of hiring minority job applicants. This is an odd place to draw a distinction,[1] and while necessary judicial line-drawing sometimes looks arbitrary, any distinction obliges a court to justify its choice. Here, there is no adequate justification for the majority's line categorically denying *Pickering* protection to any speech uttered "pursuant to . . . official duties," *ante*, at 9.

As all agree, the qualified speech protection embodied in *Pickering* balancing resolves the tension between individual and public interests in the speech, on the one hand, and the government's interest in operating efficiently without distraction or embarrassment by talkative or headline-grabbing employees. The need for a balance hardly disappears when an employee speaks on matters his job requires him to address; rather, it seems obvious that the individual and public value of such speech is no less, and may well be greater, when the employee speaks pursuant to his duties in addressing a subject he knows intimately for the very reason that it falls within his duties.[2]

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[1] It seems stranger still in light of 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. *Ante*, at 12.

[2] I do not say the value of speech "pursuant to . . . duties" will always be greater, because I am pessimistic enough to expect that one response to the Court's holding will be moves by government employers to expand stated job descriptions to include more official duties and so exclude even some currently protectable speech from First Amendment purview. Now that the government can freely penalize the school personnel officer for criticizing the principal because speech on the subject falls within the personnel officer's job responsibilities, the government may well try to limit the English teacher's options by the simple expedient of defining teachers' job responsibilities expansively, investing them with a general obligation to ensure sound administration of the school. Hence today's rule presents the regrettable prospect that protection under *Pickering* v. *Board of Ed. of Township High School*

As for the importance of such speech to the individual, it stands to reason that a citizen may well place a very high value on a right to speak on the public issues he decides to make the subject of his work day after day. Would anyone doubt that a school principal evaluating the performance of teachers for promotion or pay adjustment retains a citizen's interest in addressing the quality of teaching in the schools? (Still, the majority indicates he could be fired without First Amendment recourse for fair but unfavorable comment when the teacher under review is the superintendent's daughter.) Would anyone deny that a prosecutor like Richard Ceballos may claim the interest of any citizen in speaking out against a rogue law enforcement officer, simply because his job requires him to express a judgment about the officer's performance? (But the majority says the First Amendment gives Ceballos no protection, even if his judgment in this case was sound and appropriately expressed.)

Indeed, the very idea of categorically separating the citizen's interest from the employee's interest ignores the fact that the ranks of public service include those who share the poet's "object . . . to unite [m]y avocation and my vocation;"[3] these citizen servants are the ones whose civic interest rises highest when they speak pursuant to their duties, and these are exactly the ones government employers most want to attract.[4] There is no question that

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Dist. 205, Will Cty., 391 U. S. 563 (1968), may be diminished by expansive statements of employment duties.

The majority's response, that the enquiry to determine duties is a "practical one," *ante*, at 13, does not alleviate this concern. It sets out a standard that will not discourage government employers from setting duties expansively, but will engender litigation to decide which stated duties were actual and which were merely formal.

[3] R. Frost, Two Tramps in Mud Time, Collected Poems, Prose, & Plays 251, 252 (R. Poirier & M. Richardson eds. 1995).

[4] Not to put too fine a point on it, the Human Resources Division of the Los Angeles County District Attorney's Office, Ceballos's employer,

public employees speaking on matters they are obliged to address would generally place a high value on a right to speak, as any responsible citizen would.

Nor is there any reason to raise the counterintuitive question whether the public interest in hearing informed employees evaporates when they speak as required on some subject at the core of their jobs. Two Terms ago, we recalled the public value that the *Pickering* Court perceived in the speech of public employees as a class: "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

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is telling anyone who will listen that its work "provides the personal satisfaction and fulfillment that comes with knowing you are contributing essential services to the citizens of Los Angeles County." Career Opportunities, http://da.co.la.ca.us/hr/default.htm (all Internet materials as visited May 25, 2006, and available in Clerk of Court's case file).

The United States expresses the same interest in identifying the individual ideals of a citizen with its employees' obligations to the Government. See Brief as *Amicus Curiae* 25 (stating that public employees are motivated to perform their duties "to serve the public"). Right now, for example, the U. S. Food and Drug Administration is appealing to physicians, scientists, and statisticians to work in the Center for Drug Evaluation and Research, with the message that they "can give back to [their] community, state, and country by making a difference in the lives of Americans everywhere." Career Opportunities at CDER: You Can Make a Difference, http://www.fda.gov/cder/career/default.htm. Indeed, the Congress of the United States, by concurrent resolution, has previously expressly endorsed respect for a citizen's obligations as the prime responsibility of Government employees: "Any person in Government Service should: . . . [p]ut loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department," and shall "[e]xpose corruption wherever discovered," Code of Ethics for Government Service, H. Con. Res. 175, 85th Cong., 2d Sess., 72 Stat. B12. Display of this Code in Government buildings was once required by law, 94 Stat. 855; this obligation has been repealed, Office of Government Ethics Authorization Act of 1996, Pub. L. 104–179, §4, 110 Stat. 1566.

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." *San Diego* v. *Roe,* 543 U. S. 77, 82 (2004) *(per curiam)* (citation omitted). This is not a whit less true when an employee's job duties require him to speak about such things: when, for example, a public auditor speaks on his discovery of embezzlement of public funds, when a building inspector makes an obligatory report of an attempt to bribe him, or when a law enforcement officer expressly balks at a superior's order to violate constitutional rights he is sworn to protect. (The majority, however, places all these speakers beyond the reach of First Amendment protection against retaliation.)

Nothing, then, accountable on the individual and public side of the *Pickering* balance changes when an employee speaks "pursuant" to public duties. On the side of the government employer, however, something is different, and to this extent, I agree with the majority of the Court. The majority is rightly concerned that the employee who speaks out on matters subject to comment in doing his own work has the greater leverage to create office uproars and fracture the government's authority to set policy to be carried out coherently through the ranks. "Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission," *ante*, at 11. Up to a point, then, the majority makes good points: government needs civility in the workplace, consistency in policy, and honesty and competence in public service.

But why do the majority's concerns, which we all share, require categorical exclusion of First Amendment protec-

tion against any official retaliation for things said on the job? Is it not possible to respect the unchallenged individual and public interests in the speech through a *Pickering* balance without drawing the strange line I mentioned before, *supra*, at 3–4? This is, to be sure, a matter of judgment, but the judgment has to account for the undoubted value of speech to those, and by those, whose specific public job responsibilities bring them face to face with wrongdoing and incompetence in government, who refuse to avert their eyes and shut their mouths. And it has to account for the need actually to disrupt government if its officials are corrupt or dangerously incompetent. See n. 4, *supra*. It is thus no adequate justification for the suppression of potentially valuable information simply to recognize that the government has a huge interest in managing its employees and preventing the occasionally irresponsible one from turning his job into a bully pulpit. Even there, the lesson of *Pickering* (and the object of most constitutional adjudication) is still to the point: when constitutionally significant interests clash, resist the demand for winner-take-all; try to make adjustments that serve all of the values at stake.

Two reasons in particular make me think an adjustment using the basic *Pickering* balancing scheme is perfectly feasible here. First, the extent of the government's legitimate authority over subjects of speech required by a public job can be recognized in advance by setting in effect a minimum heft for comments with any claim to outweigh it. Thus, the risks to the government are great enough for us to hold from the outset that an employee commenting on subjects in the course of duties should not prevail on balance unless he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it. The examples I have already given indicate the eligible subject matter, and it is fair to say that only comment on official dishonesty, deliberately unconsti-

tutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee's favor. If promulgation of this standard should fail to discourage meritless actions premised on 42 U. S. C. §1983 (or *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388 (1971)) before they get filed, the standard itself would sift them out at the summary-judgment stage.[5]

My second reason for adapting *Pickering* to the circumstances at hand is the experience in Circuits that have recognized claims like Ceballos's here. First Amendment protection less circumscribed than what I would recognize has been available in the Ninth Circuit for over 17 years, and neither there nor in other Circuits that accept claims like this one has there been a debilitating flood of litigation. There has indeed been some: as represented by Ceballos's lawyer at oral argument, each year over the last five years, approximately 70 cases in the different Courts of Appeals and approximately 100 in the various District Courts. Tr. of Oral Arg. 58–59. But even these figures reflect a readiness to litigate that might well have been cooled by my view about the importance required before *Pickering* treatment is in order.

For that matter, the majority's position comes with no guarantee against factbound litigation over whether a public employee's statements were made "pursuant to . . . official duties," *ante,* at 9. In fact, the majority invites such litigation by describing the enquiry as a "practical one," *ante,* at 13, apparently based on the totality of employment circumstances.[6] See n. 2, *supra.* Are prosecu-

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[5]As I also said, a public employer is entitled (and obliged) to impose high standards of honesty, accuracy, and judgment on employees who speak in doing their work. These criteria are not, however, likely to discourage meritless litigation or provide a handle for summary judgment. The employee who has spoken out, for example, is unlikely to blame himself for prior bad judgment before he sues for retaliation.

[6]According to the majority's logic, the litigation it encourages would

tors' discretionary statements about cases addressed to the press on the courthouse steps made "pursuant to their official duties"? Are government nuclear scientists' complaints to their supervisors about a colleague's improper handling of radioactive materials made "pursuant" to duties?

II

The majority seeks support in two lines of argument extraneous to *Pickering* doctrine. The one turns on a fallacious reading of cases on government speech, the other on a mistaken assessment of protection available under whistle-blower statutes.

A

The majority accepts the fallacy propounded by the county petitioners and the Federal Government as *amicus* that any statement made within the scope of public employment is (or should be treated as) the government's own speech, see *ante*, at 10, and should thus be differentiated as a matter of law from the personal statements the First Amendment protects, see *Broadrick* v. *Oklahoma*, 413 U. S. 601, 610 (1973). The majority invokes the interpretation set out in *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995), of *Rust* v. *Sullivan*, 500 U. S. 173 (1991), which held there was no infringement of the speech rights of Title X funds recipients and their staffs when the Government forbade any on-the-job counseling in favor of abortion as a method of family planning, *id.*, at 192–200. We have read *Rust* to mean that "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." *Rosenberger, supra*, at 833.

The key to understanding the difference between this

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have the unfortunate result of "demand[ing] permanent judicial intervention in the conduct of governmental operations," *ante*, at 11.

case and *Rust* lies in the terms of the respective employees' jobs and, in particular, the extent to which those terms require espousal of a substantive position prescribed by the government in advance. Some public employees are hired to "promote a particular policy" by broadcasting a particular message set by the government, but not everyone working for the government, after all, is hired to speak from a government manifesto. See *Legal Services Corporation* v. *Velazquez,* 531 U. S. 533, 542 (2001). There is no claim or indication that Ceballos was hired to perform such a speaking assignment. He was paid to enforce the law by constitutional action: to exercise the county government's prosecutorial power by acting honestly, competently, and constitutionally. The only sense in which his position apparently required him to hew to a substantive message was at the relatively abstract point of favoring respect for law and its evenhanded enforcement, subjects that are not at the level of controversy in this case and were not in *Rust.* Unlike the doctors in *Rust,* Ceballos was not paid to advance one specific policy among those legitimately available, defined by a specific message or limited by a particular message forbidden. The county government's interest in his speech cannot therefore be equated with the terms of a specific, prescribed, or forbidden substantive position comparable to the Federal Government's interest in *Rust,* and *Rust* is no authority for the notion that government may exercise plenary control over every comment made by a public employee in doing his job.

It is not, of course, that the district attorney lacked interest of a high order in what Ceballos might say. If his speech undercut effective, lawful prosecution, there would have been every reason to rein him in or fire him; a statement that created needless tension among law enforcement agencies would be a fair subject of concern, and the same would be true of inaccurate statements or false ones

made in the course of doing his work. But these interests on the government's part are entirely distinct from any claim that Ceballos's speech was government speech with a preset or proscribed content as exemplified in *Rust*. Nor did the county petitioners here even make such a claim in their answer to Ceballos's complaint, see n. 13, *infra*.

The fallacy of the majority's reliance on *Rosenberger*'s understanding of *Rust* doctrine, moreover, portends a bloated notion of controllable government speech going well beyond the circumstances of this case. Consider the breadth of the new formulation:

> "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Ante*, at 10.

This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write "pursuant to official duties." See *Grutter* v. *Bollinger*, 539 U. S. 306, 329 (2003) ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition"); *Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy

over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools'" (quoting *Shelton* v. *Tucker,* 364 U. S. 479, 487 (1960))); *Sweezy* v. *New Hampshire,* 354 U. S. 234, 250 (1957) (a governmental enquiry into the contents of a scholar's lectures at a state university "unquestionably was an invasion of [his] liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread").

B

The majority's second argument for its disputed limitation of *Pickering* doctrine is that the First Amendment has little or no work to do here owing to an assertedly comprehensive complement of state and national statutes protecting government whistle-blowers from vindictive bosses. See *ante,* at 13–14. But even if I close my eyes to the tenet that "'[t]he applicability of a provision of the Constitution has never depended on the vagaries of state or federal law,'" *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr,* 518 U. S. 668, 680 (1996), the majority's counsel to rest easy fails on its own terms.[7]

To begin with, speech addressing official wrongdoing may well fall outside protected whistle-blowing, defined in the classic sense of exposing an official's fault to a third party or to the public; the teacher in *Givhan,* for example, who raised the issue of unconstitutional hiring bias, would not have qualified as that sort of whistle-blower, for she

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[7]Even though this Court has recognized that 42 U. S. C. §1983 "does not authorize a suit for every alleged violation of federal law," *Livadas* v. *Bradshaw,* 512 U. S. 107, 132 (1994), the rule is that "§1983 remains a generally and presumptively available remedy for claimed violations of federal law," *id.,* at 133. Individual enforcement under §1983 is rendered unavailable for alleged violations of federal law when the underlying statutory provision is part of a federal statutory scheme clearly incompatible with individual enforcement under §1983. See *Rancho Palos Verdes* v. *Abrams,* 544 U. S. 113, 119–120 (2005).

was fired after a private conversation with the school principal. In any event, the combined variants of statutory whistle-blower definitions and protections add up to a patchwork, not a showing that worries may be remitted to legislatures for relief. See D. Westman & N. Modesitt, Whistleblowing: Law of Retaliatory Discharge 67–75, 281–307 (2d ed. 2004). Some state statutes protect all government workers, including the employees of municipalities and other subdivisions;[8] others stop at state employees.[9] Some limit protection to employees who tell their bosses before they speak out;[10] others forbid bosses from imposing any requirement to warn.[11] As for the federal Whistleblower Protection Act of 1989, 5 U. S. C. §1213 *et seq.*, current case law requires an employee complaining of retaliation to show "'irrefragable proof'" that the person criticized was not acting in good faith and in compliance with the law, see *Lachance* v. *White,* 174 F. 3d 1378, 1381 (CA Fed. 1999), cert. denied, 528 U. S. 1153 (2000). And

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[8]Del. Code Ann., Tit. 29, §5115 (2003); Fla. Stat. §112.3187 (2003); Haw. Rev. Stat. §378–61 (1993); Ky. Rev. Stat. Ann. §61.101 (West 2005); Mass. Gen. Laws Ann., ch. 149, §185 (West 2004); Nev. Rev. Stat. §281.611 (2003); N. H. Rev. Stat. Ann. §275–E:1 (Supp. 2005); Ohio Rev. Code Ann. §4113.51 (Lexis 2001); Tenn. Code Ann. §50–1–304 (2006 Cum. Supp.).

[9]Ala. Code §36–26A–1 *et seq.* (2001); Colo. Rev. Stat. §24–50.5–101 *et seq.* (2004); Iowa Code Ann. §70A.28 *et seq.* (1999); Kan. Stat. Ann. §75–2973 (2003 Cum. Supp.); Mo. Rev. Stat. §105.055 (2004 Cum. Supp.); N. C. Gen. Stat. Ann. §126–84 (Lexis 2003); 2 Okla. Stat., Tit. 74, §840–2.5 *et seq.* (West 2005 Supp.); Wash. Rev. Code §42.40.010 (2000); Wyo. Stat. Ann. §9–11–102 (2003).

[10]Idaho Code §6–2104(1)(a) (Lexis 2004); Me. Rev. Stat. Ann., Tit. 26, §833(2) (1988); Mass. Gen. Laws Ann., ch. 149, §185(c)(1) (West 2004); N. H. Rev. Stat. Ann. §275–E:2(II) (1999); N. J. Stat. Ann. §34:19–4 (West 2000); N. Y. Civ. Serv. Law Ann. §75–b(2)(b) (West 1999); Wyo. Stat. Ann. §9–11–103(b) (2003).

[11]Kan. Stat. Ann. §75–2973(d)(2) (Cum. Supp. 2003); Ky. Rev. Stat. Ann. §61.102(1) (West 2005); Mo. Rev. Stat. §105.055(2) (2004 Cum. Supp.); 2 Okla. Stat., Tit. 74, §840–2.5(B)(4) (West 2005 Supp.); Ore. Rev. Stat. §659A.203(1)(c) (2003).

federal employees have been held to have no protection for disclosures made to immediate supervisors, see *Willis* v. *Department of Agriculture,* 141 F. 3d 1139, 1143 (CA Fed. 1998); *Horton* v. *Department of Navy,* 66 F. 3d 279, 282 (CA Fed. 1995), cert. denied, 516 U. S. 1176 (1996), or for statements of facts publicly known already, see *Francisco* v. *Office of Personnel Management,* 295 F. 3d 1310, 1314 (CA Fed. 2002). Most significantly, federal employees have been held to be unprotected for statements made in connection with normal employment duties, *Huffman* v. *Office of Personnel Management,* 263 F. 3d 1341, 1352 (CA Fed. 2001), the very speech that the majority says will be covered by "the powerful network of legislative enactments . . . available to those who seek to expose wrongdoing," *ante,* at 13–14.[12] My point is not to disparage particular statutes or speak here to the merits of interpretations by other federal courts, but merely to show the current understanding of statutory protection: individuals doing the same sorts of governmental jobs and saying the same sorts of things addressed to civic concerns will get different protection depending on the local, state, or federal jurisdictions that happened to employ them.

III

The Court remands because the Court of Appeals considered only the disposition memorandum and because Ceballos charges retaliation for some speech apparently outside the ambit of utterances "pursuant to official duties." When the Court of Appeals takes up this case once again, it should consider some of the following facts that escape emphasis in the majority opinion owing to its focus.[13] Ceballos says he sought his position out of a per-

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[12] See n. 4, *supra.*

[13] This case comes to the Court on the motions of petitioners for summary judgment, and as such, "[t]he evidence of [Ceballos] is to be believed, and all justifiable inferences are to be drawn in his favor."

sonal commitment to perform civic work. After showing his superior, petitioner Frank Sunstedt, the disposition memorandum at issue in this case, Ceballos complied with Sunstedt's direction to tone down some accusatory rhetoric out of concern that the memorandum would be unnecessarily incendiary when shown to the Sheriff's Department. After meeting with members of that department, Ceballos told his immediate supervisor, petitioner Carol Najera, that he thought *Brady* v. *Maryland,* 373 U. S. 83 (1963), obliged him to give the defense his internal memorandum as exculpatory evidence. He says that Najera responded by ordering him to write a new memorandum containing nothing but the deputy sheriff's statements, but that he balked at that. Instead, he proposed to turn over the existing memorandum with his own conclusions redacted as work product, and this is what he did. The issue over revealing his conclusions arose again in preparing for the suppression hearing. Ceballos maintains that Sunstedt ordered Najera, representing the prosecution, to give the trial judge a full picture of the circumstances, but that Najera told Ceballos he would suffer retaliation if he testified that the affidavit contained intentional fabrications. In any event, Ceballos's testimony generally stopped short of his own conclusions. After the hearing, the trial judge denied the motion to suppress, explaining that he found grounds independent of the challenged material sufficient to show probable cause for the warrant.

Ceballos says that over the next six months his supervisors retaliated against him[14] not only for his written re-

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Anderson v. *Liberty Lobby, Inc.,* 477 U. S. 242, 255 (1986).

[14] Sunstedt demoted Ceballos to a trial deputy; his only murder case was reassigned to a junior colleague with no experience in homicide matters, and no new murder cases were assigned to him; then-District Attorney Gil Garcetti, relying in part on Sunstedt's recommendation, denied Ceballos a promotion; finally, Sunstedt and Najera transferred him to the Office's El Monte Branch, requiring longer commuting.

ports, see *ante*, at 3, but also for his spoken statements to them and his hearing testimony in the pending criminal case. While an internal grievance filed by Ceballos challenging these actions was pending, Ceballos spoke at a meeting of the Mexican-American Bar Association about misconduct of the Sheriff's Department in the criminal case, the lack of any policy at the District Attorney's Office for handling allegations of police misconduct, and the retaliatory acts he ascribed to his supervisors. Two days later, the office dismissed Ceballos's grievance, a result he attributes in part to his Bar Association speech.

Ceballos's action against petitioners under 42 U. S. C. §1983 claims that the individuals retaliated against him for exercising his First Amendment rights in submitting the memorandum, discussing the matter with Najera and Sunstedt, testifying truthfully at the hearing, and speaking at the bar meeting.[15] As I mentioned, the Court of

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Before transferring Ceballos, Najera offered him a choice between transferring and remaining at the Pomona Branch prosecuting misdemeanors instead of felonies. When Ceballos refused to choose, Najera transferred him.

[15] The county petitioners' position on these claims is difficult to follow or, at least, puzzling. In their motion for summary judgment, they denied that any of their actions was responsive to Ceballos's criticism of the sheriff's affidavit. *E.g.*, App. 159–160, 170–172 (maintaining that Ceballos was transferred to the El Monte Branch because of the decreased workload in the Pomona Branch and because he was next in a rotation to go there to serve as a "filing deputy"); *id.*, at 160, 172–173 (contending that Ceballos's murder case was reassigned to a junior colleague to give that attorney murder trial experience before he was transferred to the Juvenile Division of the District Attorney's Office); *id.*, at 161–162, 173–174 (arguing that Ceballos was denied a promotion by Garcetti despite Sunstedt's stellar review of Ceballos, when Garcetti was unaware of the matter in *People* v. *Cuskey*, the criminal case for which Ceballos wrote the pertinent disposition memorandum). Their reply to Ceballos's opposition to summary judgment, however, shows that petitioners argued for a *Pickering* assessment (for want of a holding that Ceballos was categorically disentitled to any First Amendment protection) giving great weight in their favor to workplace

Appeals saw no need to address the protection afforded to Ceballos's statements other than the disposition memorandum, which it thought was protected under the *Pickering* test. Upon remand, it will be open to the Court of Appeals to consider the application of *Pickering* to any retaliation shown for other statements; not all of those statements would have been made pursuant to official duties in any obvious sense, and the claim relating to truthful testimony in court must surely be analyzed independently to protect the integrity of the judicial process.

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disharmony and distrust caused by Ceballos's actions. *E.g.*, App. 477–478.

SUPREME COURT OF THE UNITED STATES

No. 04–473

GIL GARCETTI, ET AL., PETITIONERS *v.* RICHARD CEBALLOS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May 30, 2006]

JUSTICE BREYER, dissenting.

This case asks whether the First Amendment protects public employees when they engage in speech that both (1) involves matters of public concern and (2) takes place in the ordinary course of performing the duties of a government job. I write separately to explain why I cannot fully accept either the Court's or JUSTICE SOUTER's answer to the question presented.

I

I begin with what I believe is common ground:

(1) Because virtually all human interaction takes place through speech, the First Amendment cannot offer all speech the same degree of protection. Rather, judges must apply different protective presumptions in different contexts, scrutinizing government's speech-related restrictions differently depending upon the general category of activity. Compare, *e.g.*, *Burson* v. *Freeman*, 504 U. S. 191 (1992) (plurality opinion), (political speech), with *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980) (commercial speech), and *Rust* v. *Sullivan*, 500 U. S. 173 (1991) (government speech).

(2) Where the speech of government employees is at issue, the First Amendment offers protection only where the offer of protection itself will not unduly interfere with

legitimate governmental interests, such as the interest in efficient administration. That is because the government, like any employer, must have adequate authority to direct the activities of its employees. That is also because efficient administration of legislatively authorized programs reflects the constitutional need effectively to implement the public's democratically determined will.

(3) Consequently, where a government employee speaks "as an employee upon matters only of personal interest," the First Amendment does not offer protection. *Connick* v. *Myers*, 461 U. S. 138, 147 (1983). Where the employee speaks "as a citizen . . . upon matters of public concern," the First Amendment offers protection but only where the speech survives a screening test. *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 568 (1968). That test, called, in legal shorthand, "*Pickering* balancing," requires a judge to "balance . . . the interests" of the employee "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." *Ibid.* See also *Connick*, *supra*, at 142.

(4) Our prior cases do not decide what screening test a judge should apply in the circumstances before us, namely when the government employee both speaks upon a matter of public concern and does so in the course of his ordinary duties as a government employee.

II

The majority answers the question by holding 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." *Ante*, at 9. In a word, the majority says, "never." That word, in my view, is too absolute.

Like the majority, I understand the need to "affor[d] government employers sufficient discretion to manage their operations." *Ante*, at 11. And I agree that the Constitution does not seek to "displac[e] . . . managerial discretion by judicial supervision." *Ibid.* Nonetheless, there may well be circumstances with special demand for constitutional protection of the speech at issue, where governmental justifications may be limited, and where administrable standards seem readily available—to the point where the majority's fears of department management by lawsuit are misplaced. In such an instance, I believe that courts should apply the *Pickering* standard, even though the government employee speaks upon matters of public concern in the course of his ordinary duties.

This is such a case. The respondent, a government lawyer, complained of retaliation, in part, on the basis of speech contained in his disposition memorandum that he says fell within the scope of his obligations under *Brady* v. *Maryland*, 373 U. S. 83 (1963). The facts present two special circumstances that together justify First Amendment review.

First, the speech at issue is professional speech—the speech of a lawyer. Such speech is subject to independent regulation by canons of the profession. Those canons provide an obligation to speak in certain instances. And where that is so, the government's own interest in forbidding that speech is diminished. Cf. *Legal Services Corporation* v. *Velazquez*, 531 U. S. 533, 544 (2001) ("Restricting LSC [Legal Services Corporation] attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys"). See also *Polk County* v. *Dodson*, 454 U. S. 312, 321 (1981) ("[A] public defender is not amenable to administrative direction in the same sense as other employees of the State"). See generally Post, Subsidized Speech, 106 Yale L. J. 151, 172 (1996)

("[P]rofessionals must always qualify their loyalty and commitment to the vertical hierarchy of an organization by their horizontal commitment to general professional norms and standards"). The objective specificity and public availability of the profession's canons also help to diminish the risk that the courts will improperly interfere with the government's necessary authority to manage its work.

Second, the Constitution itself here imposes speech obligations upon the government's professional employee. A prosecutor has a constitutional obligation to learn of, to preserve, and to communicate with the defense about exculpatory and impeachment evidence in the government's possession. *Kyles* v. *Whitley,* 514 U. S. 419, 437 (1995); *Brady, supra.* So, for example, might a prison doctor have a similar constitutionally related professional obligation to communicate with superiors about seriously unsafe or unsanitary conditions in the cellblock. Cf. *Farmer* v. *Brennan,* 511 U. S. 825, 832 (1994). There may well be other examples.

Where professional and special constitutional obligations are both present, the need to protect the employee's speech is augmented, the need for broad government authority to control that speech is likely diminished, and administrable standards are quite likely available. Hence, I would find that the Constitution mandates special protection of employee speech in such circumstances. Thus I would apply the *Pickering* balancing test here.

III

While I agree with much of JUSTICE SOUTER's analysis, I believe that the constitutional standard he enunciates fails to give sufficient weight to the serious managerial and administrative concerns that the majority describes. The standard would instruct courts to apply *Pickering* balancing in all cases, but says that the government

should prevail unless the employee (1) "speaks on a matter of unusual importance," and (2) "satisfies high standards of responsibility in the way he does it." *Ante,* at 8 (dissenting opinion). JUSTICE SOUTER adds that "only comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee's favor." *Id.*, at 9.

There are, however, far too many issues of public concern, even if defined as "matters of unusual importance," for the screen to screen out very much. Government administration typically involves matters of public concern. Why else would government be involved? And "public issues," indeed, matters of "unusual importance," are often daily bread-and-butter concerns for the police, the intelligence agencies, the military, and many whose jobs involve protecting the public's health, safety, and the environment. This aspect of JUSTICE SOUTER's "adjustment" of "the basic *Pickering* balancing scheme" is similar to the Court's present insistence that speech be of "legitimate news interest", *ibid.*, when the employee speaks only as a private citizen. See *San Diego* v. *Roe*, 543 U. S. 77, 83–84 (2004) *(per curiam).* It gives no extra weight to the government's augmented need to direct speech that is an ordinary part of the employee's job-related duties.

Moreover, the speech of vast numbers of public employees deals with wrongdoing, health, safety, and honesty: for example, police officers, firefighters, environmental protection agents, building inspectors, hospital workers, bank regulators, and so on. Indeed, this categorization could encompass speech by an employee performing almost any public function, except perhaps setting electricity rates. Nor do these categories bear any obvious relation to the constitutional importance of protecting the job-related speech at issue.

The underlying problem with this breadth of coverage is that the standard (despite predictions that the govern-

ment is likely to *prevail* in the balance unless the speech concerns "official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety," *ante*, at 9), does not avoid the judicial need to *undertake the balance* in the first place. And this form of judicial activity—the ability of a dissatisfied employee to file a complaint, engage in discovery, and insist that the court undertake a balancing of interests—itself may interfere unreasonably with both the managerial function (the ability of the employer to control the way in which an employee performs his basic job) and with the use of other grievance-resolution mechanisms, such as arbitration, civil service review boards, and whistle-blower remedies, for which employees and employers may have bargained or which legislatures may have enacted.

At the same time, the list of categories substantially overlaps areas where the law already provides nonconstitutional protection through whistle-blower statutes and the like. See *ante*, at 13 (majority opinion); *ante*, at 13–15 (SOUTER, J., dissenting). That overlap diminishes the need for a constitutional forum and also means that adoption of the test would authorize federal Constitution-based legal actions that threaten to upset the legislatively struck (or administratively struck) balance that those statutes (or administrative procedures) embody.

IV

I conclude that the First Amendment sometimes does authorize judicial actions based upon a government employee's speech that both (1) involves a matter of public concern and also (2) takes place in the course of ordinary job-related duties. But it does so only in the presence of augmented need for constitutional protection and diminished risk of undue judicial interference with governmental management of the public's affairs. In my view, these conditions are met in this case and *Pickering* balancing is consequently appropriate.

With respect, I dissent.

TOM DAVIS, VIRGINIA,
CHAIRMAN

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BERNARD SANDERS, VERMONT,
INDEPENDENT

March 7, 2006

The Honorable Donald H. Rumsfeld
Secretary of Defense
U.S. Department of Defense
Washington, DC 20301

Dear Secretary Rumsfeld:

On February 14, 2006, U.S. Army Spc. Samuel Provance testified that his attempts to provide pertinent information to investigators regarding abuses at Abu Ghraib prison in Iraq were rebuffed, that he was threatened with punishment for reporting abuses, and that he was retaliated against for providing unclassified information to the press. The Subcommittee is conducting an investigation into Spc. Provance's allegations, and we seek your assistance in obtaining documents relevant to our inquiry.

In a separate letter sent today, we asked you and CIA Director Porter Goss for materials regarding Spc. Provance's substantive allegations. This letter requests materials regarding actions taken against Spc. Provance in the course of his attempts to report these allegations of abuse. We request that you provide all communications, e-mails, reports, transcripts, papers, notes, records, orders, directives, policies, drafts, and other materials, whether in written, graphic, visual, audio, or audio-visual formats, relating to:

(1) Sgt. Provance's contact with any member of the media;

(2) the order issued to Sgt. Provance on May 14, 2004, by Cpt. Scott B. Hedberg prohibiting Sgt. Provance from discussing the alleged and actual abuses that took place at Abu Ghraib;

(3) the Developmental Counseling Form issued to Sgt. Provance on May 21, 2004, by Lt. Col. James E. Norwood, suspending Sgt. Provance's security clearance and directing him not to discuss the alleged and actual abuses that took place at Abu Ghraib;

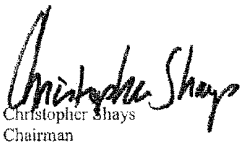
(4) whether the procedures under DOD Regulation 5200.2-R were followed in Spc. Provance's case;

(5) any written directives or orders directing anyone other than Sgt. Provance not to discuss the alleged and actual abuses that took place at Abu Ghraib; and

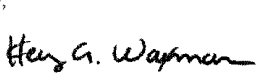
(7) the Record of Proceedings Under Article 15 of the Uniform Code of Military Justice issued on July 29, 2005, demoting Sgt. Provance to the rank of Specialist.

This request covers all materials in your possession or control, including from all elements and offices of your department. We request that you provide these materials to the Subcommittee by April 21, 2006. Classified information should be provided by the same date under separate cover. If you have any questions about this request, please contact Vincent Chase at (202) 225-2548 or David Rapallo at (202) 225-5420. Thank you for your assistance in this matter.

Sincerely,



Christopher Shays
Chairman
Subcommittee on National Security, Emerging Threats, and International Relation



Henry A. Waxman
Ranking Minority Member
Committee on Government Reform

Cc. The Honorable Peter Hoekstra
The Honorable Jane Harman

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BERNARD SANDERS, VERMONT,
INDEPENDENT

March 7, 2006

The Honorable Donald H. Rumsfeld
Secretary of Defense
U.S. Department of Defense
Washington, DC 20301

The Honorable Porter J. Goss
Director
Central Intelligence Agency
Washington, DC 20505

Dear Secretary Rumsfeld and Director Goss:

On February 14, 2006, U.S. Army Spc. Samuel Provance testified that his attempts to provide pertinent information to investigators regarding abuses at Abu Ghraib prison in Iraq were rebuffed, that he was threatened with punishment for reporting abuses, and that he was retaliated against for providing unclassified information to the press. The Subcommittee is conducting an investigation into Spc. Provance's allegations, and we seek your assistance in obtaining documents relevant to our inquiry.

First, Spc. Provance provided written testimony to the Subcommittee that was redacted in part. During questioning, Spc. Provance reported that these redactions were done by Defense Department officials. We request that you provide an unredacted copy of his testimony for the Subcommittee's review. We also request that the Department indicate where there are privacy, law enforcement, or other concerns relating to the information so that we may properly safeguard the information.

Second, Spc. Provance alleged that children of detainees were used to "break" them and force them to cooperate with interrogators. We request that you provide all communications, e-mails, reports, transcripts, papers, notes, records, orders, directives, policies, drafts, and other materials, whether in written, graphic, visual, audio, or audio-visual formats, relating to the interrogation, treatment, or detention at Abu Ghraib of Iraqi General Hamid Zabar, as well as his son and any other of his relatives.

Third, we request the same materials relating to any other cases in which family members of detainees or others held at Abu Ghraib were involved in any way with the interrogation, treatment, or detention of individuals at Abu Ghraib.

Fourth, we request all drafts of the Report of the AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade conducted by Maj. Gen. George R. Fay and Lt. Gen. Anthony R. Jones, including preliminary drafts and drafts submitted for review by Lt. Gen. Ricardo Sanchez prior to finalization. We also request copies of all DA Form 1574s (reports of investigating officers and boards of officers), DA Form 2823s (sworn statement forms), DA Form 3881s (rights warning forms), appointment orders and authorities, requests and orders to broaden or narrow the scope of the investigation, and any investigative chronologies created during the course of investigation.

Finally, to the extent not already requested above, we request all communications, e-mails, reports, transcripts, papers, notes, records, orders, directives, policies, drafts, and other materials, whether in written, graphic, visual, audio, or audio-visual formats, relating to information provided by Spc. Provance about alleged or actual abuses at Abu Ghraib prison, including but not limited to information provided during the interview of Spc. Provance by MG Fay on May 1, 2004.

This request covers all materials in your possession or control, including from all elements and offices of your respective departments. We request that you provide these materials to the Subcommittee by April 21, 2006. Classified information should be provided by the same date under separate cover. If you have any questions about this request, please contact Vincent Chase at (202) 225-2548 or David Rapallo at (202) 225-5420. Thank you for your assistance in this matter.

Sincerely,

Christopher Shays
Chairman
Subcommittee on National Security, Emerging Threats, and International Relations

Henry A. Waxman
Ranking Minority Member
Committee on Government Reform

Cc: The Honorable Peter Hoekstra
The Honorable Jane Harman

Whistleblower Statement before Government Reform Hearing on the *Ceballos* decision by Congressman Todd Platts (6/29/06)

Mr. Chairman, thank you for convening this hearing to better understand the *Ceballos* decision and its implications for whistleblowers. Allow me to also thank you for your longstanding assistance and partnership with me to shore up and expand whistleblower protections for federal employees who courageously expose waste, fraud, abuse, or threats to the safety of our fellow citizens.

Last year, on September 29, we passed out of this Committee bi-partisan legislation I introduced, H.R. 1317, "The Federal Employee Protection of Disclosures Act," to reinforce and extend protections for federal employees who blow the whistle on improper actions that undermine our government. Companion legislation in the Senate, S. 494, was approved unanimously by the Senate Committee on Homeland Security and Governmental Affairs on May 25, 2005. Last Thursday, June 22, Senators Akaka and Collins successfully incorporated S. 494 into the Senate's defense authorization bill.

In the *Ceballos* decision, the Supreme Court held that public employees blowing the whistle in their official duties are not protected by the First Amendment. Instead, the speech in their official capacity is protected by whistleblower rights provided by law. In opting not to create a right under the First Amendment for whistleblowers, *Ceballos* emphasizes the importance of the strength of existing protections provided by statute.

The *Ceballos* decision is Congress' wake-up call to strengthen whistleblower protections under federal law. *Ceballos* means that statutory protections are a whistleblower's one and only shot at due process and protection from retaliation. The decision does not necessarily weaken federal whistleblower protections, but it certainly demonstrates the importance of reinforcing current protections. In effect, *Ceballos* tells us that statutory protections are a whistleblower's last and sometimes only recourse to seek protection from retribution. Congress, therefore, has a responsibility to ensure that federal whistleblower protections are clear, strong, and without loopholes.

I am hopeful that this hearing will attract more attention to the importance of improving protections for whistleblowers. It is my sincere hope also that this hearing will help us to move quickly to floor consideration of H.R. 1317. The *Ceballos* decision has sent us a clear message to strengthen whistleblower protections, and I sincerely hope that we listen, and more importantly, that the House acts on H.R. 1317. I yield back the balance of my time.

Statement
Congresswoman Wm. Lacy Clay
Government Reform Committee
Hearing entitled: "What Price Free Speech?: Whistleblowers and the Ceballos Decision."
June 29, 2006

Thank you, Chairman Davis and Ranking Member Waxman, for holding this hearing today. I would like to thank all witnesses for attending.

The purpose of this hearing today is to discuss one of the most fundamental rights we have as citizens of this nation.

The First Amendment of the Bill of Rights to the U.S. Constitution guarantees four freedoms: freedom of religion, speech, press and assembly, for all our citizens. Since the Bill of Rights was ratified those freedoms have been discussed, debated, fought and died for.

The First Amendment serves as a protection for the most basic tenant of our Democracy; free speech.

The question today is whether the recent Supreme Court decision in Garcetti v. Ceballos removed First

Amendment rights from Richard Ceballos and as a result perhaps 23 million other federal employees.

Chairman Davis said recently regarding this hearing that "To ensure the effective and efficient operation of the United States Government, federal employees must feel free to bring examples of waste, fraud and abuse to the attention of their superiors." I agree with Chairman Davis.

I believe the 5-4 decision ruling against Ceballos seriously puts in jeopardy the ability for federal employees to speak up and be heard when they observe examples of waste, fraud and abuse in the federal government.

The effect of this decision on our government could be catastrophic and paralyzing. If you have 23 million federal employees precluded from speaking out about potential abuses, you cease to have a government that is accountable to its citizens and that is transparent.

Whistleblowers play a vital role in our society, from calling attention to fraud and misconduct in our government, to serving as vital public messengers to alert citizens of concerns in connection with the behavior and directives of private corporations.

In this case Mr. Ceballos, observed what he thought was an abuse and sought to remedy the situation working through the proper chain of command. For his trouble according to the documentation presented, he was demoted, transferred and prevented from receiving a promotion. Mr. Ceballos followed the procedures of his office and seems to have been punished for it. All citizens regardless of job status and station in life should have full and total access to the Constitution and to the protections and freedoms it provides.

I know we have Federal Whistleblower Protection Laws on the books, the Senate recently passed legislation to bolster the existing law and this committee has two pending pieces of legislation, HR 1317, the Federal Employee Protection of Disclosure Act and HR 5112 that goes even further in the protection of Whistleblowers.

However, even with this legislation and supportive state legislation there is still a gap that exists. The First Amendment is the very foundation of these protections and must be allowed to apply fairly to all citizens.

Thank you Mr. Chairman. I look forward to hearing from the witnesses today on how we can protect and preserve the most fundamental right we have in this country for all our citizens in every situation, the freedom of speech.

I yield back.

Committee on Government Reform
Oversight Hearing

"What Price Free Speech?: Whistleblowers and the Ceballos Decision"

Thursday, June 29, 2006
10:00 am
2154 Rayburn House Office Building

Statement of Congresswoman Carolyn B. Maloney

Mr. Chairman, Ranking Member Waxman,
I would like to thank you for holding
this important hearing on the rights
of whistleblowers.

I think one thing we can all agree on
is that the current system is broken and
whistleblowers are simply not being protected.

The recent Supreme Court decision of
Garcetti v. Ceballos
raises even more questions
about who we are going to protect –
the whistleblower or the wrong doer?

I anticipate that we will hear a lot
of commentary today arguing
the reaction to this decision
has been overblown and that this case
did not strip employees of whistleblower rights.

While the impact of the decision
may be arguable,
the message to potential whistleblowers
is loud and clear – "speak at your own risk".

Too often our system retaliates
against whistleblowers rather than
thanking them for standing up for what is right.

This committee has heard from many of them,
including Sibel Edmonds,
the former FBI Translator who was fired
for raising concerns about the way
the FBI was translating important
information about our security.

Her reward for blowing the whistle included
having her security clearance stripped,
being fired from her job and
being forced to endure a years-long court battle
that has prevented her from
any sort of normal life.

Things are so bad with her case
that when she testified before this committee
she literally could not tell us anything about her
life – where she was born or which languages
she speaks. Sadly, she is not alone.

We have moved forward with legislation
such as H.R. 1317,
the Federal Employee Protection
of Disclosure Act,
that would protect federal government
whistleblowers, but similar legislation
failed last Congress and by all account
there is strong opposition by
the Bush Administration
to comprehensive whistleblower protections.

I have teamed up with Congressman Ed Markey
of Massachusetts to introduce H.R. 4925,
the Paul Revere Freedom to Warn Act.

This legislation would provide
the same whistleblower protections that
Congress provided to those reporting accounting
fraud in the Sarbanes-Oxley Act
to all federal employees, contractors,
subcontractors or corporate employees.

Passage of either of these bills
will send the message to whistleblowers
that we care and that they will be protected
when they raise serious issues of wrongdoing.

Not only is this the right thing to do,
we will be a better and safer nation for it.

Again, I thank the chairman for holding
this hearing and I look forward
to testimony of our witnesses.

July 7, 2006

Statement for the Record June 29, 2006 House Government Reform Committee Oversight Hearing "What Price Free Speech?: Whistleblowers and the Ceballos Decision"

Mr. Chairman, I appreciate this hearing on this important topic. In 1989, Congress, through the Federal Whistleblower Protection Act (WPA) created the U.S. Office of Special Counsel (OSC) as an independent agency with the primary purpose of protecting federal employees from prohibited personnel practices (PPP's), particularly whistleblower reprisal. This is detailed in the appendix of 5 USC 1201 and is also stated at 5 USC 1212(a)(1).

At present, I understand OSC receives about 2000 PPP complaints a year and that it has received about 25,000 PPP complaints since 1989.

OSC's statutory obligations to these concerned employees include:

1) investigating the PPP complaint to extent necessary to determine whether there are reasonable grounds to believe a PPP occurred (5 USC 1214(a)(1)(A)),
2) making such a determination (1214(b)(2)(A)), and
3) if a positive determination is made, reporting it, in every instance, to the involved agency.

The law allows OSC two methods of making its required report - either directly to the head of the involved agency, in which case the agency head must certify a response addressing what the agency will do to correct the PPP and by when (see 5 USC 1214(e)) - or, in the alternative, or if dissatisfied with the initial agency response, to both the Merit System Protection Board (MSPB) and the agency, as part of establishing jurisdiction for seeking corrective action on behalf of the affected employee, if the agency does not promptly correct the PPP (see 5 USC 1214(b)(2)(B)).

Additionally, when OSC terminates a PPP investigation, it is required to include a "termination statement" in its investigation termination notice as described in the "amendment" section of 5 USC 1214, that allows the employee to talk to an appropriate OSC official about its investigation, its findings, and how the law was applied by OSC.

I understand, based on OSC's public record, maintained per 5 USC 1219(a)(3), that OSC has yet to make an 1214(e) report, as a result of any of the approximately 25,000 PPP investigations it has conducted since 1989. I also understand that OSC recently admitted it has failed to include the required "termination statement" in approximately 18,000 PPP investigation termination letters since 1994.

I recommend that this Committee should conduct oversight of OSC's compliance with law and record in protecting federal employees from PPP's, particularly whistleblower reprisal necessary for members of Congress to be able to assure federal employees that if they take risks to comply with the merit principles of the federal civil service, including "blowing the whistle" in good faith, that OSC will comply with its statutory obligations to protect them .

I respectfully suggest such oversight is even more warranted, given the bills pending to reform the WPA, such as H.R. 1317.

For instance, I note H.R. 1317 does not mention OSC's crucial responsibility to protect federal employees from PPP's nor make clear that it, not the federal employee, is supposed to bear the burden of obtaining redress for agency PPP's, particularly whistleblower reprisal. Instead, H.R. 1317 seems to presume federal employees who experience PPP's should be expected to fend for themselves in litigation at MSPB or the Federal Courts, instead of being protected, at the government's expense, by OSC. I think H.R. 1317 is defective in not establishing that when a federal employee who alleges a PPP obtains redress on his own, because OSC failed to protect him, that it is still an unacceptable result and consideration should be given to providing additional compensation to such an individual, to compensate him for the sacrifice and loss caused by OSC's failure.

Additionally, neither does H.R. 1317 address the inconsistency between the law at 5 USC 1214(b)(1), 1221(c), and the regulations of the U.S. Merit Systems Protection Board at 5 CFR 1209.107 for granting "stays" in whistleblower cases. If OSC seeks a stay on behalf of a federal whistleblower at MSPB, the evidentiary standard, established by law, is "reasonable grounds to believe." But if OSC fails to protect a good-faith whistleblower and he has to fend for himself, MSPB has established in its regulations, per the discretion allowed it in 1221(c), the much higher evidentiary burden of "substantial likelihood" to grant a stay. I understand MSPB's record of granting individual whistleblower stay requests since 1990 is about 3%, which is not what Congress intended. Congress intended the good-faith whistleblower to be protected from all possible harm, sooner rather than later, in recognition of how damaging and harmful the process can be, even when the good-faith whistleblower eventually "prevails," through independent action, after OSC failed to protect him.

I have provided some "questions for the record" for some of our witnesses about my concerns about OSC's compliance with the law and its record in protecting federal employees from PPP's as well as inadequacies in the current scope of H.R. 1317 in ensuring OSC does it duty to protect as the primary protector of federal employees from PPP's.

Questions Read Into the Record for June 29, 2006 House Government Reform Committee Oversight Hearing "What Price Free Speech?: Whistleblowers and the Ceballos Decision"

For Witnesses:

1) Stephen Kohn, National Whistleblower Cener
2) William Bransford, Senior Executive Association
3) Barbara Atkin, NTEU
4) Joe Goldberg, AFGE

1) Do you agree or disagree that OSC's essential statutory obligations to protect federal employees from PPP's particularly whistleblower reprisal include the following:

> A) investigating the PPP complaint to extent necessary to determine whether there are reasonable grounds to believe a PPP occurred (5 USC 1214(a)(1)(A)),
> B) making such a determination (1214(b)(2)(A)),
> C) if a positive determination is made, reporting it, in every instance, to the involved agency, either per 1214(e) or, as an alternative in its discretion, per 1214(b)(2)(B), and
> D) explicitly reporting its statutory required determination to the complainant, per 1214(a)(1)(D) or 1214(a)(2)(A).

2) In your opinion, is OSC complying with its essential statutory obligations to protect federal employees from PPP's? If not, how not?

3) Do you agree or disagree that OSC has not included the required "termination statement" in its PPP investigation termination letters since 1994?

4) In your experience, does OSC act in the interests of those who seek its protection, as the law directs? If not, how not?

5) Do you think Congress is conducting adequate oversight of OSC's compliance with law and record in protecting federal employees from PPP's?

6) Do you think there is currently an objective basis for any member of Congress or the Administration to assure federal employees that if they uphold the merit principles of the federal civil service, including "blowing whistles" in good faith when necessary, that OSC will comply with its statutory obligations to protect them from prohibited personnel practices (PPP's), particularly whistleblower reprisal?

7) Do you think S. 494 and/or H.R. 1317 adequately reflect the intention that OSC is charged to protect federal employees from PPP's with their obtaining redress on their own indicating an unacceptable performance by OSC? How do you think the bills should be changed to reflect

OSC's responsibility to be the primary protector of federal employees from PPP's, with their seeking redress on their own an undesirable alternative?

8) Do you have any other comments about OSC role and performance in protecting federal employees from PPP's and Congressional oversight of it?

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