

GOVERNMENT'S EXPRESSIVE INTERESTS IN THE SPEECH OF ITS EMPLOYEES

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This paper explains how government's increasing control of its employees' speech both on and off the job marks a deeply disturbing trend that imperils the public's interest in transparent government as well as the free speech rights of more than twenty million government workers. It identifies courts' expansive deference to government's own expressive interests as a new prism through which to understand this trend.

For example, courts increasingly defer to government's asserted need to protect its own speech by controlling workers' on-the-job expression. Applying the Supreme Court's recent decision in *Garcetti v. Ceballos* – which held that the First Amendment does not protect public employees' speech made pursuant to their official duties -- lower courts now routinely reject the First Amendment claims of a wide range of government workers punished after their on-the-job reports of safety hazards, ethical improprieties, and other government misconduct. This trend frustrates a meaningful commitment to republican government because it allows government officials to deprive the public of whistleblowing and other valuable job-related speech that would otherwise inform voters' views and facilitate their ability to hold the government politically accountable for its choices.

While *Garcetti* brought an end to most First Amendment claims involving public employees' on-duty speech, courts also frequently reject the constitutional challenges of government workers fired for their objectionable, controversial, or simply unpopular off-duty speech. Government increasingly claims public employees' expression away from work as its own, urging that its association with employees who engage in certain off-duty expression undermines its ability to communicate its own contrary views. To be sure, government's expressive interests are often significant – including, for example, police departments' interest in credibly communicating their commitment to evenhanded law enforcement regardless of race. But absent limitation, courts' unexamined deference to government in these cases portends deeply troubling implications for public employees' free speech rights. If unconstrained, this trend would permit government agencies to fire workers for any unpopular or controversial off-duty speech to which the public might object, such as edgy artistic expression or politically volatile speech.

In response, this paper seeks to ground the First Amendment doctrine governing public employee speech in a deeper understanding of government's own expressive interests, focusing specifically on when those concerns are sufficiently strong to justify controlling the speech of government workers. More careful attention to what it is that government actually seeks to express can help us capture those interests more precisely while providing greater protection for workers' own free speech rights.

