13-2915-CV

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CRAIG MATTHEWS, Plaintiff-Appellant, vs. CITY OF NEW YORK; RAYMOND KELLY, as Commissioner of the New York City Police Department; JON BLOCH, a deputy inspector in the New York City Police Department; and MARK SEDRAN, a lieutenant in the New York City Police Department, Defendants-Appellees.	No. 13-2915-cv

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLANT CRAIG MATTHEWS

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New York, N.Y.

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INTRODUCTION

The central issue in this appeal -- the second time this case has been before this Court -- is whether a policy requiring police department employees to report to the department itself all misconduct within the department renders speech about police misconduct unprotected by the First Amendment pursuant to the Supreme Court's ruling in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). Here, the District Court found that reports by Craig Matthews, a 16-year veteran NYPD police officer, about a quota system for arrests, summonses, and stop-and-frisks in his Bronx precinct were unprotected under *Garcetti* because the NYPD has a policy that requires every employee to report to the NYPD all misconduct by NYPD officials.

The District Court's ruling squarely conflicts with decades of Supreme Court law recognizing the critically important free speech rights of public employees, fundamentally misconstrues *Garcetti* and this Court's post-*Garcetti* decisions, and is contrary to this Court's earlier ruling in this case. If accepted, the District Court's ruling would not only strip away First Amendment protections for all NYPD whistleblowers, but it would leave government agencies free to eviscerate the free speech rights of whistleblowing employees through broad misconduct-reporting policies like the NYPD policy at issue in this case.

JURISDICTIONAL STATEMENT

The case presents a challenge under the First Amendment to the United States Constitution as well as under its New York State Constitution counterpart, Art. I, Section 8. As such, the District Court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3)-(4) and had supplemental jurisdiction over the state-law claims under 28 U.S.C. § 1367(a). Because the District Court issued a final decision, this Court has jurisdiction under 28 U.S.C. § 1291.

The District Court issued its decision and order on July 29, 2013. *See* Special Appendix ("SA") at 1-37. The plaintiff filed a timely Notice of Appeal on August 1, 2013. *See* Joint Appendix ("JA") at 497. In the decision being appealed, the District Court dismissed the complaint in its entirety, thereby disposing of all the plaintiff's claims.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether, in light of *Garcetti v. Ceballos*, 547 U.S. 410 (2006), *Garcetti*'s progeny in this Court, and this Court's earlier decision in this matter, the District Court erred in finding that a police officer's speech about an NYPD quota system is unprotected by the First Amendment because of a police department policy requiring all employees to report to the police department all misconduct within the department.

2. Whether, in light of *Garcetti* and its progeny in this Court, the District Court erred in holding that a police officer's report of a quota system to commanding officers is not speech protected by the First Amendment when members of the public can and do make reports to the same commanding officers about police misconduct.

3. Whether, on a motion for summary judgment, the District Court erred in holding that no dispute of material fact existed concerning whether the NYPD misconduct-reporting policy at issue in this case encompassed the plaintiff's speech about a quota system in his precinct.

STATEMENT OF THE CASE

The plaintiff Craig Matthews filed his complaint on February 23, 2012, naming as defendants the City of New York, NYPD Commissioner Raymond Kelly, and two commanding officers from Officer Matthews' Bronx precinct. *See* JA19-34. He promptly sought expedited discovery and to schedule preliminary injunction proceedings, while the defendants requested permission to proceed on a motion to dismiss. Following briefing and argument on the City's motion, District Judge Barbara S. Jones dismissed the complaint in an opinion and order dated April 12, 2012. *See Matthews v. City of New York*, 2012 WL 8084831 *3 (S.D.N.Y., Apr. 12, 2012).

The plaintiff appealed, and in November 2012 this Court issued a summary order reversing the District Court and remanding the matter for discovery directed at Officer Matthews's actual job duties, focusing on "the nature of the plaintiff's job responsibilities, the nature of the speech, and the relationship between the two." *Matthews v. City of New York*, 488 Fed.Appx. 532 (2d Cir. 2012) (citation and internal quotations marks omitted).

On remand, the case was assigned to District Judge Paul E. Engelmayer, as Judge Jones had retired from the bench. Following discovery that focused on the job duties of Officer Matthews and of NYPD precinct commanding officers, the City moved for summary judgment on May 20, 2013, on the narrow issue of whether, given his job duties, Officer Matthews' speech was protected "citizen" speech or unprotected "employee" speech under the *Garcetti* framework.

On July 29, after briefing and oral argument, Judge Engelmayer issued an opinion and order granting the City's summary judgment motion and dismissing the case. That decision is reported at *Matthews v. City of New York*, 2013 WL 3879891 (S.D.N.Y. July 29, 2013) (SA1-37). On August 1, 2013, the plaintiff filed a timely notice of appeal. *See* JA497.

STATEMENT OF FACTS

In support of its summary judgment motion, the City submitted a 19-paragraph statement pursuant to Southern District of New York Local Rule 56.1, supported by the complaint, the NYPD's misconduct-reporting policy, and two sets of deposition excerpts. *See* JA11-62. In opposition the plaintiff filed a Rule 56.1 Statement that disputed most of the 19 facts asserted by the City, that asserted 76 separate facts, and that was supported by extensive evidentiary materials.[1] In reply, the City did not file a supplemental Rule 56.1 Statement, did not contest any of the facts the plaintiff asserted, and did not provide any further support for the facts the City had asserted in its original Rule 56.1 Statement and that the plaintiff had contested.[2]

Given these submissions and given that this appeal concerns a grant of summary judgment against Officer Matthews, the relevant facts before this Court are those asserted in the plaintiff's Rule 56.1 Statement and those in the City's

[1]Among the materials the plaintiff submitted in support of his position were (1) an affidavit from himself; (2) excerpts from his deposition and the depositions of the two precinct commanding officers to whom he had made his reports; (3) separate NYPD job descriptions for police officers, for precinct commanding officers, and for precinct integrity control officers; (4) materials connected to community meetings held by Officer Matthews' precinct commanding officers; and (5) various press reports about the NYPD quota controversy. *See* JA63-407.

[2]Its sole evidentiary submission was a single page of the NYPD's policy guide, which it offered in response to a case briefed by the parties. *See* JA410.

statement that are not disputed, with all inferences drawn in favor of Officer Matthews. In addition, because the summary judgment motion was limited to the narrow issue of Officer Matthews's job duties for purposes of the *Garcetti* analysis, the City stipulated to the facts in the complaint about his speech for purposes of the motion. *See Matthews v. City of New York*, Slip Op. at 2 n.1 (SA2).

In light of this record and stipulation, the facts before the Court are as set out below. In presenting them, the plaintiff notes that he does not contend that the District Court erred in its recitation of the facts, *see Matthews*, Slip Op. at 2-4, 5-10 (SA2-4, 5-10), though that presentation is incomplete.

A. The Public Controversy About NYPD Quotas

For several years, the New York City Police Department has been engulfed in a public controversy about the use of quota systems that cause innocent New Yorkers to be stopped and frisked, given summonses, and even arrested. Starting in May 2010, *The Village Voice* ran a series of articles focusing on a quota system in the 81st Precinct in Brooklyn. The articles were based on tape recordings that an officer assigned to the precinct -- Adrian Schoolcraft -- made and that revealed supervisors announcing mandated numbers for arrests, summonses, and stop-and-frisks. *See* G. Rayman, "The NYPD Tapes: Inside Bed-Stuy's 81st Precinct," The Village Voice, May 4, 2010 (JA159-76).

In August 2010 then-Governor David Paterson signed legislation expanding the scope of the state's anti-quota statute to ban retaliation for not meeting quotas for tickets, summonses, arrests, and stop-and-frisk encounters. *See* N.Y. Labor Law § 215-a (McKinney 2012). (Before it was amended, the anti-quota law covered only traffic violations.)

Shortly before the complaint was filed in February 2012, several controversies about NYPD quotas had arisen. In January 2012, the NYPD was ordered to arbitrate a grievance brought by an officer who claimed there was a pervasive quota system in the 20th Precinct on the Upper West Side of Manhattan. And in October 2011, a narcotics detective in Queens admitted that the use of quotas by the NYPD led him and other officers to plant cocaine on innocent individuals in order to boost their arrest numbers. The officer, a former narcotics detective named Stephen Anderson, testified in court that he participated in the practice -- called "flaking" -- when his co-workers needed last-minute arrests to fulfill their quotas. Anderson testified that he and his partner had a "number to reach" and that they planted drugs on innocent people because his partner was "worried about getting sent back [to patrol] and . . . the supervisors getting on his case." *See* Complaint ¶14 (JA24).

Finally, just a week after the issuance of the summary judgment ruling on appeal here, a Southern District judge issued a lengthy opinion finding that the NYPD has engaged in a widespread practice of unlawfully stopping people, and in doing so the court relied significantly on the Schoolcraft tapes and on testimony from other NYPD officers about quotas in their precincts. *See Floyd v. City of New York*, 2013 WL 4046209, **29-31 (S.D.N.Y., Aug. 12, 2013).

B. The Quota System in the 42nd Precinct and Officer Matthews' Speech

While the public controversy about NYPD quotas was unfolding, a quota system had been developing in the 42nd Precinct, located in the Bronx. As the District Court explained:

> [B]eginning in 2008, mid-level supervisors in the 42nd Precinct "developed and implemented a system of quotas mandating numbers of arrests, summonses, and stop-and-frisks." To enforce these quotas, supervisors developed a system that assessed officers using color-coded reports that identified who was meeting, partially meeting, and not meeting his or her quotas. The quota system in Officer Matthews' squad was further refined by his platoon commander, Lieutenant Mark Sedran. Lieutenant Sedran created a system that awarded points for "'good summonses" -- those that addressed hazardous behavior, such as use of a cell phone while driving -- and subtracted points for non-hazardous summonses. Officers were allegedly under constant pressure to meet these quotas and were subject to punishment for not doing so.

Slip Op. at 2-3 (citing and quoting complaint) (SA2-3).[3]

[3]In December 2011 the color-coded computer reports used with the quota

Plaintiff Craig Matthews is a 16-year NYPD veteran of the New York City who had been assigned to the 42nd Precinct in the Bronx since 1999. *See* Affidavit of Craig Matthews ¶¶ 1-5 (JA91). During his time at the 42nd Precinct, Officer Matthews received over 20 awards for his police work and, until the advent of the quota controversy in 2008, he received consistently positive annual reviews. Complaint ¶¶ 16-17 (JA24-25).

Starting in February 2009 Officer Matthews began speaking out about the quota system. As the District Court explained,

> Officer Matthews believed that the quota system violated the NYPD's core mission, and he was "unwilling to participate in a practice that would damage the communities he was entrusted to protect." [Complaint at] ¶ 19. Accordingly, in February 2009, Officer Matthews met with the precinct's commanding officer at the time, then-Captain Timothy Bugge, and informed Captain Bugge about the existence of the quota system. *Id.* ¶ 20. In March and April 2009, with the quota system having persisted, Officer Matthews met again with Captain Bugge. *Id.* In May 2009, Officer Matthews also reported the quota system to an unnamed precinct executive officer. *Id.* In June 2009, Captain Bugge told Officer Matthews that he had spoken with Lieutenant Sedran and that "the situation was handled." *Id.* ¶ 21.

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system in the 42nd Precinct were changed to reflect an even more discriminating monitoring system. Whereas prior reports had labeled officers in black and red ink depending upon their compliance with quotas, the new reports added a silver category for officers meeting quotas in some categories but not in others. A version of this report covering the first two weeks of January 2012 identifies 15 officers in black ink, 90 in silver ink, and 60 in red ink. Complaint ¶ 35 (JA30-31).

> Nevertheless, Officer Matthews alleges, the quota system continued in secret. *Id.* In October 2009, Captain Bugge informed Officer Matthews that he would not interfere with how supervisors ran their platoons. At this point, Officer Matthews alleges, he concluded that it was futile to raise his concerns with Captain Bugge any further. *Id.* ¶ 22.
>
> In January 2011, Officer Matthews met with then-Captain Jon Bloch, who had replaced Captain Bugge in May 2010 as the precinct's commanding officer. *See* Bloch Dep. 13; Bugge Dep. 13. The meeting took place in Captain Bloch's office, with two other officers present. Compl. ¶ 28. Officer Matthews explained his concerns that the quota system was (1) "causing unjustified stops, arrests, and summonses because police officers felt forced to abandon their discretion in order to meet their numbers," and (2) "having an adverse effect on the precinct's relationship with the community." *Id.* Officer Matthews has attested that when he raised these concerns, he did not identify any particular unjustified stop or arrest. Matthews Decl. ¶ 13.

Matthews, Slip-Op at 3-4 (SA3-4).

From the time of his first complaints in 2009, Officer Matthews faced retaliation in the form of negative performance evaluations, punitive assignments such as foot posts or prisoner transports, denial of overtime, denial of leave, separation from his career-long partner, and humiliating treatment by his supervisors. Complaint ¶¶ 21, 25-27 (JA26, 27-28). On the day this lawsuit was filed, Officer Matthews was given an annual evaluation rating that subjected him to close monitoring and put him at risk of being fired. Complaint ¶ 38 (JA31).

C. Officer Matthews' Job Duties

The NYPD has a written job description for all members with the rank of "police officer," a copy of which -- Patrol Guide section 202-21 -- is included in the Joint Appendix at 113. It is undisputed that nothing in that job description imposes on Officer Matthews any duty to report misconduct by supervising officers. *See* Plaintiff's Rule 56.1 Statement ¶¶ 17-18 (JA77).

In addition, as the District Court noted, Officer Matthews explained that his day-to-day activities included (1) going on radio runs, which are responses to 911 calls in the precinct, (2) patrolling the streets and vertical patrolling of local housing, (3) filling out complaint reports relating to criminal activity, lost property, and missing persons, including interviewing witnesses, (4) responding to traffic accidents, (5) transporting prisoners to and from the precinct house, courts, and hospitals, and (6) doing community visits with local businesses and organizations. *See id.* ¶¶ 5-6 (JA67-68) (quoted in Slip Op. at 6 (SA6)).

As the District Court noted, NYPD officials uniformly testified that a police officer has no duty to monitor the conduct of his superior officers; rather, it is the express duty of the precinct's Integrity Control Officer to monitor and report any such misconduct to the Internal Affairs Bureau. *See Matthews*, Slip Op. at 7-8

(SA7-8). Officer Matthews is not and never has been an Integrity Control Officer. *See id.*

When performing his job duties, Officer Matthews had minimal contact with Inspector (then captain) Bugge, the commanding officer of the 42nd Precinct between November 2007 and May 2010, or with Deputy Inspector Bloch, who took over the position in May 2010. He provided no direct or routine reports (oral or written) to the commanding officers and had no regular meetings with them beyond the normal greetings exchanged by colleagues in any workplace. The testimony of Inspector Bugge and Deputy Inspector Bloch corroborates not only that their interactions with Officer Matthews were minimal and informal but also that this minimal level of interaction was typical of their involvement with the police officers in the 42nd precinct generally. *See* Plaintiff's Rule 56.1 Statement ¶¶ 7-17 (JA80-81); *Matthews*, Slip Op. at 8 (SA8).

D. The Job Duties of NYPD Precinct Commanding Officers

As the District Court explained, "One duty of a commanding officer is to meet with civilians to receive complaints or other feedback about police misconduct." *Matthews*, Slip Op. at 8 (SA8) (citing, among other things, Patrol Guide 202-09 (JA207-11), which is the written NYPD job description for commanding officers).

Consistent with this duty, the precinct commanders to whom Officer Matthews conveyed his reports about the quota system routinely met with members of the public to receive reports of police misconduct. As the District Court explained,

> For Officer Matthews' precinct, this [duty to receive complaints] includes attending monthly meetings of the 42nd Precinct's Community Council. These meetings typically take place in the precinct and are open to members of the public. At these meetings, community members and representatives of community organizations are free to raise concerns about policing practices. Captain Bloch testified that he personally attended approximately two dozen such meetings during his three years as commanding officer of the 42nd Precinct.
>
> In addition to the Community Council meetings, members of the community, under some circumstances, may contact commanding officers and meet with them in person, including at the precinct, to discuss concerns about policing practices. Captain Bloch testified that such meetings happened "rarely." However, Captain Bugge testified that one to three times per month he meets with members of the community, such as local politicians and leaders of religious or civic organizations, to discuss policing issues. Some of these meetings took place in his office, and others in the Community Affairs Office or in a common area of the stationhouse. Such meetings were typically set up through the precinct's Community Affairs Officer, a point of first contact for community members. For instance, on one occasion, a prominent reverend in the community -- who was an advisor to the Community Council board and visited the Community Affairs Office "a couple of times a week" -- met with Captain Bugge in his office to discuss his mistreatment during a stop.

Matthews, Slip Op. at 9-10 (citations omitted) (SA9-10).

E. The NYPD's Misconduct Reporting Policy

Central to the City's summary judgment motion is an NYPD policy that imposes on all members of the department certain obligations to report certain misconduct. That policy is NYPD Patrol Guide Section 207-21, and is reproduced in full in the Joint Appendix at pages 36-37.

According to the "scope" section of the policy, "All members of the service have an absolute duty to report any corruption or other misconduct, of which they become aware." The policy's "definition" section provides as follows:

> CORRUPTION/OTHER MISCONDUCT: Criminal activity or other misconduct of any kind including the use of excessive force or perjury that is committed by a member of the service whether on or off duty.

Finally, the "procedure" section of the policy directs that members of the department are to report the alleged misconduct to the Internal Affairs Bureau, either by telephone or in writing. *See* Patrol Guide section 207-21 (JA36).

Whether Officer Matthews' reports to precinct commanding officers came within the parameters of section 207-21 is disputed. Beyond the fact that the policy by its terms mandates reports to Internal Affairs only, the parties disagreed about the type of misconduct covered by the policy.

In his deposition, Officer Matthews testified that his duty to report under section 207-21 is limited to penal violations only, an understanding he gained

through his training in the police academy. Plaintiff's Rule 56.1 Statement ¶¶ 25, 27 (JA82). Thus, while the implementation of a quota system is plainly a form of misconduct, it is not the type of misconduct that must be reported pursuant to Patrol Guide 207-21. *See id.* ¶ 26.

The NYPD representative produced in response to plaintiff's notice for a 30(b)(6) deposition, Deputy Commissioner John Beirne, provided several different and inconsistent explanations of the scope of section 207-21. He testified that conduct that constitutes corruption, criminal activity, excessive force, or perjury must be reported pursuant to section 207-21. Plaintiff's Rule 56.1 Statement ¶ 65 (JA88). He also testified that a police officer's reasonable belief regarding whether conduct is "misconduct" determines whether the conduct must be reported pursuant to the policy. *Id.* He testified that some violations of NYPD Patrol Guide procedures may constitute misconduct "including not using black ink for reports, but "[t]here probably are some things that don't necessarily have to be reported." *Id.* at ¶¶ 66, 69. Finally, he testified that the only way a police officer can know which violations of the Patrol Guide must be reported under PG section 207-21 is to use common sense. *Id.* at ¶ 70.

SUMMARY OF ARGUMENT

At the heart of the First Amendment protections afforded to public employees is the recognition that they have unique knowledge of and insight into government misconduct within the agencies where they work, misconduct that often is otherwise hidden from public view. Starting with its seminal decision in *Pickering v. Board of Education*, the Supreme Court repeatedly has emphasized the importance of employee speech to the public debate about the work of the employee's agency. This has been the fundamental premise of the *Pickering* doctrine, under which speech by public employees is protected so long as it is on a matter of "public concern."

In its 2006 decision in *Garcetti v. Ceballos*, the Court somewhat narrowed the *Pickering* doctrine when it held that speech, even if on a matter of public concern, is not protected if the public employee engages in the speech as part of his or her regular job duties, in that case completion of a routine report. By contrast, as the Supreme Court made clear in its analysis, public employee speech made through channels generally available to the public -- speech with a "civilian analogue," to use the Court's term -- was not affected by *Garcetti* and remains fully protected. Relying on this distinction, this Court just two years ago in *Jackler v. Byrne* reversed a District Court's dismissal of a First Amendment claim brought by a police officer

alleging retaliation for speech to his supervisors.

Here, the plaintiff -- NYPD officer Craig Matthews -- reported to his precinct commanders about the existence of a highly developed and unlawful system of quotas for arrests, summonses, and stops and frisks in the precinct and the impact the quota system was having on the community. The undisputed record before the District Court establishes that it was no part of Officer Matthews' job -- either by virtue of his written NYPD job description or by virtue of his day-to-day duties -- to make such reports. The undisputed record likewise establishes that it is part of the job duties of NYPD precinct commanders to receive from members of the public reports about police misconduct and further that the precinct commanders to whom Officer Matthews made his reports in fact routinely met with the public to receive reports about misconduct.

Notwithstanding this record, the District Court granted summary judgment to the defendants, holding that Officer Matthews' reports about the quota system were part of his job duties for purposes of *Garcetti* and rejecting the contention that his speech had a "civilian analogue." With respect to the job-speech point, the District Court relied primarily on an NYPD policy that requires every one of the tens of thousands of NYPD members, of all ranks and commands, to report misconduct to the department itself. According to the District Court, this department-wide policy

transformed Officer Matthews' speech into nothing more than unprotected job speech. As for the issue of a civilian analogue, the District Court recognized that precinct commanding officers in fact are a channel for public complaints about misconduct but nonetheless held that that channel was not a civilian analogue because Officer Matthews had "superior" access to those commanders.

The District Court's conclusion that the NYPD's misconduct-reporting policy can define the First Amendment rights of its employees goes far beyond *Garcetti* and simply eliminates all First Amendment protections for NYPD employees to speak out about unlawful activity in the department. Beyond that, this approach, if adopted, would threaten the entire *Pickering* doctrine, as it would allow government employers to curtail employee free-speech rights simply by pointing to or adopting general misconduct-reporting policies. More narrowly, the District Court's approach also conflicts with this Court summary reversal of an earlier dismissal of this case, a decision in which the Court made clear that the job-duty inquiry did not lend itself to a "brightline" approach but instead required a focus on the employee's actual job duties.

As for the civilian analogue issue, the relative degree of access that public employees have to a channel of communication is irrelevant. Moreover, the undisputed record establishes that, far from having superior access to the precinct

commanders, Officer Matthews in fact had virtually no official dealings with them while in turn they had regular dealings with members of the public who wished to report misconduct.

ARGUMENT

The District Court granted summary judgment to the defendants, concluding that Officer Matthews' speech about a quota system in his NYPD precinct was job duty speech unprotected by the First Amendment. In reaching this conclusion, the lower court relied primarily on an NYPD policy that requires all NYPD members to report misconduct to the department itself. It also sought to buttress its holding by pointing to the fact that Officer Matthews' speech was made to NYPD supervisors, by suggesting his speech was simply about his own personal job, and by noting that the speech was possible because of his employment as an NYPD officer. The lower court also held that there was no "civilian analogue" to his speech that would take it out of the category of unprotected employee speech.

The standards employed by this Court when reviewing orders granting summary judgment are well established:

> We review the grant of a motion for summary judgment *de novo*. In determining whether there are genuine issues of material fact that preclude judgment for the defendant as a matter of law, we must resolve all ambiguities in favor of the nonmoving parties. The Court is not to weigh the evidence but is instead required to view the evidence in

> the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments. Thus, we will affirm the district court's grant of summary judgment only if, taking all of plaintiffs' evidence as true, we find that no reasonable juror could conclude that plaintiffs have established that the [defendants] violated plaintiffs' constitutional rights . . . .

Amnesty America v. Town of West Hartford, 361 F.3d 113, 122-23 (2d Cir. 2004) (reversing District Court) (citation and internal quotations omitted; emendation supplied).

In part I below, the plaintiff reviews the relevant caselaw from the Supreme Court and this Court, including *Garcetti* and decisions from this Court interpreting *Garcetti*. In Part II the plaintiff explains why the District Court's ruling directly conflicts with these controlling cases, including this Court's prior ruling in this case.

I. THE FIRST AMENDMENT RIGHTS OF PUBLIC EMPLOYEES.

For over forty-five years the Supreme Court has recognized that public employees enjoy protections under the First Amendment that are grounded in the Court's recognition of the important role that public-employee speech plays in government accountability, a concern that is particularly important in the context of law-enforcement agencies. In 2006, the Court in *Garcetti v. Ceballos* narrowed those protections to exclude speech that was simply part of an employee's job duties, and since then this Court has applied that exception in several cases. This caselaw

provides the context in which the District Court's ruling must be considered.

A. Public Employee Speech Is Critically Important.

Dating back to the Supreme Court's seminal ruling in *Pickering v. Board of Education,* it has been a staple of First Amendment jurisprudence that public employees have a qualified First Amendment right to speak about matters of public concern. *See, e.g., Pickering v. Board of Education*, 391 U.S. 563, 572-73 (1968) (teacher right to discuss school district budget decisions); *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 411-16 (1979) (teacher right to discuss in private with supervisor discriminatory hiring practices by school district); *Rankin v. McPherson*, 483 U.S. 378, 388-92 (1987) (law-enforcement employee right to discuss attempted assassination of President Reagan); *see generally Garcetti v. Ceballos*, 547 U.S. 410, 417-20 (2006) (reviewing public employee First Amendment jurisprudence); *Jackler v. Byrne*, 658 F.3d 225, 234-38 (2d Cir. 2011) (same), *cert. denied*, 132 S.Ct. 1634 (2012)

While the *Pickering* doctrine has come to protect the speech of public employees when their speech is generally on matters of "public concern," at the heart of the doctrine is the recognition that public employee speech about misconduct within the employee's agency is particularly valuable for the public to receive and therefore must be protected. In *Pickering*, for example, the Court

explained, "Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out on such questions without fear of retaliatory dismissal." 391 U.S. at 572.

The core notion of the *Pickering* doctrine runs through the Court's public-employee free speech case, as the Court noted in *Garcetti* (its most recent *Pickering* case):

> The Court's employee-speech jurisprudence protects, of course, the constitutional rights of public employees. Yet the First Amendment interests at stake extend beyond the individual speaker. The Court has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion. *Pickering* again provides an instructive example. The Court characterized its holding as rejecting the attempt of school administrators to "limi[t] teachers' opportunities to contribute to public debate." It also noted that teachers are "the members of a community most likely to have informed and definite opinions" about school expenditures. The Court's approach acknowledged the necessity for informed, vibrant dialogue in a democratic society. It suggested, in addition, that widespread costs may arise when dialogue is repressed. The Court's more recent cases have expressed similar concerns. *See, e.g., San Diego v. Roe,* 543 U.S. 77, 82, 125 S.Ct. 521, 160 L.Ed.2d 410 (2004) *(per curiam)* ("Were [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it" (citation omitted)); cf. [*United States v. National Treasury Employees Union,* 513 U.S. 454, 470 (1995)] ("The large-scale disincentive to Government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and

said").

547 U.S. at 419-20 (some citations omitted).

Consistent with this recognition of the public value of employee speech, this Court just two years ago emphasized the importance to the public of speech by police officers about misconduct within police departments. As the Court explained in *Jackler* "Exposure of official misconduct, especially within the police department, is generally of great consequence to the public." 658 F.3d at 236.

Many other Circuits have similarly emphasized the value of officer speech about police departments. *See, e.g., See v. City of Elyria*, 502 F.3d 484, 493 (6th Cir. 2007) (in holding that police officer engaged in protected speech in reporting misconduct in a city's police department to the FBI, stating that "[s]tatements exposing possible corruption in a police department are exactly the type of statements that demand strong First Amendment protections"); *Kinney v. Weaver*, 367 F.3d 337, 361 (5th Cir. 2004); (noting that "because individuals working in law enforcement are often in the best position to know about the occurrence of official misconduct, it is essential that such well-placed individuals be able to speak out freely about official misconduct"; internal quotations and citations omitted); *O'Brien v. Town of Caledonia,* 748 F.2d 403, 406-07 (7th Cir. 1984) (noting that "while not all means of criticism by a policeman are protected by the First

Amendment . . . a policeman's rights must be vigilantly protected because he or she is extraordinarily able to inform the public of deficiencies in this important governmental department"; internal quotations omitted); *Branton v. City of Dallas*, 272 F.3d 730, 745 (5th Cir. 2001) ("The disclosure of misbehavior by public officials is a matter of public interest and therefore deserves constitutional protection, especially when it concerns the operation of a police department"; internal quotations and citation omitted); *LeFande v. District of Columbia,* 613 F.3d 1155, 1161 (D.C. Cir. 2010) (holding that protected matters of public concern include "important issues of Police Department policy" such as "allegations of procedural irregularities" in the Police Department because such disclosures are "relevant to the public's evaluation of the [Police Department] and its Chief" and may "seriously affect the public welfare"; internal quotations omitted).

Simply put, the core premise of the *Pickering* doctrine is that public employees' speech about the work of their employer agencies is particularly valuable to public debate about the functioning of government. And employee speech about misconduct inside police departments ranks particularly high.

B. "Citizen" and "Employee" Speech Under *Garcetti v. Ceballos*

Though their speech is valued, not all speech by public employees enjoy First Amendment protection. From the advent of the *Pickering* doctrine, whether First

Amendment protections attach has turned on whether the speech at issue was on a matter of "public concern." *Compare, e.g., Connick v. Myers*, 461 U.S. 138, 147-48 (1983) (noting that most topics of plaintiff employee's survey did not address matters of public concern and thus were unprotected) *with id*. at 149 (noting that one topic in survey did address matter of public concern and thus implicated First Amendment).

The Supreme Court's 2006 decision in *Garcetti v. Ceballos*, however, introduced a second significant consideration, which is important to this case since the lower court relied on it in granting summary judgment to the City. Specifically, the Court in *Garcetti* held that not only must the employee speak on a matter of public concern but he or she also must have spoken as a citizen as opposed to having simply spoken in the course or his or her job duties.

The plaintiff in *Garcetti*, Richard Ceballos, was an assistant district attorney who functioned as a calendar deputy. In that capacity one of his duties was to receive and investigate complaints about search warrants issued in cases pending in the district attorney's office. In response to one such complaint Ceballos had investigated, he concluded the warrant had been improperly obtained and wrote a "disposition memorandum" to his supervisors outlining his concerns and recommending that the case be dismissed. As a result of this, Ceballos alleged, he

was retaliated against. He then sued, alleging violations of his First Amendment rights. *See* 547 U.S. at 413-15.

In an opinion by Justice Kennedy, the Supreme Court rejected his claim. Without disturbing the First Amendment protections of a public employee to speak "as a citizen on a matter of public concern," 547 U.S. at 418, the Court held that a public employee does not speak as a "citizen" when simply discharging his or her normal job responsibilities, *see id*. at 420-25 (part III). Rather, in those circumstances public employees are doing nothing more than their jobs.

Given this approach, the Court held that Ceballos' speech did not implicate the First Amendment because the disposition memorandum was part of his normal job duties. As Justice Kennedy explained,

> The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy. That consideration -- the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case -- distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline. We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.
>
> . . . .
>
> Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. When he went to work and

> performed the tasks he was paid to perform, Ceballos acted as a government employee.

547 U.S. at 421-22.

In reaching this conclusion, the Court made three observations germane to this appeal. First, it rejected the notion that Ceballos' claim was foreclosed by the fact that he had spoken to his supervisors, citing an earlier case in which the Court had reversed the Fifth Circuit and held that speech to supervisors was entitled to First Amendment protection. *See id.* at 420 (citing *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979)). In other words, notwithstanding *Garcetti*, a public employee may be speaking as a "citizen" even when speaking to a supervisor. The relevant question is whether the speech in question is simply part of the employee's job duties.

Second, with respect to the issue of how to conceive of an employee's job duties, the Court emphasized that employers could not, under the rule announced in *Garcetti*, deprive employees of their First Amendment rights simply by resorting to "excessively broad job descriptions." *Garcetti*, 547 U.S. at 424-25. Ceballos fell within the *Garcetti* rule because "the parties in this case do not dispute that Ceballos wrote his disposition memo pursuant to his employment duties." *Id.*

Finally, with respect to the issue of how to separate citizen speech from employee speech, the Court explained that whether the speech qualified as citizen

speech turned on whether there was a citizen "analogue" to the speech engaged in by the public employee. Where such an analogue exists, employee's speech is citizen speech protected by First Amendment; when such an analogue does not exist, the speech may be unprotected employee speech:

> Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. The same goes for writing a letter to a local newspaper or discussing politics with a co-worker. When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees.

547 U.S. at 423-24 (internal citation omitted).

C. This Court's Treatment of *Garcetti v. Ceballos*

This Court has issued a limited number of precedential decisions addressing the specific issues of what constitutes employees versus citizen speech in the aftermath of *Garcetti*.[4] Three of those decisions are most germane to this appeal.

In *Ross v. Breslin*, which this Court issued last year shortly before argument in the earlier appeal in this case, the plaintiff was a school-district payroll clerk who

[4]Throughout this litigation, the City has relied heavily on summary orders issued by this Court, and the District Court did likewise in its summary judgment ruling. *See* Slip Op. at 21-23 & n.12 (SA21-23). By rule of this Court, such orders have no precedential effect, *see* Second Circuit Local Rule 32.1.1.(a), and the plaintiff therefore does not address them.

had reported payroll discrepancies to the district superintendent and then, when dissatisfied with his response, to others, after which she was fired. 693 F.3d 300, 302-04 (2d Cir. 2012). In considering her First Amendment claim, the Court described *Garcetti* as follows:

> In *Garcetti,* the plaintiff, Richard Ceballos, who was a deputy district attorney, was asked by a defense attorney to review an affidavit that had been used to obtain a search warrant. Ceballos discovered significant misrepresentations in the affidavit. He informed his supervisors of his discovery and wrote a disposition memo recommending that the charges be dismissed. He claimed that he was subsequently subjected to retaliatory employment action. The Supreme Court determined that he had not been speaking as a citizen when he told his supervisors about the problems with the affidavit: "The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy.... Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case. In short, "Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do."

693 F.3d at 305 (quoting *Garcetti*). Given this controlling precedent, this Court rejected Ross' First Amendment challenge because her own testimony established that as part of her job she regularly reported payroll discrepancies to supervisors and had often made such reports to the district superintendent – Robert Lichtenfield -- to whom she had reported the discrepancies at issue in the case. As the Court explained, "Ross testified that her job duties included processing the payroll and making sure pay rates were correct. She stated that if there was a mistake with a pay

requisition, her duty was to 'bring it to the appropriate person's attention.' She specifically noted that she brought many such requisitions to Lichtenfeld's attention." 693 F.3d at 306 (citations and emendation omitted).

In *Weintraub v. Board of Education of the City School District of the City of New York*, this Court rejected the First Amendment claim of a teacher who alleged retaliation for having filed a formal grievance arising out of his school's failure to discipline a student who had thrown books at him in his classroom. *See* 593 F.3d 196, 198-99 (2d Cir.), *cert. denied*, 131 S.Ct. 444 (2010). This Court concluded that the filing of the grievance was pursuant to the teacher's job duties and therefore unprotected speech because "his speech challenging the school administration's decision to not discipline a student in his class was a means to fulfill and undertaken in the course of performing his primary employment responsibility of teaching." *Id*. at 203 (internal quotations and citations omitted). In so concluding, the Court also relied on the fact that there was no civilian analogue to the grievance process: "Our conclusion that Weintraub spoke pursuant to his job duties is supported by the fact that his speech ultimately took the form of an employee grievance, for which there is no relevant citizen analogue." *Id*. As the Court explained, "Rather than voicing his grievance through channels available to citizens generally, Weintraub made an internal communication pursuant to an existing dispute resolution policy

established by his employer . . . ." *Id*. at 204. *See also Ross*, 693 F.3d at 305-06 (describing *Weintraub*).

Finally, there is *Jackler v. Byrne*, in which this Court upheld the First Amendment retaliation claim of a police officer and in doing so highlighted the importance of the distinction it had drawn in *Weintraub* between channels available to the public and those available only to employees. *See* 658 F.3d 225 (2d Cir. 2011), *cert. denied*, 132 S.Ct. 1634 (2012). The plaintiff was Jason Jackler, a probationary police officer who had witnessed another officer strike a handcuffed arrestee in the face. After the arrestee filed a complaint about the incident, a supervisor of Jackler's directed him to file a report about what he had observed, which he did and in which he corroborated the arrestee's account. In response to his having filed the report, higher level supervisors repeatedly attempted to pressure Jackler into withdrawing the report and filing a false report that would have exonerated the officer who had struck the arrestee. Jackler refused to do so, was fired for that, and then filed suit alleging a violation of his First Amendment rights. *See* 658 F.3d at 230-32. Relying on *Weintraub*, the District Court dismissed the case, but this Court reversed.

After reviewing the case law governing free speech claims by public employees, *see id.* at 234-37, the Court addressed the issue of "citizen" versus

"employee" speech, including the role that a "civilian analogue" plays in distinguishing one from the other and explained the significance of *Weintraub*:

> If the employee did not speak as a citizen, the speech is not protected by the First Amendment, and no *Pickering* balancing analysis is required. Whether the employee spoke solely as an employee and not as a citizen is also largely a question of law for the court. The *Garcetti* Court stated that the nature of the employee's duties is to be determined as a "practical" matter; it observed that "[f]ormal job descriptions often bear little resemblance to the duties an employee actually is expected to perform"; and it "reject[ed] . . . the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions." As a rule of thumb, activities required of the employee as part of his employment duties are not performed "as a citizen" if they are not "the kind of activity engaged in by citizens who do not work for the government."
>
> In *Weintraub*, for example, this Court concluded that the plaintiff teacher's complaints of classroom disorder, which related to his core duties as a teacher, were not protected by the First Amendment in part because "his speech ultimately took the form of *an employee grievance*" filed with his union, for which there was "no relevant analogue to citizen speech." We indicated that the complaints by Weintraub would have had a relevant civilian analogue if, instead of lodging them with his union, he had "voic[ed] his grievance through channels available to citizens generally."

Id. at 237-38 (internal citations omitted; emphasis in original).

After finding that the officer's refusal to file a false report was speech protected by the First Amendment, *see id*. at 238-40, the Court turned to the issue of whether that speech, under *Garcetti* and *Weintraub*, was citizen speech or employee speech. It held that it was protected citizen speech because Jackler's refusal to file the false report had a civilian analogue since civilians also could reject government

efforts seeking to force them to file false reports with the police. *See id*. at 241.

II. THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT CONFLICTS WITH CONTROLLING LAW FROM THE SUPREME COURT AND THIS COURT.

The District Court's grant of summary judgment conflicts with the Supreme Court's public-employee free-speech jurisprudence -- including *Garcetti* -- and with this Court's post-*Garcetti* rulings, including this Court's earlier ruling in this case. Because the Court has issued a previous ruling in this case, the plaintiff starts with that and then turns to the broader *Garcetti* issues presented by this appeal.

A. Consistent with *Garcetti*, this Court Already Has Ruled in this Case that the Job Duty Inquiry Is Not a Brightline One and Must Focus on Officer Matthews' Actual Job Duties.

In November 2012 this Court summarily reversed an April 2012 dismissal of Officer Matthews' complaint. *See Matthews v. City of New York*, 488 Fed.Appx. 532 (2d Cir. 2012). That ruling provides an important starting point for the *Garcetti* issues presented in this appeal.

The District Court originally dismissed the complaint with the argument that it was the duty of police officers to enforce the law and therefore, under *Garcetti*, that Officer's Matthews' reporting about a quota system in his precinct was merely job speech unprotected by the First Amendment. *See Matthews v. City of New York*, 2012 WL 8084831 *3 (S.D.N.Y., Apr. 12, 2012). In seeking affirmance of

that ruling, the City argued that Officer Matthews' speech, as alleged in the complaint, was simply part of his job because the job of police officers is "to lawfully enforce the law" and also because of the NYPD's misconduct-reporting policy (Patrol Guide section 207-21):

> Reporting such violations are squarely within a police officer's job duties. All members of the New York City Police Department have an obligation to report misconduct. This obligation is reflected in the NYPD Patrol Guide § 207-21 -- as pointed out to the District Court below and unaddressed by plaintiff on appeal -- which states that "[a]ll members of the service have an absolute duty to report any corruption or other misconduct, or allegation of corruption or other misconduct, of which they become aware."

Brief of Defendants-Appellees at 16 (July 6, 2012) (JA392). The City also argued for affirmance because "the persons to whom the speech was directed were plaintiff's commanding officers" and because "plaintiff's complaints resulted from special knowledge gained through his employment [as an] NYPD officer." *Id*. at 19 (JA395).

In reversing, this Court's summary order described Officers Matthews' speech as alleged in the complaint, noted the allegations that he made his reports about the quota system to his precinct commanding officers, stated that inquiries into whether speech is job speech is not subject to a "brightline rule," and remanded the matter for discovery into Officer Matthews' actual job duties:

> The record in this case is not yet sufficiently developed, however, to determine as a matter of law whether Officer Matthews spoke pursuant to his official duties when he voiced the complaints made here in the manner in which he voiced them. *See Garcetti v. Ceballos,* 547 U.S. at 424-26, 126 S.Ct. 1951 (distinguishing between giving employees an internal forum for their speech and making certain speech a duty of employment). As we have recently observed, "whether a public employee is speaking pursuant to h[is] official duties is not susceptible to a brightline rule." *Ross v. Breslin,* 693 F.3d 300, 306 (2d Cir.2012). The matter may require some inquiry into 'the nature of the plaintiff's job responsibilities, the nature of the speech, and the relationship between the two." *Id*. Here, some discovery as to these matters is necessary before it can be decided whether Matthews can or cannot pursue a First Amendment retaliation claim in this case.
>
> Accordingly, the judgment of the district court is VACATED and the case REMANDED for further proceedings consistent with this order.

Matthews v. City of New York, 488 Fed.Appx. 532 (2d Cir. 2012) (emphasis added).

A few useful lessons emerge from this earlier decision. First, though the Court did not discuss the District Court's reliance on the undisputed fact that it is the duty of police officers to enforce the law, its summary reversal plainly rejected that view of Officer Matthews' job duties for purposes of the *Garcetti* analysis in this case.

More broadly, that rejection, combined with the Court's statement that the job duty inquiry here is not subject to a "brightline rule" signals a recognition that the inquiry needs to focus not on sweeping propositions but instead on the specific

duties of Officer Matthews. This is wholly consistent with *Garcetti*'s admonition against reliance on "excessively broad job descriptions."

Finally, that this Court discussed the facts of the complaint concerning the specifics of Officer Matthews' speech, including the fact he made his reports to his precinct commanding officers, highlights the singular significance of Patrol Guide section 207-21 in this appeal. For purposes of summary judgment, the City stipulated to all the complaint allegations relating to Officer Matthews' speech, which means all of those facts are the same as the facts that were before this Court when it summarily reversed.

Given this, the only difference between the record before the Court last year and now is the formal inclusion of Patrol Guide section 207-21 and the facts the plaintiff introduced about his NYPD job description, his daily activities (including his interactions with his precinct commanding officers), and the duties of commanding officers in receiving complaints from the public about police misconduct. With this record in mind, the plaintiff turns to the *Garcetti* issues presented to the Court on this second appeal.

B. Officer Matthews' Speech Was on a Matter of Public Concern.

A threshold inquiry in all public-employee free speech cases is whether the speech in question is on a matter of "public concern." *See, e.g. Garcetti*, 547 U.S.

at 418 (explaining that first inquiry under *Pickering* doctrine "requires determining whether the employee spoke as a citizen on a matter of public concern"). This Court addressed that issue in its earlier ruling in this case, holding that the facts alleged in the complaint plainly established that Officer Matthews' speech met this threshold:

> Matthews alleges that he told his commanding officer on multiple occasions in 2009 that a quota system existed. Matthews further alleges that, in 2011, he told a new commanding officer not only that a quota system existed, but also that it "was causing unjustified stops, arrests, and summonses because police officers felt forced to abandon their discretion in order to meet their numbers." Compl. ¶ 28. He also told the commanding officer that "the quota system was having an adverse effect on the precinct's relationship with the community." *Id.*
>
> Accepting Matthews's allegations as true, it is undisputed that his speech addressed a matter of public concern. *See Jackler v. Byrne,* 658 F.3d 225, 236–37 (2d Cir.2011) (holding that speech pertaining to police misconduct is a matter of public concern). That conclusion is only reinforced by the fact that, by 2011, the quota system he alleged existed violated New York law.

Matthews, 488 Fed.Appx. at 533.

As noted, on summary judgment the City stipulated to the facts in the complaint about Officer Matthews' speech. Given that these are the very same facts that were before this Court when it ruled last year, it is the law of the case that Officer Matthews' speech was on a matter of public concern.

C. The Undisputed Record Establishes that It Was No Part of Officer Matthews' Job Duties to Report the Quota System in His Precinct.

Guided by this Court's remand, the plaintiff developed a record about his specific job duties and introduced that in opposition to the City's summary judgment motion. *See* Plaintiff's Rule 56.1 Statement ¶¶ 1-15 (JA79-81). The City did not dispute any of these findings, and they make clear it was no part of Officer Matthews' job, for purposes of *Garcetti* to make the reports about the quota system that he did.

As an initial matter, the NYPD has a written job description for all members with the rank of "police officer," -- Patrol Guide section 202-21 – and it is undisputed that nothing in that job description imposes on Officer Matthews any duty to report misconduct by supervising officers. *See* Plaintiff's Rule 56.1 Statement ¶¶ 18-19 (JA77).

Beyond that, it is undisputed that a duty to make such reports was no part of Officer Matthews' daily activities: (1) going on radio runs, which are responses to 911 calls in the precinct, (2) patrolling the streets and vertical patrolling of local housing, (3) filling out complaint reports relating to criminal activity, lost property, and missing persons, including interviewing witnesses, (4) responding to traffic accidents, (5) transporting prisoners to and from the precinct house, courts, and

hospitals, and (6) doing community visits with local businesses and organizations. *See Matthews*, Slip Op. at 5-6 (SA5-6).

Aside from his job description and daily activities, NYPD officials uniformly testified that a police officer has no duty to monitor the conduct of his superior officers; rather, it is the express duty of the precinct's Integrity Control Officer to monitor and report any such misconduct to the Internal Affairs Bureau. *See Matthews*, Slip Op. at 7-8 (SA7-8). Officer Matthews is not and never has been an Integrity Control Officer. *See id*.

Finally, it is undisputed that Officer Matthews had minimal contact with his precinct commanding officers, provided them with no direct or routine reports (oral or written), and had no regular meetings with them beyond the normal greetings exchanged by colleagues in any workplace. *See* Plaintiff's Rule 56.1 Statement ¶¶ 7-15 (JA80-81). And this minimal level of interaction was typical of the precinct commander's involvement with police officers in the 42nd precinct generally. *See id*. ¶¶ 16-17 (JA80-81).

This is the type of record that *Garcetti* established was relevant for the purpose of determining whether speech is unprotected employee speech. There, the Supreme Court examined the specific job duties of Richard Ceballos, the calendar deputy who was the plaintiff, and expressly relied on the fact that it was a routine

part of his daily job to prepare the disposition memorandum that was the speech at issue. As the Court explained:

> Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee.

547 U.S. at 421-22.

In line with *Garcetti*, this Court has taken a similar on-the-ground approach in terms of its focus when concluding that speech was part of a public employee's job. *See Ross*, 693 F.3d at 306 (focusing on connection between payroll clerk's reports about payroll improprieties and her regular job of reporting such improprieties to supervisors); *Weintraub*, 593 F.3d at 203 (focusing on connection between teacher's speech about classroom incident and his classroom duties).

And of course, this was the approach taken by this Court in its earlier ruling in this case, where it rejected any "brightline" approach and remanded for an inquiry into "the nature of the plaintiff's job responsibilities, the nature of the speech, and the relationship between the two." *Matthews*, 488 Fed.Appx. at 533.

Notwithstanding this controlling caselaw, the District Court disregarded the undisputed facts about Officer Matthews' job duties, noting them in one paragraph

of its recitation of the facts, *see* Slip Op. at 6 (SA6), but never again mentioning them. This approach does not accord with *Garcetti,* as these are the key facts, and those facts establish it was no part of Officer Matthews' job duties, for purposes of *Garcetti*, for him to make the reports he did.

Had Officer Matthews complained about quotas in completing a report he normally completed as part of his job -- an arrest report, for instance – he might well have no First Amendment claim, as that report might been the equivalent of the dispositional memorandum at issue in *Garcetti*. Likewise, had he been an Integrity Control Officer whose job was to report misconduct about supervising officers,[5] he might not have a First Amendment claim, as such reporting might have been the equivalent of the payroll irregularity complaints at issue in *Ross*. But neither is the case here. Rather, the undisputed record before this Court establishes it was no part of Officer Matthews' job duties -- as the Supreme Court and this Court have construed that notion for First Amendment purposes -- to report to his precinct commanding officers about the quota system devised and enforced by supervisors in the 42nd Precinct.

[5] *See* Plaintiff's Rule 56.1 Statement ¶¶ 20-21 (JA81).

D. The NYPD's Misconduct-Reporting Policy Does Not Remove Officer Matthews' Speech About NYPD Misconduct from the First Amendment.

Rather than examining the facts about Officer Matthews' actual job duties, the District Court focused on the NYPD's misconduct-reporting policy to conclude that Officer Matthews' speech was unprotected job duty speech. *See* Slip Op. at 25-29 (SA25-29). That policy, which is not particular to Officer Matthews or even to the rank of police officer, provides that "[a]ll members of the service have an absolute duty to report any corruption or other misconduct, of which they become aware." Patrol Guide section 207-21 (JA35-37). Setting aside the factual dispute about whether the policy even applies to Officer Matthews' speech,[6] this policy cannot

[6]Officer Matthews testified that his reports about quotas were not the type of "misconduct" encompassed within section 207-21. The only specific types of misconduct the section identifies are "corruption," "excessive force," and "perjury"; Officer Matthews testified that he understood that section 207-21 required reporting only of misconduct that rose to a criminal violation and that he was trained to that effect in the police academy; and he further testified that nothing about his quota reports involved any alleged criminal activity. Pl.'s 56.1 Statement at ¶¶ 25-28, 60 (JA82, 87-88). A witness produced by the City disputed Officer Matthews's testimony about the scope of section 207-21, claiming that it covers virtually all misconduct, including minutiae of the NYPD's Patrol Guide and trivial violations of civil statutes (such as the vehicle and traffic law). *Id.* at ¶¶ 66-67 (JA89). But he also testified that the NYPD has no documents beyond section 207-21 that define or identify the misconduct the section covers, *id.* at ¶¶ 63-64 (JA88), which of course includes documents that would explain or suggest that the section goes beyond the criminal acts it specifically mentions. He also testified that the only way a police officer can know which violations of the Patrol Guide must be reported under PG 207-21 is to use common sense. *Id.* at ¶ 70. Moreover, discovery to date indicates

eliminate his First Amendment right to make the reports he did about the quota system in his precinct.

Neither the Supreme Court nor this Court has ever held or suggested that an employer can establish that a public employee's speech is unprotected job-duty speech within the meaning of *Garcetti* simply by pointing to an agency-wide reporting policy.[7] To the contrary, as discussed in the prior section, *Garcetti* and post-*Garcetti* rulings from this Court establish that the relevant inquiry is focused on the actual, on-the-ground duties of the employee. Indeed, reliance on a policy like section 207-21 is a protypical example of the very type of "brightline" approach this

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that the NYPD has only rarely disciplined officers for failing to report misconduct as required by section 207-21, *id.* at ¶ 76 (JA90), further suggesting that the section's scope is narrower rather than broader.

Given the ambiguity of section 207-21, the lack of any other documents explaining the scope of the section, the evidence of infrequent discipline for failing to make reports, and Officer's Matthews's testimony about its scope, section 207-21 cannot be construed to cover Officer Matthews's speech on the pending motion for summary judgment. Consequently, beyond being legally foreclosed, the City's effort to invoke section 207-21 fails as a factual matter at this juncture of the proceedings.

The plaintiff, however, does suggest that the Court reverse and remand solely on this basis, as such a ruling would leave unresolved the far more important legal issue presented by the District Court's reliance on the NYPD's misconduct-reporting policy.

[7]The District Court did not purport to identify any such case though it did point to a number of unreported summary orders from this Court that it believed endorsed such an approach. *See Matthews*, Slip Op. at 21-23 & n.12 (SA21-23). By local rule of this Court, of course, such orders have no precedential effect. *See* Second Circuit Local Rule 32.1.1(a).

Court expressly rejected in the earlier decision in this case.

In a similar vein, the District Court's reliance on a department-wide misconduct-reporting policy directly conflicts with the Supreme Court's admonition in *Garcetti* that government agencies cannot deprive employees of their First Amendment rights simply by resorting to "excessively broad job descriptions." 547 U.S. at 424. The District Court's approach goes even beyond this, as it did not purport to rely on any "job description" at all but instead on a general employer policy.

Not only does the District Court's approach conflict with controlling law, it threatens to destroy the First Amendment rights of public employees. At the outset, that approach would mark the end of First Amendment protections for any of the tens of thousands of members of the NYPD who might wish to speak out about misconduct within the department.[8] By its terms, the policy requires every department member – of every rank, command, and position -- to report "any corruption or other misconduct, or allegation of corruption or other misconduct." Patrol Guide section 207-21 (JA36). And the department goes even further, asserting that the policy "covers any actual or potential misconduct." Defendants'

[8]According to the NYPD's website as of the filing of this brief, "The NYPD's current uniformed strength is approximately 34,500." http://www.nyc.gov/html/nypd/html/faq/faq_police.shtml#1 (accessed Oct. 4, 2013).

Rule 56.1 Statement ¶ 7 (JA13) (emphasis supplied). If section 207-21 were construed as making it the job, for purposes of *Garcetti*, to report all misconduct to the NYPD itself, then no department employee can speak out about misconduct within the NYPD and be protected by the First Amendment. It was for this very reason that Judge Raymond Dearie of the Eastern District recently rejected the City's effort to invoke section 207-21 in a whistleblowing case brought by a different police officer. *See Griffin v. City of New York*, 880 F.Supp.2d 384, 397 (E.D.N.Y. 2012) ("If the Court were to accept defendants' expansive theory of the 'official duties' of police officers based upon the mere existence of Section 207–21, irrespective of its compulsory language, it would effectively curtail all NYPD officers' right to speak out about corruption, thereby discouraging whistleblower activity that is of great benefit to civil society." (citation, internal quotations marks, and emendation omitted).

This concern does not stop at the NYPD, as the District Court's approach opens the door to agencies or even municipalities to end the *Pickering* protections of their employees simply by adopting broad misconduct-reporting policies. And this is no abstract, slippery-slope argument. New York City, in a Southern District case brought by an employee of the city's Department of Health and Mental Hygiene, argued two years ago that an Executive Order covering all City employees required

them to report corruption and therefore rendered the plaintiff's reports about corruption in his agency job speech unprotected by the First Amendment:

> Defendants also argue, for the first time in the reply brief, that the Mayor's Executive Order No. 16, issued in 1978, affirmatively obligates all city employees to report corruption, criminal activity, or conflicts of interest. They assert that this order establishes Tucker's official duty as a city employee to report the activities of his supervisor which he believed to be illegal, and thus deprives him of First Amendment protection for whistleblowing.

Tucker v. City of New York, 2011 WL 2893077 *6 n.4 (S.D.N.Y., July 15, 2011). As did Judge Dearie, Judge Buchwald recognized the broad dangers posed by the City's position:

> Accepting the defendants' broad theory of the scope of a city employee's duties would effectively curtail all city employees' rights to speak out about corruption, thereby discouraging whistleblower activity that is of great benefit to civil society. Because the Supreme Court has specifically rejected the notion "that employers can restrict employees' rights by creating excessively broad job descriptions," *Garcetti,* 547 U.S. at 424, we find defendants' reliance on Executive Order No. 16 to be misplaced.

Id.[9]

[9]Here, the District Court acknowledged the plaintiff's arguments about the implications of its analysis but rejected them: "Section 207-21 does not sweep broadly. Instead it imposes on police officers the unsurprising duty of reporting criminal activity or other misconduct within the NYPD." *Matthews*, Slip Op. at 28 (SA28). With all due respect to the District Court, this is a *non-sequitur*. A mandate that deprives police officers of First Amendment protections when talking about misconduct within a police department (much less the NYPD, the largest police department in the country), is the essence of a mandate that sweeps broadly.

Finally, the District Court's approach even means that NYPD employees speaking to the press about police misconduct would enjoy no First Amendment protection. In response to the plaintiff arguing that section 207-21 did not apply to his speech because the policy by its terms requires reporting only to the NYPD Internal Affairs Bureau (to which it is undisputed Officer Matthews did not report), the District Court said it made no difference that Officer Matthews had gone "outside the employer's designated channel." Slip Op. at 28 n.16 (SA28) (citing *Anemone v. Metropolitan Transportation Authority*, 629 F.3d 97 (2d Cir. 2011)). Consistent with this view, the City in oral argument on the summary judgment motion would not agree that Officer Matthews' speech would have been protected had he disclosed misconduct not otherwise known outside the NYPD to The New York Times. *See* Oral Argument Transcript at 16-19 (July 19, 2013) (JA427-30).

To be clear, the plaintiff does not suggest that the NYPD cannot have and enforce a policy requiring its employees to report misconduct to the department. Rather, he only contends that such a policy cannot define the First Amendment rights of public employees. This was the fundamental error the District Court made, as without analysis it equated the department-wide reporting obligation imposed by section 207-21 with the job duties of Officer Matthews that are relevant

for purposes of *Garcetti*. *See Matthews*, Slip Op. at 25 (SA25).

Simply put, nothing in *Garcetti* allows a government employer to eliminate the free-speech protections of its employees simply by adopting a broad misconduct-reporting policy like section 207-21. To allow such an approach would negate the entire *Pickering* doctrine and destroy the government accountability value at the heart of that doctrine.

E. That Officer Matthews Reported the Quota System to His Precinct Commanding Officers and Learned of the Quotas By Virtue of His NYPD Employment Does Not Render His Speech Unprotected Job Speech.

Though it focused on Patrol Guide section 207-21, the District Court also relied on its view of how Officer Matthews' speech related to his employment and on the fact that he made his reports within the workplace. *See Matthews*, Slip Op. at 30-32 (SA30-32). Neither factor justifies the finding that Officer Matthews' speech is unprotected by the First Amendment.

Starting with the issue of "internal speech," Slip Op. at 31 (SA31), the District Court stated that Officer Matthews' speech was "to his direct supervisor," and suggested that *Garcetti* stands for the proposition that "in-house" speech is unprotected. *Id.* at 32 (SA32). Setting aside the fact that the precinct commanders

were not the "direct supervisor" of Officer Matthews,[10] this Court expressly noted, when summarily reversing the earlier dismissal of this case, that Officer Matthews had made his reports to the precinct commanding officers. *See* 488 Fed.Appx. at 532. Given that and the current record, the fact that Officer Matthews made his reports to the precinct commanding officers cannot be a basis for finding his speech unprotected.

Consistent with this Court's ruling, it is well-established that *Garcetti* did not change the law that speech on a matter of public concern does not lose its First Amendment protections merely because it was made to a supervisor. *See Garcetti*, 547 U.S. at 540 ("That [plaintiff] expressed his views inside his office, rather than publicly, is not dispositive.") (citing *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979)); *Ross v. Breslin*, 693 F.3d at 307 ("Speech to a supervisor even in the workplace can be protected as that of a private citizen if it s not made pursuant to an employee's official duties as an employee."); *Jackler*, 658 F.3d at 240-42 (holding that police officer speech to supervisors was protected by

[10]The District Court did not cite to the record in making this statement, and nothing in the record supports it. In fact, precinct commanding officers are far removed from being the "direct supervisor" of police officers, and, the undisputed record is that Officer Matthews essentially had no dealings with the precinct commanding officers to whom he made his reports. *See* Plaintiff's Rule 56.1 Statement ¶¶ 7-15 (JA80-81).

First Amendment).[11]

As for the issue of the "subject matter of employment," Slip Op. at 29 (SA29), the District Court reasoned that Officers Matthews' speech about the quota system was unprotected because it "placed significant emphasis on his ability to do his own job" and "owed its existence" to his employment as an NYPD officer and because the *id*. at 30 (SA30). Neither contention supports the District Court's ultimate holding.

With respect to the lower court's effort to transform Officer Matthews' speech into a personal complaint about his own job by characterizing him as having "placed significant emphasis on his ability to do his own job," this is foreclosed by this Court's earlier ruling and the posture of this appeal. As this Court noted in the earlier ruling,

> Matthews further alleges that, in 2011, he told a new commanding officer not only that a quota system existed, but also that it "was causing unjustified stops, arrests, and summonses because police officers felt forced to abandon their discretion in order to meet their numbers." Compl. ¶ 28. He also told the commanding officer that "the quota system was having an adverse effect on the precinct's

[11]This is not to suggest that the fact that an employee spoke to a supervisor is never relevant. In those situations in which it is part of the employee's job to make certain reports to a supervisor, that the speech at issue in fact was made to that supervisor would plainly factor into whether the speech was employee speech for *Garcetti* purposes. Here, however, it is undisputed that Officer Matthews had no duties that involved making reports to the commanding officers to whom he reported the quotas. *See* Plaintiff's Rule 56.1 Statement ¶¶ 7-15 (JA80-81).

relationship with the community." *Id.*

488 Fed.Appx. at 532. Given these allegations, this Court held that "it is undisputed that his speech addressed a matter of public concern." And those same allegations control this appeal, as the City stipulated to complaint allegations about Officer Matthews' speech for purposes of this appeal. *See* Slip Op. at 2. This forecloses the District Court's effort, relying on the same facts that were before this Court, to recast Officer Matthews' speech into some kind of small dispute about his personal job.

This is not a situation where a public employee spoke out about some incident specific to his job, such as the calendar deputy in *Garcetti*, who spoke out about an unlawful search he uncovered in investigating a complaint; or the teacher in *Weintraub*, who complained about a student who had thrown books at him in his classroom; or the payroll clerk in *Ross*, who complained about specific discrepancies she had uncovered as part of her regular payroll monitoring. Rather, the undisputed record, which of course must be construed in favor of Officer Matthews, establishes that he spoke out about a precinct-wide quota system devised and instituted by precinct supervisors and about the system's impact on the community at large, and did so in the context of a broad public controversy about quotas in the NYPD. That is far removed from some personal dispute and is the

essence of the speech the *Pickering* doctrine is designed to protect.

As for the District Court's contention that Officer Matthews' speech "owed its existence" to his NYPD employment, that of course is factually true but does not provide any basis for finding his speech unprotected. To the contrary, the premise of the *Pickering* doctrine is that public employees, by virtue of their employment, have specialized knowledge about government operations that make their speech valuable under the First Amendment. *See supra* at 21-24. This concern is particularly important when it comes to police departments, as this Court noted in *Jackler*: "Exposure of official misconduct, especially within the police department, is generally of great consequence to the public." 658 F.3d at 236.

In *Garcetti* the Supreme Court explained that the fact the speech concerns "the subject matter of employment . . . is nondispositive," 547 U.S. at 421, and the District Court was wrong to suggest that this consideration rendered Officer Matthews' speech unprotected. *See also Jackler*, 658 F.3d at 230-32, 240-42 (holding that officer speech related to excessive force during arrest protected by First Amendment where officer knew about force only by virtue of having been at the scene while on duty).

F. Officer Matthews' Speech Had a Civilian Analogue Because Precinct Commanders Regularly Receive Reports from the Public About Police Misconduct.

Not only is there is no basis for concluding that Officer Matthews' speech about quotas was part of his job duties, but the undisputed record establishes that his speech had a clear civilian analogue within the meaning of *Garcetti*. This is an additional reason to reverse the District Court.

As this Court explained in *Jackler*, whether an employee's speech has a civilian analogue turns on whether the employee voices his or her speech through "channels available to citizens generally." 658 F.3d at 238 (citation and internal quotations omitted). It was on this basis that the Court distinguished the speech at issue in *Weintraub* from the speech at issue in *Jackler*. In *Weintraub* the employee's speech was in the form of the filing of a formal grievance with his union, which was a channel available only to employees and not to members of the public. *See id*. at 237-38 (explaining that speech had no civilian analogue because it "took the form of an *employee grievance* filed with his union"; emphasis in original, citation omitted). By contrast, in *Jackler* the employee's speech was in the form of refusing to file a false report with his police supervisors, a channel of speech that members of the public also enjoyed. *See id*. at 241.[12]

[12]The existence of a civilian analogue was bolstered by the fact that Jackler's

The record before the Court plainly establishes that, to use the language of *Jackler*, Officer Matthews "voiced his grievance through channels available to citizens generally." As the District Court explained, "One duty of a commanding officer is to meet with civilians to receive complaints or other feedback about police misconduct." *Matthews*, Slip Op. at 8 (SA8) (citing, among other thing the written NYPD job description for commanding officers); Plaintiff's Rule 56.1 Statement ¶¶ 36-40 (undisputed facts about relevant duties of commanding officers) (JA84-85). And the undisputed facts before the District Court establish that precinct commanding officers discharged this duty by meeting with members of the community in various ways to receive complaints about misconduct within the precinct, including in group meetings in the precinct house and in individual meetings in the commander's personal office. *See* Plaintiff's Rule 56.1 Statement ¶¶ 42-59 (JA85-87); *Matthews*, Slip Op. at 8-10 (discussing civilian interactions) (SA8-10).

Officer Matthews did exactly what any community member could have done: complain to the commanding officers of the 42nd Precinct about police misconduct.

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speech was directed to a police department, as this Court had held in *Weintraub* that a civilian analogue exists when the speech is made to an independent agency responsible for receiving civilian complaints. *See id.* As the Court noted in *Jackler*, "A police department plainly is such an agency." *Id.*

And of course, as did Officer Jackler, Officer Matthews made his complaint to a police department, which this Court held in *Jackler* was an indicium of a civilian analogue. *See* 658 F.3d at 241.

The District Court's finding that no civilian analogue existed because "relative to the average citizen, Officer Matthews had superior access to his commanding officers," *Matthews*, Slip Op. at 34 (SA34), is factually wrong and legally irrelevant. Nothing in the record establishes that Officer Matthews had superior access to the commanding officers to make the complaints he did; to the contrary, the undisputed record shows that members of the public had ready access to precinct commanding officers to make complaints about police misconduct and frequently did so, *see* Plaintiff's Rule 56.1 Statement ¶¶ 42-59 (JA85-87), while Officer Matthews had virtually no official dealings with either of the two commanding officers to whom he reported the quota system, consistent with the fact that precinct commanding officers had few official dealings with police officers, *see id*. ¶¶ 7-17 (JA80-81).[13] And legally, the distinction suggested by the District Court

[13]The District Court seemingly attempted to blunt these undisputed facts by suggesting that the relevant channel of communication was limited to one-on-one in-person meetings. *See Matthews*, Slip Op. at 34 (SA34) ("By contrast, the only specific instance of a civilian's meeting in person with a commanding officer of the 42nd Precinct in a manner akin to Officer Matthews' . . . ."). This approach distorts the inquiry under *Garcetti*, *Weintraub*, and *Jackler*. It is undisputed that commanding officers regularly met in person with civilians to receive complaints

is one without a difference. Under *Weintraub* and *Jackler*, the relevant inquiry is whether the employee "voiced his grievance through channels available to citizens generally." Fine-tuned distinctions between varying degrees of access to the channel are no part of the inquiry.

The undisputed record establishes there was a civilian analogue to Officer Matthews' speech. This provides an independent basis for concluding that his speech was not employee speech but instead citizen speech left undisturbed by *Garcetti*.

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about misconduct, and nothing in the relevant law provides any basis for thinking that the number of other people present for the conversation or the exact location of the conversation make any difference.

CONCLUSION

For all the foregoing reasons, the plaintiff-appellant Craig Matthews respectfully urges the Court to reverse the District Court, reinstate the complaint, and remand this matter for further proceedings.

Respectfully submitted,

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Dated: October 4, 2013
New York, N.Y.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief, according to the word-processing program with which it was prepared, complies with Rule 32(a)(7) of the Federal Rules of Appellate Procedure in that it contains a total of 13,532 words.

/s/ *Christopher Dunn*
CHRISTOPHER DUNN

SPECIAL APPENDIX

Matthews v. City of New York, et al.

No. 13-2915cv

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CRAIG MATTHEWS, Plaintiff, -v- CITY OF NEW YORK, RAYMOND KELLY, JON BLOCH, and MARK SEDRAN, Defendants.	12 Civ. 1354 (PAE) OPINION & ORDER

PAUL A. ENGELMAYER, District Judge:

Plaintiff Craig Matthews, a member of the New York City Police Department ("NYPD"), brings this action pursuant to 42 U.S.C. § 1983 against the City of New York, NYPD Commissioner Raymond Kelly, Deputy Inspector Jon Bloch, and Lieutenant Mark Sedran (collectively, "defendants" or "the City"). Officer Matthews alleges that defendants violated his First Amendment rights when they, allegedly, retaliated against him after he raised concerns to the precinct's commanding officers about a policy being implemented by mid-level supervisors in his precinct. That policy allegedly required each patrol officer to meet a quota of arrests, stop-and-frisks, and summonses each month. Defendants move for summary judgment. They argue that Officer Matthews' speech is unprotected by the First Amendment, because he was speaking pursuant to his official employment duties when he reported the quota system to his commanding officers. For the reasons that follow, defendants' motion for summary judgment is granted.

I. Background and Undisputed Facts[1]

Officer Matthews has been employed by the NYPD for 16 years. Matthews Decl. ¶ 4; Matthews Dep. 9. During the last 14 years, he has been assigned to the 42nd Precinct. Matthews Decl. ¶ 5; Matthews Dep. 9. His current rank is "Police Officer." Matthews Decl. ¶ 3.

A. Officer Matthews' Speech

The parties have stipulated that, for purposes of resolving this motion, Officer Matthews' speech occurred in the manner alleged in the Complaint. *See* Def. Br. 1; Pl. Br. 6 n.1; Def. Reply Br. 1 n.1.

The Complaint alleges that, beginning in 2008, mid-level supervisors in the 42nd Precinct "developed and implemented a system of quotas mandating numbers of arrests, summonses, and stop-and-frisks." Compl. ¶ 2. To enforce these quotas, supervisors developed a system that assessed officers using color-coded reports that identified who was meeting, partially meeting, and not meeting his or her quotas. *Id.* The quota system in Officer Matthews' squad was further refined by his platoon commander, Lieutenant Mark Sedran. Lieutenant Sedran created a system that awarded points for "good summonses"—those that addressed hazardous behavior, such as use of a cell phone while driving—and subtracted points for non-hazardous summonses. *Id.*

[1] The Court's account of the underlying facts of this case is drawn from the parties' submissions in support of and in opposition to the instant motion, including: the Declaration of William S.J. Fraenkel in Support of Defendants' Motion for Summary Judgment ("Fraenkel Decl.") (Dkt. 37), and attached exhibits; the Affidavit of Officer Craig Matthews ("Matthews Decl.") (Dkt. 41); the Declaration of Erin Beth Harrist in Opposition to Defendants' Motion for Summary Judgment ("Harrist Decl.") (Dkt. 40), and attached exhibits; the Declaration of William S.J. Fraenkel in Further Support of Defendants' Motion for Summary Judgment ("Fraenkel Reply Decl.") (Dkt. 46); the deposition of Officer Matthews, excerpts of which are attached as Exhibit D to the Fraenkel Declaration and Exhibit 1 to the Harrist Declaration ("Matthews Dep."); the deposition of the City's Rule 30(b)(6) witness, John Beirne, excerpts of which are attached as Exhibit C to the Fraenkel Declaration and Exhibit 6 to the Harrist Declaration ("Beirne Dep."); the deposition of Jon Bloch, Harrist Decl. Ex. 3 ("Bloch Dep."); and the deposition of Timothy Bugge, Harrist Decl. Ex. 4 ("Bugge Dep.").

¶ 18. Officers were allegedly under constant pressure to meet these quotas and were subject to punishment for not doing so. *Id.* ¶ 2.

Officer Matthews believed that the quota system violated the NYPD's core mission, and he was "unwilling to participate in a practice that would damage the communities he was entrusted to protect." *Id.* ¶ 19. Accordingly, in February 2009, Officer Matthews met with the precinct's commanding officer at the time, then-Captain Timothy Bugge, and informed Captain Bugge about the existence of the quota system. *Id.* ¶ 20. In March and April 2009, with the quota system having persisted, Officer Matthews met again with Captain Bugge. *Id.* In May 2009, Officer Matthews also reported the quota system to an unnamed precinct executive officer. *Id.* In June 2009, Captain Bugge told Officer Matthews that he had spoken with Lieutenant Sedran and that "the situation was handled." *Id.* ¶ 21. Nevertheless, Officer Matthews alleges, the quota system continued in secret. *Id.* In October 2009, Captain Bugge informed Officer Matthews that he would not interfere with how supervisors ran their platoons. At this point, Officer Matthews alleges, he concluded that it was futile to raise his concerns with Captain Bugge any further. *Id.* ¶ 22.[2]

In January 2011, Officer Matthews met with then-Captain Jon Bloch, who had replaced Captain Bugge in May 2010 as the precinct's commanding officer. *See* Bloch Dep. 13; Bugge Dep. 13. The meeting took place in Captain Bloch's office, with two other officers present. Compl. ¶ 28. Officer Matthews explained his concerns that the quota system was (1) "causing unjustified stops, arrests, and summonses because police officers felt forced to abandon their discretion in order to meet their numbers," and (2) "having an adverse effect on the precinct's

[2] The Complaint does not specify where Officer Matthews' meetings with Captain Bugge occurred, but implies that they occurred in the precinct.

relationship with the community." *Id.* Officer Matthews has attested that when he raised these concerns, he did not identify any particular unjustified stop or arrest. Matthews Decl. ¶ 13.

Officer Matthews alleges that, as a result of his speech, he was subject to a campaign of retaliation. *Id.* ¶¶ 21, 25–27, 32–34, 36–38.[3]

B. Procedural History

On February 23, 2012, Officer Matthews filed the Complaint, which brings a § 1983 claim based on alleged infringement of his First Amendment rights, and a parallel claim under the New York Constitution. Dkt. 1; *see infra* note 7. On March 16, 2012, defendants moved to dismiss, arguing that Officer Matthews' speech was unprotected because it was made pursuant to his official employment duties—to wit, his inherent duty to enforce the law—and therefore that his § 1983 claim must fail. Dkt. 12. Honorable Barbara S. Jones, to whom this case was then assigned, granted defendants' motion. She reasoned: "Matthews' complaints to his supervisors are consistent with his core duties as a police officer, to legally and ethically search, arrest, issue summonses, and—in general—police." *Matthews v. City of N.Y.*, No. 12 Civ. 1354 (BSJ), 2012 WL 8084831, at *3 (S.D.N.Y. Apr. 12, 2012).

On appeal, the Second Circuit vacated that dismissal. It stated:

> The record in this case is not yet sufficiently developed . . . to determine as a matter of law whether Officer Matthews spoke pursuant to his official duties when he voiced the complaints made here in the manner in which he voiced them. *See Garcetti v. Ceballos*, 547 U.S. [410,] 424–26 [(2006)] (distinguishing between giving employees an internal forum for their speech and making certain speech a duty of employment). As we have recently observed, "whether a public

[3] Officer Matthews' allegations of retaliation are not at issue on this motion, which, for the reasons explained below, is based solely on defendants' argument that Officer Matthews did not engage in constitutionally protected speech. As alleged, the acts of retaliation against Officer Matthews consisted of: punitive assignment; denial of overtime and leave; separation from his career-long partner; humiliating treatment; and negative performance reviews. *See* Compl. ¶¶ 21, 25–27, 32–34, 36–38.

> employee is speaking pursuant to h[is] official duties is not susceptible to a brightline rule." *Ross v. Breslin*, 693 F.3d 300, 306 (2d Cir. 2012). The matter may require some inquiry into "the nature of the plaintiff's job responsibilities, the nature of the speech, and the relationship between the two." *Id.* Here, some discovery as to these matters is necessary before it can be decided whether Matthews can or cannot pursue a First Amendment retaliation claim in this case.

Matthews v. City of N.Y., 488 F. App'x 532, 533 (2d Cir. 2012) (summary order).

Upon remand, the case was reassigned to this Court. On December 17, 2012, the Court held a conference with the parties to discuss fashioning a targeted discovery plan keyed to the factual issue identified by the Second Circuit. The parties thereupon submitted, and the Court approved, a joint case management plan providing for plenary document discovery, but limiting depositions to witnesses with knowledge of Officer Matthews' job responsibilities as they relate to the speech at issue. Dkt. 29.

On May 20, 2013, as contemplated at the December 17, 2012 conference, defendants filed a motion for summary judgment. They argued, this time based on the factual record developed in discovery, that Officer Matthews' speech was made pursuant to his official employment duties. *See* Dkt. 36 ("Def. Br."). On June 7, 2013, Officer Matthews opposed that motion. Dkt. 39 ("Pl. Br."). On June 14, 2013, defendants filed a reply. Dkt. 45 ("Def. Reply Br."). On July 19, 2013, the Court heard argument.

C. Officer Matthews' Employment Duties

As contemplated by the Second Circuit in its summary order and this Court in its case management plan, discovery focused on the nature of Officer Matthews' employment duties. The evidence adduced on that point is as follows.

Section 202-21 of the NYPD Patrol Guide[4] sets forth the "Duties and Responsibilities" of a Police Officer. *See* Harrist Decl. Ex. 2. It lists 20 specific duties. It does not, however, describe, or purport to describe, the day-to-day activities of a Police Officer. Officer Matthews attested that his regular activities, which occupy 95% of his time on the job, involve:

> (1) going on radio runs, which are responses to 911 calls in the precinct, in addition to '311' requests, and requests that come through the station house telephone switchboard, (2) patrolling the streets and vertical patrolling of local housing, (3) filling out complaint reports and additional forms relating to criminal activity, lost property, and missing persons, including interviewing witnesses, (4) responding to traffic accidents, (5) transporting prisoners to and from the precinct house, courts, and hospitals, and (6) doing community visits with local businesses and organizations.

Matthews Decl. ¶ 6; *see also* Matthews Dep. 10 ("Q: [H]ow would you describe your job, the job of a police officer? A: I enforce the law.").

Particularly relevant here, Section 207-21 of the Patrol Guide addresses the duty of a member of the NYPD to report allegations of "corruption or other misconduct against members of the service." It states, in pertinent part:

> All members of the service must be incorruptible. An honest member of the service will not tolerate members of the service who engage in corruption or other misconduct. *All members of the service have an absolute duty to report any corruption or other misconduct, or allegation of corruption or other misconduct, of which they become aware.*

Fraenkel Decl. Ex. B (emphasis added). Section 207-21 defines "corruption/other misconduct" as "[c]riminal activity or other misconduct of any kind including the use of excessive force or perjury that is committed by a member of the service whether on or off duty." *Id.* It also

[4] The Patrol Guide "serves as a guide for ALL members of the service." Fraenkel Reply Decl. Ex. E (Foreword to the Patrol Guide) (emphasis in original). It "does not contain distinct instructions for every situation that may be encountered in the field," but its procedures "serve as performance expectations." *Id.* Matthews testified that he does not consider the Patrol Guide to be optional, and acknowledged that were he to not follow a provision of the Patrol Guide he would receive "[a]nything from a warning and admonish [*sic*] to a command discipline." Matthews Dep. 10–11.

provides a procedure for reporting such misconduct to the Internal Affairs Bureau. It further states that "[f]ailure to report corruption, other misconduct, or allegations of such act is, in itself, an offense of serious misconduct and will be charged as such." *Id.*

In deposition testimony, the parties offered differing interpretations of the extent to which an officer has a duty to report "misconduct" under Section 207-21. Officer Matthews testified that his understanding of that provision is that he is not obligated to report *every* violation of the Patrol Guide, only those that amount to criminal misconduct, such as corruption, bribery, or excessive force. *See* Matthews Dep. 14, 19, 21, 24–25, 33, 37, 39. He testified that he acquired that understanding during his training at the police academy, *id.* at 24, 34, but he could not recall more specifically where in that training he learned of that limit on his duty to report, *id.* at 39. Commissioner John Beirne, the City's Rule 30(b)(6) witness, offered a different understanding of Section 207-21. He testified that whether an officer has a duty to report a particular event or practice generally turns on whether the officer reasonably believes it to be misconduct, and on the officer's "common sense." *See* Beirne Dep. 26–27, 46–50, 55, 62–63. However, he stated, some actions, such as corruption, criminal activity, and excessive force, must be reported regardless of any subjective belief on the part of the individual officer. *Id.* at 50, 55.[5]

Commissioner Beirne, Captain Bloch, and Captain Bugge all testified that a Police Officer has no duty to monitor the conduct of his supervisors. Beirne Dep. 22; Bloch Dep. 13; Bugge Dep. 25. Rather, that job falls to the Integrity Control Officer—an officer with the

[5] Commissioner Beirne also testified that although some violations of the Patrol Guide's procedures would be misconduct that must be reported, he was "reluctant to say" that *all* violations of the Patrol Guide must be reported, because it is a "very voluminous document" and "[t]here probably are some things that don't necessarily have to be reported." Beirne Dep. 48–49. Commissioner Beirne testified that a numerical quota system, in and of itself, is not misconduct that an officer is obligated to report. *Id.* at 36–37, 65. However, if that quota resulted in unlawful activity, such as unjustified stops and arrests, it would need to be reported to the Internal Affairs Bureau. *Id.* at 65, 67, 77.

specific duty of monitoring the conduct of personnel in the precinct, including supervisors, and reporting any misconduct to Internal Affairs. Beirne Dep. 23; Bloch Dep. 21; Bugge Dep. 34–35; *see also* Harrist Decl. Ex. 11 (Patrol Guide Section 202-15, setting forth duties of the Integrity Control Officer). Officer Matthews was never an Integrity Control Officer. Matthews Decl. ¶ 12.

Officer Matthews attests that, aside from the specific occasions on which he raised his concerns about the quota system, he did not regularly meet with, or make written or oral reports to, the 42nd Precinct's commanding officers. *Id.* ¶¶ 8–11. Consistent with this, Captain Bloch testified that he had no regularly scheduled meetings and received no regular reports from Officer Matthews; their interactions were "minimal." Bloch Dep. 20. He further testified that, although Captain Bloch would make small talk with Police Officers and speak to them in passing, he would not have regular meetings with any Police Officers in his command. *Id.* at 15–16. Captain Bugge similarly testified that he did not have regularly scheduled meetings with Officer Matthews, nor with any Police Officers in his command. Bugge Dep. 31–32, 34.

D. Avenues for Civilian Complaints

Discovery also focused on the degree to which civilians could have made complaints to the commanding officers of the 42nd Precinct in the same manner that Officer Matthews did.[6]

One duty of a commanding officer is to meet with civilians to receive complaints or other feedback about police conduct. Beirne Dep. 24–25; Bloch Dep. 22, 48; Bugge Dep. 39; *see also* Harrist Decl. Ex. 7 (Patrol Guide section 202-09, setting forth the duties of a commanding officer, including to "[m]aintain as much personal contact as possible with business, civic . . . and other groups or media with community influence and interests to keep abreast of community

[6] The Second Circuit has considered this factor in determining whether an employee's speech was made pursuant to his official duties. *See infra* Part IV(B)(3).

tensions and trends"). For Officer Matthews' precinct, this includes attending monthly meetings of the 42nd Precinct's Community Council. Bloch Dep. 24; Bugge Dep. 45; *see also* Harrist Decl. Ex. 8–9 (attendance logs and minutes from Community Council meetings). These meetings typically take place in the precinct and are open to members of the public. Bloch Dep. 25; Bugge Dep. 45–46. At these meetings, community members and representatives of community organizations are free to raise concerns about policing practices. Bloch Dep. 25; Bugge Dep. 46–47. Captain Bloch testified that he personally attended approximately two dozen such meetings during his three years as commanding officer of the 42nd Precinct. Bloch Dep. 24.

In addition to the Community Council meetings, members of the community, under some circumstances, may contact commanding officers and meet with them in person, including at the precinct, to discuss concerns about policing practices. Bloch Dep. 36, 39, 41; Bugge Dep. 64–65; *see also* Harrist Decl. Ex. 8, at NYPD 188 (Community Council meeting minutes, noting that "Inspector Bugge commented that he welcomes the community to call him and discuss problems, but is concerned about complaints that have never been brought to him"). Captain Bloch testified that such meetings happened "rarely." Bloch Dep. 41. However, Captain Bugge testified that one to three times per month he meets with members of the community, such as local politicians and leaders of religious or civic organizations, to discuss policing issues. Bugge Dep. 66. Some of these meetings took place in his office, and others in the Community Affairs Office or in a common area of the stationhouse. *Id.* Such meetings were typically set up through the precinct's Community Affairs Officer, a point of first contact for community members. *Id.* at 65; Bloch Dep. 39. For instance, on one occasion, a prominent reverend in the community—who was an advisor to the Community Council board and visited the Community Affairs Office

"a couple of times a week"—met with Captain Bugge in his office to discuss his mistreatment during a stop. Bugge Dep. 58–59.

II. Legal Standard

To prevail on a motion for summary judgment, the movant must "show[] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant bears the burden of demonstrating the absence of a question of material fact. In making this determination, the Court must view all facts "in the light most favorable" to the non-moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *see also Holcomb v. Iona Coll.*, 521 F.3d 130, 132 (2d Cir. 2008). To survive a summary judgment motion, the opposing party must establish a genuine issue of fact by "citing to particular parts of materials in the record." Fed. R. Civ. P. 56(c)(1); *see also Wright v. Goord*, 554 F.3d 255, 266 (2d Cir. 2009). "A party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." *Hicks v. Baines*, 593 F.3d 159, 166 (2d Cir. 2010) (citation omitted). Only disputes over "facts that might affect the outcome of the suit under the governing law" will preclude a grant of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether there are genuine issues of material fact, the Court is "required to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." *Johnson v. Killian*, 680 F.3d 234, 236 (2d Cir. 2012) (citing *Terry v. Ashcroft*, 336 F.3d 128, 137 (2d Cir. 2003)).

III. Applicable Legal Framework

"To state a First Amendment retaliation claim, a plaintiff must establish that: (1) his speech or conduct was protected by the First Amendment; (2) the defendant took an adverse

action against him; and (3) there was a causal connection between this adverse action and the protected speech." *Cox v. Warwick Valley Cent. Sch. Dist.*, 654 F.3d 267, 272 (2d Cir. 2011); *accord Skehan v. Vill. of Mamaroneck*, 465 F.3d 96, 106 (2d Cir. 2006), *overruled on other grounds by Appel v. Spiridon*, 531 F.3d 139, 140 (2d Cir. 2008).[7] Here, the Court only addresses the first element: whether Officer Matthews' speech was protected.

The Supreme Court has articulated a two-step inquiry to determine whether speech by a public employee enjoys constitutional protection. "The first requires determining whether the employee spoke as a citizen on a matter of public concern." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (citing *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty.*, 391 U.S. 563, 568 (1968)); *accord Anemone v. Metro. Transp. Auth.*, 629 F.3d 97, 114 (2d Cir. 2011). If the answer is yes, then the possibility of a First Amendment claim arises; if the answer is no, it does not. "The [second] question [is] whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Garcetti*, 547 U.S. at 418 (citing *Pickering*, 391 U.S. at 568); *accord Anemone*, 629 F.3d at 119 (referring to this second inquiry as the "*Pickering* defense"). The first of these two inquiries in turn consists of two separate questions: "(1) whether the subject of the employee's speech was a matter of public concern and (2) whether the employee spoke 'as a citizen' rather than solely as

[7] Officer Matthews has also alleged a violation of Article I, Section 8 of the New York State Constitution. Compl. ¶ 43. However, this claim is subject to the same analysis as his free speech claims under the First Amendment. *See Carter v. Incorporated Vill. of Ocean Beach*, 693 F. Supp. 2d 203, 212 (E.D.N.Y. 2010), *aff'd*, 415 F. App'x 290 (2d Cir. 2011); *Almontaser v. N.Y.C. Dep't of Educ.*, No. 07 Civ. 10444 (SHS), 2009 WL 2762699, at *2 n.1 (S.D.N.Y. Sept. 1, 2009); *Hous. Works, Inc. v. Turner*, 179 F. Supp. 2d 177, 199 n.25 (S.D.N.Y. 2001).

an employee." *Jackler v. Byrne*, 658 F.3d 225, 235 (2d Cir. 2011) (citing *Garcetti*, 547 U.S. at 420–22). The Court addresses these two questions here.[8]

IV. Discussion

A. Whether Officer Matthews' Speech Addressed a Matter of Public Concern

Whether speech addresses a matter of public concern is a question of law "to be answered by the court after examining the 'content, form, and context of a given statement, as revealed by the whole record.'" *Jackler*, 658 F.3d at 235 (quoting *Connick v. Myers*, 461 U.S. 138, 147–48 & n.7 (1983)). Speech is a matter of public concern when it is "fairly considered as relating to any matter of political, social, or other concern to the community." *Connick*, 461 U.S. at 146; *accord Jackler*, 658 F.3d at 236 ("[A] topic is a matter of public concern for First Amendment purposes if it is 'of general interest,' or 'of legitimate news interest,' or 'of value and concern to the public at the time' of the speech." (citation omitted)). "Speech that, although touching on a topic of general importance, primarily concerns an issue that is personal in nature and generally related to the speaker's own situation, such as his or her assignments, promotion, or salary, does not address matters of public concern." *Jackler*, 658 F.3d at 236 (citation and alteration omitted); *see also Sousa v. Roque*, 578 F.3d 164, 170–74 (2d Cir. 2009) (surveying Second Circuit precedent on whether speech is a matter of public concern).

The Second Circuit has consistently held that the lawfulness of public officials' actions—including, specifically, police misconduct—is a matter of public concern. *See, e.g.*, *Jackler*, 658 F.3d at 236–37 (holding that police malfeasance consisting of the use of excessive force is a matter of public concern, and noting that "[e]xposure of official misconduct, especially within the police department, is generally of great consequence to the public" (citation omitted));

[8] Because the Court finds, for the reasons that follow, that Officer Matthews spoke as a public employee and not as a citizen, the Court has no occasion to address the "*Pickering* defense" here.

Skehan, 465 F.3d at 106 ("Plaintiffs' speech plainly concerned issues of public concern: misfeasance within the police department and allegations of an ongoing cover-up and an attempt to silence those who spoke out against it."); *Hoyt v. Andreucci*, 433 F.3d 320, 330 (2d Cir. 2006) (sheriff disciplining corrections officers in an unlawful manner was a matter of public concern). That standard is met here. In its decision remanding this case to this Court, the Second Circuit recognized that, as to the speech by Officer Matthews described in the Complaint, "it is undisputed that this speech addressed a matter of public concern." *Matthews*, 488 F. App'x at 533.[9]

B. Whether Officer Matthews Spoke as a Citizen or an Employee

The more difficult question is the one that the Second Circuit directed be addressed on remand: whether, following discovery on this point, the facts permit the Court to find, as a matter of law, that Officer Matthews "spoke pursuant to his official duties when he voiced the complaints made here in the manner in which he voiced them." *Matthews*, 488 F. App'x at 533. The Court has carefully reviewed the undisputed facts. Considering those facts, viewing the facts that are disputed in the light most favorable to Officer Matthews, and applying apposite case law, the Court finds that Officer Matthews spoke solely as an employee.

1. Public Employee Speech and *Garcetti*

The Supreme Court long ago held that "a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick*, 461 U.S. at 142 (collecting cases); *accord Garcetti*, 547 U.S. at 417; *Lewis v. Cowen*, 165 F.3d 154, 158 (2d Cir. 1999) ("It is by now well established that public employees do not check all of their First Amendment rights at the door upon accepting public employment."). But

[9] At argument, the City conceded that if Officer Matthews' speech occurred as alleged, it necessarily touched on a matter of public concern.

the First Amendment rights of a public employee are not absolute: "When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." *Garcetti*, 547 U.S. at 418. As the Supreme Court has explained, that is because "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Id.* And, because public employees often occupy positions of trust in society, their expression has the potential to "contravene governmental policies or impair the performance of governmental functions." *Id.* at 419. At the same time, a public employee does not forfeit the right to free expression that he or she would have absent that job: "[A] citizen who works for the government is nonetheless a citizen." *Id.*

The Supreme Court's employee speech cases further reflect that the interests at stake are not merely the speech rights of public employees and the functional needs of public employers—the interests of the public are also implicated. In *Pickering*, which involved a teacher speaking out against the school board's allocation of funds between educational and athletic programs, the Court recognized that "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." *Pickering*, 391 U.S. at 572. The Court therefore recognized the "necessity for informed, vibrant dialogue in a democratic society" and the "widespread costs [that] may arise when dialogue is repressed." *Garcetti*, 547 U.S. at 419 (describing *Pickering*); *accord San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam) ("Were [public employees] not able to speak on [the operations of their employers], the community would be deprived of informed opinions on important public issues."). As the Supreme Court

has put the point, when it comes to the speech of public employees, "[t]he interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." *Roe*, 543 U.S. at 82. Synthesizing these considerations, the Court has held that "[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Garcetti*, 547 U.S. at 419.

The line of cases most apposite to Officer Matthews' speech begins with *Garcetti*. There, the Supreme Court applied these principles to employee speech that, undisputedly, occurred in the course of an employee's performance of his day-to-day job duties. In that case, a deputy district attorney alleged that he was punished for writing a disposition memo recommending dismissal of a pending criminal prosecution due to his concerns that an affidavit used to obtain a critical search warrant contained inaccuracies. *Id.* at 414–15. In finding this speech unprotected, the Supreme Court emphasized that it was not dispositive that the plaintiff expressed his views only inside his office, rather than publicly, nor that his speech concerned the subject matter of his employment. *Id.* at 420–21. To deny constitutional protection based on these factors, the Court recognized, would contravene its teachings that employees do not lose all constitutional protection for speech made at work, *see Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414 (1979), and that public employees have important perspectives to lend to public discourse about matters of public concern relating to their employment, *see Pickering*, 391 U.S. at 572.

Instead, the Court stated, the "controlling factor" in its analysis was that the plaintiff's expressions had been "made pursuant to his duties as a calendar deputy." *Garcetti*, 547 U.S. at 421. That is, the plaintiff "wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do," and in doing so he "spoke as a prosecutor fulfilling a

responsibility to advise his supervisor about how best to proceed with a pending case." *Id.* Therefore, the Court held, "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.*

This holding, the Court explained, was consistent with its precedents governing employee speech, because the holding did not infringe any right to speak that the plaintiff would have had had he never become a public employee—*i.e.*, as private citizen: "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." *Id.* at 421–22. The plaintiff thus stood in contrast to the teacher in *Pickering*, whose letter to the local newspaper was not part of his job function and was the sort of letter any citizen could have written: An ordinary citizen could not have written an official memo to the plaintiff's supervisors concerning the proper disposition of a pending criminal case. *Id.* at 422. By contrast, to treat the plaintiff's official communications to his supervisor as protected by the First Amendment protections would "constitutionalize the employee grievance." *Id.* at 420 (quoting *Connick*, 461 U.S. at 154).

In so ruling, the Supreme Court in *Garcetti* rejected the concern (articulated by a lower court) that so holding would incent public employees to raise concerns publicly, not through ordinary in-house channels where they would be more likely to lack First Amendment protection, thereby causing greater disruption to the public employer's operations. The relevant point, the Court stated, is that "[e]mployees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government." *Id.* at

423. And, in practice, a public employer that wishes to encourage employees to air their concerns privately can create internal procedures for receiving such criticism. *Id.* at 424.

Significant here, the parties in *Garcetti* did not dispute, as a factual matter, that the plaintiff had written his memo pursuant to his official employment duties. Accordingly, the Court had "no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." *Id.* Since *Garcetti*, however, several cases have reached the Second Circuit in which there was serious debate whether the speech at issue fell within the scope of the employee's duties. These precedents are instructive, indeed, decisive here.

2. The Second Circuit's Post-*Garcetti* Precedents

As Judge Calabresi has observed, given the facts and discussion in *Garcetti*, *Garcetti* was capable of being read narrowly, specifically, to resolve only the issue presented when "the employee is *required* to make such speech in the course of fulfilling his job duties." *Weintraub v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 593 F.3d 196, 208 (2d Cir. 2010) (Calabresi, J., dissenting) (emphasis added). In that circumstance, such speech is properly viewed as having been made pursuant to an employee's official duties, as it is fair to say both that the employer "'commissioned or created' the speech," and that the employer "*relies* on the speech made by the employee." *Id.* (quoting *Garcetti*, 547 U.S. at 422, 423) (emphasis in original). However, the cases that have arisen in the Second Circuit following *Garcetti* have tended to involve fact patterns beyond the scenario of required speech presented in *Garcetti*. Accordingly, the Second Circuit, applying the principles discussed by the Supreme Court, has extracted from *Garcetti* a broader understanding of the speech made pursuant to an employee's official duties.

In *Weintraub*, the plaintiff, a public school teacher, had filed a grievance with the teacher's union over his supervisor's decision not to discipline a student who had thrown a book at the plaintiff on two occasions. *Id.* at 198–99. A divided panel of the Second Circuit held that the teacher's grievance was unprotected, because he had spoken pursuant to his official duties. *Id.* at 201. The Court rejected the teacher's argument that his speech was protected because it was not required by, or included in, his official job description: "Weintraub's grievance was pursuant to his official duties because it was part-and-parcel of his concerns about his ability to properly execute his duties as a public school teacher—namely, to maintain classroom discipline." *Id.* at 203 (citation omitted). The Court also noted that the teacher had spoken via a channel—a union grievance—unavailable to citizens generally. *Id.* at 203–04. Judge Calabresi dissented, arguing that *Garcetti* should be limited to required employee speech. *Id.* at 205–09.

In *Ross v. Breslin*, 693 F.3d 300 (2d Cir. 2012), a payroll clerk for the local school district had reported financial malfeasance—specifically, improper disbursements made without the requisite board approval—to the district's superintendent and, when he failed to act, to the board of education. The Second Circuit held the plaintiff clerk's speech unprotected. In deposition testimony, the clerk had stated that if there was a mistake with pay requisition, her duty was to "bring it to the appropriate person's attention." *Id.* at 306 (alteration omitted). Accordingly, the Court held, "reporting pay irregularities to a supervisor was one of her job duties." *Id.* The Court rejected plaintiff's argument that she had spoken as a private citizen because she reported the misconduct to the superintendent and the board, rather than to her direct supervisor: "Taking a complaint up the chain of command to find someone who will take it seriously does not, without more, transform her speech into protected speech made as a private citizen." *Id.* at 307 (citation and alteration omitted). Nor was it dispositive that plaintiff's letter

to the board began: "Although I am an employee of the School District, I am writing to you . . . on a personal note out of complete frustration with the District's administration." *Id.* at 303. A plaintiff's characterization of her own speech, the court held, is not dispositive. *Id.* at 307.

In *Looney v. Black*, 702 F.3d 701 (2d Cir. 2012), a town building official had informed a town resident about his concern that the town's use of a wood-burning stove, and the resulting discharge, constituted a public health concern. A divided panel of the Second Circuit held that the building official's speech—the precise content and context of which were vaguely alleged in the Complaint—was unprotected. *Id.* at 712. The Court noted that the plaintiff had alleged that his job duties included "administration and enforcement of the State Building Code at the municipal level, including the organization and conduct of the building advisory, inspection and enforcement program" and that he kept the safety of the townspeople "uppermost in mind" in the performance of these duties. *Id.* Accordingly, the Court stated, the "only sensible way to interpret [plaintiff's] allegations is that he spoke on these issues *because* he was in an official position that required, or at least allowed, him to do so. It follows that these statements owed their existence to his position as the Building Official." *Id.* (emphasis in original).[10]

This streak of victories for employers was interrupted in *Jackler v. Byrne*, 658 F.3d 225 (2d Cir. 2011). Jackler, a probationary police officer, had witnessed a fellow officer punch an arrestee in the face after the arrestee, who was handcuffed and seated in the back seat of a patrol car, insulted the officer. *Id.* at 230. After the arrestee filed a complaint, Jackler was directed by his supervisors to file a report as to what he had seen. His report corroborated the arrestee's

[10] Judge Droney dissented. He took issue with what he characterized as the majority's holding that plaintiff's speech was unprotected simply because it "owed its existence" to his job duties. *Looney*, 702 F.3d at 718. Judge Droney would have held that the speech also must have been made "*in furtherance of those duties*," *id.* at 718 (emphasis in original) (quoting *Ross*, 693 F.3d at 308), and that it was premature to conclude, on the pleadings, that plaintiff's speech was unprotected, *id.* at 720.

account, *i.e.*, that the other officer had used unnecessary force. Jackler alleged that his supervisors then pressured him to retract his truthful report and file a new report that would conceal his fellow officer's misconduct, and retaliated against him when he refused to do so. *Id.* at 231. The district court reluctantly concluded that *Garcetti* and *Weintraub* compelled it to dismiss the complaint. *See Jackler v. Byrne*, 708 F. Supp. 2d 319, 324 & n.5 (S.D.N.Y. 2010). The Second Circuit, however, reversed, holding that Jackler's speech was protected, because he was "not simply doing his job in refusing to obey those orders from the department's top administrative officers and the chief of police." *Jackler*, 658 F.3d at 242. The Court emphasized that Jackler's speech had a "clear civilian analogue," because "a citizen who has truthfully reported a crime has the indisputable right to reject pressure from the police to have him rescind his accusation and falsely exculpate the accused." *Id.* at 241–42.

Officer Matthews relies on *Jackler* here. But although the two cases are superficially similar in that they both involve a police officer reporting police misconduct, the Second Circuit in *Jackler* pointedly described the protected speech as the *refusal* to retract the truthful report and file a false one. *See id.* at 240 ("Jackler had a strong First Amendment interest in refusing to make a report that was dishonest."), 241–42 ("We conclude that Jackler's refusal to comply with orders to retract his truthful Report and file one that was false [is protected speech]."). The Court did *not* address whether, let alone hold that, Jackler's original, truthful report would have constituted protected speech had he been retaliated against on that basis. *See id.* at 234 (stating that the parties agreed that Jackler's retaliation claim was based on his refusal to file the false report, not his filing of the truthful report), 241 ("In the context of the demands that Jackler retract his truthful statements and make statements that were false, we conclude that his refusals to accede to those demands constituted speech activity that was significantly different from the

mere filing of his initial Report."). But this latter scenario is presented here: Officer Matthews made a series of truthful reports about his concerns; unlike Jackler, he was neither compelled to retract those statements nor to file a false report. *See Ross*, 693 F.3d at 307–08 (distinguishing *Jackler* on this basis).

In non-precedential summary orders, the Second Circuit has addressed two cases with far more analogous facts to those here than *Jackler*, and ruled for the employer in each. In *Carter v. Incorporated Village of Ocean Beach*, 693 F. Supp. 2d 203 (E.D.N.Y. 2010), part-time police officers had complained to their supervisors about certain departmental practices that posed a threat to public safety, including: hiring officers that were not properly certified; hiring civilians as police dispatchers; permitting officers to drink alcohol while on duty; and instructing other officers to chauffeur them home. The district court held the officers' speech unprotected:

> All of plaintiffs' complaints to their superiors . . . related to their concerns about their ability to properly execute their duties as police officers, as they expressed concern, *inter alia*, that the assignment of officers to chauffeur intoxicated officers left the [Ocean Beach Police Department] short-handed, that the hiring of uncertified officers and the retention of unqualified and/or corrupt officers affected their ability to perform their job assignments safely and that they were told not to issue summonses to certain individuals and businesses. Plaintiffs' speech in challenging the Ocean Beach defendants' alleged cover-ups of officer misconduct, including their complaints to the Suffolk County District Attorney's Office, was undertaken in the course of performing one of their core employment responsibilities of enforcing the law and, thus, was speech made pursuant to their official duties. Moreover, all of the relevant speech reflected plaintiffs' special knowledge about the Ocean Beach defendants which was gained as a result of plaintiffs' position as police officers for those defendants based upon what plaintiffs' [*sic*] observed or learned from their job.

Id. at 211. Accordingly, the district court granted summary judgment for defendants. The Second Circuit affirmed. It stated: "Plaintiffs' allegations establish no more than that they reported what they believed to be misconduct by a supervisor up the chain of command—misconduct they knew of only by virtue of their jobs as police officers and which they reported

as 'part-and-parcel of [their] concerns about [their] ability to properly execute [their] duties.'" *Carter v. Inc. Vill. of Ocean Beach*, 415 F. App'x 290, 293 (2d Cir. 2011) (summary order) (quoting *Weintraub*, 593 F.3d at 203).

Similarly, in *D'Olimpio v. Crisafi*, 718 F. Supp. 2d 340 (S.D.N.Y. 2010) (Rakoff, J.), an investigator in the New York State Department of Health's Bureau of Narcotics Enforcement had complained to the Bureau's program director that his immediate supervisor was, *inter alia*, violating suspects' *Miranda* rights and performing "ill-conceived and dangerous" arrests and searches. The plaintiff investigator had also filed a workplace incident report and informed the Inspector General. *Id.* at 351. Observing that "*Weintraub* made clear that . . . 'official duties' are to be construed broadly," the district court held, "not without reluctance," that plaintiff's speech was made pursuant to his official duties. *Id.* at 353. It observed that "the common theme of all these statements was that [the supervisor] was violating suspects' rights and was not performing his job properly, and by implication that [the supervisor] was interfering with [plaintiff's] ability to perform his own duties." *Id.* Because it was a part of plaintiff's duties to ensure that investigations and arrests of narcotics offenses be lawfully conducted, plaintiff's speech was therefore "'part-and-parcel of his concerns' about his ability to 'properly execute his duties' as a[n] investigator." *Id.* at 354 (quoting *Weintraub*, 593 F.3d at 203). In addition, the district court noted, the plaintiff was required by New York law to file his workplace incident report and the complaint to the Inspector General. It stated: "Speech made pursuant to a public employee's legal obligations is not made 'as a citizen.'" *Id.* (citing N.Y. Labor Law § 27-b(6)(a) & N.Y. Exec. Law § 55(1)).[11] On appeal, plaintiff focused on his complaint to the Inspector General, but the Second Circuit affirmed by summary order. It found that plaintiff's speech was

[11] Defendants do not argue that the same laws are applicable here.

unprotected because his complaint had been mandated by law and thus was part-and-parcel of his employment duties. *D'Olimpio v. Crisafi*, 462 F. App'x 79, 81 (2d Cir. 2012) (summary order). The court distinguished *Jackler* on the grounds that that that case concerned only Jackler's refusal to retract a truthful statement. *Id.* at 81 n.1.

Taken together, *Weintraub*, *Ross*, and *Looney*, along with various non-precedential summary orders,[12] reveal that the Second Circuit has taken a broader view than was necessary to decide *Garcetti* of what constitutes speech pursuant to an employee's official duties. *See also Anemone v. Metro. Transp. Auth.*, 629 F.3d 97, 115–17 (2d Cir. 2011) (plaintiff, as Director of Security at MTA, spoke pursuant to his employment duties when he contacted Queens DA's office regarding allegations of corruption); *Huth v. Haslun*, 598 F.3d 70, 74 (2d Cir. 2010) (employee's report to supervisor that co-workers were selling bootleg DVDs at work and about reverse discrimination was unprotected where made during daily meetings convened to discuss

[12] *See, e.g.*, *D'Olimpio*, 462 F. App'x at 81; *Carter*, 415 F. App'x at 293; *Platt v. Inc. Vill. of Southampton*, 391 F. App'x 62 (2d Cir. 2010) (summary order); *Paola v. Spada*, 372 F. App'x 143, 144 (2d Cir. 2010) (summary order) (state trooper's report about supervisor's unlawful conduct was unprotected because employee manual required him to report wrongdoing up the chain of command or to internal affairs); *Barclay v. Michalsky*, 368 F. App'x 266, 268 (2d Cir. 2010) (summary order); *Mulcahey v. Mulrenan*, 328 F. App'x 8, 9 (2d Cir. 2009) (summary order); *Healy v. City of N.Y. Dep't of Sanitation*, 286 F. App'x 744, 746 (2d Cir. 2008) (summary order); *cf. Bearss v. Wilton*, 445 F. App'x 400, 403 (2d Cir. 2011) (summary order) (plaintiff's response to newspaper's inquiries was unprotected where such inquiries were to be directed to her as city's technology coordinator); *Drolett v. DeMarco*, 382 F. App'x 7, 8 (2d Cir. 2010) (summary order) (after district court found that factual dispute precluded summary judgment on whether police officer's letter to police commissioners, local politician, and local newspaper about police misconduct was protected speech and rejected argument that police manual compelled the speech, Second Circuit reversed denial of qualified immunity, finding no violation of clearly established rights and noting, "[h]ad [plaintiff] raised his concerns within the chain of command, that speech likely would have been made pursuant to his official duties, and therefore not protected by the First Amendment").

the employees in their division). The great majority of district court decisions applying these precedents have drawn the same conclusion.[13]

[13] *See, e.g.*, *Schoolcraft v. City of N.Y.*, No. 10 Civ. 6005 (RWS), 2012 WL 2161596, at *8 (S.D.N.Y. June 14, 2012) (police officer's objections to, *inter alia*, arrest and summons quota policy, which were confined to his supervisors, Internal Affairs, and the Quality Assurance, were unprotected); *Frisenda v. Inc. Vill. of Malverne*, 775 F. Supp. 2d 486, 506–08 (E.D.N.Y. 2011) (police officer's internal memo to supervisors addressing communications problem within department that led to dangerous situations not protected); *Pisano v. Mancone*, No. 08 Civ. 1045 (KMW), 2011 WL 1097554, at *10–13 (S.D.N.Y. Mar. 18, 2011) (where police officer approached town mayor at his home, his speech about the internal workings of the police department, such as its lack of internal rules or policies and the police chief's issuance of orders to commit unlawful arrests, was unprotected, whereas his complaint that the police chief had not taken the civil service exam as required by state law was protected); *Brady v. Cnty. of Suffolk*, 657 F. Supp. 2d 331, 344–54 (E.D.N.Y. 2009) (police officers' internal memo and oral statements to supervisors about policy of not ticketing off-duty officers not protected); *Platt v. Inc. Vill. of Southampton*, No. 08-CV-2953 (JS)(ARL), 2009 WL 3076099, at *5–6 (E.D.N.Y. Sept. 21, 2009) (police officer's report to village trustee that police lieutenant was having an affair with another officer and giving her preferential treatment was unprotected where the report "primarily sought to address personal grievance with [lieutenant's] conduct rather than advance public safety concerns"), *aff'd*, 391 F. App'x 62 (2d Cir. 2010) (summary order); *Mulcahey v. Mulrenan*, No. 06 Civ. 4371 (LBS), 2008 WL 110949, at *5–7 (S.D.N.Y. Jan. 3, 2008) (Sand, J.) (firefighter's internal memo expressing his concerns that he was unqualified to perform certain duties, putting himself and coworkers in danger, was unprotected), *aff'd*, 328 F. App'x 8 (2d Cir. 2009) (summary order); *Barclay v. Michalsky*, 493 F. Supp. 2d 269, 275 (D. Conn. 2007) (nurse's report to supervisors that her co-workers were mistreating patients and sleeping on the job not protected where employee work rules required such a report), *aff'd*, 368 F. App'x 266, 268 (2d Cir. 2010) (summary order); *Healy v. City of N.Y. Dep't of Sanitation*, No. 04 Civ. 7344 (DC), 2006 WL 3457702, at *5 (S.D.N.Y. Nov. 22, 2006) (employee's report of corruption uncovered during inventory check unprotected where report was made to superior who ordered the inventory check be performed, was not made externally, and plaintiff originally testified alleged that he made the report as part of his duties, only to recant after *Garcetti* came down), *aff'd*, 286 F. App'x 744, 746 (2d Cir. 2008) (summary order). *But see Griffin v. City of N.Y.*, 880 F. Supp. 2d 384, 394–400 (E.D.N.Y. 2012) (police detective's complaint to Internal Affairs that a fellow detective had attempted to pressure him to falsely accept blame for a botched homicide investigation was protected); *Anderson v. State of N.Y. Office of Court Admin. of Unified Court Sys.*, 614 F. Supp. 2d 404, 427–29 (S.D.N.Y. 2009) (attorney on disciplinary committee's complaints to supervisors about committee's failure to vigorously prosecute complaints against attorney accused of misconduct were protected because they addressed systemic problems, not individual cases); *Wallace v. Suffolk Cnty. Police Dep't*, No. 04 Civ. 2599 (JS), 2007 WL 7749467, at *5–7 (E.D.N.Y. Feb. 5, 2007) (police officer, who was injured in the line of duty, engaged in protected speech when he complained to his supervisors that the report concerning his injury had been forged and omitted some of his injuries, and that improper training had led to the explosion that caused his injuries).

3. Application

With the Second Circuit's teachings in mind, the Court turns to the fact-specific inquiry whether the speech in question here was made pursuant to Officer Matthews' official duties. "Th[is] inquiry . . . is not susceptible to a brightline rule. Courts must examine the nature of the plaintiff's job responsibilities, the nature of the speech, and the relationship between the two." *Ross*, 693 F.3d at 306. The inquiry is to be both "practical," *Garcetti*, 547 U.S. at 424, and "objective," *Weintraub*, 593 F.3d at 202. Although the Supreme Court did not prescribe a "comprehensive framework for defining the scope of an employee's duties," *Garcetti*, 547 U.S. at 424, four factors identified by the Court and the Second Circuit, considered in combination, compel the finding that Officer Matthews' complaints to his supervisors about the quota system were made pursuant to his official duties.

***1. The Patrol Guide*:** Section 207-21 of the Patrol Guide unambiguously imposed on Officer Matthews a duty to report the fact of "unjustified stops, arrests, and summonses" that he alleged had been occurring as a result of the quota system. The plain text of Section 207-21 imposes a duty to report "[c]riminal activity or other misconduct of any kind including the use of excessive force or perjury that is committed by a member of the service whether on or off duty." Fraenkel Decl. Ex. B. The Patrol Guide sets performance expectations for members of the NYPD, *see* Fraenkel Reply Decl. Ex. E, and Officer Matthews testified that he did not consider its procedures to be optional, *see* Matthews Dep. 10–11. By reporting a policy that he asserted had already produced a pattern of unjustified (*i.e.*, unlawful) stops, arrests, and summonses, Officer Matthews was necessarily reporting "misconduct" within the meaning of the Patrol Guide.

Officer Matthews argues that his own deposition testimony, in which he attested that it is his view that Section 207-21 requires only the reporting of *criminal* misconduct, creates a material factual dispute over the meaning of the phrase "or other misconduct."[14] *See* Matthews Dep. 14, 19, 21, 24–25, 33, 37, 39. But, whatever Officer Matthews' subjective belief, the plain language of Section 207-21 cannot be so read. Section 207-21 unconditionally requires reporting of "criminal activity" *and* "other misconduct." Officer Matthews' reading overlooks the term "other misconduct" and treats it as superfluous. Moreover, although Officer Matthews testified generally that this understanding derived from his training, *see id.* at 24, 34, he did not offer any evidence (*e.g.*, a training manual or other documentary evidence) supporting this contra-textual

[14] The Second Circuit has described the question whether an employee spoke solely as an employee or as a citizen as "largely a question of law for the court." *Jackler*, 658 F.3d at 237. In *Connick*, the Supreme Court stated that "[t]he inquiry into the protected status of speech is one of law, not fact." *Connick*, 461 U.S. at 138 n.7. However, since *Garcetti* described the employee speech inquiry as a "practical one" requiring fact-specific inquiry into the nature of the speech and the nature of the employee's duties, circuits have described the nature of this inquiry differently, with some casting it as a pure question of law and others as a mixed question of law and fact. *See Fox v. Traverse City Area Public Schools Bd. of Educ.*, 605 F.3d 345, 350 (6th Cir. 2010) (surveying circuit split). *Compare Deutsch v. Jordan*, 618 F.3d 1093, 1098 (10th Cir. 2010) (question of law, but which may turn on jury's resolution of factual disputes such as precisely what plaintiff said), *Charles v. Grief*, 522 F.3d 508, 513 n.17 (5th Cir. 2008) (question of law, involving examination of underlying factual issues), *and Wilburn v. Robinson*, 480 F.3d 1140, 1149 (D.C. Cir. 2007) (question of law), *with Reilly v. City of Atl. City*, 532 F.3d 216, 227 (3d Cir. 2008) (mixed question of law and fact), *and Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1127–29 (9th Cir. 2008) (same). This Court reads *Jackler* to hold that, however described, the protected status of employee speech is ultimately a question of law for the court, but which must be determined by reference to the attendant facts and circumstances. Accordingly, where a fact critical to this legal analysis is disputed, the fact-finder must resolve the factual dispute before resolving this question of law. *See Anemone*, 629 F.3d at 117 (assuming *arguendo* that material disputes of fact exist as to whether employee spoke in official capacity or as a private citizen); *Pisano*, 2011 WL 1097554, at *9 ("The application of these tests is generally a matter of law for the court to decide, but in some instances, questions of fact will need to be resolved by a fact-finder before the court can apply the test."). In this case, because Officer Matthews' report of illegal stops, arrests, and summonses unambiguously was compelled by Section 207-21, the Court has no occasion to opine on how the inquiry would be properly cast or conducted had it turned on the resolution of disputed factual questions.

reading of Section 207-21, *see id.* at 39. And he specifically testified that he *would* have a duty to report unjustified stops, arrests, and summonses—exactly the conduct at issue here. *Id.* at 18.[15]

To be sure, it is generally not dispositive of the employee speech question that a duty to make such speech is listed in a manual: "[T]he listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." *Garcetti*, 547 U.S. at 424–25. But this factor is highly relevant: The Second Circuit has "frequently confronted similar situations where, as in *Garcetti*, the speech at issue was expressly part of the employee's official job duties and thus not protected under the First Amendment." *Griffin*, 880 F. Supp. 2d at 395 (collecting cases); *see Paola*, 372 F. App'x at 144 (state trooper's report about supervisor's unlawful conduct was unprotected because employee manual required him to report wrongdoing up the chain of command or to internal affairs); *Barclay*, 368 F. App'x at 268 (nurse's report to supervisors that her co-workers were mistreating patients and sleeping on the job not protected where employee work rules required such a report); *cf. D'Olimpio*, 462 F. App'x at 80 (affirming district court's conclusion that plaintiff's report of misconduct was unprotected because it was compelled by state law). And the concern animating the observation in *Garcetti*, that an excessively broad job description be determinative of whether an employee's

[15] Officer Matthews twice tried to blunt the effect of this testimony. First, in his deposition, he clarified that he would have no duty to report an unjustified stop based simply on an error in judgment; rather, he would only need to report intentionally unjustified stops. *See* Matthews Dep. 25, 28. But Officer Matthews alleges in the Complaint that officers were forced to "abandon their discretion in order to meet their numbers," which implies willful conduct. Compl. ¶ 28. Second, Officer Matthews filed an affidavit stating that he did not report "any particular" unjustified stop or arrest, just the broader practice. Matthews Decl. ¶ 13. But if Officer Matthews had a duty to report *particular* unjustified stops and arrests, surely he would also have a duty to report *a pattern of* unjustified stops and arrests, which is precisely what he claims to have done. Compl. ¶ 28.

speech is constitutionally protected, is absent here. Section 207-21 does not sweep broadly. Instead it imposes on police officers the unsurprising obligation of reporting criminal activity and other misconduct within the NYPD.[16]

For this reason, Officer Matthews' claim that reliance on Section 207-21 to define his job duties might strip police officers of any right to protest unlawful activity does not carry the day. A public employer may not strip its employees of all First Amendment protection by fashioning an excessively broad description of their official duties. Dissenting in *Garcetti*, Justice Souter voiced concern that "a response to the Court's holding will be moves by government employers to expand stated job descriptions to include more official duties and so exclude even some currently protectable speech from First Amendment purview." *Garcetti*, 547 U.S. at 431 n.2. In response, however, the majority clarified: "We reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions." *Id.* at 424. Here, Officer Matthews' fears are overstated, because Section 207-21, as interpreted here to require the reporting of unlawful stops and arrests, is neither overbroad nor overreaching. *See Schoolcraft*, 2012 WL 2161596, at *6 (relying on Patrol Guide Section 207-21 as a factor indicating that plaintiff's speech about quota policies in the NYPD was pursuant to his duties as a police officer). *But see Griffin*, 880 F. Supp. 2d at 397 (rejecting argument that Section 207-21 forecloses detective's claim to First Amendment protection where he reported to Internal Affairs that another detective had asked him to lie during official investigation by taking blame for a failed murder investigation). Unjustified arrests are a frequent source of civil liability, *see* 42

[16] Officer Matthews notes that he raised his complaints to his supervisor, rather than to Internal Affairs, as Section 207-21 directs, but that does not affect the First Amendment analysis. *See Ross*, 693 F.3d at 306 (rejecting claim that plaintiff's speech was protected because she made it outside the employer's designated channel); *Anemone*, 639 F.3d at 116 (same).

U.S.C. § 1983, and, under extreme circumstances, criminal liability, *see* 18 U.S.C. § 242. The claim that a departmental policy that requires police officers to report a pattern of such violations of law is overbroad is unpersuasive.[17]

In holding that Section 207-21 supports defendants' claim that Officer Matthews' speech was within his job responsibilities, the Court is mindful that formal descriptions "often bear little resemblance to the duties an employee actually is expected to perform." *Garcetti*, 547 U.S. at 424–25. "[S]peech can be pursuant to a public employee's official job duties even though it is not required by, or included in, the employee's job description, or in response to a request by the employer." *Weintraub*, 593 F.3d at 203 (alterations omitted); *accord Ross*, 693 F.3d at 305. Accordingly, the Court proceeds to consider other factors identified by the Supreme Court and the Second Circuit as relevant to that inquiry. These factors point in the same direction.

***2. Subject Matter of Employment*:** Officer Matthews' remarks about illegal stops and arrests, and about the quota policy that brought that misconduct about and to which he claimed he was personally subject, concerned the subject matter of his employment, owed its existence to his employment, and was made in furtherance of that employment. Where an employee's speech is "part-and-parcel of his concerns about his ability to properly execute his duties," it is unprotected. *Weintraub*, 593 F.3d at 203 (citation omitted); *accord Carter*, 415 F. App'x at 293

[17] Officer Matthews notes that defendants relied on Section 207-21 in their brief to the Second Circuit defending Judge Jones's dismissal of his Complaint. He argues that that Court's summary reversal, "though it did not expressly discuss the City's reliance on section 207-21, makes clear that section 207-21 cannot be the basis for disposing of Officer Matthews's First Amendment claim." Pl. Br. 16. But that is not so. Officer Matthews argued on appeal that Section 207-21 had not been before the Court on the motion to dismiss, and noted that Judge Jones had not referred to it in granting that motion. Far from finding Section 207-21 inapposite, the Second Circuit directed this Court to inquire into Officer Matthews' job responsibilities, *Matthews*, 488 F. App'x at 533, and this Court has carefully done so. Section 207-21 bears on that inquiry.

(affirming decision that speech was unprotected where it concerned officers' ability to perform their own duties). Here, the Complaint indicates that Officer Matthews spoke out of concern about the effect the quota system had on his and other officers' abilities to perform their duties: It alleges that "police officers felt forced to abandon their discretion in order to meet their numbers" and that the quota system was "having an adverse effect on *the precinct's* relationship with the community." Compl. ¶ 28 (emphasis added). To be sure, Officer Matthews also alleged that the quota system harmed the public. *See id*. ¶ 1 (alleging that Officer Matthews' complaint "comes in the context of a city-wide controversy over the NYPD's use of illegal quotas and the damage such quotas inflict on innocent people, policing, and police-community relations"). But Officer Matthews placed significant emphasis on his ability to do his own job; his reference to a related public interest did not transform an employment dispute into citizen speech. *See Brady*, 657 F. Supp. 2d at 348 ("[M]any aspects of a police officer's job duties, and those of many other public employees, directly impact issues important to the citizenry; simply mentioning this potential impact is not enough, by itself, to turn employees' internal disputes with their superiors about official matters into First Amendment claims."). As alleged in the Complaint, Officer Matthews, by challenging a policy he believed was impeding his and fellow officers' abilities to carry out their duties, was plainly acting in furtherance of his employment.

Officer Matthews' speech also "owed its existence to" his employment. Like the building official in *Looney* and the payroll clerk in *Ross*, Officer Matthews gained the information he reported while doing his job. *See Looney*, 702 F.3d at 712; *Ross*, 693 F.3d at 306; *see also Carter*, 415 F. App'x at 293 (affirming holding that speech about "misconduct [plaintiffs] knew of only by virtue of their job as police officers" was unprotected). To be sure, not all speech reporting information learned in the course of one's employment is unprotected; as

the Supreme Court has noted, public employees are often the only people with information about their employer's practices, and leaving such speech unprotected could deprive the public of valuable insights. *See Garcetti*, 547 U.S. at 419–21 ("The First Amendment protects some expressions related to the speaker's job."); *Pickering*, 391 U.S. at 572. Here, Officer Matthews' speech was on a subject of consequence: It stood to notify the public that unlawful stops and arrests in the 42nd precinct were occurring and were rooted in an internal quota system. *See Griffin*, 880 F. Supp. 2d at 400. However, in assessing whether or not Officer Matthews' speech was constitutionally protected, the fact that it directly implicated the subject matter of his employment supports a finding that it was not. *See Looney*, 702 F.3d at 712; *Ross*, 693 F.3d at 306; *Frisenda*, 775 F. Supp. 2d at 506.

***3. Internal Speech*:** A public employee does not "forfeit[] his protection against governmental abridgement of freedom of speech if he decides to express his views privately rather than publicly." *Givhan*, 439 U.S. at 695–96; *accord Garcetti*, 547 U.S. at 420–21. Nevertheless, speech confined to internal channels tends to look less like citizen speech than does the paradigmatic letter to the editor. *See Garcetti*, 547 U.S. at 423; *Ross*, 693 F.3d at 306 ("Other contextual factors, such as whether the complaint was also conveyed to the public, may properly influence a court's decision."); *Weintraub*, 593 F.3d at 205 (contrasting teacher's union grievance to a case where an employee pursued his complaints at a public press conference); *Healy*, 286 F. App'x at 746 (that employee reported finding of corruption only to his supervisor, not externally, supported finding that speech was unprotected); *Frisenda*, 775 F. Supp. 2d at 506 (police officer's internal memo unprotected in part because no indication that he made external complaints); *see also Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008) ("If however a public employee takes his job concerns to persons outside the work place in addition to raising

them up the chain of command at his workplace, then those external communications are ordinarily not made as an employee, but as a citizen.").

Here, Officer Matthews' speech was internal to the precinct—it was made to his direct supervisor. It is an ironic artifact of First Amendment law that Officer Matthews' decision to keep his complaints in-house, rather than airing the NYPD's dirty laundry to the media, results in a loss of protection. *See Singer v. Ferro*, 711 F.3d 334, 341 (2d Cir. 2013) ("[W]e acknowledge that there is no little irony in the fact that [plaintiff's] claim suffers because he did not make more serious allegations or circulate his criticism publicly, to the likely greater injury of the defendants."). But the Supreme Court recognized that irony in *Garcetti*, and ruled against the employee nonetheless. *Garcetti*, 547 U.S. at 423–24.[18]

***4. Lack of Civilian Analogue*:** A final relevant factor is whether there is a civilian analogue to Officer Matthews' speech. Where an employee speaks in a manner that no private citizen could, depriving the employee of First Amendment protection for such speech does not strip him of a right he would have had but for his employment. *See Garcetti*, 547 U.S. at 422, 424; *Weintraub*, 593 F.3d at 206 (Calabresi, J., dissenting). Instead, it puts him in the position he would have been in but for the fact of employment. The presence or absence of a civilian analogue is thus relevant to the issue at hand. *Weintraub*, 593 F.3d at 204; *see Jackler*, 658 F.3d at 241 (finding protected speech where plaintiff's refusal to retract his truthful report and file a false one "has a clear civilian analogue"); *cf. Bowie v. Maddox*, 653 F.3d 45, 48 (D.C. Cir. 2011)

[18] This irony is mitigated by the fact that the absence of a First Amendment cause of action does not mean that public employees relinquish their rights under applicable federal or state laws, *e.g.*, those that protect whistleblowers. *See Garcetti*, 547 U.S. at 425–26; *Ross*, 693 F.3d at 307. The Complaint here, however, is not brought under such laws.

(holding that the existence of a civilian analogue does not alone render speech protected, because "[a]ll official speech, viewed at a sufficient level of abstraction, has a civilian analogue").[19]

Examples of speech with a civilian analogue include a letter to the local newspaper, *see Garcetti*, 547 U.S. at 423, and complaints to elected officials or independent state agencies, *see Weintraub*, 593 F.3d at 204; *Freitag v. Ayers*, 468 F.3d 528, 545 (9th Cir. 2006). In *Jackler*, the Second Circuit found a civilian analogue to Jackler's refusal to retract his truthful report and file a false one, because a citizen has the right to file a report with the police department, and, having done so, "has the indisputable right to reject pressure from the police to have him rescind his accusation and falsely exculpate the accused." *Jackler*, 658 F.3d at 241. By contrast, examples of speech lacking such an analogue include an official report made to a supervisor, *see Garcetti*, 547 U.S. at 422–23, and an employee grievance filed in a forum unavailable to non-employees, *see Weintraub*, 593 F.3d at 203.

Here, Officer Matthews likens his oral complaints to his commanding officers to the reports or complaints which a civilian is, of course, free to make to a police department. *Jackler*, 658 F.3d at 241; *see also Griffin*, 880 F. Supp. 2d at 399–400 (citizens may report misconduct to the police department through the Internal Affairs Bureau in the same manner that NYPD

[19] Judge Calabresi has read the majority in *Weintraub* to treat the presence of a civilian analogue as a *necessary* condition for constitutional protection. *See Weintraub*, 593 F.3d at 206. The D.C. Circuit, by contrast, has interpreted the Second Circuit as holding, in *Jackler*, that the presence of a civilian analogue is a *sufficient* condition for such protection. *See Bowie*, 653 F.3d at 48. It appears to this Court that the most apt description of the Circuit's doctrine on this point is that the presence or absence of a civilian analogue is a relevant, but not invariably dispositive, factor. In *Weintraub*, the Court stated that its finding of employee speech was "*supported by* the fact that [plaintiff's] speech ultimately took the form of an employee grievance, for which there is no relevant citizen analogue," *Weintraub*, 593 F.3d at 203 (emphasis added), and that the lack of a civilian analogue is "not dispositive," *id.* at 204. *Jackler*, in turn, identified the presence of a civilian analogue as an important indicator that Jackler had not spoken as an employee. *See Jackler*, 658 F.3d at 240. It appears that the Second Circuit has thus viewed the presence of a civilian analogue as neither necessary nor sufficient, but simply a factor that "bear[s] on the perspective of the speaker." *Weintraub*, 593 F.3d at 204.

officers can). But Officer Matthews did not file a police report or call Internal Affairs. Instead, he made his reports to the commanding officers of the 42nd Precinct during a series of in-person meetings in the precinct. The decisive question is, therefore, whether *this* is a "channel[] available to citizens generally." *Weintraub*, 593 F.3d at 204.

Officer Matthews argues that civilians may make such complaints in the manner that he did. He notes that the 42nd Precinct's commanding officer has a duty to meet with civilians to receive feedback about police conduct, *see* Beirne Dep. 24–25; Bloch Dep. 22, 48; Bugge Dep. 39; Harrist Decl Ex. 7, and points to Captain Bloch's and Captain Bugge's attendance at public meetings of the 42nd Precinct's Community Council, *see* Bloch Dep. 24–25; Bugge Dep. 45–47, and to their availability for additional in-person meetings to address specific concerns, *see* Bloch Dep. 36, 39, 41; Bugge Dep. 64–65; Harrist Decl. Ex. 8, at NYPD 188. Officer Matthews also identifies at least one occasion in which Captain Bugge met in person in his office with a local reverend to discuss his mistreatment during a stop. Bugge Dep. 58–59.

On the other hand, as the City notes, relative to the average citizen, Officer Matthews had superior access to his commanding officers. He spoke with Captain Bugge about the existence of the quota system in February, March, April, June, and October 2009, and with another precinct executive in May 2009. Compl. ¶¶ 20–21. In January 2011, after Captain Bugge was replaced by Captain Bloch—who, apparently, met less frequently with community members, *see* Bloch Dep. 41—Officer Matthews spoke with Captain Bloch. Compl. ¶ 28. By contrast, the only specific instance of a civilian's meeting in person with a commanding officer of the 42nd Precinct in a manner akin to Officer Matthews' involved a prominent local reverend who was an advisor to the Community Council board and was otherwise in the Community Affairs Office "a couple of times a week." *See* Bugge Dep. 58–59. Further, even for such local leaders, such

meetings would be set up through the Community Affairs Office, which would often resolve the issue at hand before the civilian ever got face time with the commanding officer. *See* Bugge Dep. 65.

For these reasons, it is not correct for Officer Matthews to claim that the average civilian enjoyed access to the channel which he used to lodge his complaint about unlawful stops and arrests and about the quota system. *See Williams v. Cnty. of Nassau*, 779 F. Supp. 2d 276, 285–86 (E.D.N.Y. 2011) ("While citizens may write letters to, or request meetings with, the Deputy County Executive, none would have the kind of access to [the Deputy County Executive] that [plaintiff] had as Executive Director of the [Civil Service Commission]."). In so noting, the Court recognizes that Officer Matthews did not make his complaints during regularly scheduled meetings with his commanding officers, *see* Matthews Decl. ¶¶ 8–11; Bloch Dep. 20; Bugge Dep. 31–32, 34; *see also Huth*, 598 F.3d at 74 (involving employee's complaints raised during daily meetings convened to discuss such matters), and that for there to be a civilian analogue there need not be perfect symmetry between the manner in which the plaintiff spoke and the channels available to the ordinary civilian. But the differences here are significant. Officer Matthews was able to get the ear of his commanding officers more readily, more frequently, and more privately than could an average citizen. Accordingly, this factor, too, supports a finding that Officer Matthews spoke pursuant to his official duties.

* * *

Taken together, the above factors, derived from *Garcetti* and its Second Circuit progeny, require the finding that, when Officer Matthews reported unlawful stops, arrests, and summonses and the quota policy from which they derived, he spoke as an NYPD employee, not a citizen. Officer Matthews' speech was compelled by the NYPD Patrol Guide; concerned the subject

matter of his employment; was made internally; and lacked a direct civilian analogue. His speech therefore was not constitutionally protected.

In so holding, the Court recognizes that, as a matter of fact, Officer Matthews' speech had undeniable value to the public. The enforcement priorities of the NYPD may profoundly affect the lives of New Yorkers. And there is a paramount public interest in shining a light on a policy that allegedly incents or causes police officers to violate citizens' rights not to be subject to unlawful stops and arrests. Reinforcing that notion, the quota system that Officer Matthews protested would, in fact, today violate New York state law. *See* N.Y. Labor Law § 215–a (effective Aug. 30, 2010). Officer Matthews' speech had the potential to contribute usefully to public discourse on issues of consequence. *See Pickering*, 391 U.S. at 572.

However, as a matter of law, *Garcetti* and its Second Circuit progeny teach that not all speech by public employees enjoys First Amendment protection. Public employees who wish to lend their voice to the public debate in a way that enables them to claim such protection for their words must be mindful that the First Amendment does not "constitutionalize the employee grievance," *Garcetti*, 547 U.S. at 420 (citation omitted), and that the availability of such protection will ineluctably turn on a fact-intensive inquiry as to whether such speech was made pursuant to the employee's duties. *See id.* at 424; *Ross*, 693 F.3d at 306. The facts here have led the Court to deny such protection to Officer Matthews' speech. His speech was more in the nature of an employee grievance than a political statement. But whether speech in the future by police officers protesting unlawful police practices will be similarly classified will turn on the facts and the context. A police officer's inherent duty to enforce the law does not invariably

deprive him or her of First Amendment protection for speech that tends to reveal unlawful police practices.[20]

CONCLUSION

For the reasons stated, defendants' motion for summary judgment is granted. The Clerk of Court is directed to terminate the motion pending at docket number 35, and to close this case.

SO ORDERED.

Paul A. Engelmayer

Paul A. Engelmayer
United States District Judge

Dated: July 29, 2013
New York, New York

[20] Nor does such an officer relinquish his rights under relevant whistleblower laws. *See Garcetti*, 547 U.S. at 425–26; *Ross*, 693 F.3d at 307.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

CRAIG MATTHEWS,

Plaintiff,

-against-

CITY OF NEW YORK, RAYMOND KELLY, JON BLOCH, and MARK SEDRAN,

Defendants.

----------X

12 **CIVIL** 1354 (PAE)

JUDGMENT

Defendants having moved for summary judgment, and the matter having come before the Honorable Paul A. Engelmayer, United States District Judge, and the Court, on July 29, 2013, having rendered its Opinion and Order granting defendants' motion for summary judgment, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion and Order dated July 29, 2013, defendants' motion for summary judgment is granted; accordingly, the case is closed.

Dated: New York, New York
July 30, 2013

RUBY J. KRAJICK

Clerk of Court

BY:

Deputy Clerk

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON _____