



## **I. FACTUAL BACKGROUND**

The facts of this case are not in dispute. The parties have stipulated to the following: Thomas Harris, an attorney with the local county prosecutor's office in Odessa, Texas, brought a First Amendment retaliation claim under 42 U.S.C. § 1983 against the Defendants alleging a violation of the First Amendment as incorporated by the Fourteenth Amendment. *See Connick v. Myers*, 461 U.S. 138 (1983).

Harris is a mid-level prosecutor at the Ector County Office of the District Attorney in Odessa where he has worked for four years. Harris has been responsible for prosecuting crimes of violence, harassment, and domestic disputes. He also handled some supervisory duties in the office, including the monitoring of caseloads for three other Assistant District Attorneys. Upon beginning employment at the District Attorney's office, Harris took the following oath:

I, Thomas Harris, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of the Ector County District Attorney of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State, so help me God.

Since beginning his employment with the District Attorney's office, Harris has received uniformly positive job reviews. However, he has not advanced as much as he expected and believes that he should receive more high-profile assignments given his performance record. Harris also believes that the office does not prosecute domestic violence cases as vigorously as it should. Specifically, Harris believes that his office did not adequately prosecute a domestic violence case involving a local political official, Jonathan Nelson, who allegedly battered his wife. Nelson pled guilty to a minor battery offense. Most similarly situated defendants have not received the same favorable plea bargain, as the office instead pursued the cases more rigorously and refused to offer lenient plea bargains. Many in the community believed that the punishment for Nelson should have been more severe.

On May 17, 2007, Harris granted an interview to Tracy Scott, a local blogger who writes about public officials in Ector County. On her website, [www.ForThePeopleofEctorCoTX.com](http://www.ForThePeopleofEctorCoTX.com), Scott pursues her role as a government watchdog in the classic muckraking tradition. She has written critically about the mayor, the police chief, the District Attorney and various other public officials, and has been responsible for uncovering past incidents of corruption by various public officials in Odessa. Scott asked Harris what he thought about the prosecution of Nelson. Harris replied:

I think the community reaction is understandable, given that the defendant received such a minor punishment. Of course, there are many factors in these cases that the public is not privy to see. I might have prosecuted the case more vigorously but there are many other factors to consider. But, I don't think the community reaction is entirely misplaced. It at least gives the appearance of corruption or at least preferential treatment.

On the same day, Harris sent a letter on his personal stationery, through office mail, to Texas Attorney General Christina Edwards. It is common practice in the Ector County District Attorney's office to allow employees to send mail through the office mail, so long as they provide their own postage. In the letter, Harris articulated his position that domestic violence cases should be pursued more vigorously in Texas. He referenced the Nelson case as an example of negative public reaction to the office's handling of such cases. Harris did not directly criticize any of his fellow prosecutors or his District Attorney. Instead he outlined what he thought was a better overall approach to handle domestic violence cases statewide, especially prosecuting them more uniformly. (Letter to Attorney General Edwards, Appendix A.)

Texas Attorney General Edwards is an elected official with a mandate to oversee the state's legal system, and, under her own original jurisdiction, may prosecute criminal cases. Normally the Attorney General will only engage in criminal prosecutions at the request of a local prosecutor. (Duties and Responsibilities of the Office of the Attorney General, Appendix B.)

Harris's supervisor, District Attorney George Turner, became aware of Harris's interview after Scott contacted him with questions regarding Harris's comments. Turner refused to comment to Scott and expressed his displeasure that one of his attorneys would speak to the blogger, whom Turner considered a gadfly. District Attorney Turner also was contacted by Attorney General Edwards regarding the concerns expressed in Harris's letter. The District Attorney found it necessary to authorize overtime for several employees to ensure a timely response to the Attorney General. Turner called Harris into the office and queried him about his response to the blogger. Harris then told Turner his complaints about the handling of domestic violence cases. Much of the conversation involved Harris's belief that he should handle more of the high-profile domestic violence cases. Harris indicated that he thought the Nelson case could have been handled better. Turner told Harris that he should be careful about speaking to reporters about office business and to remember his oath of office.

In the meantime, Harris had applied for a promotion in the office. On June 29, 2007, Turner denied Harris the promotion and transferred him to the unit that prosecuted drug cases. Turner also stripped Harris of his supervisory duties. Turner said that the successful prosecution rate in drug cases had dropped in the past two years and that the office needed the zealousness of Harris to help move that department in a positive direction. Harris contended that he was denied the promotion, transferred to the less desirable position, and stripped of his supervisory authority because he (1) spoke to the blogger about a domestic violence case and negative public reaction, (2) complained to his supervisor directly in his office, and (3) sent a letter to an outside agency. Turner has admitted that Harris's comments substantially contributed to the promotion denial, transfer, and loss of supervisory authority. The Defendants have also stipulated that these

actions, either individually or *in toto*, amounted to adverse employment actions for purposes of the cross-motions for summary judgment.

On August 3, 2007, Harris filed a complaint in the United States District Court for the Western District of Texas against Turner and the Ector County Office of the District Attorney, in their official capacities, alleging the defendants retaliated against him for exercising his First Amendment rights, in violation of 42 U.S.C. § 1983.

## II. ANALYSIS

The Court must decide whether Harris's speech is accorded protection under the First Amendment. For many years public employees possessed no First Amendment rights in the employment setting. Courts followed Justice Oliver Wendell Holmes' oft-cited dictum that "[t]he petitioner may have a constitutional right to talk politics, but he does not have a constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892). In other words, public employees willingly relinquished their First Amendment rights upon accepting public employment.

The U.S. Supreme Court developed the "unconstitutional conditions" doctrine, limiting when government employers and other government entities can condition the relinquishment of constitutional rights. *Perry v. Sindermann*, 408 U.S. 593 (1972); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967). The Court has also explicitly recognized that public employees possess a First Amendment right to speak out on matters of public concern in certain circumstances. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (explaining that "[t]he problem in any case 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").

The Supreme Court refined the *Pickering* test in *Connick v. Myers*, 461 U.S. 138 (1983), holding that an employer's efficiency interests often trump employees' free-speech claims. The Court's *Pickering-Connick* test established that public employees must speak out on a matter of public concern and that their First Amendment rights must trump the employers' interests in a disruption-free, efficient workplace. For many years the *Pickering-Connick* test governed public employee First Amendment claims.

That framework changed with the Supreme Court's more recent decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), which established a threshold requirement for public employees in asserting First Amendment claims. In *Garcetti*, the Court established 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." *Id.* at 421. After *Garcetti*, "[o]nly when government penalizes speech that a plaintiff utters 'as a citizen' must the court consider the balance of public and private interests, along with the other questions posed by *Pickering* and its successors." *Mills v. City of Evansville*, 452 F.3d 646, 647–48 (7th Cir. 2006).

The inquiry whether the employee's speech is constitutionally protected involves three considerations. First it must be determined whether the employee's speech is pursuant to his or her official duties. If it is, then the speech is not protected by the First Amendment. Second, if the speech is not pursuant to official duties, then it must be determined whether the speech is on a matter of public concern. Third, if the speech is on a matter of public concern, the *Pickering* test must be applied to balance the employee's interest in expressing such a concern with the employer's interest in promoting the efficiency of the public services it performs through its employees. (Footnotes and citations omitted.)

*Davis v. McKinney*, 518 F.3d 304, 312 (5th Cir. 2008) (citing Ronna Greff Schneider, *1 Education Law: First Amendment, Due Process and Discrimination Litigation* § 2:20 (West 2007)).

The answer to this threshold question in the instant case is “no” because Assistant District Attorney Harris was speaking pursuant to his official job duties when he spoke to the blogger, to his supervisor, and to the state official. Not only was Harris responsible for handling these types of cases, but also, as a mid-level prosecutor, it was incumbent upon him to communicate within his chain of command regarding such cases. Because Harris was speaking pursuant to his official duties, his speech was not entitled to First Amendment protection under *Garcetti*.

A. Harris Was Speaking Pursuant to His Job Duties.

Harris engaged in three forms of speech, all of which were pursuant to his job duties as an Assistant District Attorney responsible for domestic violence cases in Ector County. When one speaks pursuant to his official job duties, his speech is not protected by the First Amendment. As the Supreme Court recently elucidated in *Garcetti*, “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.” *Garcetti*, 547 U.S. at 421.

i. Meeting with District Attorney Turner

The meeting between Harris and his immediate supervisor, Turner, regarding how the District Attorney’s office should proceed with prosecution of domestic violence cases occurred pursuant to Harris’s job duties. The Fifth Circuit has adopted the rule from other circuits that “when a public employee raises complaints or concerns up the chain of command at his workplace about his job duties, that speech is undertaken in the course of performing his job.” *Davis*, 518 F.3d at 313; *see also Spiegla v. Hull*, 481 F.3d 961 (7th Cir. 2007) (prison guard’s

reports to prison assistant superintendent regarding a possible security lapse that occurred at her assigned position were part of her official responsibility as a correctional officer to keep the prison secure). Such a meeting clearly falls within Harris’s chain of command, and thus, under the prevailing interpretation of *Garcetti* in the Fifth Circuit, is clearly within his job duties as an Assistant District Attorney. Harris’s meeting with District Attorney Turner is not accorded First Amendment protection.

In *Garcetti*, the Supreme Court found that when the Assistant District Attorney in that case, Richard Ceballos, wrote a memorandum criticizing the handling of a case and the continued pursuit of criminal charges on the basis of a questionable warrant, then that action was taken pursuant to his official duties and not as a public citizen. Specifically, the Court clarified “[t]hat 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.” *Garcetti*, 547 U.S. at 421.

Harris’s reliance on the Fifth Circuit’s decision in *Charles v. Grief*, 522 F.3d 508 (5th Cir. 2008) is misplaced. “[m]ost significantly, though, Charles’s speech . . . was not made in the course of performing or fulfilling his job responsibilities, was not even indirectly related to his job, and was not made to higher-ups in his organization.” *Id.* at 514.; *see also Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 694 (5th Cir. 2007) (a public employee’s speech may be within the scope of his official duties even if not necessarily required but was sufficiently related to them). Public employees do not lose all First Amendment protection simply because they speak to their supervisors in the office. *Garcetti*, 410 U.S. at 420–21 (citing *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414 (1979)) (“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.”). However, Harris was speaking to his supervisor, Turner, about the prosecution of domestic violence cases, a subject matter clearly within the ambit of his official duties.

Thus, when Harris met with Turner to express his concerns about the prosecution of domestic violence cases he was doing exactly what a mid-level prosecutor should do—and what an average citizen cannot do—express his viewpoint directly to the District Attorney in a professional capacity. Both Harris’s requirement to act in this manner pursuant to his official duties, and the inability of a private citizen to act in the same manner, clearly mark this speech as within the scope of his official duties, and thereby, under *Garcetti*, outside the protection of the First Amendment.

ii. Letter to Attorney General Christina Edwards

As with Harris’s meeting with Turner, when he wrote the letter to Texas Attorney General Edwards, Harris was speaking with someone within his chain of command regarding his official job duties. “Speech related to an employee’s job duties that is directed within the employee’s chain of command is not protected.” *Davis*, 518 F.3d at 315 (finding that the plaintiff’s written correspondence to the Chancellor of the University of Texas System was within her chain of command, despite the fact that there were several intervening layers of authority). Furthermore, Harris’s communication with Attorney General Edwards is easily distinguished from *Charles*, where the Plaintiff wrote directly to the legislature, an entirely different branch of government. Here, the Texas Attorney General is the head of the Texas legal

system. Harris did not go outside of the legal system into the executive branch generally, let alone the legislative branch.

The present case is on all fours with *Williams v. Dallas Indep. Sch. Dist.* Just as in *Williams*, the substance of Harris's complaints in the letter, the handling of domestic violence cases, was related to his official job duties. The target of the letter, the Texas Attorney General, was in a position to effectuate the changes Harris was seeking. And, finally, the contents of Harris's letter were based on his specialized knowledge as a prosecutor of the Ector County District Attorney's office and were not available to the general public. *See Williams*, 480 F.3d at 694 (holding that memoranda to the office manager and the principal were written pursuant to his official duties as athletic director, not as a "father" or "taxpayer"). Further, as in *Williams*, the writing of memoranda that were not required of him does not necessarily fall outside the course of performing his job. *Id.* at 694.

The Eleventh Circuit holds that where communications are within the chain of command, they are pursuant to job duties, regardless of whether or not the Plaintiff circumvents his direct supervisor. In *Akins v. Fulton County*, the court held that where employees of the county's purchasing department reported bid irregularities outside of the chain of command by reporting directly to the Board of Commissioners instead of to their direct superior, who in turn was expected to present them to the Board of Commissioners, employees nonetheless were not speaking as private citizens and were not entitled to First Amendment protection. 278 F. App'x 964, 971 (11th Cir. 2008).

Here, Harris argues that he circumvented the chain of command by directly writing to the Texas Attorney General. However, Turner was not circumvented in that Harris did meet with

him and, regardless of whether Harris met with him, his speech does not escape *Garcetti* simply because the speaker decides to circumvent a layer of the chain of command.

iii. Interview with Ms. Scott

When Harris spoke with the blogger Scott he was speaking pursuant to his official job duties because, as a mid-level prosecutor, it was incumbent upon him, from time to time, to interface with the local media regarding developments in the District Attorney's office. "Speech related to an employee's job duties that is directed within the employee's chain of command is not protected." *Davis*, 518 F.3d at 315 (finding that the plaintiff's written correspondence to the Chancellor of the University of Texas System was within her chain of command, despite the fact that there were several intervening layers of authority).

B. The Speech Does Not Warrant Protection Under a *Pickering-Connick* Analysis.

Even if, arguendo, the Court was to accept the Plaintiff's argument that he was speaking as a private citizen and not pursuant to his official duties, his claim would still fail under the *Pickering-Connick* analysis. The first step of the analysis once the *Garcetti* threshold is crossed is to determine whether the employee spoke as a citizen on a matter of public concern. *See Connick*, 461 U.S. at 142; *Pickering*, 391 U.S. at 368. If not, then "the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." *Garcetti*, 547 U.S. at 418 (citing *Connick*, 461 U.S. at 147). If, however, the public employee was speaking as a citizen on matters of public concern, the second step of the analysis is to consider "whether the relevant government entity had an adequate justification for treating the employee

differently from any other member of the general public.” *Id.* (citing *Pickering*, 391 U.S. at 568). This second part of the analysis is commonly referred to as “*Pickering* balancing.”

Applying a *Pickering-Connick* analysis in this case would show that none of Harris’s speech was focused only on issues of public concern; rather, all of his speech reflected attempts to advance his own career in the District Attorney’s office. As such, it is not entitled to First Amendment protection. The fact that this speech may have touched on matters of public concern is not enough to save it under the *Connick* analysis. Applying the *Pickering* analysis in this case, we see that the meeting between Harris and Turner, the letter to Attorney General Edwards, and, especially, the interview with Scott were extraordinarily inflammatory and contained information that was exclusively within the province of Harris’s position as an Assistant District Attorney. Harris’s speech clearly fails the *Pickering* balancing test and, therefore, does not receive First Amendment protection, and the Ector County Office of the District Attorney is not liable for treating Harris differently from anyone in the general public.

### C. Question of Fact or Law

It is clear that in the Fifth Circuit, the issue of whether the employee is speaking as a citizen on a matter of public concern is a question of law. *Markos v. City of Atlanta*, 364 F.3d 567, 570 (5th Cir. 2004). Similarly, the determination under *Garcetti* as to whether or not the employee was speaking pursuant to his official duties is a matter of law appropriate for summary judgment. *See Vila v. Padrón*, 484 F.3d 1334, 1339 (11th Cir. 2007) (affirming the grant of judgment as a matter of law as to whether Plaintiff spoke “as a citizen on a matter of public concern”). Therefore summary judgment is appropriate in this case.

### **III . CONCLUSION AND ORDER**

If the Plaintiff wishes to seek redress from Texas, or change the District Attorney's office, his answer lies not in the First Amendment, as such speech by Harris is not protected by the First Amendment. The Plaintiff should instead look to the ultimate check against the failure properly to discharge the duties of government power, the ballot box. Therefore, it is ordered that Plaintiff's motion be denied, and Defendants' motion is granted.

## **APPENDIX A**

### **Letter to Attorney General Edwards**

Dear Attorney General Edwards:

As a prosecutor at the Ector County Office of the District Attorney in Odessa, Texas, it has come to my attention that domestic violence cases are not being pursued sufficiently in the Ector County Office. Specifically, there seems to be a disparity in the prosecution of otherwise equally situated defendants based solely on their position in society.

One recent, and particularly glaring, example of this preferential treatment is the highly publicized case involving public works manager Jonathan Nelson, who was accused of battering his wife. Nelson was offered a plea bargain for a very minor battery offense. In over four years as a prosecutor in Ector County, I have never seen such lenient treatment of a defendant faced with solid evidence against him. Understandably, the community was outraged at this perceived evasion of justice. There were protests in the community and numerous critical letters sent to our office. The essence of criminal justice is found in the absence of preferential treatment, or even the appearance of such treatment, which raises the specter of corruption.

In order to restore the community's faith in the criminal justice system, future domestic violence cases must be prosecuted uniformly by dedicated prosecutors, like me, who are committed to bringing criminals to justice, regardless of their position in society. The community will not be denied the justice it deserves. I sign this letter as a citizen, taxpayer, voter, and fellow prosecutor.

Respectfully,  
Thomas Harris, Assistant District Attorney

## **APPENDIX B**

### **Duties & Responsibilities of the Office of the Attorney General**

Attorney General Christina Edwards is the lawyer for the State of Texas and is charged by the Texas Constitution to:

- defend the laws and the Constitution of the State of Texas
- represent the State in litigation
- approve public bond issues

To fulfill these responsibilities, the Office of the Attorney General serves as legal counsel to all boards and agencies of state government, issues legal opinions when requested by the Governor, heads of state agencies and other officials and agencies as provided by Texas statutes, sits as an ex-officio member of state committees and commissions, and defends challenges to state laws and suits against both state agencies and individual employees of the State.

The Office of the Attorney General has taken on numerous other roles through the years. Texas statutes contain nearly 2000, references to the Attorney General. In addition to its constitutionally prescribed duties, the Office of the Attorney General files civil suits upon referral by other state agencies. In some circumstances, the Attorney General has original jurisdiction to prosecute violations of the law, but in most cases, criminal prosecutions by the Attorney General are initiated only upon the request of a local prosecutor.

Although the Attorney General is prohibited from offering legal advice or representing private individuals, he serves and protects the rights of all citizens of Texas through the activities of the various divisions of the agencies. Actions that benefit all citizens of this state include enforcement of health, safety and consumer regulations; educational outreach programs and protection of the rights of the elderly and disabled. The Attorney General is also charged with the collection of court-ordered child support and the administration of the Crime Victims' Compensation Fund.

[Source: Texas Attorney General, Duties and Responsibilities of the Office of the Attorney General, <http://www.oag.state.tx.us/agency/agency.shtml> (last visited Aug. 31, 2008).]

**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

<b>THOMAS HARRIS</b>	)	
	)	
<b>Plaintiff-Appellant,</b>	)	
	)	
<b>v.</b>	)	<b>Case No.: VU 3:83-4733</b>
	)	
<b>ECTOR COUNTY OFFICE OF THE DISTRICT</b>	)	
<b>ATTORNEY AND DISTRICT ATTORNEY</b>	)	
<b>GEORGE TURNER</b>	)	
	)	
<b>Defendants-Appellees.</b>	)	

**MEMORANDUM OPINION AND ORDER**

April 2, 2008, Argued

May 5, 2008, Decided

BEFORE: BATEMAN, Chief Judge, GREENE, MILTON, Circuit Judges.

**BATEMAN, C.J. delivered the Opinion of the Court, in which GREENE, J. joined.**

**MILTON, J, filed a dissenting opinion.**

BATEMAN, Chief Judge.

This case is before the Court on appeal from the United States District Court for the Western District of Texas. On August 3, 2007, Thomas Harris, a mid-level prosecutor at the Ector County District Attorney’s office, brought suit under 42 U.S.C. § 1983 against Ector County and George Turner, the Ector County Attorney and Harris’s superior, alleging that Turner denied him a promotion, transferred him to a less desirable position, and stripped him of

supervisory authority in retaliation for Harris’s exercise of his First Amendment rights. On appeal, Harris seeks reversal of the District Court’s grant of summary judgment in favor of Appellees. Because we find that Harris’s speech was not protected by the First Amendment, we affirm, though we adopt a different rationale than the District Court.

## **I. BACKGROUND**

The uncontested facts of this case as summarized by the District Court are adopted herein by reference. On January 25, 2008, the District Court found that Harris’s speech was made pursuant to his official employment duties under the U.S. Supreme Court’s decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). The District Court granted summary judgment to the Defendants-Appellees and dismissed the complaint. On February 11, 2008, Harris appealed to this Court. Oral argument was heard by this Court on April 2, 2008.

## **II. STANDARD OF REVIEW**

We review the District Court’s grant of summary judgment *de novo*, applying the same standard as the District Court. *Nixon v. City of Houston*, 511 F.3d 494, 497 (5th Cir. 2007). Summary judgment is appropriate when the record establishes “that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c).

## **III. LEGAL ANALYSIS**

To establish a § 1983 claim for employment retaliation related to speech, a plaintiff-employee must show: (1) he suffered “an adverse employment action,” *Alexander v. Eeds*, 392

F.3d 138, 142 (5th Cir. 2004); (2) he spoke “as a citizen on a matter of public concern,” *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006); (3) his interest in the speech outweighs the government’s interest in the efficient provision of public services, *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); and (4) the speech “precipitated the adverse employment action.” *Eeds*, 392 F.3d at 142.

In this case, the parties agree that the denial of Harris’s promotion, his transfer to drug cases, and the removal of Harris’s supervisory duties constituted adverse employment actions and that his speech substantially contributed to the adverse employment actions. Thus, our inquiry is (1) whether, under *Garcetti*, Harris was speaking in his role as an employee or as a citizen and on a matter of public concern, and (2) if he was speaking as a citizen and on a matter of public concern under *Pickering*, whether his interest in speaking outweighed the government’s interest in efficient operation as a public employer under the balancing prong of the *Pickering-Connick* test. *Connick v. Myers*, 461 U.S. 138, 150 (1983).

**A. Some of Harris’s statements were made as a citizen on a matter of public concern**

“It is now a rote principle of constitutional law that ‘public employees do not surrender all their First Amendment rights by reason of their employment.’” *Jordan v. Ector County*, 516 F.3d 290, 294–95 (5th Cir. 2008) (citing *Garcetti*, 547 U.S. at 417). Speech by government employees may be protected when they speak “as a citizen upon matters of public concern.” *Connick*, 461 U.S. at 147.

We begin our analysis of whether Harris’s statements were protected by applying the Supreme Court’s decision in *Garcetti*, holding that whenever an employee speaks pursuant to his employment duties, he is not speaking as a citizen. *Garcetti*, 547 U.S. at 421. “*Garcetti* did not explicate what it means to speak ‘pursuant to’ one’s ‘official duties.’” *Williams v. Dallas Indep.*

*Sch. Dist.*, 480 F.3d 689, 692 (5th Cir. 2007). However, the *Garcetti* Court did provide some guidance, noting that employers cannot “restrict employees’ rights by creating excessively broad job descriptions.” *Garcetti*, 547 U.S. at 424. The Court in *Garcetti* further stated that the proper inquiry into official duties “is a practical one” and that courts should look to the “duties an employee actually is expected to perform.” *Id.* at 424–25.

This Court defined when an employee is speaking pursuant to his official duties in *Williams*, 480 F.3d at 693–94. In *Williams*, we noted that “a formal job description is not dispositive, . . . nor is speaking on the subject matter of one’s employment.” *Id.* at 692, (citing *Garcetti*, 547 U.S. at 421, 425). There, this Court stated that speech required by one’s position as an employee is not protected by the First Amendment. *Williams*, 480 F.3d at 693. This Court went on to state that “[a]ctivities undertaken in the course of performing one’s job are activities pursuant to official duties.” *Id.* at 693.

With these principles in mind, we turn to the question of whether Harris’s speech was made pursuant to his official duties. Here, the parties agree that several instances of Harris’s speech substantially contributed to adverse actions taken against Harris: (1) Harris’s speech during an interview with a blogger in which he criticized the handling of the domestic violence prosecution of a local official, (2) Harris’s letter to the Texas Attorney General detailing his view on how the state should handle domestic violence cases, and (3) Harris’s complaints to his superior, Turner, about the handling of domestic violence cases.

The Ninth Circuit has previously held that where a public employee suffers adverse action as a result of several different instances of speech, each instance of speech must be analyzed separately. *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006). In *Freitag*, the plaintiff, a female corrections officer at a California state prison, complained about male inmate exhibitionist

behavior and was ultimately terminated for her complaint. *Id.* at 532. In that case, the plaintiff: (a) reported the problem to her superiors; (b) documented the failure of her superiors to respond to her reports; (c) reported the behavior or her superiors' failure to respond to the California Department of Corrections; (d) informed a state senator of the behavior or her superiors' failure to respond; (e) made a similar report to the Office of the Inspector General; and (f) cooperated with the investigation conducted by the Office of the Inspector General. *Id.* at 544. The Ninth Circuit found that the plaintiff was speaking as a citizen as to communications (d), (e), and (f) because “[h]er right to complain both to an elected public official and to an independent state agency is guaranteed to any citizen in a democratic society regardless of his status as a public employee.” *Id.* at 545. On the other hand, the plaintiff’s communications (a) and (b) were made pursuant to her official duties as a corrections officer. *Id.* at 545–46. The Court was “unsure whether prison guards are expected to air complaints regarding the conditions in their prisons all the way up to the Director of the CDCR” and thus remanded the case for the District Court to consider whether communication (c) was made pursuant to the plaintiff’s official duties. *Id.* at 546.

This Court approved of the Ninth Circuit’s separate analysis of each instance of speech in *Davis v. McKinney*, 518 F.3d 304, 314 (5th Cir. 2008). Thus, we must analyze each instance of Harris’s speech separately.

1. Harris’s interview with Scott was not made pursuant to his job duties.

In *Garcetti* itself, the Supreme Court cited *Pickering* for the proposition that “writing a letter to a local newspaper” was the “kind of activity engaged in by citizens who do not work for the government” and that public statements made “outside the course of performing . . . official

duties retain some possibility of First Amendment protection.” *Garcetti*, 547 U.S at 423. Harris contends that his communication with Scott, a blogger, is analogous to writing a letter to a local newspaper and that his statements to her were not made pursuant to work duties.

In order to analyze this claim, we must first explain the nature of a “blog.” “The term ‘blog’ is a portmanteau of “Web log” and is a term referring to an online journal or diary.” *Doe v. MySpace, Inc.*, 528 F.3d 413, 415 n.1 (5th Cir. 2008). At first blush, blogs appear quite similar to newspapers and thus, if a letter to a newspaper is protected speech, then an interview with a blogger should be as well.

However, Appellees argue that statements to the media may not be afforded First Amendment protection if they are made pursuant to official job duties. They contend that Harris’s statement to Scott was made pursuant to his official duties because Harris’s statement related to the subject matter of his employment, the prosecution of domestic violence cases. In support of this argument the Appellees cite *Nixon v. City of Houston*, 511 F.3d 494 (5th Cir. 2007).

Appellees’ reliance on *Nixon* is misplaced. In that case we considered a police officer’s statements to the media following a crash that occurred in the context of a high-speed pursuit of a suspect and the same officer’s authorship of articles for a local magazine. *Id.* at 496. We held that, although the officer’s statements may have been unauthorized, he spoke to the media pursuant to his official duties because he made the statement in uniform, while on duty at the scene of an accident, because he attempted to gain approval from a supervisor before doing so, and because the police department’s media relations policy directed officers to “provide the media with information regarding the scene or event in a timely manner.” *Id.* at 498–99. Moreover, after making his statement to the press, the officer informed the department’s media

relations office of his statement in an effort to comply with the department's media policy. *Id.* at 499 n.7. We concluded that the officer's statements to the media were without any citizen analogue and, thus, were made pursuant to his official duties. *Id.* at 498.

Harris's statement to Scott is of a very different character than the officer's statements to the media. The officer made his statements as a representative of the police department. His uniform and presence at the scene of the accident as well as his attempt to secure permission to speak on behalf of the department all indicate that he was speaking as a part of his official duty to provide the media with information. Harris, on the other hand, was not making an official statement about the prosecution of Nelson. He was not representing or claiming to represent Ector County. He was not talking about a case in which he had any involvement whatsoever. Moreover, this court has not seen any evidence that Ector County prosecutors have any duty to speak to the media.

Appellees are quick to assert that we also held in *Nixon* that the officer's authorship of articles for a local magazine was unprotected by the First Amendment. *See id.* at 500. Appellees argue that Harris's statements to the blogger are quite similar to the officer's authorship of the articles and thus should be unprotected under *Garcetti*. This misses the point. In *Nixon* we held that the officer's articles were not protected under the *Pickering* balancing test rather than under *Garcetti*. *Id.* at 500.

Harris's statements to Scott were not made in furtherance of a given prosecution. Thus, they were not made pursuant to Harris's official duties as a prosecutor and are not deprived of First Amendment protection by *Garcetti*.

2. Harris's letter to the Texas Attorney General was not written pursuant to his official duties.

Appellees also argue that, because Harris sent the letter through office mail during office hours, he was acting pursuant to his official duties. Appellees also contend that the letter to the Texas Attorney General was written pursuant to Harris's official duties because he raised them up the chain of command. In support of this argument, Appellees note that the Texas Attorney General has a mandate to oversee the state's legal system and occasionally engages in criminal prosecution at the request of a local prosecutor. Finally, Appellees argue that, by sending the letter, Harris was upholding the laws of the state of Texas pursuant to his oath of office and was thereby acting pursuant to official duties. We address these arguments in order.

The fact that Harris sent the letter through office mail and wrote it during office hours does not necessarily lead to the conclusion that Harris was acting pursuant to his official duties. First, the letter was written on Harris's personal, rather than his official, stationery. Second, it is common practice in the Ector County District Attorney's office for employees to send personal correspondence through office mail. Third, attorneys, as professional employees, have some discretion as to when to engage in their professional duties. *Connick v. Myers*, 461 U.S. at 153. Fourth, as the Seventh Circuit has noted, "the location and audience of the employee's speech are not dispositive; speech may be protected even if it is made by an employee at his place of work." *Callahan v. Fermon*, 526 F.3d 1040, 1044 (7th Cir. 2008) (citing *Garcetti*, 547 U.S. at 420). Finally, the letter was to an elected official, the Texas Attorney General. We have previously held that e-mails to public officials can constitute protected speech. *Charles v. Grief*, 522 F.3d. 508, 514 (5th Cir. 2008). Thus, the place and time at which the letter was written, from where it was mailed, and to whom it was mailed are not dispositive as to whether the speech was made pursuant to Harris's official duties.

Post-*Garcetti* cases throughout the country have consistently held that, when a public employee raises complaints or concerns up the chain of command at his workplace about his job duties, that speech is undertaken in the course of performing his job. *See Davis*, 518 F.3d at 313; *Spiegla v. Hull*, 481 F.3d 961, 966 (7th Cir. 2007) (prison guard’s reports to prison assistant superintendent regarding security lapse at her assigned position were part of her official responsibilities for prison security); *Foraker v. Chaffinch*, 501 F.3d 231, 243 (3d Cir. 2007) (instructors at state police firearms training unit acted pursuant to official duties by bringing health and safety concerns about the firing range up the chain of command); *Battle v. Bd. of Regents*, 468 F.3d 755, 761 (11th Cir. 2006) (university employee’s internal report alleging improprieties in supervisor’s handling of funds was made pursuant to official employment duties).

On the other hand, when a public employee voices his job concerns to persons outside the workplace, those external communications are ordinarily made not as an employee, but as a citizen. *See Davis*, 518 F.3d at 313; *Freitag v. Ayers*, 468 F.3d 528, 545–46 (9th Cir. 2006). In *Davis*, we concluded that where an information systems auditor at the University of Texas contacted the FBI regarding possible child pornography on university computers, she was not acting pursuant to her employment duties. *Davis*, 518 F.3d at 316.

The Texas Attorney General cannot properly be considered to be within Harris’s chain of command. In *Davis v. McKinney*, we considered the question of whether the Chancellor of the University of Texas was within the chain of command for an information services auditor who worked for one of the health institutions overseen by the University. 518 F.3d at 315. We noted that this was a difficult question because it is sometimes unclear “how high within an organization an employee’s reporting responsibilities extend.” *Id.* In *Davis*, we were able to

conclude the Chancellor was within the chain of command because it was University policy that “[a]udit reports . . . are summarized for the Audit, Compliance, and Management Review Committee,” on which the Chancellor sat. *Id.* at 316. Thus, we were able to determine that the Chancellor was within the auditor’s chain of command without answering the question of how many intervening layers of authority an employee must circumvent in order to go outside of his chain of command. Thus, the District Court’s interpretation of our opinion in *Davis*, that a plaintiff will remain within the chain of command even though he circumvents many layers of responsibility, is incorrect. We simply did not decide that question in *Davis*, nor is it necessary to resolve that question in this case.

The Texas Attorney General’s position as the State’s lawyer and the fact that she may engage in criminal prosecutions at the request of local prosecutors does not place her in Harris’s chain of command. Unlike in *Davis*, neither Harris nor his immediate supervisor has any duty to report to the Attorney General. Thus, the Texas Attorney General is not within Harris’s chain of command.

Even if Edwards was in Harris’s chain of command, this fact alone would not be dispositive. *Garcetti* cautions that the inquiry into whether a public employee’s speech is made pursuant to job duties is a practical one. *Garcetti*, 547 U.S. at 424. Moreover, our cases state quite clearly that communication to a person up the chain of command from a public employee is not enough to render that communication “speech made pursuant to employment duties.” The speech itself must be a complaint or concern about the employee’s job duties. *See Davis*, 518 F.3d at 313.

Here, the letter was not a concern or complaint about Harris’s job duties. In his letter Harris did not request that Edwards engage in prosecution<sup>1</sup> nor did it discuss any case on which Harris

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<sup>1</sup> Such a request may well be properly characterized as speech pursuant to official duties because it would be speech made by a prosecutor, in furtherance of the prosecution of a specific case.

had actually worked. Rather, it articulated Harris’s personal view that domestic violence cases within the state should be prosecuted more vigorously and more uniformly.

Appellees argue that the letter related to Harris’s job duties because he took an oath of office to uphold the laws of Texas. Once again, the inquiry is a practical one. There is no evidence that Harris was expected to issue statewide policy recommendations to the Attorney General as a part of his job prosecuting domestic violence cases. Harris’s letter is exactly the kind of speech a normal citizen might make to an elected official. We have never held that government employee speech is unprotected by the First Amendment simply because the speaker has special knowledge of the issue. Indeed, that is a strong rationale for upholding protection for the speech. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968).

In short, Harris’s letter to the Attorney General was not written pursuant to Harris’s official duties because Harris’s official job duties did not include making statewide policy recommendations to the state attorney general.

3. The conversation with Turner was made pursuant to Harris’s official duties.

The District Court was correct in ruling that Harris’s conversation with Turner was made pursuant to his official duties because “he was doing exactly what a mid-level prosecutor should do—and what an average citizen cannot do—express his viewpoint directly to the District Attorney in a professional capacity.” (District Ct. Op. 9.)

However, the District Court’s suggestion that the letter was somehow written pursuant to Harris’s official duties because substantially the same speech was made to Harris’s supervisor and was made pursuant to official duties in that context is incorrect. (District Ct. Op. 10–11.) We have previously suggested that speech that could otherwise be the speech of a citizen might

be considered to be made pursuant to official duties if it is a “continuation” of speech that was made pursuant to those duties. *Nixon v. City of Houston*, 511 F.3d 494, 499 (5th Cir. 2007).

However, we need not decide that question here, because Harris sent the letter to Edwards prior to his conversation with Turner. Thus, the letter cannot be a continuation of the conversation, because it precipitated the conversation.

This result may seem contrived given that speech with very similar content is treated differently under a *Garcetti* analysis depending on when, where, and to whom it was uttered. However, this is a result that was specifically contemplated by the Supreme Court. *See Garcetti*, 547 U.S. at 427 (Stevens, J., dissenting).

Because Harris’s interview with the blogger and his letter to Edwards both pass the *Garcetti* threshold, we must now determine whether they constitute speech made upon a matter of public concern under the *Pickering-Connick* test. *Charles v. Grief*, 522 F.3d. 508, 514 (5th Cir. 2008).

**B. The letter and interview both raise issues of public concern.**

“Matters of public concern are those which can ‘be fairly considered as relating to any matter of political, social, or other concern to the community.’” *Branton v. City of Dallas*, 272 F.3d 730, 739 (5th Cir.2001) (citing *Connick v. Myers*, 461 U.S. 138, 146 (1983)). “Whether an employee’s speech addresses a matter of public concern must be determined by the content, form, and context of a given statement . . . .” *Connick*, 461 U.S. at 147–48. In *Connick*, an Assistant District Attorney “prepared 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 in political campaigns,” and was fired as a result. *Id.* at 141. The Court analyzed each question on the questionnaire

separately in order to determine whether any of them raised an issue of public concern. *Id.* at 149. However, the “public concern” requirement may not be satisfied if the employee’s speech touches on a matter of public concern “in only a most limited sense.” *Id.* at 154. Thus, we analyze both Harris’s letter and his statements to Scott to determine if either raises an issue of public concern sufficient to warrant consideration for First Amendment protection.

1. Harris’s letter raises a matter of public concern.

Here, the form of the speech, a letter to an elected public official, tends to indicate that speech was on a matter of public concern. *Czurlanis v. Albanese*, 721 F.2d 98, 104 (3d Cir. 1983) (speaking in a public forum before a group of elected officials is a “classic form” of protesting government abuses).

The context in which the letter was sent could be understood to weigh on either side of the balance. Given that Harris believed he should receive more high profile cases, his letter to Edwards could be seen as a purely personal attempt to secure more high profile assignments rather than an attempt to uncover government abuse. However, such a conclusion is undermined by the fact that the Texas Attorney General usually is not involved in local criminal prosecutions and would not be able to change the sort of work that Harris receives. Moreover, the letter was sent directly after settlement of a controversial case that resulted in public outcry. The timing of the letter, and the fact that Harris had not suffered any adverse employment action at the time he sent it, weigh in his favor.

As to content, we have several guiding principles: “(1) the content of the speech may relate to the public concern if it does not involve solely personal matters or strictly a discussion of management policies that is only interesting to the public by virtue of the manager's status as an

arm of the government; (2) speech need not be made to the public, but it may relate to the public concern if it is made against the backdrop of public debate; and (3) the speech cannot be made in furtherance of a personal employer-employee dispute if it is to relate to the public concern.”

*Durrett v. Vargas*, No. 00-50333, 2001 WL 274735, at \*3 (5th Cir. Feb. 20, 2001). Although Harris was disappointed that he had not received more high-profile cases, his letter cannot be said to involve solely personal matters. The letter was most certainly written against a backdrop of public debate and does not appear to have been made in furtherance of a personal employer-employee dispute, because there was no such dispute at the time it was written.

More importantly, the letter alleges disparity in the prosecution of domestic violence defendants based upon their relative level of political power. In effect, the letter alleges government corruption and “[t]here is perhaps no subset of ‘matters of public concern’ more important than bringing official misconduct to light.” *Davis v. Ector County*, 40 F.3d 777, 782 (5th Cir. 1994) (citing *Coughlin v. Lee*, 946 F.2d 1152, 1157 (5th Cir. 1991), in holding that, as to content, the test is whether the information in a letter was “relevan[t] to the public’s evaluation of the performance of governmental agencies”). Here, the information contained in Harris’s letter, the allegation that the District Attorney’s office was engaging in differential prosecution based on political standing, is most certainly relevant to the public’s evaluation of the performance of the District Attorney’s office. Thus, Harris’s letter to Edwards touched on issues of public concern.

2. Harris’s speech in the interview with Scott was on a matter of public concern.

Harris’s statement to Scott contains substantially the same content as his letter to Edwards. The context of that statement, given on the same day as he wrote the letter, also appears

identical—only the form is different. This difference is immaterial given the strong public concern inherent in identifying government corruption.

Because Harris has spoken as a citizen on a matter of public concern, we must now determine whether his interest in speaking out on potential government corruption outweighs “the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

**C. The government’s interest in operating efficiently outweighs Harris’s interest in fee speech.**

Appellees argue that, as a result of Harris’s letter, the District Attorney’s office was required to authorize overtime in order to respond to inquiries by the Attorney General. They also allege that office morale has suffered as a result of increased suspicion in the community fomented by Scott’s blog that included quotes from Harris.

In the Fifth Circuit, the “*Pickering-Connick* balancing test is not all-or-nothing but rather a sliding scale under which public concern is weighed against disruption: a stronger showing of disruption may be necessary if the employee’s speech more substantially involves matters of public concern.” *Click v. Copeland*, 970 F.2d 106, 112 (5th Cir. 1992) (internal quotation marks and citations omitted). As noted above, Harris’s speech involves a matter of public concern. However, as the State contends, there is a personal side to both the letter and the interview with Scott. In the letter, Harris puts himself forward as an impartial prosecutor prepared to take on more responsibility. In the interview with Scott, he stated that he might “have prosecuted the case more vigorously.” Thus, while the State must make some showing of its interest in operating an efficient workplace, the bar is not set as high as it might otherwise be if these personal statements were absent from the speech.

“Factors to weigh in the balancing include: (1) whether the employee’s actions involve public concerns; (2) whether close working relationships are essential to fulfilling the employee’s public responsibilities; (3) the time, place, and manner of the employee’s activity; (4) whether the activity can be considered hostile, abusive, or insubordinate; and (5) whether the activity impairs discipline by superiors or harmony among coworkers.” *Click*, 970 F.2d at 112 (internal quotation marks and citations omitted).

As we have already established, Harris’s actions implicated issues of public concern to at least some extent. As to the second factor, close working relationships between employees and superiors are essential to the efficient functioning of a District Attorney’s office. *Connick v. Myers*, 461 U.S. 138, 151 (1983). “When such close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer’s judgment is appropriate.” *Id.* at 151–52. Because close working relationships are necessary to the functioning of the office, and because that function might have been disrupted by Harris’s suggestions of corruption at the office, the second factor weighs strongly in favor of the government.

The time and place of Harris’s speech has already been discussed in substantial detail. Although Harris did write and mail the letter from work, this fact does not weigh heavily on either side, given that professional employees are afforded some discretion in performing their duties.

However, the manner in which the letter was written and the interview given warrant some attention. The letter was addressed to Attorney General Edwards, who is clearly outside Harris’s chain of command. Scott is also clearly outside Harris’s chain of command, given that she is in no way directly involved in government or prosecution. Harris knew these facts and must have

known that his circumvention of his chain of command might have negative effects on the discipline and morale in the office, in addition to creating public distrust of the office. The Third Circuit has held that a police officer's disregard of the established chain of command weighed against him in the *Pickering* analysis. *Meenan v. Harrison*, 264 F. App'x 146, 151 (3d Cir. 2008). There, the court noted that the State need not show that the officer's circumvention of the chain of command by contacting the media to complain about a fellow officer's performance was actually disruptive, only that it was likely to be disruptive. *Id.* at 150–51. The facts of this case are similar. Harris's speech circumvented the chain of command and criticized the work of his fellow prosecutors. The only material difference between this case and *Meenan* is that the State can actually show that Harris's speech was disruptive, given the need to authorize overtime in order to respond to a query from the Attorney General regarding Harris's speech. The third factor weighs heavily against Harris.

Although it is difficult to characterize Harris's speech as hostile or abusive, it is possible to characterize it as insubordinate. His comments to the effect that the District Attorney's office was corrupt seem quite insubordinate. On the basis of these comments, it is reasonable for the District Attorney's office to believe that Harris would continue to exhibit insubordinate behavior, undermining office morale, the close working relationships between Harris and his fellow prosecutors (especially other prosecutors staffed to domestic violence cases), and the reputation of the office among the public. We have previously found such government interests to outweigh an employee's interest in speaking on a matter of public concern. *Nixon v. City of Houston*, 511 F.3d 494, 499 (5th Cir. 2007). Thus, the fourth factor weighs against Harris.

The fifth factor weighs against Harris as well because public criticism of his fellow attorney's work can be reasonably expected to impair harmony among, even if those persons were not specifically identified in his speech.

In sum, although Harris's speech does implicate matters of public concern, the State's interest in running an efficient workplace strongly outweighs Harris's interest. Therefore, we hold that Harris's speech is not protected by the First Amendment.

#### **IV. ORDER**

For the foregoing reasons, the District Court's order granting summary judgment to Defendants is AFFIRMED.

MILTON, J., dissenting:

I agree with the majority holding insofar as it recognizes the Appellant's interview with the blogger Scott and letter to Texas Attorney General Edwards as the speech of "a citizen on a matter of public concern," *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006), rather than unprotected job-related speech. I also agree that the Appellant's complaints to his direct supervisor, District Attorney Turner, are unprotected because they constitute job-related speech under *Garcetti*. I dissent, however, because, under the *Pickering-Connick* balancing test, the government's interest in the efficient provision of public services does not outweigh the Appellant's interest in his speech in this case.

The factors at stake in this balancing are "(1) whether the employee's actions involve public concerns; (2) whether close working relationships are essential to fulfilling the employee's public responsibilities; (3) the time, place, and manner of the employee's activity; (4) whether

the activity can be considered hostile, abusive, or insubordinate; and (5) whether the activity impairs discipline by superiors or harmony among coworkers.” *Click v. Copeland*, 970 F.2d 106, 112 (5th Cir. 1992).

The majority concedes that the first factor weighs in Appellant’s favor. Under the Supreme Court’s decision in *Connick*, the majority is correct in counting the second factor in favor of Appellees, although I question whether close working relationships are as essential in a District Attorney’s office as they are in a police department. Close working relationships might be characterized as essential in many, if not most or all, workplaces. It cannot be the case that close working relationships are equally “essential” in all cases. While I would resolve this factor in Appellees’ favor, I accord it less weight than I would in a case in which the workplace at issue was a police department or another environment in which employees often are required to rely on one another for their physical safety.

I take particular issue with the majority’s analysis of the third factor. The majority concedes that the time and place of Appellant’s speech do not weigh heavily on either side but resolves this factor in Appellees’ favor based on the likely disruption caused by the Appellant’s circumvention of the chain of command, citing the Third Circuit’s decision in *Meenan v. Harrison*, 264 F. App’x 146, 151 (3d Cir. 2008). That case involved adverse action taken against a police officer for that officer’s potentially disruptive speech. As I explained above regarding the characterization of close working relationships as essential, the weight to be accorded this factor must be less in a workplace in which chain of command is a less rigorous feature of one’s job. More importantly, it simply cannot be the case that a public employee is required under *Garcetti* to go outside the chain of command—to speak in a way that is not pursuant to one’s official duties—in order for his speech to be protected by the First

Amendment, but then to use that same factor to deny protection on the basis of the state's interest in limiting exactly that kind of speech. *See Meenan*, 264 F. App'x at 151. This is an absurd result that renders First Amendment protection of public employees' speech virtually meaningless. Thus the third factor, in this case, does not favor Appellees.

The majority's opinion rested entirely on the third factor in reaching its result. Its cursory treatment of the fourth and fifth factors reveals that, without the use of Appellant's circumvention of the chain of command to resolve the balance in the state's favor, the *Pickering* balance comes out in the Appellant's favor. Appellant has an interest in speaking on his office's handling of domestic violence cases, which is a matter of public concern. Just how Appellant's speech interfered with the state's interest in the efficient administration of its business is unclear. The one-time expense of overtime pay in order to respond to an inquiry about Appellant's speech and the assumed detriment to office morale and harmony do not outweigh Appellant's speech interest. For all of these reasons, I respectfully dissent.

**SUPREME COURT OF THE UNITED STATES**

**THOMAS HARRIS, Petitioner,**

**v.**

**ECTOR COUNTY OFFICE OF THE DISTRICT ATTORNEY  
AND DISTRICT ATTORNEY GEORGE TURNER,  
Respondents.**

No. VU-SUP 2007  
September 25, 2008

Case Below:

\_\_\_ F.3d \_\_\_ (5th Cir. 2008)  
\_\_\_ F. Supp. 3d \_\_\_ (W.D. Tex. 2008)

Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit  
**GRANTED.**

The issues before the Court are:

Whether the Petitioner’s speech qualifies as protected citizen speech or unprotected  
“official job duty speech” under *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

Whether the Petitioner’s speech qualifies for First Amendment protection under the  
*Pickering-Connick* test.

Arguments will be heard on an expedited basis. The Petitioner Thomas Harris shall present  
argument first.

## LIST OF RELEVANT SOURCES

### CASES

*Akins v. Fulton County*, 278 F. App'x 964 (11th Cir. 2008)  
*Battle v. Bd. of Regents*, 468 F.3d 755 (11th Cir. 2006)  
*Benoit v. Bd. of Comm'rs*, 459 F.Supp. 2d 513 (E.D. La. 2006)  
*Branton v. City of Dallas*, 272 F.3d 730 (5th Cir.2001)  
*Callahan v. Fermon*, 526 F.3d 1040 (7th Cir. 2008)  
*Casey v. W. Las Vegas Independent School District*, 473 F.3d 1323 (9th Cir. 2007)  
*Charles v. Grief*, 522 F.3d 508 (5th Cir. 2008)  
*Click v. Copeland*, 970 F.2d 106 (5th Cir. 1992)  
*Connick v. Myers*, 461 U.S. 138 (1983)  
*Coughlin v. Lee*, 946 F.2d 1152 (5th Cir. 1991)  
*Czurlanis v. Albanese*, 721 F.2d 98 (3d Cir. 1983)  
*Davis v. McKinney*, 518 F.3d 304 (5th Cir. 2008)  
*Durrett v. Vargas*, No. 00-50333, 2001 WL 274735 (5th Cir. Feb. 20, 2001)  
*Foraker v. Chaffinch*, 501 F.3d 231 (3d Cir. 2007)  
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*Garcetti v. Ceballos*, 547 U.S. 410 (2006)  
*Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979)  
*Green v. Board of County Commr's*, 472 F.3d 794 (10th Cir. 2007)  
*Jordan v. Ector County*, 516 F.3d 290 (5th Cir. 2008)  
*Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967)  
*Markos v. City of Atlanta*, 364 F.3d 567 (5th Cir. 2004)  
*Meenan v. Harrison*, 264 F. App'x 146 (3d Cir. 2008)  
*McAuliffe v. Mayor of New Bedford*, 29 N.E. 517 (Mass. 1892)  
*Mills v. City of Evansville*, 452 F.3d 646 (7th Cir. 2006)  
*Nixon v. City of Houston*, 511 F.3d 494 (5th Cir. 2007)  
*Perry v. Sindermann*, 408 U.S. 593 (1972)  
*Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)  
*Rankin v. McPherson*, 483 U.S. 378 (1987)  
*Rust v. Sullivan*, 500 U.S. 173 (1991)  
*San Diego v. Roe*, 543 U.S. 77 (2004)  
*Sigsworth v. City of Aurora*, 487 F.3d 506 (7th Cir. 2007)  
*Spiegla v. Hull*, 481 F.3d 961 (7th Cir. 2007)  
*Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2001)  
*Vila v. Padrón*, 484 F.3d 1334 (11th Cir. 2007)  
*Waters v. Churchill*, 511 U.S. 661 (1994)  
*Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689 (5th Cir. 2007)

### OTHER SOURCES

42 U.S.C. § 1983  
Federal Rule of Civil Procedure 56(c)  
Duties and Responsibilities of the Office of the Attorney General, Appendix B.  
Letter to Attorney General Edwards, Appendix A.  
Ronna Greff Schneider, *1 Education Law: First Amendment, Due Process and Discrimination Litigation* § 2:20 (West 2007)