Appeal No. 11-55213

IN THE

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

JOHN ELLINS,

Plaintiff/Appellant,

v.

CITY OF SIERRA MADRE, A municipality;
MARILYN DIAZ, Individually and as Chief of Police,

Defendants/Appellees.

On Appeal from an Order of the United States District Court
for the Central District of California

AMICUS CURIAE BRIEF OF LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF APPELLEES' PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. THE *ELLINS* DECISION HAS IMPROPERLY WEAKENED THE "PUBLIC CONCERN" ELEMENT OF A PUBLIC EMPLOYEE'S FIRST AMENDMENT CLAIM 2

III. THE *ELLINS* DECISION ERRED IN FINDING PUBLIC EMPLOYEE SPEECH ON BEHALF OF THEIR UNIONS WILL ESSENTIALLY ALWAYS PASS THE "OFFICIAL DUTIES" ELEMENT 3

IV. THE PRECEDENT SET BY THE PANEL DECISION ON THE ISSUES OF CAUSATION AND QUALIFIED IMMUNITY GROSSLY DISRUPT PUBLIC SECTOR LABOR RELATIONS 5

V. THE *ELLINS* PANEL DECISION WILL UNDULY EMBROIL FEDERAL COURTS IN THE FEDERAL, STATE, AND GOVERNMENT WORKPLACE 6

VI. CONCLUSION 7

TABLE OF AUTHORITIES

Page(s)

Cases

City of San Diego, Cal. v. Roe
543 U.S. 77 (2004) 2

Connick v. Myers
461 U.S. 138 (1983) 1, 2, 6

Freitag v. Ayers
468 F.3d 528 (9th Cir. 2006) 4

Garcetti v. Ceballos
547 U.S. 410 (2006) 1, 3, 6, 7

Johnson v. Multnomah County, Or.
48 F.3d 420 (9th Cir.1995) 2

Ross v. Breslin
693 F.3d 300 (2d Cir. 2012) 4

Weintraub v. Board of Educ. of City School Dist. of City of New York
593 F.3d 196 (2d Cir. 2010) 4

Statutes

42 U.S.C. section 1983 1

Constitutional Provisions

First Amendment ..... passim

INTEREST OF *AMICUS CURIAE*

The League of California Cities is an association of 469 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

As discussed further below, the League of California Cities submits this Brief in support of Defendants' petition for rehearing en banc because this case presents an issue of exceptional importance in interpreting how the First Amendment free speech protection of the U.S. Constitution applies to government employment.

Counsel for the parties to this case have not authored this Brief in whole or in part. Neither the parties nor their counsel have contributed money intended to fund preparing or submitting this Brief, nor has anyone other than the *amicus curiae*, its members, or its counsel, Liebert Cassidy Whitmore, contributed money intended to fund preparing or submitting the brief.[1]

The League of California Cities has obtained the consent of all parties to submit this Brief.

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[1] Liebert Cassidy Whitmore wishes to disclose that it worked on an administrative matter pertaining to Plaintiff John Ellins for the City of Sierra Madre. It was, however, not the alleged adverse action in this case. Nor does this Brief relate to arguments based on the specific facts of the *Ellins* administrative matter.

I. INTRODUCTION

Amicus Curiae the League of California Cities submits this Brief in support of Defendants' petition for rehearing en banc because this case presents an issue of exceptional importance in interpreting how the First Amendment free speech protection of the U.S. Constitution applies to government employment. Under established law, public employees retain First Amendment free speech rights, even as against their own government employer. They do, however, surrender certain aspects of those rights in going to work for the government, and their doing so allows government to carry out its duties effectively. Public employees cannot state First Amendment free speech claims against their employer if they speak on matters not of "public concern," or if they speak pursuant to their "official duties." *Connick v. Myers*, 461 U.S. 138, 146 (1983); *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

The opinion in *Ellins v. City of Sierra Madre* improperly overrides this established balance of rights by conferring unique and powerful First Amendment free speech protection to one particular type of actor in the government workplace: labor unions. *Ellins* does so by holding (1) that speech by a public employee on behalf of the employee's union or in the capacity of a union official essentially always satisfies the "public concern" element, even if the same speech would not if rendered by a single employee or small group independent of the union; and (2) that public employee speech on behalf of a union should, by definition, stand outside of "official duties." These broadly phrased holdings do not have the support of established or well-reasoned case law. They set a dangerous precedent by allowing a small set of employees who are entitled to speak on behalf of their union's greatly enhanced free speech rights, which include the ability much more readily to assert 42 U.S.C. section 1983 claims against individual members of management.

Indeed, the concurring opinion by Judge Rawlinson in *Ellins* expresses that the Court should not have gone so far as to set forth more expansive rulings on the law of free speech protection.

Ellins takes at least two giant steps forward in developing the law of the First Amendment, and does so in a way that contradicts U.S. Supreme Court precedent and sound principles of constitutional law in the context of labor relations. The League of California Cities respectfully requests that this Court grant Defendants' petition for rehearing en banc, in order to address these matters of exceptional importance.

II. THE *ELLINS* DECISION HAS IMPROPERLY WEAKENED THE "PUBLIC CONCERN" ELEMENT OF A PUBLIC EMPLOYEE'S FIRST AMENDMENT CLAIM

"Speech involves a matter of public concern when it can fairly be considered to relate to 'any matter of political, social, or other concern to the community.'" *Johnson v. Multnomah County, Or.*, 48 F.3d 420, 422 (9th Cir. 1995) (quoting *Connick*, 461 U.S. at 146). The U.S. Supreme Court has described that a topic is only 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." *City of San Diego, Cal. v. Roe*, 543 U.S. 77, 84, 125 S. Ct. 521, 160 L.Ed.2d 410 (2004).

The Court's reasoning here sharply skews the "public concern" test for union-related speech, by holding that when an employee's speech is not individualized but the "collective" speech on behalf of a group of represented employees, it assumes the mantle of "public concern." The *Ellins* Court, in discussing prior precedent, identified this "collective" feature of the speech in those cases as its salient characteristic in satisfying public concern. *Ellins v. City of Sierra Madre*, No. 11-55213, slip op. at 12-13 (9th Cir. March 22, 2013)

(citations omitted). The *Ellins* Court went on to apply this individual versus collective distinction as a near-dispositive feature of the facts before it:

> Here, Ellins led a no-confidence vote about Diaz by the police officers' union. Diaz does not contend that any of the grievances motivating the vote were *individual* as opposed to *collective*. Instead, as in *Lambert*, the record suggests that the police union's concerns were with Diaz's leadership style and other department-wide problems, not private grievances.

Id. at 13 (emphasis added).

This prominent and over-arching reasoning of the *Ellins* opinion will greatly deter courts from finding outside the scope of "public concern" even the most routine speech by a union official in collective bargaining or labor relations generally, for example speech on wage and schedule issues, standard benefits, assignments, and other typically internal matters.

III. THE *ELLINS* DECISION ERRED IN FINDING PUBLIC EMPLOYEE SPEECH ON BEHALF OF THEIR UNIONS WILL ESSENTIALLY ALWAYS PASS THE "OFFICIAL DUTIES" ELEMENT

The U.S. Supreme Court held 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." *Garcetti*, 547 U.S. at 421 (emphasis added). The Court reasoned that restricting speech that "owes its existence" to a public employee's job responsibilities does not infringe any liberties the employee enjoys as a private citizen. *Id.* at 421-22. Under established case law, "official duties" are in no way limited to the employee's day-to-day job responsibilities, and instead can encompass the employee's voluntarily asserting complaints regarding

conditions of employment. *See Freitag v. Ayers*, 468 F.3d 528, 544, 546 (9th Cir. 2006).

Indeed, courts have held that a public employee's entirely voluntary speech activities meant to advance his or her job goals constitutes speech pursuant to "official duties." *See Weintraub v. Board of Educ. of City School Dist. of City of New York*, 593 F.3d 196, 203 (2d Cir. 2010) (plaintiff instructor's voluntary assertion of grievances concerning conditions in his classroom constituted speech pursuant to "official duties"; his grievance was "part-and-parcel of his concerns" about his ability to "properly execute his duties"); *Ross v. Breslin*, 693 F.3d 300, 305-06 (2d Cir. 2012) (applying standard).

This well-established circuit precedent for "official duties" is broad enough to encompass a public employee's speech on behalf of his or her union, including speech that voices workplace concerns of the bargaining unit. Public employee speech as a union official is not the speech of a "private citizen," because the employee would never be in such a position with such authority or responsibility as a private citizen. The speech on behalf of the union owes its existence wholly to the employee's position and role in the government workplace.

The *Ellins* opinion cuts through all of this analysis by holding that public employee speech on behalf of unions essentially never constitutes speech pursuant to "official duties." The *Ellins* opinion after discussing authority concluded as a general rule: "Given the inherent institutional conflict of interest between an employer and its employees' union, we conclude that a police officer *does not* act in furtherance of his public duties when speaking as a representative of the police union." *Ellins*, slip op. at 17 (emphasis added).

As Judge Rawlinson's concurring opinion points out, this conclusion rests only on out-of-circuit authority that lacks substantial reasoning. *Ellins*, slip op. at 33-34.

This Court should rehear this matter en banc in order to reconsider and reject this improperly expansive approach to "official duties."

IV. THE PRECEDENT SET BY THE PANEL DECISION ON THE ISSUES OF CAUSATION AND QUALIFIED IMMUNITY GROSSLY DISRUPT PUBLIC SECTOR LABOR RELATIONS

The *Ellins* opinion also raised the stakes for management by ruling against it on a number of other aspects of public employee free speech claims. The Court determined that the delayed signing of the POST certificate, and the delay in payment of the 5% increase was an "adverse action" against Ellins; and that there was enough evidence to go to a jury on whether Ellins' speech as the Association President was a "substantial or motivating" factor, and on whether the Department had "adequate justification" for further evaluating the certificate before signing. *Ellins*, slip op. at 18-25. In a determination that can be disconcerting to management, the Court also found that the Chief of Police did not have qualified immunity and that therefore a jury would have to decide whether the Chief had engaged in conduct that could result in her personal liability. *Ellins*, slip op. at 26-29.

These additional rulings assure that employees who are union officials have an enormously greater ability than their fellow employees to present management with the threat of personal liability for acts that can be characterized, wrongly or not, as free speech retaliation. This will grossly disrupt public sector labor-management relations.

Those employees who serve as union officials at the bargaining table could easily, for example, take strident positions on bargaining unit compensation and benefits, use inflammatory but appropriate rhetoric against management, and even cast aspersions at individual managers across the table -- then, under the *Ellins* Court's reasoning, if these union officials suffered any arguable adverse actions

against them whatsoever, they could use their speech in bargaining to at least state a First Amendment retaliation civil rights claim against management, even if management never intended any retaliation. This would have the practical effect of strongly deterring any adverse actions against union officials, even if entirely warranted.

Indeed, again hypothetically, union officials could even use *Ellins* to make the implausible argument that management officials' bargaining behavior itself could supposedly constitute "retaliation" for union officials' speech. Union officials conducting collective bargaining could set forth the "collective" unit position on pay raises, and then if management responds in a way that has a sufficiently adverse economic impact, the union could easily try to twist *Ellins* to argue management's response was retaliation for exercise of First Amendment rights, i.e., retaliation for the union officials' expression of union views on the issue of pay raises. If management broke applicable state labor relations law, of course, this would be a matter for state agency intervention by the Public Employment Relations Board ("PERB"), but it should not be a federal civil rights lawsuit demanding the intervention of the federal judiciary.

V. THE *ELLINS* PANEL DECISION WILL UNDULY EMBROIL FEDERAL COURTS IN THE FEDERAL, STATE, AND GOVERNMENT WORKPLACE

The U.S. Supreme Court has described that the "public concern" and "official duties" limitations on public employee free speech claims are justified by the government's need to retain "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." *Garcetti*, 547 U.S. at 418; *see also Connick*, 461 U.S. at 143 ("[G]overnment offices could not function if every employment decision became a constitutional matter").

In *Garcetti*, the U.S. Supreme Court rejected Respondent Richard Ceballos' argument that the First Amendment should protect a government employee even if he speaks pursuant to his official duties, stating that: "Ceballos' proposed contrary rule, adopted by the Court of Appeals, would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business." *Garcetti*, 547 U.S. at 423.

Ellins' expansive ruling paves the way for the federal courts to take up roles reserved for state labor agencies. By "constitutionalizing" management-labor relations in the public sector, the decision takes this area of the law in many respects out of the hands of state legislators and even Congress, and invests responsibility for them in the federal courts. See *Garcetti*, 547 U.S. at 423 (the "official duties" limitation advances "sound principles of federalism and the separation of powers").

VI. CONCLUSION

Ellins v. City of Sierra Madre presents this Court with the opportunity to render a landmark decision clarifying the law on public employee First Amendment rights. The League of California Cities respectfully requests that this Court vote to rehear the *Ellins* case en banc.

DATED: April 12, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 29-2 FOR CASE NUMBER 11-55213

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 29-2, I certify that Amicus Curiae's attached Brief is proportionately spaced, has a typeface of 14 points or more and contains 1,958 words.

DATED: April 12, 2013

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