No. 04-473

In The Supreme Court of the United States

GIL GARCETTI, ET AL.,

Petitioners,

v.

RICHARD CEBALLOS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE AMERICAN CIVIL LIBERTIES UNION, AND THE AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA AS AMICI CURIAE SUPPORTING RESPONDENT

MICHAEL C. SMALL
AKIN GUMP STRAUSS HAUER & FELD L.L.P.
2029 Century Park East, Suite 2400
Los Angeles, California 90067
Telephone: 310-229-1000
Facsimile: 310-229-1001
Counsel of Record

JEFFREY L. FISHER
Co-Chair, NACDL Amicus Committee
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101

STEVEN R. SHAPIRO
ACLU FOUNDATION
125 Broad Street
New York, New York 10004

PETER ELIASBERG
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1616 Beverly Blvd.
Los Angeles, California 90026

Attorneys for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. NACDL's more than 12,500 direct members – and 90 state, local, and international affiliate organizations with another 35,000 members – include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 400,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Southern California is one of the ACLU's regional affiliates. Since its founding in 1920, the ACLU has appeared before this Court in numerous free speech cases, both as direct counsel and as amicus curiae, including a series of cases that have helped define the free speech rights of public employees.

[1] The parties have consented to the filing of this brief. Their consent letters are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for amici curiae certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than counsel for amici has made a monetary contribution to the preparation and submission of this brief.

STATEMENT OF THE CASE

Respondent Richard Ceballos, a Deputy District Attorney in Los Angeles County, was carrying out his job responsibilities when he investigated allegations that a deputy sheriff had lied in an affidavit used to obtain a search warrant that led to a prosecution brought by the District Attorney's office. After completing his investigation, Ceballos concluded that the deputy sheriff had, at minimum, grossly misrepresented the facts. Pet. App. 2-3. In light of that conclusion, Ceballos wrote a memorandum to his immediate supervisor in which he recommended that the prosecution be dismissed. Pet. App. 3-4. The supervisor rejected Ceballos' recommendation and the prosecution went forward. Pet. App. 3-4, 53-55.

Ceballos alleges that Petitioners subsequently retaliated against him on account of his memorandum in violation of his First Amendment rights. Pet. App. 4-5. In suing the Petitioners, Ceballos relied on this Court's precedents establishing that government employees have a First Amendment right to speak on matters of public concern, which can be overcome only if the government demonstrates that the employee's speech interferes with the functioning of the public workplace. Pet. App. 2.

The district court granted summary judgment to Petitioners. It held that even though Ceballos' memorandum addressed a matter of public concern, this communication was not protected by the First Amendment because it was made by Ceballos in the discharge of his employment responsibilities as a prosecutor. Pet. App. 62. The district court also said that even if Ceballos' job-related speech were protected by the First Amendment, this constitutional guarantee was not clearly established

at the time of the alleged retaliatory action against him, and therefore Petitioners were immune from suit. Pet. App. 66.

The court of appeals reversed and remanded for further proceedings. It held that Ceballos' memorandum was protected by the First Amendment because it addressed a matter of public concern (*i.e.*, allegations of corruption and wrongdoing in law enforcement). Pet. App. 10. The court of appeals said that the position that the First Amendment did not protect speech of government employees on matters of public concern that is made in the discharge of employment responsibilities was foreclosed by prior circuit precedent, and, in any event, was incorrect. Pet. App. 11-13. The court of appeals also held that Ceballos' interest in free speech was not outweighed by the asserted interest of the District Attorney's office in promoting workplace efficiency. Pet. App. 22. Finally, the court of appeals held that Petitioners were not immune from suit because it was clearly established in the circuit that government employees have a First Amendment right to speak on matters of public concern made in the discharge of employment responsibilities. Pet. App. 24.

Judge O'Scannlain wrote a special concurring opinion. He agreed that prior circuit precedent foreclosed the argument that the First Amendment did not protect speech of government employees on matters of public concern that is made in the discharge of employment responsibilities. Pet. App. 32-33. He opined, however, that this precedent was inconsistent with Supreme Court decisions delineating the First Amendment rights of

government employees, and therefore should be overruled by the circuit. Pet. App. 35-36.

SUMMARY OF ARGUMENT

Two basic principles have applied to the free speech claims of government employees for almost forty years now. First, government employees have a First Amendment right to speak on matters of public concern. Second, government employers can trump that right only by demonstrating that an employee's speech interferes with the government's interest in the efficient operation of the public workplace. Petitioners and the United States urge the Court to create a *per se* exception to this longstanding constitutional framework for the "job-related" speech of government employees. Under the proposed exception, government employees would have no First Amendment right to speak on matters of public concern when that speech is made in the discharge of their employment responsibilities, even if the speech has no impact on the functioning of the public workplace. We believe that adoption of this exception would be unwise.

First, elimination of First Amendment protection for the job-related speech of government employees would impede effective policymaking. Many government employees have substantive expertise. They are tasked by their government employers with using that expertise to recommend policy options to agency higher-ups. Accordingly, open discourse between government employees and their superiors enhances the formulation of sound public policy by broadening the range of policy options from which policymakers can choose. Furthermore, by facilitating

deliberation in policymaking, such discourse also advances the values of self-government that are at the core of the First Amendment. Stripping away all First Amendment protection for the job-related speech of government employees would tend to chill the candor of communications in the public workplace, and thereby deprive policymakers of informed views on which to base their policy determinations. In the end, the government's decisions will suffer for it, as will the public in whose name the government acts.

Second, elimination of First Amendment protection for the job-related speech of government employees would disregard the strong personal interest that government employees have in their speech on matters of public concern on which they work. It is the job of many government employees to communicate to superiors their own views on such matters. This speech is therefore inherently personal. The proposed exception for the job-related speech of government employees would mistakenly treat such expression as the speech of the government itself. Under this Court's government speech precedents, a government employee does not lose her personal stake in job-related speech, and thus the speech does not become the government's speech, merely because her expression is made in the discharge of her employment responsibilities. Rather, the government employee's expression is that of the government's only when the government pays the employee to communicate the government's views on a subject, not her personal views.

Third, elimination of First Amendment protection for the job-related speech of government employees would have particularly negative ramifications in the law enforcement setting. This Court repeatedly has described the criminal process as a search for truth in which the

government wins when justice is done in a particular case, even if the government loses the case. This truth-seeking function of the criminal process is served when police and prosecutors are encouraged to communicate frankly to their superiors, and to give honest assessments as to whether an arrest should be made or a criminal trial initiated. Without the First Amendment to buttress them, however, police and prosecutors are less likely to speak up and be counted when they believe that the foundation of a criminal proceeding initiated by their agencies is infirm, much to the detriment of the quest for the truth.

ARGUMENT

For nearly four decades, this Court has treated speech by government employees on matters of public concern as presumptively protected by the First Amendment. This presumption can be overridden only if the employee's interest in the speech is outweighed by the government's interest, as employer, in the orderly operation of the public workplace and the efficient delivery of public services by public employees. *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968); *Connick v. Myers*, 461 U.S. 138, 140 (1983).

The Petitioners and the United States seek to carve out a blanket exception to this well-entrenched constitutional framework for "job-related" speech of government employees. Under this exception, First Amendment protection would be eliminated altogether for speech by government employees on matters of public concern that is communicated in the performance of the employees' job

responsibilities, even if the speech does not impair the operation of the public workplace or the delivery of public services. Pet. Br. at 25; U.S. Br. at 10. In our view, eliminating First Amendment protection for the job-related speech of government employees would be seriously mistaken in at least three respects. First, it would impede the formulation of sound public policy by chilling the expression of government employees with substantive expertise who are tasked with communicating to government decisionmakers their views on the matters of public concern on which they work. Second, it would discount the deep personal stake that government employees have in their speech on matters of public concern on which they work by mischaracterizing such speech as that of the government itself. Third, it would have particularly adverse consequences in the law enforcement setting, where candor on the part of police and prosecutors is imperative if the truth-seeking function of the criminal process is to be honored.[2]

A. Eliminating First Amendment Protection For Job-Related Speech Of Government Employees Would Impede The Formulation Of Sound Public Policy By Chilling Candid Communications To Government Decisionmakers In The Public Workplace.

For many government employees, speaking about matters of public concern on which they work is a critical

[2] As Respondent demonstrates in his brief, the proposed exception also finds no support in this Court's precedents charting the First Amendment boundaries of government employee speech. We do not review that terrain in this brief.

aspect of their day-to-day job responsibilities. Take the following examples. The scientist at the Food and Drug Administration who examines the safety of a new pharmaceutical. The consumer fraud specialist at the Federal Trade Commission who studies various methods of preventing identity theft. The economist at a state budget and finance department who analyzes the fiscal implications of a tax cut proposal. The urban planner in a municipal land use agency who evaluates the impact of a large-scale economic development project. For these employees, communication on the policy matters on which they work is a core function of their job. All are tasked with applying their substantive knowledge to the problem at hand, reaching their own views on what they think is the desired policy choice, and making a recommendation to superiors within their agencies who, in turn, select a particular policy to adopt.

Respondent Richard Ceballos acted in this same vein. As part of his job duties as a supervising attorney in the Los Angeles County District Attorney's office, he investigated allegations that a law enforcement officer had lied in an affidavit used to obtain a search warrant that led to a prosecution – allegations that indisputably related to a matter of public concern. Pet. App. 62-63. Based on his investigation, Ceballos reached the conclusion that the prosecution should be dismissed, and he communicated that recommendation to his superiors. Pet. App. 3-4.

Petitioners and the United States discount entirely the benefits that inure to government decisionmaking – and ultimately to society at large – when government employees are encouraged to speak frankly and openly to higher-ups in the public workplace about the matters of public concern on which they work. Government agencies

are staffed by employees who bring substantive expertise to the resolution of complex public policy issues. *See Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 865 (1984). As part of their jobs, these employees communicate to decisionmakers their views on those issues – views they form by applying their expertise. When this channel of communication between government employee and government employer is left largely unfettered, policymakers have a more informed and broader range of policy options from which to choose. In short, the free flow of information within the public workplace serves to facilitate the formulation of sound public policy. *See Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion) ("[P]ublic debate may gain much from the[ ] informed opinions" of government employees.); *id*. at 699 (Stevens, J., dissenting) ("Government agencies are often the site of sharp differences over a wide range of important public issues. In offices where the First Amendment commands respect for candid deliberation and individual opinion, such disagreements are both inevitable and desirable."); *see also City of Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 177 (1976) (curbing teachers' speech to board of education about school operations "would seriously impair the board's ability to govern the district").

Petitioners and the United States overlook an additional benefit of the job-related speech of government employees. By fostering deliberation on public policy, such speech also advances the values of republican self-government that lie at the heart of the First Amendment. *See* Cass R. Sunstein, *Democracy and the Problem of Free Speech* 241-42 (1993) (free speech guarantees of First Amendment reinforce republican system of self-government, which contemplates "discussion and debate among people who are genuinely

different in their perspectives and position, in the interest of creating a process through which reflection will encourage the emergence of political truths"); Alexander Meiklejohn, *The First Amendment Is An Absolute*, 1961 Sup. Ct. Rev. 245, 255 ("The First Amendment [protects] the freedom of those activities of thought and communication by which we 'govern.'"); *see also Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1965) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("public discussion is a political duty" in the American system of self-government).[3]

Petitioners and the United States have it backwards. Discourse between government employees and policymakers on matters of public concern on which the employees work should be encouraged, not stifled. Eliminating First Amendment protection for job-related speech of government employees on matters of public concern would hamper government decisionmaking, for it would tend to chill the candor in communications between government employees and policymakers that enhances the formulation of policy.

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[3] The importance to government decisionmaking of open discourse in the public workplace is manifested in the exemption in the Freedom of Information Act ("FOIA") for communications that are made as part of the government's "deliberative process." 5 U.S.C. § 552(b)(5). *See Department of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001). As this Court has observed, FOIA's deliberative process exemption "rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news. . . ." *Id*. at 8-9. The purpose of the exemption, therefore, is "to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government." *Id*. at 9 (internal quotations omitted).

Under the proposed exception, the government could direct an employee to say what he thinks about a policy matter on which the employee is working, but then turn around and (unshackled by the First Amendment) discipline, demote, or discharge the employee if the government does not like what he actually has to say on the matter. With this double-edged sword hanging over their heads – "it is your job to give us your views, but you could lose your job if we disagree with your views" – government employees might be prone to pull their punches. They would be converted from purveyors of frank assessments about matters of public concern into a cadre of yes-men who tailor their views on such matters to fit what they believe their superiors want to hear, instead of saying what they believe their superiors should hear. *Cf. Wieman v. Updegraff*, 344 U.S. 183, 193 (1952) (Black, J., concurring) (loyalty oath requirements for government employees "have a way of reaching, ensnaring and silencing many more people than at first intended. We must have freedom of speech for all or we will in the long run have it for none but the cringing and the craven"). This is not a recipe for wise policymaking.

The following illustration underscores the problem. Suppose a government employee is charged with surveying the vulnerability of the nation's mass transit systems to a terrorist attack and conveying his views on the subject to higher-ups at his agency. Based on his substantive expertise, the employee concludes that the mass transit systems are at risk, and that concrete steps need to be taken to address the security gap. The employee is contemplating preparing a memorandum communicating his concerns to his superiors. But the employee is aware that the agency head has touted his ability to safeguard the

country's mass transit systems, and has made this the centerpiece of a public relations campaign to reassure Americans that travel on subways and buses is safe. If the proposed exception to the First Amendment for "job-related" speech were the law, the employee might be reluctant to contradict his boss and deliver a message that is out of sync with the message the agency is transmitting, for fear of losing his job. The gun-shy employee could downplay the nature of the security problem that he identified, or whitewash it completely. In that event, nobody would gain. Not the employee, who felt compelled to hold his fire. Not the government, which was deprived of significant (and potentially life-saving) information when formulating policy. And certainly not the people in whose name the government acts. Everyone would be better off if the employee simply called it as he saw it. With the First Amendment as a bulwark behind him, the employee would be more inclined to do just that, instead of shading what he regards as the truth.[4]

This Court has recognized that guaranteeing government employees the right to speak on matters of public concern is in line with the First Amendment's special protections for speech about, and participation in, political affairs – protections that enable all of us, if we so choose, to play a role in the American system of self-government. *See Connick,* 461 U.S. at 145. A government employee is no less a participant in the system of self-government when

[4] The United States claims that if the constitutional guarantee is withdrawn, federal and state statutes adequately will protect government employees who suffer retaliation on account of their job-related speech. U.S. Br. at 25, 27. As amicus Government Accountability Project shows in its brief, however, this patchwork of legislation is no substitute for the uniform baseline of the First Amendment.

he speaks on matters of public concern as part of his job duties than when he speaks on such matters when the workday is done. In both instances, the employee is commenting on public policy, and seeking to shape it.

In the end, stripping away all constitutional protection for the job-related speech of government employees would do violence to an animating principle behind the Court's steadfast insistence that government employees do not shed their First Amendment rights when the government hires them: "speech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection." *Connick*, 461 U.S. at 145 (internal quotations omitted). The job-related speech of government employees on public issues has a rightful place in that hierarchy, and the Court should keep it there.[5]

[5] To be sure, the government as employer has more latitude to restrict expression on matters of public concern than does the government as sovereign. For that reason, many familiar First Amendment maxims do not apply with full force in the public workplace. *See Waters*, 511 U.S. at 671-72 (plurality opinion). But while speech on matters of public concern can be limited inside the public workplace in ways that it cannot be on the outside, the government's interest in imposing such limitations in the name of preserving the orderly operation of the public workplace must be balanced against the interest of government employees in expression. *Pickering*, 391 U.S. at 568. The proposed exception for job-related speech would upset that balance – the government's interest always would trump the employee's interest, no matter the strength of the government's interest in a given case. As the Respondent shows in his brief, the government's interest in ensuring that the job-related speech of government employees on matters of public concern does not disrupt the functioning of the public workplace readily can be accommodated within the existing constitutional framework. For example, the government's interest typically would prevail over the employee's interest in job-related speech if the speech contradicts a lawful directive from the employer. Similarly, a spokesperson for a government agency normally would have no First

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B. Eliminating First Amendment Protection For Job-Related Speech Of Government Employees Would Discount The Personal Stake That Government Employees Have In Speech On Policy Matters On Which They Work By Wrongly Treating Such Expression As Speech Of The Government.

The Petitioners and the United States argue that government employees have no First Amendment rights in their job-related speech because they lack a personal interest in such speech, which (the argument continues) is really the speech of the government itself, not the employees.' Pet. Br. at 32-33; U.S. Br. at 19-20. This argument is incorrect.

Returning to some of our earlier illustrations, when the scientist at the FDA examines a new pharmaceutical and makes a recommendation on whether it should be marketed, he is expressing his personal view on the matter, not the FDA's. When the urban planner at the municipal land use agency evaluates the impact of a large-scale development project and makes a recommendation on whether the project should go forward, he is expressing his personal view on the matter, not the city's. And here in this case, when Richard Ceballos investigated allegations that a law enforcement officer had lied in an affidavit used to obtain a search warrant that led to a prosecution, and then made a recommendation that the prosecution be dismissed, he was expressing his personal view on the matter, not Los Angeles County's. In each of these instances, the government employees have a personal stake

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Amendment right to announce a view on a policy matter that is at odds with the view that has been established by the agency. *See infra* page 17.

in what they said on the job, because what they said was inherently personal. Of course, the employees are compensated by the government to communicate their views. But the fact that they receive a government paycheck does not depersonalize this speech and transform it into government speech in which the employees have no interest.

The notion that government employees lack a personal stake in their job-related speech is not supported by *Rust v. Sullivan*, 500 U.S. 173 (1991), and the Court's other "government speech" precedents. *Rust* involved a federal program that subsidized clinics to advise patients on family planning. In establishing the program, Congress made the policy judgment that abortion was not an appropriate method of family planning, and so it barred doctors participating in the program from discussing abortion with their patients. *Id.* at 179-80. Implementing Congress' determination, federal regulations precluded recipients of program funds from "provid[ing] counseling concerning the use of abortion as a method of family planning or provid[ing] referral for abortion as a method of family planning." *Id.* at 179 (quoting 42 C.F.R. § 59.8(a)(1) (1988)). The Court rejected a First Amendment challenge to the restriction on abortion counseling and referrals, holding that the government had not impermissibly discriminated against the speech of persons who advocate abortion as a method of family planning, but had simply chosen not "to fund activities, including speech, which are specifically excluded from the scope of the project funded." *Id.* at 194-95.

As the Court subsequently explained, the speech of the recipients of the federal funds in *Rust* was tantamount to the speech of the government because the government

was subsidizing clinics to transmit the government's message on family planning practices, not the clinic's message on such practices. *See Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 833 (1995); *cf. Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. 2055, 2061-62 (2005) (First Amendment does not preclude the government from compelling citizens to subsidize a government message the government seeks to transmit). But neither *Rust* nor the subsequent decisions interpreting it stand for Petitioners' bald proposition that all "government-funded speech is equivalent to 'governmental speech.'" Pet. Br. at 33.

For example, in *Rosenberger*, the Court distinguished *Rust* and held that the First Amendment prevented a public university from imposing viewpoint-based restrictions on student expression that was funded by the university. The Court said that whereas the purpose of the subsidies in *Rust* was to promote the communication of the government's views, the purpose of the subsidies in *Rosenberger* was to promote the communication of the student-recipients' views. 515 U.S. at 833. *See also Velazquez*, 531 U.S. at 542 (purpose of funds provided to lawyers under legal services program was "to facilitate private speech, not to promote a governmental message"). The Court stressed that, in cases such as *Rust*, where "the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Rosenberger*, 515 U.S. at 833. In *Rust* itself, those steps entailed the prohibition on recipients of federal funds from conveying a message on abortion

that was not in tune with the message the government sought to convey.

In sum, under the Court's government speech cases, a government employee loses a personal stake in his job-related speech on a matter of public concern, and such speech becomes the government's speech, only when the government pays the employee to communicate the government's view on that matter. When that is the case, the government can restrict the job-related speech of government employees on matters of public concern if the speech is at odds with a particular policy, message, or idea the government is trying to communicate. Conflicts of that sort arise, for example, when a spokesperson for a government agency issues a public statement that is inconsistent with the position that the agency head has adopted; when a government lawyer makes a legal argument in a brief or in court that is inconsistent with the argument his client and/or superiors have directed him to make; or when a senior appointee in a federal department or agency announces a policy decision that is inconsistent with the position of the President.[6]

[6] Under the Court's "patronage" rulings, a senior appointee who conveys a policy view that conflicts with the President's policy view can be disciplined for that speech, and the First Amendment would not stand in the way. Such appointees serve at the pleasure of the President; and given the high positions they hold in the executive branch, their communications on policy are so intertwined with the President's that they may lack a personal interest in their job-related speech on policy matters. *See Waters*, 511 U.S. at 672 (plurality opinion); *Branti v. Finkel*, 445 U.S. 507, 518 (1980); *see also Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982) (vesting of constitutional power in President to execute the laws necessitates that he have broad authority to remove high-level subordinates from office).

Applying the teachings of the Court's government speech precedents here, Richard Ceballos' memorandum calling to his superiors' attention a tainted prosecution was not the government's speech. Ceballos was neither a spokesperson for the District Attorney's office nor a final decisionmaker as to whether the prosecution should be dismissed. More fundamentally, the District Attorney's office did not pay Ceballos to transmit a particular message of the County's. To the contrary, as a supervising attorney with responsibilities to recommend which prosecutions to bring and which not to bring, Ceballos was paid to communicate his own views on that subject; thus, he had a personal stake in the speech.[7]

[7] The Court's expressive association precedents also betray the assertion that the job-related speech of a government employee on a matter of public concern is invariably government speech in which the employee has no personal stake. Under those precedents, First Amendment rights of expressive association are infringed when private organizations are required to admit members whose presence would dilute a message that the group seeks to communicate. For example, in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), the Court held that forcing the Boy Scouts to accept a gay scoutmaster violated the group's right of expressive association, because (as the Court saw it) his inclusion would impede the group's ability to communicate its view on the impropriety of homosexuality. *Id.* at 651. By contrast, in *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), the Court held that requiring a civic organization to accept women in its ranks did not infringe the organization's right of expressive association because in excluding women, the group had never intended to transmit any particular message about the role of women in society. *Id*. at 627. Looking at this case through the prism of the Court's expressive association precedents, it is analogous to *Roberts v. U.S. Jaycees*, not *Boy Scouts of America v. Dale.* Ceballos' memorandum did not interfere with any message that the County was trying to convey about police misconduct. In fact, the views conveyed in the memorandum were consistent with the County's view that police misconduct will not be tolerated. Pet. App. 20-21.

C. Eliminating First Amendment Protection For Job-Related Speech Of Government Employees Would Have Particularly Adverse Consequences In The Law Enforcement Setting, Where Candor Of Police And Prosecutors Is Imperative To The Truth-Seeking Function Of The Criminal Process.

Time and again, this Court has recognized that, at bottom, the criminal process involves a search for the truth. *See United States v. Mezzanatto*, 513 U.S. 196, 204 (1995); *United States v. Leon*, 468 U.S. 897, 907 (1984). The government's goal in a criminal proceeding, therefore, is not to win the case, but to see that justice is done. *See Kyles v. Whitley*, 514 U.S. 419, 439-40 (1995); *see also Brady v. Maryland*, 373 U.S. 83, 88 (1963) ("Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.").

Frank assessments by police and prosecutors on the strength of cases their agencies seek to bring is a key component of the criminal justice system's search for truth. Simply put, law enforcement officers must be able to stand up and raise questions when their agencies initiate what they consider to be a dubious criminal proceeding. First Amendment protection for such job-related speech of police and prosecutors bolsters workplace candor at law enforcement agencies, and thereby reinforces the truth-seeking function of the criminal process.

Needless to say, police misconduct, such as fabricating evidence, undermines the quest for truth in the criminal process. Not surprisingly, therefore, it is a staple of contemporary best police practices that officers should communicate to superiors instances of misconduct of fellow

officers. *See* U.S. Department of Justice, *Principles of Promoting Police Integrity: Examples of Promising Police Practices and Policies* 1 (2001) ("[L]aw enforcement officers should be required to report misconduct by other officers that they witness or which they become aware.").

By encouraging police officers to come forward and speak about misconduct in the ranks, law enforcement agencies strive to overcome the so-called "code of silence," which posits that "an officer does not provide adverse information against a fellow officer." Report of the Independent Commission on the Los Angeles Police Department 168 (1991) [hereinafter "Christopher Commission Report"]. *See also* U.S. Department of Justice, *Police Integrity: Public Service With Honor* 48 (1997) (law enforcement agencies should be "intolerant of the 'code of silence' [and] should work to establish a culture that promotes openness, ensures internal and external fairness, promotes and rewards ethical behavior, and establishes a foundation that calls for mandating the highest quality service to the public"). The code of silence is a deeply-ingrained and pernicious informal loyalty oath among police officers that corrupts the truth-seeking function of the criminal process. Law enforcement agencies need every tool at their disposal to eradicate it. The First Amendment is one such weapon. Eliminating constitutional protection for the job-related speech of government employees will make it that much harder to root out the code of silence in law enforcement agencies, and accordingly, would hinder the search for truth.

Open discourse is just as important in prosecutors' offices as it is in police departments. This Court has long acknowledged the prosecutor's "special role . . . in the search for truth in criminal trials." *Strickler v. Greene*, 527

U.S. 263, 281 (1999). The prosecutor may act "with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1935); *see also United States v. Kattar*, 840 F.2d 118, 127 (1st Cir. 1988) (prosecutor's responsibility "is not merely to prosecute crimes, but also to make certain that the truth is honored to the fullest extent possible"); ABA Model Code of Professional Responsibility, EC 7-13 ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."). Among the ways that a prosecutor fulfills this responsibility is when she carefully evaluates a case, determines that it lacks merit and should not proceed, and conveys that conclusion to her superiors. Eliminating First Amendment protection for job-related speech of government employees would tend to discourage a prosecutor from making the blunt recommendation that a case be dismissed, particularly when it is a highly-publicized case on which her superiors have much riding. In such circumstances, the prosecutor is more likely to keep her views to herself and let the case proceed apace, rather than risk upsetting the apple cart and provoking the ire of higher-ups within her office.

Richard Ceballos' memorandum to his superiors concluding that police misconduct had sullied a prosecution highlights the connection between free expression in the law enforcement context and the truth-seeking function of the criminal justice system. As part of his job duties, Ceballos conducted a thorough investigation into

allegations that an officer had lied in an affidavit used to obtain a search warrant that led to a prosecution. J.A. 30-37. During his investigation, Ceballos discovered evidence that severely undercut the veracity of the affiant's statement, as well as statements of two other deputies on which the affiant purported to have relied. J.A. 36-37. None of the deputies reported anything amiss about the evidence contained in the affidavit. They apparently had vouched for each other, until they were challenged by Ceballos. J.A. 495-503.

It is highly significant that Ceballos conducted his investigation and submitted his memorandum against the backdrop of the "Rampart" police corruption scandal that had eroded public trust in law enforcement in Southern California. At the time that Ceballos spoke up, it had only recently come to light that an anti-gang unit assigned to the Rampart division of the Los Angeles Police Department ("LAPD") had, for several years, committed a staggering array of abuses, including planting evidence, framing citizens for crimes they did not commit, beating suspects, stealing money and drugs, filing false police reports, and obstructing justice. *See* Scott Glover & Matt Lait, *Ex-Officer Calls Corruption a Chronic Cancer*, LA Times, Sept. 21, 1999, at A1. *See generally* Report of the Rampart Independent Review Panel, *available at* http://www.lacity.org/oig.

The gross misconduct of the officers involved in the Rampart scandal distorted the truth-seeking function of the criminal justice system. Unfortunately, their egregious behavior was tightly sealed from scrutiny by the code of silence: police officers simply refused to report the misdeeds of their fellow officers. *See id.* at 70; Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's*

Board of Inquiry Report on the Rampart Scandal, 34 Loy L.A. L. Rev. 545, 558 (2001).[8]

The Rampart scandal also cast a spotlight on the Los Angeles County District Attorney's office, which prosecuted persons framed by the officers implicated in the Rampart scandal. *See* Report of the Rampart Independent Review Panel, at 280-82. Ultimately, more than 100 criminal convictions obtained by the District Attorney's office were overturned because the evidence supporting them had been fabricated by the lawless Rampart officers. Scott Glover & Matt Lait, *LAPD Settling Abuse Scandal*,

[8] Nearly a decade before the Rampart scandal broke, Southern California had been rocked by police misconduct when LAPD officers were caught on videotape beating a criminal suspect, Rodney King. An independent panel, the Christopher Commission, was established in the wake of the King beating to study the LAPD's practices. Among other things, the Christopher Commission admonished that the code of silence had concealed police abuses down through the years, and that the LAPD no longer could allow it to "be used as a shield to hide misconduct." Christopher Commission Report at 170. To that end, the Christopher Commission recommended that the LAPD "make enforcement of its policy against the code of silence a high priority in discipline, training, and other areas. In doing so, it should actively and severely discipline those who violate Department policy by failing truthfully to report known instances of misconduct." *Id*. at 177.

Notwithstanding the recommendation of the Christopher Commission, the code of silence survived. Indeed, the Rampart scandal revealed its virulence within the LAPD. The scandal was exposed only because one of the ringleaders finally was caught in the act of one of his crimes, and, in exchange for leniency, revealed to prosecutors the extent of the lawlessness in which he and his accomplices had been engaged. *See* Glover & Lait, LA Times, Sept. 21, 1999, at A1. The scandal led to a federal investigation of the practices of the LAPD. Ultimately, the LAPD entered into a consent decree with the federal government, which, among other things, requires officers to breach the code of silence and "report to the LAPD without delay" misconduct of fellow officers. *United States v. City of Los Angeles*, Consent Decree, ¶ 78, at 30, *available at* http://www.lapdonline.org./pdf_files/boi/final_consent_decree.pdf.

LA Times, March 31, 2005, at A1. As set forth in a report prepared for the Los Angeles Police Protective League (an organization that represents the interests of LAPD officers), the District Attorney's office may have inadvertently facilitated the Rampart scandal by routinely declining to confront suspected police wrongdoing and to scrutinize the credibility of officers who testify for the prosecution; tacitly encouraging officers to slant their testimony in favor of the prosecution; and generally failing to evaluate the real strength of cases before they were brought. *See Chemerinsky*, 34 Loy. L.A. L. Rev. at 634-36. The Police Protective League report rebuked the District Attorney's office in an additional important respect. It observed that "a key to preventing a recurrence of the Rampart incident is recognition of the failure of the District Attorney's office to request internal reports indicating police officers involved in their cases may have lied or mishandled their investigations. For years, there appears to have been a 'don't ask, don't tell policy' [in the District Attorney's office]." *Id.* at 636.

With news of the Rampart scandal percolating in the community that he served,[9] Richard Ceballos did not look the other way when allegations of police misconduct were called to his attention. Instead, he carried out his responsibilities as a prosecutor. He took the allegations seriously, investigated them, and, based on his investigation, recommended to his superiors that the prosecution should not go forward because, in his view, it was premised on inaccurate and misleading evidence supplied by law

[9] As the district court tersely put it, the "code word 'Rampart' says it all – there can be no doubt that, in Southern California, police misconduct is a matter of great political and social concern to the community." Pet. App. 62.

enforcement officers. In expressing that view, Ceballos honored the truth-seeking function of the criminal justice system. He did exactly what prosecutors are supposed to do. It would dishonor the truth-seeking function of the criminal justice system to conclude that because Ceballos did his job and spoke out within his workplace on a matter of public concern, he is not entitled to First Amendment protection.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

MICHAEL C. SMALL
AKIN GUMP STRAUSS HAUER & FELD L.L.P.
2029 Century Park East, Suite 2400
Los Angeles, California 90067
Telephone: 310-229-1000
Facsimile: 310-229-1001
Counsel of Record

JEFFREY L. FISHER
Co-Chair, NACDL Amicus Committee
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101

STEVEN R. SHAPIRO
ACLU FOUNDATION
125 Broad Street
New York, New York 10004

PETER ELIASBERG
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1616 Beverly Blvd.
Los Angeles, California 90026

Attorneys for Amici Curiae