QUESTIONS PRESENTED

1. Does *Connick v. Myers*, 461 U.S. 138 (1983), permit the Seventh Circuit to emphasize the motivation for speech by a public employee when determining whether that employee spoke on a matter of public concern?

2. Whether a public employee's speech, based on information learned through his employment, but spoken as a citizen, is excluded from First Amendment protection by *Garcetti v. Ceballos*, 547 U.S. 410 (2006)?

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STATUTES AND RULES

OPINIONS BELOW

Petitioners respectfully request that a writ of certiorari be issued to review the judgment below. The opinion of the United States Court of Appeals for the Seventh Circuit appears in the Appendix (hereinafter "App.") at App. 1-25 and is reported at 574 F.3d 370 (7th Cir. 2009). The opinion of the United States District Court for the Eastern District of Wisconsin, docket No. 06-C-900, appears at App. 26-60 and is unpublished. The judgment entered by the Eastern District of Wisconsin dismissing the action appears at App. 61-62.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit sought to be reviewed was entered on July 21, 2009. The petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rules 13.1 and 13.3 because it is being filed within 90 days after the entry of the judgment. No petition for rehearing was filed. The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

United States Constitution, Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 United States Code, Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Factual Background[1]

In May 2005, the Milwaukee County Deputy Sheriff's Association ("MDSA"), the union that represents all Deputy Sheriffs and Sergeants in the Milwaukee County Sheriff's Department ("Department"), learned that Milwaukee County Sheriff David A. Clarke Jr. ("Sheriff Clarke") had directed on-duty deputies to escort him to and from Milwaukee's General Mitchell International Airport, and to conduct patrols of his personal residence. MDSA President, Deputy Roy Felber, believing this to be an improper and wasteful personal use of resources met with a reporter from the *Milwaukee Journal Sentinel* to express his concerns.

Shortly thereafter, Sheriff Clarke posted a quote on roll-call boards throughout the Department. This quotation was confrontational and seemed to attack the courage of members of the department. It said, "[i]f you are afraid or have lost your courage, you may go home, otherwise you will ruin the morale of others. Deuteronomy, Chapter 20, Verse 8."

Deputy Michael Schuh ("Deputy Schuh"), an eighteen-year veteran of the Sheriff's Department read Sheriff Clarke's message, and believed that Sheriff Clarke was personally challenging the courage of the entire department. In response to Sheriff Clarke's quote, Deputy Schuh submitted a statement to the *Star*, the MDSA newsletter. The *Star* regularly contains editorials and commentary from deputies,

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[1]As the facts of this case are not in dispute, they are drawn from the Seventh Circuit decision. *See* App. 2-8.

including criticism of Sheriff Clarke. It is distributed to approximately 700 current and retired MDSA members, as well as private businesses, sponsors, and the Milwaukee County Board of Supervisors, which controls the Department's budget. Deputy Schuh's article stated:

> Union Member's Response
> If you are afraid or you have lost your courage and need two deputies and a sergeant to escort you every time you fly in and out of the airport and patrol deputies to drive by your house when you're out of town you should resign and go home! Then you would lift the morale of this whole department (a.k.a. office).

Deputy Schuh learned of Sheriff Clarke's use of deputies to patrol his residence by viewing an order for that assignment on a roll-call board, and of Sheriff Clarke's personal escort at the airport through the "grapevine."

On Friday, July 22, 2005, the MDSA distributed the edition of the *Star* containing Deputy Schuh's article. Prior to reading the article, Sheriff Clarke did not know Deputy Schuh. After reading the article, Sheriff Clarke and his second-in-command, Inspector Kevin Carr, discussed an appropriate response.

Sheriff Clarke decided to reassign Deputy Schuh to a new "Pilot Project," which he created specifically for Deputy Schuh on Saturday, July 23, 2005. This project required Deputy Schuh to patrol part of Milwaukee on foot, in full uniform, and perform various community outreach tasks. The specific area of Deputy Schuh's new assignment was decided by Sheriff Clarke on Sunday, July 24, 2005, after reading a *Milwaukee*

Journal Sentinel article which included a map detailing a crime-ridden section of Milwaukee's north side. This neighborhood was described as "the City's deadliest area," and "Milwaukee's hot spot" for crime.

Deputy Schuh received his new assignment on Monday, July 25, 2005. The location of his patrol precisely matched the area highlighted in the *Milwaukee Journal Sentinel* article. Deputy Schuh was assigned to this area in full uniform, without a partner, and without a car. He was required to ride public transportation to and from his new assignment. There was no advance notice of this new assignment as required by the collective bargaining agreement between the MDSA and Milwaukee County.

On July 28, 2005, Sheriff Clarke issued Directive No. 13-05, which revised the Department's Confidentiality Policy, originally enacted in 1984. This revised policy (hereinafter "Confidentiality Policy") was drafted by Captain Eileen Richards ("Captain Richards") and relied in large part on an unimplemented 2002 proposal.

The new policy differed from the old policy. Employees were now required to "keep official agency business confidential" rather than "keep departmental business confidential." Employees were prohibited from disclosing such information "to anyone except those for whom it is intended, or as directed by the Sheriff or his designee, or as ordered by law." Under the old policy a deputy's immediate supervisor could approve communications. (App. 20)

Sheriff Clarke's reassignment of Deputy Schuh caused an uproar throughout Milwaukee. On July 27, 2005, the Milwaukee County Board of Supervisors issued an open letter to Sheriff Clarke criticizing his fiscal irresponsibility and expressing their disgust at

his actions. On that same day Deputy Schuh and the MDSA filed their initial suit.

Proceedings Below

This matter was originally commenced as a federal action on July 25, 2005, in the United States District Court for the Eastern District of Wisconsin pursuant to 42 U.S.C. § 1983. Plaintiffs-petitioners Deputy Schuh and the MDSA alleged that defendants-respondents, David A. Clarke, Jr., in his official capacity as the Sheriff of Milwaukee County, and Captain Richards, in her official capacity as an employee of Milwaukee County and the Milwaukee County Sheriff's Office, had violated their constitutional rights. The suit sought a temporary restraining order and a permanent injunction in addition to other remedies. On August 4, 2005, a summons was served on both respondents. On October 6, 2005, before the court had set the matter for hearing on the restraining order, the parties filed a stipulation to dismiss without prejudice.

The petitioners then filed this suit on October 7, 2005, in the Circuit Court for Milwaukee County, Wisconsin, against the respondents. On August 2, 2006, the plaintiffs filed an amended complaint under 42 U.S.C. § 1983, alleging that the defendants violated Deputy Schuh's First Amendment rights of free speech and free association due to the reassignment, and that the Department's new Confidentiality Policy constituted an impermissible prior restraint on speech. The amended complaint also alleged similar state law claims arising out of the Wisconsin Constitution. On August 17, 2006, the defendants removed the case to the United States District Court for the Eastern District of Wisconsin pursuant to federal subject

matter jurisdiction under 28 U.S.C. § 1441.

In accordance with 28 U.S.C. § 636(c) and Rule 73(b) of the Federal Rules of Civil Procedure, on August 18, 2006, and August 21, 2006, the respondents and petitioners, respectively, consented to proceed before the Honorable Patricia Gorence, United States Magistrate Judge.

The parties filed cross-motions for summary judgment. The district court ruled in favor of Sheriff Clarke and Captain Richards on all federal claims in a final judgment dated August 15, 2008, and entered August 18, 2008. According to the district court, Deputy Schuh had spoken as a citizen, but not on a matter of public concern. (App. 47-48). The court held that while some of the issues raised in Deputy Schuh's article were matters of public concern, the context of the article revealed that "his 'purpose was to advance his personal interests.'" (App. 51) (citing *Phelan v. Cook County*, 463 F.3d 773, 791 (7th Cir. 2006)). The court noted that the petitioners had not provided any evidence, "that the point of Deputy Schuh's speech was to raise a matter of public concern." (App. 51).

The court declined to exercise supplemental jurisdiction over the state law claims and dismissed the action. On September 5, 2008, the petitioners filed a Notice of Appeal and docketing statement with the United States District Court for the Eastern District of Wisconsin.

On February 13, 2009, oral arguments were heard before the Honorable Justices Michael S. Kanne, Ilana Diamond Rovner, and Terence T. Evans, of the United States Court of Appeals for the Seventh Circuit. On July 21, 2009, the panel issued its decision affirming the district court's decision that Deputy Schuh's speech was not on a matter of public concern, and that he could not sustain a First Amendment retaliation claim.

The Seventh Circuit held that both the content and form of Deputy Schuh's article related to a matter of public concern. (App. 13-14). However, after looking at the context of the speech, the court determined that Deputy Schuh was speaking on a matter of purely private concern, and therefore his speech was not protected by the First Amendment. (App. 19). The court held that the context of the statement was more important because Deputy Schuh had not directly questioned Sheriff Clarke's fiscal responsibility or raised the public ramifications of his conduct. (App. 14).

The Seventh Circuit characterized its analysis of Deputy Schuh's motive for speaking as not applying a litmus test, but stated, "[t]he motive of a statement, rather, 'matters to the extent that even speech on a subject that would otherwise be of interest to the public will not be protected if the expression addresses only the personal effect upon the employee, or if the only *point* of the speech was to further some purely private interest.'" (App. 12) (emphasis in original) (quoting *Gustafson v. Jones*, 290 F.3d 895, 908 (7th Cir. 2002)). The court said it was required to analyze the extent that Deputy Schuh's speech was made for personal reasons in conjunction with the extent to which the content related to a matter of public concern. (App. 14). The Seventh Circuit stated, "[i]n the end, Schuh cannot avoid that he wrote his short statement, which on its face merely questioned Sheriff Clarke's courage, for purely personal reasons." (App. 19).

The Seventh Circuit also affirmed the district court's decision concerning the new Confidentiality Policy. The circuit court held that the Confidentiality Policy "is not an unlawful prior restraint because it does not apply to speech protected by the First Amendment."

(App. 22-23). Rather, the policy only regulated speech grounded in the public employee's job duties. (App. 23). This petition for writ of certiorari timely followed.

REASONS FOR ALLOWANCE OF THE WRIT

The appropriate amount of emphasis given to a public employee's motivation for speaking in determining whether he or she spoke on a matter of public concern is an important question requiring the guidance of this Court. This question implicates the free speech rights of public employees across the United States. In addressing this question the courts of appeals have split. The Seventh Circuit's affirmance of summary judgment against Deputy Schuh and the MDSA conflicts in various respects with the decisions of other circuits that have examined the matter. Furthermore, the Seventh Circuit's decision conflicts with the binding precedents of this Court as stated in *Connick v. Myers*, 461 U.S. 138 (1983); *City of San Diego v. Roe*, 543 U.S. 77 (2004) (per curiam); and *Rankin v. McPherson*, 483 U.S. 378 (1987). Petitioners respectfully contend that the Seventh Circuit, along with the Fifth, Sixth, and Eleventh Circuits have erroneously interpreted these precedents in such a way as to limit the free speech rights of public employees by focusing on the motivation for the speech in question, as opposed to applying the three-part test of content, form, and context test created by this Court. *Connick*, 461 U.S. at 147-48.

The free speech rights of public employees are further implicated by the question of whether speech made by a public employee as a citizen, but based on information learned through public employment, is protected by the Constitution. The petitioners contend that the Seventh Circuit's application of *Garcetti v.*

Ceballos, 547 U.S. 410 (2006), has expanded the reasoning of that case in such a way as to disqualify certain speech by public employees made as citizens on matters of public concern from protection. Review by this court is warranted to clarify the holding of *Garcetti* and provide guidance to public employees throughout the United States.

I. REVIEW IS NECESSARY TO CLARIFY THE APPROPRIATE EMPHASIS GIVEN TO A PUBLIC EMPLOYEE'S MOTIVATION FOR SPEAKING IN DETERMINING WHETHER THAT EMPLOYEE SPOKE ON A MATTER OF PUBLIC CONCERN.

A. The Seventh Circuit misinterprets and improperly applies *Connick* and its progeny.

The Seventh Circuit determined that Deputy Schuh did not speak on a matter of public concern when he published his article in the *Star*. This holding resulted in the granting and affirming of summary judgment against him by the Seventh Circuit and the United States District Court for the Eastern District of Wisconsin. Petitioners respectfully contend that this holding was based on an erroneous application of Supreme Court precedent. The Seventh Circuit put extensive emphasis on Deputy Schuh's motivation for speaking, despite Supreme Court precedent to the contrary. The Seventh Circuit has emphasized the motivation for public employee speech on multiple occasions. Furthermore, numerous courts of appeals have addressed this issue in conflicting ways.

1. The Supreme Court's analysis of whether a public employee's speech is on a matter of public concern does not turn on the personal motivation for that speech.

This Court has repeatedly stated that public employees do not surrender all of their First Amendment rights because of their employment. *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). In certain circumstances, a public employee has the First Amendment right to speak as a citizen on a matter of public concern. *Id*. (citing *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will County*, 391 U.S. 563, 568 (1968); *Connick v. Myers*, 461 U.S. 138, 147 (1983); *Rankin v. McPherson*, 483 U.S. 378, 384 (1987); *United States v. National Treasury Employees Union*, 513 U.S. 454, 466 (1995) (hereinafter *NTEU*)).

The Court's seminal case in defining the right of public employees to speak on matters of public concern is *Pickering*. In that case, a teacher was retaliated against for writing a letter to a local newspaper on issues that included the funding policies of his school and the requirements for certain tax revenues. *Pickering*, 391 U.S. at 566. The Court stated that the issue in the case was, "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 statements at issue were found to have "neither 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 school generally." *Id*. at 572-73 (footnote omitted). The

case focused on balancing the respective interests of the employee and employer, not on the teacher's motivation for speaking out against the school board. *Id*. at 572-73.

The balancing test developed in *Pickering* was refined in *Connick v. Myers*, 461 U.S. 138 (1983). The case involved an Assistant District Attorney for New Orleans Parish in Louisiana, Sheila Myers, who was strongly opposed to a proposed transfer within the criminal court. *Connick*, 461 U.S. at 140. In an attempt to gather information to oppose her transfer, Ms. Myers created and circulated a fourteen-question survey concerning the New Orleans Parish office. *Id*. at 141. She was then terminated by District Attorney Harry Connick for refusing to accept the transfer and for insubordination as a result of her questionnaire. *Id*.

Before scrutinizing the reasons for the discharge, the Court determined whether the speech at issue could be fairly characterized as constituting speech on a matter of public concern. *Id*. at 146. The reason for this was because, "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices." *Id*. On the other hand, employee speech on matters of purely personal interest is not entitled to protection. *Id*. at 147. In order to determine whether an employee's speech addresses a matter of public concern, courts were directed to look at the content, form, and context of a given statement, as revealed by the whole record. *Id*. at 147-48.

Applying this test, the Court found that thirteen of the fourteen questions contained in the questionnaire prepared by Ms. Myers were not on matters of public concern. *Id*. at 148. These thirteen questions related to internal office matters such as morale, transfer

policies, the need for a grievance committee, and the level of trust and confidence in various supervisors. *Id.* One question did touch upon a matter of public concern, whether any of the assistant district attorneys had ever felt pressured to work in political campaigns on behalf of office supported candidates. *Id.* at 149. This question was put through the *Pickering* balancing analysis because it passed the Court's new test. *Id.* at 150-54. Applying the *Pickering* balancing test, the Court held that Mr. Connick was justified in firing Ms. Myers, despite the fact that her speech touched upon a matter of public concern. *Id.* at 154.

In *Connick*, as in *Pickering*, the Court was not concerned with the motivation for the speech in question. The Court stated that, "the focus of Myers' questions is not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors." *Id.* at 148. Despite Ms. Myers' personal motivation for circulating the survey, the Court put the single question that was found to be on a matter of public concern through the *Pickering* balancing test. *Id.* at 149-50.

Motive for speaking was even less of an issue in *Rankin v. McPherson*, 483 U.S. 378 (1987). In *Rankin*, a clerical employee in the office of the Constable of Harris County, Texas, Ardith McPherson, was discharged for making a personal statement to a fellow employee that was inadvertently overheard by a third employee. *Id.* at 381-82. After hearing that an attempt had been made on the life of President Reagan, she stated that, "if they go for him again, I hope they get him." *Id.* at 381.

The Court held that the statement made by Ms. McPherson to the fellow employee concerning her personal feelings constituted speech on a matter of public concern. "Considering the statement in context,

as *Connick* requires, discloses that it plainly dealt with a matter of public concern." *Id.* at 386. This statement was then put through the *Pickering* balancing test and the Court concluded that Ms. McPherson's dismissal had been improper. *Id.* at 392. There was no discussion of her motivation for speaking on this issue. The inadvertently overheard statement was made to a fellow employee in supposed confidence, and therefore seemed to have a purely personal motivation.

Public employee speech on matters of public concern was addressed in *NTEU*, 513 U.S. 454 (1995). In *NTEU*, employees of the Executive Branch challenged a federal statute which forbade them from receiving honoraria for public appearances, speeches, or articles. *Id.* at 459. The employees who challenged this statute had previously received compensation for writing and speaking to public audiences outside of the workplace, and the content of their speech was mostly unrelated to their Government employment. *Id.* at 466. The Court determined that this speech fell "within the protected category of citizen comment on matters of public concern rather than employee comment on matters related to personal status in the workplace." *Id.* There was no discussion of the motivation for the employees' speech. Presumably, because the employees were most often compensated for speaking on issues unrelated to their public employment, they had only a personal motive for speaking.

In *City of San Diego v. Roe*, 543 U.S. 77 (2004) (per curiam), this Court commented on the public concern test of *Connick* and provided some guidance for its application. The Court stated that *Connick* and the cases applying it:

> make clear that public concern is something that is a subject of legitimate

> news interest; that is, a subject of general interest and of value and concern to the public at the time of publication. The Court has also recognized that certain private remarks, such as negative comments about the President of the United States, touch on matters of public concern and should thus be subject to *Pickering* balancing.

Id. at 83-84.

In *Roe,* the speech at issue was found not to be on a matter of public concern in that it consisted of sexually explicit performances which were linked to the speaker's employment as a police officer. *Id*. at 78. In this case, these activities did nothing to inform the public about any aspect of the police department's functioning or operation. *Id*. at 84. In holding that Officer Roe had not spoken on a matter of public concern, there was no discussion of his motivation for speaking. Instead, the Court focused on the content of his speech, its form, and the context in which it was made. Motivation did not figure into the analysis.

This Court's recent decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), discussed the *Connick* test. In *Garcetti*, a supervising deputy district attorney in the Los Angeles County District Attorney's Office claimed that he was subjected to retaliation for writing two memoranda concerning an allegedly inaccurate warrant affidavit and recounting his concerns after being called by the defense in a case involving the affidavit. *Id*. at 413-15. The Court found that the dispositive factor was that the speech at issue was made pursuant to Mr. Ceballos' official duties. *Id*. at 421. "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." *Id.* The case turned on the point that Mr. Ceballos communicated pursuant to his official duties, his motive did not matter, instead his role was dispositive.

These cases highlight that this Court has repeatedly declined to focus on the motivation for public employee speech in determining whether the speech was on a matter of public concern. Rather, this Court has applied the *Connick* test of content, form, and context. Despite the fact that this Court has never focused on a public employee's reason for speaking, the Seventh Circuit has focused on the "point" or motivation of the speech of public employees in such a way as to restrict the free speech rights of public employees guaranteed by the First Amendment.

2. The Seventh Circuit's application of *Connick* improperly focuses on a public employee's motivation for speaking, and as a result, review by this Court is required.

The Seventh Circuit's application of *Connick*, from the beginning, has given the motivation for speech by public employees heavy weight in determining whether their speech was on a matter of public concern. In one of the first decisions following *Connick*, the Seventh Circuit interpreted *Connick* as turning on the "essentially 'private motive' for the speech." *Altman v. Hurst*, 734 F.2d 1240, 1244 (7th Cir. 1984). The Seventh Circuit reasoned that while one of the questions contained in the questionnaire at issue in *Connick* related to a matter of public concern, the

questionnaire on the whole did not involve speech on a matter of public concern. *Id. at 1243.* This reasoning, however, ignored the fact that the single question on a matter of public concern in *Connick* was analyzed under the *Pickering* balancing test. *Connick*, 461 U.S. at 149-50. It was only pursuant to this balancing test that the *Connick* Court considered Ms. Myers' motivation for speaking. *Id.* at 153-54. Therefore, her motivation for speaking was considered during the *Pickering* balancing test, not during the analysis of whether she had spoken on a matter of public concern.

The Seventh Circuit then interpreted *Connick* as requiring it to "look at the point of the speech in question: was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?" *Linhart v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985). In *Linhart,* an acting police chief had been reprimanded for allegedly engaging in political activity in his office by recruiting a replacement Village Manager. *Id.* at 1006. The Seventh Circuit stated that because it was not the acting police chief's intent to speak out on a matter of public concern, his speech was only of personal interest, and did not constitute protected speech. *Id.* at 1010. This early interpretation has led to a string of path-dependent decisions in which the Seventh Circuit has used the motivation for speech by a public employee to determine whether the speech was on a matter of public concern, while at the same time pointing out that it did not consider motivation to be a litmus test.

The *Linhart* interpretation of the *Connick* test has become a leading interpretation in the Seventh

Circuit.[2] In *Callaway v. Hafeman*, 832 F.2d 414 (7th Cir. 1987), *Linhart* was the basis for a decision holding that a school administrator's sexual harassment complaints did not constitute speech on a matter of public concern. *Id.* at 417. The court stated that "[w]hile the content of [the plaintiff's] communications touched upon an issue of public concern generally, she was not attempting to speak out as a citizen concerned with problems facing the school district; instead, she spoke as an employee attempting to resolve her private dilemma." *Id.* Her speech was not protected because "it was uttered in the pursuit of purely private interests." *Id.* This rationale conflicts directly with the holding in *Connick*. Ms. Myers' motive for speaking in *Connick* was "to gather ammunition for another round of controversy with her superiors." *Connick*, 461 U.S. at 148. Despite this personal motive, one question in her survey was put through the *Pickering* balancing analysis. In *Callaway*, the Seventh Circuit allowed the motivation of the speech to predominate and erroneously failed to apply the *Pickering* balancing test to the speech at issue.

Focusing on the motivation for public employee speech in determining whether that employee spoke on a matter of public concern is a familiar refrain in the Seventh Circuit case law.[3] This is despite frequent

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[2]As of September 15, 2009, it has been cited seventy-nine times by federal courts according to Loislaw.com, including thirty-one times by the Seventh Circuit.

[3]"Speech that serves a private or personal interest, as opposed to a public one, does not satisfy the standards for First Amendment protections." *Houskins v. Sheahan*, 549 F.3d 480, 491-92 (7th Cir. 2008) (holding that because the statement at issue was made in the context of a personal employment dispute and not aimed at

statements that motive is not dispositive, or "a litmus test," and that the content of the speech is the most important factor. (App. 12).

Nonetheless, the Seventh Circuit is not completely devoid of decisions which have rejected motivation as a key inquiry in determining whether the speech of public employees is on a matter of public concern. In a 1988 case the Seventh Circuit stated:

> [a]lthough the point or motive behind an employee's speech is relevant in determining whether matters of public concern are implicated by that speech, motive alone is not dispositive. A fair reading of *Connick* simply will not support the use of such a litmus test. Despite the Court's explicit finding that Myers's questionnaire was motivated by

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raising public awareness of any wrongdoing by the defendant, it was not on a matter of public concern). "While a statement born of pure personal interest does not constitute a public concern, a mere personal aspect of the speaker's motivation will not defeat the entire speech." *Miller v. Jones*, 444 F.3d 929, 937 (7th Cir. 2006). "[Plaintiff] provides no evidence that the point of her speech was to raise a matter of public concern, rather than to further her purely private interests." *Metzger v. DaRosa*, 367 F.3d 699, 702-03 (7th Cir. 2004) (ruling that an employee's speech was not on a matter of public concern). "Because [plaintiff's] complaints were both motivated by and framed in terms of his own interest, they did not constitute speech on a matter of public concern." *Smith v. Fruin*, 28 F.3d 646, 652 (7th Cir. 1994). *See also Barkoo v. Melby*, 901 F.2d 613, 619 (7th Cir. 1990) (holding that a public employee's speech was not on a matter of public concern because she failed to present some evidence that she publicized an issue out of concern for the public interest, and that her only concern was purely personal).

> a personal dispute, the content of her speech was paramount to the Court's finding that a public issue was implicated. This court also has recognized that content is the greatest single factor in the *Connick* inquiry.

Berg v. Hunter, 854 F.2d 238, 242-43 (7th Cir. 1988) (citation omitted). This analysis was repeated in a later case which overturned a grant of summary judgment in favor of a public employer on the basis that the district court had focused exclusively upon the employee's purpose in speaking. *Belk v. Town of Minocqua*, 858 F.2d 1258, 1263-64 (7th Cir. 1988). The court compared the complaints at issue in *Belk* with the questions in *Connick* and held that despite being bound up in a personal dispute with her employer, the speech of the public employee touched upon matters of public concern and necessitated a *Pickering* balancing analysis. *Id.* at 1264.[4]

Petitioners respectfully contend that it is the approach developed in *Linhart* that has incorrectly predominated the Seventh Circuit's analysis of whether speech by a public employee is on a matter of public concern. The Seventh Circuit improperly focused on the motivation of public employees' speech. Despite frequent statements that motive is not a litmus test, the Seventh Circuit has repeatedly held that speech is unprotected when made for personal

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[4] *See also Auriemma v. Rice*, 910 F.2d 1449, 1460 (7th Cir. 1990) ("Even if the plaintiffs themselves viewed their problems as only a personal matter, the test of public concern is more objective. It does not depend entirely on the fact the plaintiffs filed a suit for damages and would benefit but also on the other factors discussed in *Connick*.").

reasons. Review by this Court is necessary to clarify the correct application of *Connick*.

B. The courts of appeals are in conflict over the proper application of *Connick*.

The courts of appeals are in disarray concerning the proper application of *Connick*. They have split regarding the emphasis given to a public employee's motivation for speaking. This split requires resolution by the Court to clarify how a public employee's motivation for speaking is to be considered in determining whether the employee spoke on a matter of public concern.

1. The Sixth, Tenth, and Eleventh Circuits have given extensive weight to a public employee's motivation for speaking in determining whether speech is on a matter of public concern.

The Eleventh Circuit has given the motivation for public employee speech extensive emphasis in its *Connick* analysis. "A court must therefore discern the purpose of the employee's speech - that is, whether she spoke on behalf of the public as a citizen, or whether the employee spoke for herself as an employee." *Morgan v. Ford*, 6 F.3d 750, 754 (11th Cir. 1993) (per curiam). Even where the content of an employee's speech touches on a matter of social interest, the Eleventh Circuit looks to the motivation of the employee in determining whether the speech is protected. *Id*. "[T]he relevant inquiry is not whether the public would be interested in the topic of the speech at issue but rather is 'whether the purpose of the plaintiff's speech was to raise issues of public

concern.'" *Maggio v. Sipple*, 211 F.3d 1346, 1353 (11th Cir. 2000).[5]

The Sixth Circuit also emphasizes the motivation for speech by public employees. "[O]ur court has distilled the 'public concern' test by stating that the court must determine: the 'focus' of the speech; 'the point of the speech in question'; or 'the communicative purpose of the speaker.'" *Farhat v. Jopke*, 370 F.3d 580, 592 (6th Cir. 2004). This test is closer to the Seventh Circuit's application of *Connick* than the decisions of the Supreme Court.

The Tenth Circuit goes even farther in focusing its inquiry upon the employee's motivation for speaking. The employee must be speaking with an intent to improve public welfare for their speech to be on a matter of public concern. *Maldonado v. City of Altus*, 433 F.3d 1294, 1310 (10th Cir. 2006). "In deciding how to classify particular speech, courts focus on the motive of the speaker and attempt to determine whether the speech was calculated to redress personal grievances or whether it had a broader public purpose." *Gardetto v. Mason*, 100 F.3d 803, 812 (10th Cir. 1996). This inquiry ignores that the speech in *Connick* was directed at resolving personal grievances and was made with a personal motive, not about informing the public.

2. The First, Second, and Fourth Circuits apply *Connick* without emphasizing a public employee's motivation for speaking.

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[5] *See also Boyce v. Andrew*, 510 F.3d 1333, 1343 (11th Cir. 2007) (highlighting the need to discern the employee's purpose in speaking).

The Fourth Circuit's *Connick* jurisprudence is more protective of employee speech than that of the Seventh Circuit. In a recent case, the Fourth Circuit highlighted the need to differentiate between multiple issues raised in employee speech. While any single instance of expression must be judged as a whole, that does not require the court to "ignore the portions of the letter raising issues of sexual harassment simply because most of the letter is devoted to personal grievances." *Campbell v. Galloway*, 483 F.3d 258, 267 (4th Cir. 2007). The fact that the bulk of an employee's letter was related to personal grievances was not sufficient to leave the entire letter unprotected. *Id.* at 268. Instead the Fourth Circuit takes the stance that if speech "arguably relates to a matter of public concern, we prefer to apply the approach taken in *Connick* and weigh whatever public interest commentary may be contained in the letter against the state's dual interest as a provider of public service and employer of persons hired to provide that service." *Stroman v. Colleton County Sch. Dist.*, 981 F.2d 152, 158 (4th Cir. 1992).

The First Circuit's application of *Connick* is also more protective of employee speech than the Seventh Circuit's. In determining whether speech is on a matter of public concern, the First Circuit looks primarily at the content of the speech. "If the employee's speech is on a topic that would qualify, 'on the basis of its content alone' as a matter of inherent public concern, we needn't inquire further into the 'form and context' of the expression." *Davignon v. Hodgson*, 524 F.3d 91, 101 (1st Cir. 2008) (quoting *O'Connor v. Steeves*, 994 F.2d 905, 914 (1st Cir. 1993)). Unlike the Seventh Circuit, the First Circuit does not hold that self-interested speech is excluded from First Amendment protection. *Davignon*, 524 F.3d at 102.

The Second Circuit recently addressed the issue of motivation in determining whether the speech of public employees is on a matter of public concern. The court recognized that its *Connick* case law was not entirely clear on the issue, but stated that "a speaker's motive is not dispositive in determining whether his or her speech addresses a matter of public concern." *Sousa v. Roque*, 578 F.3d 164, 2009 U.S. App. LEXIS 18844, *25 (2d Cir. Aug. 21, 2009) (as amended Aug. 31, 2009) (citing *Reuland v. Hynes*, 460 F.3d 409, 415 (2d Cir. 2006)). This holding was compelled by the decision in *Connick*. *Id.*[6]

The First, Second, and Fourth Circuits have applied *Connick* without focusing on the motivation for public employee speech. Petitioners respectfully contend that this analysis is more faithful to the analysis used by this Court, than the analysis used by the Sixth, Seventh, Tenth, and Eleventh Circuits. The conflict between circuits warrants review by this Court to clarify the appropriate emphasis to be given to the motivation for public employee speech.

II. REVIEW IS NECESSARY TO DETERMINE WHETHER A PUBLIC EMPLOYEE'S SPEECH, BASED ON INFORMATION LEARNED THROUGH HIS EMPLOYMENT, BUT SPOKEN AS A CITIZEN, IS EXCLUDED FROM FIRST AMENDMENT PROTECTION.

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[6] *See also Reuland*, 460 F.3d at 416 ("The facts of the Supreme Court's decision in *Connick* indicate that motive is not dispositive as to whether an employee's speech is a matter of public concern.").

The Seventh Circuit determined that the Confidentiality Policy promulgated by Sheriff Clarke and Captain Richards is not an unlawful prior restraint because it does not apply to speech protected by the First Amendment. (App. 22-23). The court held that the policy regulated only speech that existed due to the employee's professional duties. This holding, however, ignores that speech by a public employee as a citizen is protected regardless of the source of information on which the speech is based. It is only when a public employee speaks on a matter of public concern pursuant to their job duties that their speech is unprotected. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (stating that the controlling factor was that Mr. Ceballos' expressions were made pursuant to his job duties). The Seventh Circuit applied *Garcetti* to uphold the Confidentiality Policy of the sheriff's department, which prohibits speech by public employees not made pursuant to their job duties.

A. *Garcetti* only applies to speech made by public employees pursuant to their job duties.

In *Garcetti,* deputy district attorney for the Los Angeles County District Attorney's Office, Richard Ceballos, was punished for writing a memorandum to his supervisor concerning inaccuracies in a police report and affidavit, and recounting his concerns about the affidavit when called by defense counsel in an evidentiary hearing. *Garcetti*, 547 U.S. at 413-15. Mr. Ceballos responded by filing suit claiming retaliation for engaging in speech protected by the First Amendment. *Id.* at 415. In granting summary judgment to the employer, the district court held that Mr. Ceballos was not entitled to First Amendment

protection for his memorandum's contents. *Id*. The Ninth Circuit reversed this judgment without considering whether Mr. Ceballos had spoken as a citizen or as an employee. *Id*. at 416. This Court in turn reversed the Ninth Circuit, reasoning that "[t]he controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy." *Id*. at 421. The memorandum was part of Mr. Ceballos' job duties, and restricting this official speech did not infringe any liberties that he might have enjoyed as a private citizen. *Id*. at 421-22. Restricting such speech reflected the "exercise of employer control over what the employer itself has commissioned or created." *Id*.

The *Garcetti* case created a new factor for determining whether speech by public employees is protected by the First Amendment. If a public employee speaks as a citizen on a matter of public concern, a careful balancing analysis is required to determine whether the speech is protected. *Id*. at 423. "When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny." *Id*. The analysis from *Garcetti* does not apply to speech by a public employee made as a citizen, which is still governed by the traditional *Connick-Pickering* analysis.

B. The Seventh Circuit wrongfully expands *Garcetti* to exclude speech made by public employees as citizens from First Amendment protection.

Despite *Garcetti's* holding, the Seventh Circuit applied it to uphold a Confidentiality Policy, which restricts speech not made pursuant to the job duties of public employees. As noted in the Seventh Circuit's

decision, employee speech on behalf of an organization is not protected speech. (App. 22). Speech on behalf of an organization is made as an employee, not as a citizen. However, the Confidentiality Policy covers more than speech on behalf of the Department. The petitioners contend that the Seventh Circuit erred in holding that a requirement to keep official agency business confidential does not prohibit protected speech by an employee as a citizen.

The Seventh Circuit determined that the policy at issue regulated solely unprotected speech which owed its existence to an employee's job duties. (App. 23). The court reached this result by engaging in a close textual analysis of three words contained in the policy: official agency business. (App. 23). The Seventh Circuit determined these three words restricted the coverage of the policy to: information that was more than tangentially related to the Department (interpreting "business"); was generated by or pertained to the Department (interpreting "agency"); and restricted only speech grounded in or owing its existence to the employees' job duties, or authorized or approved by a proper authority (interpreting "official"). (App. 23). It was the interpretation of "official" that was most important to the Seventh Circuit. (App. 23).

There is no requirement in the Confidentiality Policy that covered speech consists only of speech authorized, approved, or owing its existence to the employees' job duties. Rather the policy covers speech made by employees as citizens. An employee who publicly comments on an official policy or decision of the Department, of which they learned about during their employment, could be subjected to discipline. This is regardless of whether they were speaking on behalf of the Department pursuant to their job duties, or as a citizen. There is simply no support in the

Confidentiality Policy for the assertion that the word "official" limits covered speech to that deemed unprotected by *Garcetti*. The Confidentiality Policy covers all speech about official agency business, not just speech made pursuant to an employee's job duties.

The Seventh Circuit reached this result by missing the distinction between speech which "owes its existence to a public employee's professional responsibilities,"[7] and information learned through public employment which becomes the basis for speech as a citizen. A public employee's speech about a matter of public concern, based on information learned in his employment, is protected if he speaks as a citizen. *See Garcetti*, 547 U.S. at 421 (stating that the fact that the memorandum concerned the subject matter of Mr. Ceballos' employment was not dispositive); *Connick*, 461 U.S. at 149 (holding that the question of whether fellow employees ever felt pressured to work in political campaigns on behalf of office supported candidates touched upon a matter of public concern); *Givhan v. W. Line Consol. Sch. Dist.,* 439 U.S. 410, 417 (1979) (holding that a teacher's speech concerning desegregation policies in her district could potentially be protected); *Pickering*, 391 U.S. at 572 (describing the importance of protecting a public teacher's right to speak out on subject of school board spending). What each of these cases have in common is that the employee was speaking publicly based on information learned through public employment. This speech was eligible for First Amendment protection because each employee spoke as a citizen.

The Confidentiality Policy at issue in this case has the power to restrict and prevent speech found to be

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[7] *Garcetti*, 547 U.S. at 421.

eligible for protection in the cases cited above. It restricts speech on "official agency business" whether or not the employee is speaking as a citizen. For this reason, review is warranted to determine whether public employee speech, based on information learned through public employment, but spoken as a citizen, should be excluded from First Amendment protection.

CONCLUSION

For all the foregoing reasons petitioners respectfully request that the Supreme Court grant the petition for writ of certiorari and reverse the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,
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