

***LANE v. FRANKS*: THE SUPREME COURT FRANKLY FAILS TO GO FAR ENOUGH**

INTRODUCTION

The role of the First Amendment in the public workplace is one of high importance, as nearly twenty-two million Americans are employed by governmental entities.¹ Unlike the broad constitutional protections granted to private citizen speech, the Supreme Court has constrained public employees' First Amendment freedoms.² In June 2014, though, the Supreme Court unusually, yet unanimously, bolstered the constitutional rights of public employees by taking an employee-friendly stance in the freedom of speech realm.³ The Court took cautious steps to define the blurred line established by its own precedent on what constitutes "citizen speech" protected under the First Amendment versus constitutionally unprotected "employee speech."⁴ In *Lane v. Franks*, the focus of this Note, the Supreme Court relaxed the standard public employee speech was previously held to, and it reinforced the importance of compelled testimony by ever-so-slightly expanding First Amendment protection to public employees testifying under subpoena about matters not within their ordinary job duties;⁵ however, the decision did not go quite far enough.

While *Lane v. Franks* first appeared to be a victory for public employees, the decision certainly has its drawbacks. The decision effectually left lower courts in the dark,⁶ and both public employees and employers confused on the boundaries of constitutional protection.⁷ While *Lane v. Franks* tried to redefine ambiguous precedent, it failed to do so clearly and effectively. Moreover, the Court's narrow holding leaves too many types of speech unprotected, such as

1. U.S. CENSUS BUREAU, ANNUAL SURVEY OF PUBLIC EMPLOYMENT & PAYROLL SUMMARY REPORT: 2013 2 (2014), http://www2.census.gov/govs/apes/2013_summary_report.pdf [<http://perma.cc/63F4-T93U>].

2. W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305, 313 (2001).

3. *Lane v. Franks*, 134 S. Ct. 2369, 2373 (2014).

4. *Id.* at 2378–80.

5. *See id.*

6. Catherine Fisk, *Guest Blog: Catherine Fisk on Lane v. Franks*, HAMILTON AND GRIFFIN ON RIGHTS (Apr. 28, 2014), <http://hamilton-griffin.com/guest-blog-catherine-fisk-on-lane-v-franks/> [<http://perma.cc/5PM6-QGC4>].

7. Katie Jo Baumgardner, Note, *Lane v. Franks*, 90 NOTRE DAME L. REV. ONLINE 42, 52 (2015).

voluntary testimony and speech that falls within the course of one's ordinary job duties.⁸ A citizen's First Amendment protections should not have to be checked at the door merely because he or she is employed by a state actor, and public employees should be further protected from potential retaliation.

Part I of this Note discusses the applicable portions of the Constitution and Supreme Court First Amendment jurisprudence that laid the foundation for the *Lane* decision. Part II discusses the circuit split that existed concerning the constitutional protections of public employee testimony before the Supreme Court's attempt at resolution in 2014. Part III analyzes the Supreme Court's decision in *Lane v. Franks*, the predominate focus of this Note. Part IV provides a critique of the Court's decision in *Lane*. Finally, Part V proposes a modified, and preferable, test for the Court to employ in determining whether a public employee's speech is constitutionally protected.

I. THE FIRST ATTEMPTS AT DRAWING THE CONSTITUTIONAL LINE BETWEEN CITIZEN SPEECH AND EMPLOYEE SPEECH

A. *Constitutional and Statutory Freedom of Speech Protections*

The First Amendment of the United States Constitution states, "Congress shall make no law . . . abridging the freedom of speech . . ." ⁹ The First Amendment limits the government, and its entities, from regulating the speech of its citizens.¹⁰ However, while the First Amendment is a fundamental right and is considered one of our nation's most prized values,¹¹ the right is not absolute, and there are abundant types of speech that escape the provision's scope.¹² One notable exception is the one granted to public employees. While the Supreme Court's First Amendment jurisprudence grants public employees some protection, "their speech is afforded a lower degree of constitutional protection as compared with the speech of private citizens."¹³ These narrowed rights become particularly controversial when, because of their speech, an employee faces adverse employment consequences or termination.¹⁴

8. *See infra* Part IV.

9. U.S. CONST. amend. I.

10. *See id.*

11. *E.g.*, SHAD Alliance v. Smith Haven Mall, 488 N.E.2d 1211, 1212 (N.Y. 1985) ("[T]he right to free expression is one of this Nation's most cherished civil liberties.").

12. Ronald K.L. Collins, *Exceptional Freedom—the Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 417–18 (2013) (listing examples of exceptions, such as speech used to further a criminal conspiracy, speech that amounts to treason, defamation or libelous speech, and speech that is deemed obscene).

13. Wendel, *supra* note 2, at 344.

14. *See* David L. Hudson Jr., *Balancing Act: Public Employees and Free Speech*, 3 FIRST REPS. 1, 4 (2002). In response to retaliation, many public employees seek redress under 42 U.S.C. § 1983, which in itself contains no rights but provides a private cause of action for citizens

B. Key Cases Outlining Supreme Court First Amendment Jurisprudence

For many years, “the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights.”¹⁵ However, in 1968, that officially changed when the Supreme Court decided *Pickering v. Board of Education*.¹⁶ In *Pickering*, the Court recognized that public employees do not surrender all their First Amendment rights by reason of their employment.¹⁷ Rather, the First Amendment protection of a public employee’s speech depends on a careful balance between the interests of the employee as a citizen in commenting upon matters of public concern, and the interests of the State as an employer in promoting the efficiency of the public services it performs through its employees.¹⁸

In *Pickering*, the plaintiff was a public school teacher whose employment was terminated when he wrote a letter to the editor of a local newspaper criticizing the school board’s proposed funding plans.¹⁹ The Supreme Court concluded the public school teacher’s speech was constitutionally protected under the First Amendment by way of the newly created “*Pickering* balancing test.”²⁰ Under the test, two inquiries are made.²¹ First, courts must ascertain whether the employee spoke as a citizen on a matter of public concern, which is a two-pronged inquiry.²² The first question serves as merely a threshold. If the threshold is not satisfied, the analysis ends, and the speech is not afforded First Amendment protection.²³ However, if the threshold is met, and the employee did speak as a citizen on a matter of public concern, the analysis

deprived of “any rights, privileges, or immunities secured by the Constitution,” such as the First Amendment. 42 U.S.C. § 1983 (1994).

15. *Connick v. Myers*, 461 U.S. 138, 143 (1983). Up until the middle of the twentieth century, there was no constitutional bar to a governmental employer prohibiting speech considered detrimental to the employer’s best interests. *See generally id.*; *Wood v. Georgia*, 370 U.S. 375, 395 (1962) (finding county sheriff’s letter criticizing a local judge’s ruling was protected expression because it “did not present a danger to the administration of justice”).

16. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 565 (1968).

17. *Id.* at 568; *see also Wieman v. Updegraff*, 344 U.S. 183, 192 (1952); *Shelton v. Tucker*, 364 U.S. 479, 490 (1960); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) (reiterating public employees cannot be constitutionally forced to surrender First Amendment rights afforded to all citizens based on their employment).

18. *Pickering*, 391 U.S. at 568; *Connick*, 461 U.S. at 154 (This balance takes into account the First Amendment’s primary goal: the full protection of speech involving matters of public concern as well as the “practical realities involved in the administration of a government office”).

19. *Pickering*, 391 U.S. at 564.

20. *Id.* at 568.

21. *Id.*

22. *Id.*; *see also Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006); *Connick*, 461 U.S. at 144–48 (exemplifying the dual inquiry *Pickering* balancing test).

23. *Garcetti*, 547 U.S. at 418.

proceeds to the second inquiry: the balancing test. The Court then determined whether the government employer had an adequate justification for treating the employee differently than any other member of the general public,²⁴ weighing the employee's interest against the employer's interest. Under the *Pickering* balancing test, so long as the employee is speaking as a citizen about matters of public concern, only restrictions that are necessary for the employer to operate efficiently and effectively, and avoid disruption, are permitted.²⁵

While an individual has obvious constitutional rights and interests in one's speech, the government also has important interests at stake. The government as a sovereign has few legitimate reasons to regulate speech,²⁶ but the government as an employer has a multitude of reasons to do so. When functioning as an employer, the government has the same interests as all other employers,²⁷ such as the maintenance of harmony in the workplace, the maintenance of discipline, the need for employee loyalty, and the need for an employee to keep confidences.²⁸ These governmental interests make even more sense in consideration of the overall public interest because the public has a strong interest in the services the government provides. Therefore, the public aligns with the government when the government is acting as an employer and the speech at issue would disrupt those services. The interplay of these interests (that of the employee, the employer, and the public) explains why the Court's framework began evolving with the institution of a balancing test under *Pickering*.

While *Pickering* left some matters unclear, such as the definition of a citizen speaking on a matter of public concern and its application of the analytical framework on workplace speech,²⁹ the Supreme Court handed down several other cases in the coming years to provide clarification. *Givhan v. Western Line Consolidated School District* defined the First Amendment protection to private conversations involving a matter of public concern.³⁰ The

24. *Id.*

25. *Pickering*, 391 U.S. at 574. Since the letter to the editor concerning the school budget constituted speech on a matter of public concern, and it did not impede the teacher's proper performance of his daily duties in the classroom or interfere with the regular operation of the schools, the teacher's speech alone could not serve as the basis for termination. *Id.* at 572-73.

26. When the government is sovereign, the public interest dictates that speech be allowed unless it is truly dangerous. For example, screaming "fire" in a crowded movie theatre.

27. *Public Employer May Remove Employees Acting in Direct Contravention of Employer's Interests*, 2 NO. 10 NEV. EMP. L. LETTER 3 (July 1997).

28. *See generally* Gustafson v. Jones, 290 F.3d 895, 909 (7th Cir. 2002) (describing various interests of the government functioning as an employer).

29. *See id.* at 574.

30. *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1979) (finding a school teacher's grievance on discriminatory policies to her supervisor in private was speaking as a citizen on a matter of public concern and deserving of First Amendment protection); *see also*

Court made it apparent that speech not directly related to an employee's ordinary work responsibilities would likely be protected.³¹ However, in *Connick v. Myers*, the Court looked to the content, form, and context of the speech to determine whether the speech was considered a matter of public concern.³² There, the Court was faced with a matter that pertained directly to the employee's job duties, and it hinted that government employees speaking directly about their employment may receive different treatment.³³ *Connick* indicated that if the content involves a larger audience, possibly outside the workplace, the speech is more likely to be protected.³⁴ If the speech appears more like a disgruntled employee complaining about personal employment issues, the less likely the speech will be protected.³⁵ Despite some clarifications by the Court, the precise definition of "speech involving a matter of public concern" continued to remain unclear for decades to come.

After nearly forty years of faithfully applying the *Pickering* balancing test, the Supreme Court issued a sharply divided opinion and added a new, and significant, wrinkle to the analysis.³⁶ In *Garcetti*, a district attorney claimed retaliation in violation of the First Amendment when he was reassigned for writing a memorandum recommending a case be dismissed after uncovering alleged governmental misconduct surrounding a search warrant.³⁷ While regarding *Pickering* as a "useful starting point,"³⁸ *Garcetti v. Ceballos* added an additional threshold inquiry by distinguishing between government employees speaking as members of the public and government employees speaking while performing their official job duties.³⁹ In effect, the Court usurped the previously undefined "as a citizen" language from *Pickering* and provided it with separate analytical teeth. The Court held if the speech is made "pursuant to" the public employee's "official duties," then the employee was not speaking as a citizen, and *Garcetti*'s new threshold inquiry is left unsatisfied.⁴⁰ The consequence is that the employee's speech is left unprotected, *even if* the employee can satisfy the previously established

Rankin v. McPherson, 483 U.S. 378, 384, 388–89 (1987) (deeming an employee's comment regarding the attempted assassination of President Nixon to be citizen speech).

31. *Givhan*, 439 U.S. at 415–16.

32. *Connick v. Myers*, 461 U.S. 138, 147–48 (1983).

33. *Id.* However, the Court did not expressly reach whether the employee's speech constituted citizen speech, as it was resolved based on the speech not constituting "a matter of public concern." *Id.*

34. *See id.* at 147.

35. *See id.*

36. *See Garcetti v. Ceballos*, 547 U.S. 410 (2006).

37. *Id.* at 414–15.

38. *Id.* at 417.

39. *Id.* at 421.

40. *Id.*

Pickering balancing test.⁴¹ Thus, after *Garcetti*, even if the speech is an expression of public concern the employee held in his or her capacity as a private citizen, if it is voiced pursuant to the employee's official duties, the First Amendment no longer provides a safeguard from employer discipline.⁴² This has since been referred to as the "official duties" doctrine.⁴³ The *Garcetti* Court granted public employers substantial discretion in running their respective services, and it reasoned that when a citizen accepts a government employment position, the citizen by necessity also accepts some restraints on his or her freedoms in order to maintain proper functioning of government offices.⁴⁴

Under this newly created "official duties" doctrine, the *Garcetti* Court identified whether the statements were actually made pursuant to the employee's official job responsibilities as the "controlling factor."⁴⁵ Since the district attorney prepared the memorandum at issue while performing the tasks he was compensated to perform, the Court determined his statement was made as a public employee pursuant to his official duties.⁴⁶ Therefore, he was speaking as an employee, not as a citizen, and the First Amendment did not insulate him from discipline.⁴⁷

The *Garcetti* decision created strong division across the Court. Indeed, the majority opinion, which was joined by only five justices, was countered with three dissenting opinions.⁴⁸ Justice Stevens, Justice Souter, and Justice Breyer all contended that the majority's holding went too far in setting forth a per se rule and provided the employer with too much protection at the expense of the employee's constitutional rights.⁴⁹ Alternatively, Justice Stevens asserted that "[t]he proper answer to the question 'whether the First Amendment protects a

41. *Garcetti*, 547 U.S. at 421.

42. *Id.*

43. *See* Reilly v. City of Atlantic City, 532 F.3d 216, 231 (3d Cir. 2008).

44. *Garcetti*, 547 U.S. at 418, 421–22 ("[W]hen 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 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. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.").

45. *Id.* at 421.

46. *Id.*

47. *Id.* at 422.

48. *Id.* at 412, 426, 427, 444.

49. *Garcetti*, 547 U.S. at 426, 446 (Stevens, J., and Breyer, J., dissenting); *see also id.* at 428–29 (Souter, J., dissenting) ("[A] government paycheck does nothing to eliminate the value to an individual of speaking on public matters, and there is no good reason for categorically discounting a speaker's interest in commenting on a matter of public concern just because the government employs him.").

government employee from discipline based on speech made pursuant to the employee's official duties' . . . is '[s]ometimes,' not '[n]ever.'"⁵⁰ The dissents also emphasized that there is not a categorical difference between citizen speech and employee speech, and constitutional protection should not hinge on such an arbitrary distinction.⁵¹ It was evident the *Garcetti* Court could not present a united front, which likely contributed to the confusion concerning how to apply the new standard and a subsequent split among the circuits.

II. THE CIRCUIT SPLIT IN NEED OF RESOLUTION

In the years following the *Garcetti* decision, many lower courts struggled with its application.⁵² It has proven difficult to determine whether speech falls within an employee's official duties and is left unprotected, or if the speech is otherwise subject to the First Amendment.⁵³

One activity that has proven particularly problematic in application is a public employee's in-court testimony.⁵⁴ On this issue, the circuit courts have interpreted Supreme Court precedent differently.⁵⁵ The Third Circuit took the position that any subpoenaed testimony offered in court, even if it relates to an investigation conducted as part of an employee's official duties, is protected speech because "[w]hen a government employee testifies truthfully, s/he is not 'simply performing his or her job duties;' rather, the employee is acting as a citizen and is bound by the dictates of the court and the rules of evidence."⁵⁶ The Third Circuit extended this protection further to include voluntary testimony as a way to check potential retaliation for truthful testimony and in

50. *Id.* at 426 (Stevens, J., dissenting).

51. *Id.* at 427, 430.

52. Fisk, *supra* note 6.

53. See *Looney v. Black*, 702 F.3d 701, 718 (2d Cir. 2012) ("To determine whether speech was made 'pursuant to' one's official job duties, it is necessary to ascertain whether the speech at issue 'owed its existence to [the plaintiff's] job duties and was made in furtherance of those duties.'"); *Nagle v. Marron*, 663 F.3d 100, 106–07 (2d Cir. 2011) ("Our Court has explained that, even if a public employee's speech 'is not required by, or included in, [his] job description, or [made] in response to a request by the employer,' he speaks as an employee and not as a citizen if the speech is 'part-and-parcel of his concerns' about his ability to 'properly execute his duties.'"); *Chrzanowski v. Bianchi*, 725 F.3d 734, 739 (7th Cir. 2013) ("[W]e must ask whether the speech is part of the employee's 'daily professional activities.'").

54. See *Lane v. Franks*, 134 S. Ct. 2369, 2378 (2014).

55. See *Reilly v. City of Atlantic City*, 532 F.3d 216, 231 (3d Cir. 2008); *Chrzanowski*, 725 F.3d at 736; *Lane v. Cent. Ala. Cmty. Coll.*, 523 F. App'x 709, 712 (11th Cir. 2013). *But see* Fisk, *supra* note 6 ("The Eleventh Circuit is alone among the circuits in holding that an employee can be fired for testifying truthfully pursuant to a subpoena.").

56. *Reilly*, 532 F.3d at 231 (internal citation omitted). A police officer testifying for the prosecution in a police corruption case received First Amendment protection because every citizen, including government employees, has a duty to comply with the rule of law and to testify truthfully in court proceedings. *Id.* at 224, 231.

order to preserve the truth-seeking process.⁵⁷ The Seventh Circuit took a similar approach, finding testimony of a public employee against his supervisor in a criminal proceeding protected as First Amendment speech.⁵⁸ The Seventh Circuit first applied the “official duties” doctrine of *Garcetti* and the *Pickering* balance test, but it further found the employee’s speech deserved constitutional protection whether it was part of an employee’s duties or not.⁵⁹

Other circuits have considered whether the courtroom testimony of a public employee is protected under the First Amendment without going beyond a strict application of the “official duties” doctrine of *Garcetti* and the *Pickering* balancing test. The Ninth Circuit held testimony of a domestic violence counselor was protected under the First Amendment because the counselor was not directed to testify by the employer, but rather was subpoenaed and testified to a matter of public concern.⁶⁰ Similarly, the Second Circuit held in-court testimony offered by a Department of Social Services employee was not protected speech because the employee was *not* subpoenaed but voluntarily testified about information she obtained through performing her official employee duties.⁶¹ Additionally, the employee identified herself as such, and she failed to “distinguish her personal views from those of [her employer].”⁶²

Ultimately, the various district and appellate courts were struggling with what exactly it means to speak pursuant to one’s employment. Does it mean that the act of speaking in this precise form is required by one’s job? Does it mean speaking about things related to one’s workplace? Does it mean speaking about things one learns through one’s work? The varied applications of *Garcetti* and *Pickering* in courts throughout the country led to discrepancies in

57. *Green v. Phila. Hous. Auth.*, 105 F.3d 882, 886–87 (3d Cir. 1997).

58. *Chrzanowski*, 725 F.3d at 736; *see also Morales v. Jones*, 494 F.3d 590, 598 (7th Cir. 2007).

59. *Chrzanowski*, 725 F.3d at 740–41. The court found testimony given pursuant to a subpoena is protected because the rationale behind the *Garcetti* “official duties” doctrine would not be properly served by allowing an employer to affect the testimony of an employee under oath. *Id.*

60. *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1104–06 (9th Cir. 2011). The court also considered that the counselor was testifying about someone other than a patient he treated, and the only evidence in the record of the counselor’s job duties was his job description, which included nothing about testifying in court. *Id.*

61. *Kiehle v. Cty. of Cortland*, 486 F. App’x 222, 224 (2d Cir. 2012); *see also Bearss v. Wilton*, 445 F. App’x 400, 403–04 (2d Cir. 2011) (holding testimony of a public employee was unprotected because the employee’s testimony concerned her job performance and “[was] motivated by personal interest in responding to criticism of her job performance and [was] not motivated by a desire to ‘advance a public purpose,’” and thus fell within the employee’s official duties).

62. *Kiehle*, 486 F. App’x at 224.

both holdings and reasoning, practically begging the Supreme Court to provide clarification.

III. *LANE V. FRANKS*

A. *Facts of Lane v. Franks*

Faced with pronounced division among the circuits, the Supreme Court confronted the issue of whether the First Amendment protects a public employee offering compelled court testimony in *Lane v. Franks*.⁶³ The case concerns Petitioner Edward Lane (“Lane”) who served as the director of Central Alabama Community College’s (CACC) Community Intensive Training for Youth (CITY) Program, a statewide program for underprivileged youth.⁶⁴ While conducting an audit of the program’s finances, Lane learned Suzanne Schmitz (“Schmitz”), an Alabama state representative, was on the program’s payroll but did not regularly report to work or perform any external work for the program.⁶⁵ After internally raising his concerns to his superiors, Lane attempted to rectify the situation by confronting Schmitz who refused to comply and continued to be absent from CACC’s offices.⁶⁶ Lane then unilaterally terminated Schmitz’s employment with CACC, ignoring warnings from both CACC’s attorney and president, Steve Franks (“Franks”), that doing so could involve negative repercussions for both Lane and the school.⁶⁷

Shortly thereafter, the FBI began investigating Schmitz’s employment with CITY and contacted Lane for information to aid their investigation.⁶⁸ Pursuant to subpoena, Lane testified on behalf of the prosecution in Schmitz’s case before a grand jury in 2006 and then again at a federal criminal trial in 2008,⁶⁹ relating to charges that included mail fraud and fraud involving a program receiving federal funds.⁷⁰ Lane testified to the circumstances and events that precipitated his termination of Schmitz in the grand jury proceedings and both criminal trials.⁷¹ This information consisted predominantly of information

63. *Lane v. Franks*, 134 S. Ct. 2369, 2378 (2014).

64. *Id.* at 2375.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Lane*, 134 S. Ct. at 2375.

69. *Id.* at 2375–76. Lane also testified at the second criminal trial of Schmitz in February 2009, when she was retried after the first jury failed to reach a verdict. This testimony came after his termination from CITY, which occurred in January 2009. *Id.*

70. *Id.* at 2375; see also *United States v. Schmitz*, 634 F.3d 1247, 1256–57 (11th Cir. 2011) (alleging Schmitz had collected \$177,251.82 in federal funds despite performing “little or no work for the program, generat[ing] virtually no services or work product, and rarely even appear[ing] for work . . .”).

71. *Lane*, 134 S. Ct. at 2375.

Lane obtained through the audit he conducted in his official capacity as CITY's director.⁷²

Just a few months after the conclusion of the first trial, Lane was fired by CACC.⁷³ In 2011, Lane commenced an action in response to his termination against CACC and Franks, alleging he was improperly retaliated against in violation of 42 U.S.C. § 1983 based on his testimony before the grand jury, which he contended constituted speech protected by the First Amendment.⁷⁴

B. Procedural Posture

The United States District Court for the Northern District of Alabama granted Franks' motion for summary judgment on the grounds of qualified immunity.⁷⁵ The district court relied on *Garcetti*, which held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes," in determining Lane's speech was not protected by the First Amendment, and thus there was no viable claim under 42 U.S.C. § 1983.⁷⁶ The district court stated that since Lane obtained the information he testified about in his capacity as the director of CITY, his speech was considered part of his official duties and was not speech made as a citizen involving a public concern.⁷⁷

On appeal, the Eleventh Circuit affirmed the lower court's ruling after finding no reversible error,⁷⁸ and also relying extensively on *Garcetti*.⁷⁹ The Eleventh Circuit concluded Lane testified as an employee, and not as a citizen, because his testimony concerned his investigation of the termination of Schmitz, which occurred while he was acting pursuant to his official job responsibilities.⁸⁰ Relying on its own precedent, the Eleventh Circuit reiterated that even if the speech (the subpoenaed testimony) itself was not part of the employee's official duties, Lane is left unprotected by the First Amendment if the speech "owes its existence to [the] employee's professional responsibilities' and is 'a product that the employer itself has commissioned or

72. *Id.*

73. *Id.* at 2376. The president of CACC, Steve Franks, initially laid off twenty-nine employees with three years of service or less, including Lane, to accommodate budget shortfalls. However, Franks rescinded all but two of the terminations just days later, one of which was Lane's. *Id.*

74. *Id.*

75. *Lane v. Cent. Ala. Cmty. Coll.*, No. CV-11-BE-0883-M, 2012 WL 5289412, at *12 (N.D. Ala. Oct. 18, 2012).

76. *Id.* at *10 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006)).

77. *Id.*

78. *Lane v. Cent. Ala. Cmty. Coll.*, 523 F. App'x 709, 710 (11th Cir. 2013).

79. *Lane*, 134 S. Ct. at 2376.

80. *Lane*, 523 F. App'x at 712.

created.”⁸¹ Therefore, the fact that “Lane testified about his official activities pursuant to a subpoena and in the litigation context, in and of itself, does not bring Lane’s speech within the protection of the First Amendment.”⁸² Nor did the court find relevant that Lane’s job description did not include testifying at criminal trials, finding the most pertinent fact to be that his testimony only touched on acts he performed in his official capacity as CITY’s director.⁸³ Lane then appealed, and the Supreme Court granted certiorari⁸⁴ to “resolve discord” among the circuits as to whether a public employee may be terminated for providing truthful subpoenaed testimony outside the course of their ordinary job duties.⁸⁵

C. Majority Opinion

The Supreme Court overwhelmingly disagreed with the lower courts on the First Amendment issue, holding a public employee who, outside the course of his ordinary job responsibilities, provides truthful testimony at trial pursuant to a subpoena is protected by the First Amendment from employer discipline.⁸⁶ Justice Sotomayor, writing the majority opinion for a unanimous Court, initially set out the basics of public employee free speech jurisprudence.⁸⁷ “[C]itizens do not surrender their First Amendment rights by accepting public employment.”⁸⁸ Rather, the protection depends on the balance between the employee and employer’s interests, as set forth in *Pickering*.⁸⁹

The *Lane* Court added its voice to the existing *Pickering* and *Garcetti* frameworks governing public employee speech. The first inquiry, whether the speech in question—here, Lane’s compelled testimony—is speech as a citizen on a matter of public concern, remained largely the same.⁹⁰ However, whether the speech is “pursuant to” the employee’s ordinary job duties was further defined than it had been previously in *Garcetti*. Seemingly without hesitation, the Court declared that “[t]ruthful testimony under oath by a public employee

81. *Id.* at 711 (quoting *Abdur-Rahman v. Walker*, 567 F.3d 1278, 1286 (11th Cir. 2009)).

82. *Id.* at 712.

83. *Id.* While Lane’s speech was not part of his regular duties, the Eleventh Circuit reasoned it was based on activities he engaged in within the scope of his official responsibilities as director of CITY, excluding it from the purview of citizen speech. *Id.*

84. *Lane*, 134 S. Ct. at 2377.

85. *Id.*

86. *Id.* at 2374–75, 2379. However, despite finding Lane is entitled to First Amendment protection, the Supreme Court affirmed the lower courts based on the existence of qualified immunity for Franks in his individual capacity. *Id.* at 2383.

87. *Id.* at 2377–79.

88. *Id.* at 2374.

89. *Lane*, 134 S. Ct. at 2374.

90. *Id.* at 2378. As did the final inquiry concerning whether the government could present any countervailing interest to tip the scale in its favor. *Id.* at 2380–81.

outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes,” even when the testimony concerns his public employment or information obtained during that employment.⁹¹

1. Citizen Speech or Employee Speech

The Supreme Court limited the reach of *Garcetti*'s “pursuant to” standard by asking instead whether the speech “is itself ordinarily within the scope of an employee’s duties, not whether it merely concerns those duties.”⁹² Specifically, the Court articulated the speech compelled by subpoena certainly was not within Lane’s ordinary job duties as a program supervisor, and it instead qualified as citizen speech.⁹³ In finding to the contrary, the Eleventh Circuit improperly ignored the fact that sworn testimony is the “quintessential example” of citizen speech since “[a]nyone who testifies in court bears an obligation, to the court and society at large, to tell the truth.”⁹⁴ Anyone testifying, including a public employee, has an independent obligation to be truthful, rendering sworn testimony speech as a citizen, distinct from speech made purely in the capacity as a public employee.⁹⁵

Furthermore, the Court criticized the Eleventh Circuit for improperly interpreting *Garcetti* too broadly in concluding Lane did not speak as a citizen, and instead as a government employee, when testifying.⁹⁶ The mere fact that Lane learned of the subject matter of the proffered testimony in the course of his employment with CACC does not require the speech be treated as employee speech rather than citizen speech.⁹⁷ *Garcetti* said absolutely nothing to that effect.⁹⁸ *Garcetti*'s critical inquiry is whether the speech is within the scope of, or required as part of, an employee’s ordinary duties, not whether it merely concerns those duties or whether the subject matter of the speech was discovered in the course of those duties.⁹⁹ A public employee’s speech, which just “relates to” his or her job, or is based on “information learned” in the course of fulfilling one’s job, is within the scope of First Amendment protection so long as it involves a matter of public concern.¹⁰⁰ Therefore, even though Lane acquired the information he testified to throughout the course of

91. *Id.* at 2378.

92. *Id.* at 2379.

93. *Id.* at 2378–79.

94. *Lane*, 134 S. Ct. at 2379; *see Lane v. Cent. Ala. Cmty. Coll.*, 523 F. App’x 709, 712 (11th Cir. 2013) (finding it immaterial that Lane spoke “pursuant to a subpoena and in the litigation context”).

95. *Lane*, 134 S. Ct. at 2379.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *See Lane*, 134 S. Ct. at 2378–80.

his employment, his official duties did not include providing sworn testimony, and his testimony thus should appropriately be characterized as citizen speech.¹⁰¹

The Supreme Court went on to reiterate the important policy considerations behind its decision.¹⁰² There is a “special value” held by speech of public employees relating to their employment because those employees have inside knowledge on matters of public concern.¹⁰³ Based on their inside acquisition of information, “it is essential that [public employees] be able to speak out freely on such questions without fear of retaliatory dismissal.”¹⁰⁴ Moreover, the Court recognizes the heightened importance in this context: public corruption.¹⁰⁵

It would be antithetical to our jurisprudence to conclude that the very kind of speech necessary to prosecute corruption by public officials—speech by public employees regarding information learned through their employment—may never form the basis for a First Amendment retaliation claim. Such a rule would place public employees who witness corruption in an impossible position, torn between the obligation to testify truthfully and the desire to avoid retaliation and keep their jobs.¹⁰⁶

Therefore, in light of these important judicial principles, it is apparent that Lane’s sworn testimony qualifies as citizen speech and not as employee speech within the ordinary course of his job description.¹⁰⁷

2. Matter of Public Concern

The second inquiry performed by the Court was whether the speech dealt with a matter of public concern.¹⁰⁸ Speech incorporates public concern when it relates “to any matter of political, social, or other concern to the community” or is “a subject of general interest and of value and concern to the public.”¹⁰⁹ Lane’s testimony involved the malfeasance of a state legislator in connection with the misuse of public funds.¹¹⁰ Since this was a classic case of whistleblowing about public corruption, the testimony was surely a matter of

101. *Id.*

102. *See id.* at 2379–80.

103. *Id.* at 2379.

104. *Id.* (quoting *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 572 (1968)); *see also* *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006); *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) (observing many categories of public employees “are uniquely qualified to comment” on “matters concerning government policies that are of interest to the public at large”).

105. *Lane*, 134 S. Ct. at 2380.

106. *Id.*

107. *Id.*

108. *Id.* at 2380.

109. *Id.* (quoting *Snyder v. Phelps*, 562 U.S. 443, 444 (2011)).

110. *Lane*, 134 S. Ct. at 2375.

public concern.¹¹¹ Additionally, the inquiry relies on the “‘content, form, and context’ of the speech.”¹¹² Since the form and context of the speech was sworn testimony in a judicial proceeding, the Court’s conclusion that the speech involved a public concern was bolstered.¹¹³

3. Adequate Governmental Justification

However, Lane’s testimony is not categorically entitled to protection under the First Amendment merely because it is citizen speech on a matter of public concern.¹¹⁴ The final question is whether the government provided “‘an adequate justification for treating the employee differently from any other member of the public.’”¹¹⁵ While government employers often have legitimate interests, including promoting efficiency and integrity, and maintaining proper discipline, the showing of a stronger interest may be required if the employee’s speech involves a substantial matter of public concern.¹¹⁶ Here, the defendants never seriously argued that the balance should tip in their favor.¹¹⁷ Subsequently, there was no arguable countervailing governmental interest whatsoever that would justify Lane’s firing.¹¹⁸ Due to the total lack of a governmental interest in this case, the Court held Lane’s speech was entitled to First Amendment protection.¹¹⁹

D. Concurrence Places Limitations on Majority’s Holding

However, the concurring opinion authored by Justice Thomas, and joined by Justice Scalia and Justice Alito, rationalized that the answer to the question presented, whether a public employee speaks as a citizen on a matter of public concern when testifying under oath outside the scope of his or her ordinary job responsibilities, requires merely a straightforward application of *Garcetti*.¹²⁰ Justice Thomas explained that, under *Garcetti*, “when a public employee speaks ‘pursuant to’ his official duties, he is not speaking ‘as a citizen,’ and

111. *Id.* at 2380; *see also* *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) (stating public employees are uniquely qualified to comment on matters concerning governmental policies that are of interest to the public at large).

112. *Lane*, 134 S. Ct. at 2380 (quoting *Connick v. Myers*, 461 U.S. 138, 147–48 (1983)).

113. *Id.*

114. *Id.*

115. *Id.* (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006)).

116. *Id.* at 2381.

117. *Lane*, 134 S. Ct. at 2381 (stating respondents did not even attempt to assert Lane’s testimony was erroneous, or that confidential or privileged information was unnecessarily disclosed in the testimony).

118. *Id.*

119. *Id.*

120. *Id.* at 2383 (Thomas, J., concurring).

First Amendment protection is unavailable.”¹²¹ Here, the concurrence argues by deduction that Lane spoke as a citizen, and not as an employee, because he did not testify as part of an employment responsibility, as his job duties did not include testifying in court proceedings.¹²² The concurrence goes to great lengths to reiterate that this holding only applies to factual situations in which the testimony provided by the employee is not pursuant to the employee’s direct job duties.¹²³ Therefore, the Court leaves the important question unresolved of whether a public employee speaking within the scope of his or her job description, as is so commonly required of lab technicians, police officers, and investigators, is afforded similar constitutional protection.¹²⁴

IV. AUTHOR’S ANALYSIS: *LANE* FALLS SHORT

A. *The Holding Ultimately Gets It Right*

Before addressing the abundant shortcomings of the Court’s opinion in *Lane v. Franks*, it is important to address its achievements. In a rare unanimous decision expanding an employee’s constitutional rights,¹²⁵ the Court correctly laid down protection for employees abiding by a citizen duty of utmost importance: providing truthful testimony under subpoena.¹²⁶ Almost every justice, including Justice Kennedy, the author of *Garcetti*,¹²⁷ seemed deeply troubled by the idea that a government employee subpoenaed to testify is faced with three choices: refuse to testify and be held in contempt, testify falsely and commit perjury, or testify truthfully and be terminated.¹²⁸ By resolving this dispute in favor of Lane, the Court rightly sends an important message that we, as a nation, highly value testimony given in a court of law.¹²⁹ The majority opinion even goes to great lengths to explicitly relay this policy.¹³⁰

The holding is also sufficiently narrow and confined that it manages to protect subpoenaed public employees without imposing any additional burden on government employers. This is because while the Court is correct in recognizing the value of unfettered, truthful testimony in court proceedings,

121. *Id.*

122. *Lane*, 134 S. Ct. at 2383.

123. *Id.*

124. *Id.* at 2384. Likewise, through implication by silence, the Court also leaves unresolved the constitutional protection given to those who voluntarily provide testimony versus those who testify under subpoena.

125. Jeffrey M. Hirsch, *The Supreme Court’s 2013-2014 Labor and Employment Law Decisions: Consensus at the Court*, 18 EMP. RTS. & EMP. POL’Y J. 159, 176 (2014).

126. *Lane*, 134 S. Ct. at 2378.

127. See *Garcetti v. Ceballos*, 547 U.S. 410, 412 (2006).

128. Fisk, *supra* note 6.

129. *Lane*, 134 S. Ct. at 2378–80.

130. *Id.* at 2380.

this result required little more than an application of *Garcetti v. Ceballos*.¹³¹ Lane testified in a manner that was neither pursuant to his job duties nor done to fulfill a work responsibility. The Eleventh Circuit misconstrued *Garcetti*'s "pursuant to" standard to broadly include anything that was uncovered through the employee's line of work when finding Lane's testimony unprotected.¹³² Since Lane's ordinary job duties did not include testifying at criminal trials, he spoke "as a citizen" and was entitled to constitutional protection from discipline, even under the *Garcetti* standard.¹³³ Therefore, while regarded as a major achievement for public employees,¹³⁴ the Court did little more than apply its own precedent.

B. The Court's Reasoning Was Largely Incomplete and Unfounded

Lane v. Franks was the first chance for the Supreme Court to confront many of the unresolved questions following *Garcetti v. Ceballos*. However, while *Lane v. Franks* clarifies a few contours and boundaries of *Garcetti*'s holding, the Supreme Court left many important questions unanswered. *Lane* reiterates a public employer cannot discipline an employee for providing "truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities,"¹³⁵ but the Court fails to clear up other ambiguities of its own precedent, instead electing to leave those issues for a later date.¹³⁶ In this regard, the Court missed a significant opportunity to minimize confusion and uncertainty by refusing to overturn *Garcetti*'s formalistic distinction between public employees speaking as either employees or citizens, ignoring the issue of whether voluntary testimony qualifies for First Amendment protection, and declining to explicitly define what is considered unprotected testimony within an employee's job description. By not choosing to resolve so many existing discrepancies and leaving the current doctrine in a state of many interpretations, the *Lane* decision has left lower courts confounded. The decision further leaves government entities holding their breath by not providing notice of what conduct specifically goes awry of the Constitution, and it leaves employees in fear that speaking out will cost them their jobs.¹³⁷ Therefore, even though the Court correctly extended protection to Lane, it still ultimately dropped the ball.

131. *See id.* at 2383 (Thomas, J., concurring) (stating the decision reached "require[d] little more than a straightforward application of *Garcetti*").

132. *Id.* at 2379.

133. *Id.* at 2380.

134. *See* Press Release, Serv. Emps. Int'l Union, SEIU's Henry Comments on Supreme Court Ruling in *Lane v. Franks* (June 19, 2014), <http://www.seiu.org/2014/06/seius-henry-comments-on-supreme-court-ruling-in-la> [<http://perma.cc/5MEL-5NW7>].

135. *Lane*, 134 S. Ct. at 2378.

136. *See id.* at 2383–84 (Thomas, J., concurring).

137. *See generally* Baumgardner, *supra* note 7, at 52.

1. The Boundaries of an Employee's "Ordinary Job Duties" Are Left Unresolved

The *Lane* opinion did not address whether the First Amendment should protect the truthful testimony of a public employee where the testimony is included in the employee's ordinary job duties. The majority opinion failed to acknowledge this explicitly, but the concurrence ensured to expressly reiterate that this is a question "for another day."¹³⁸ However, based on the policy rationales advanced by the Court, First Amendment application should not be precluded even when the testimony is part of the employee's ordinary job duties because the obligation to testify truthfully arises from his or her status as a citizen.¹³⁹

The *Lane* Court made clear that providing "[s]worn testimony in judicial proceedings is a quintessential example of speech as a citizen"¹⁴⁰ Why, then, should a police officer or crime scene technician¹⁴¹ be treated differently when they have the same "obligation, to the court and society at large, to tell the truth[?]"¹⁴² There is no significant distinction between *Lane*'s testimony and testimony provided to fulfill a job responsibility.¹⁴³ Extending the protection beyond mere "speech as a citizen," and instead protecting all truthful testimony, continues to meaningfully protect sworn testimony.¹⁴⁴ Furthermore, the obligation to be truthful remains. "[T]he government employer's interest in hiring and firing does not outweigh the need for [public employees] to offer truthful sworn testimony without fear of repercussion."¹⁴⁵ Most importantly, public employees who testify as a critical part of their employment duties should not be fearful that they could be terminated or retaliated against for providing truthful sworn testimony. Promoting such a policy is deeply troubling.

138. *Lane*, 134 S. Ct. at 2384 (Thomas, J., concurring) ("We accordingly have no occasion to address the quite different question whether a public employee speaks 'as a citizen' when he testifies in the course of his ordinary job responsibilities The Court properly leaves [these] constitutional questions . . . for another day.").

139. *Id.* at 2378–79.

140. *Id.* at 2379.

141. *Id.* at 2384 (Thomas, J., concurring). These are examples provided by the concurrence as public employees who regularly testify within their ordinary job duties. *Id.* at 2383 (Thomas, J., concurring).

142. *Id.* at 2379 ("That obligation is distinct and independent from any separate obligations a testifying public employee might have to his employer.").

143. Baumgardner, *supra* note 7, at 51; *see also* Garcetti v. Caeballos, 547 U.S. 410, 427 (2006) (Stevens, J., dissenting) ("[I]t is senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description.").

144. Baumgardner, *supra* note 7, at 51.

145. *Id.* at 52.

Additionally, job duties can be construed very broadly, giving public employers the potential power to construe employees' job duties to include testifying to gain control over their speech.¹⁴⁶ In addition to this concern, job responsibilities are ever-changing. Public employees should not have to guess whether something they express that is a matter of public importance will be considered "pursuant to" their "ordinary job duties"—and thus left unprotected by current First Amendment jurisprudence—or will instead be deemed to just "relate[] to" their job duties or be based on "information learned" within the course of their employment—and thus be constitutionally protected.¹⁴⁷ This is a complex inquiry, one that is leaving lower courts and experts confounded, and that should not need to be performed by every public employee before testifying.

The most viable argument that public employees should not be protected when testifying pursuant to their official duties is to avoid burdening local governments.¹⁴⁸ However, is categorically infringing upon a public employee's constitutional rights warranted solely to avoid placing a slight burden on government?¹⁴⁹ A Supreme Court ruling that the First Amendment covers public employees when subpoenaed to testify, regardless of the testimony's nature or its inclusion in their ordinary job duties, would undoubtedly protect public employees from retaliation from their employers.¹⁵⁰ While this blanket constitutional coverage could also restrict a public employer's ability to control its employee's speech,¹⁵¹ it would make great strides in advancing the principles we, as a nation, value most: truthful testimony and constitutional rights. The Court places such heavy emphasis on the importance of protecting testimony but then proceeds to leave testimony within a public employee's ordinary job duties subject to infringement. This differentiation should not exist. Further, the government could be protected in anomalous situations in which the employee's testimony does unduly interfere with its interests as an employer through the final step of the inquiry: the balancing test.¹⁵²

146. See *Garcetti*, 547 U.S. at 431 n.2 (Souter, J., dissenting).

147. See *Lane*, 134 S. Ct. at 2378.

148. Brief for the International Municipal Lawyers Association, Inc. and the International Public Management Association for Human Resources as Amici Curiae Supporting Respondent Steve Franks at 4, *Lane v. Franks*, 134 S. Ct. 2369 (2014) (No. 13-483).

149. See *Garcetti*, 547 U.S. at 434 (Souter, J., dissenting).

150. Michael Lorden, *Lane v. Franks: Public Employee Testimony and the First Amendment*, LOYOLA U. CHI. EDUC. L. & POL'Y INST. F. 1, 10 (2014), <http://www.luc.edu/media/lucedu/law/centers/childlaw/childed/pdfs/2014studentpapers/Lorden.pdf> [<http://perma.cc/MJ75-6T7T>].

151. *Connick v. Myers*, 461 U.S. 138, 143 (1983) (stating "government offices could not function if every employment decision became a constitutional matter").

152. The balancing test is utilized in *Pickering* as well as the final inquiry in *Lane*. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968); *Lane*, 134 S. Ct. at 2380–81.

2. The Distinction Between Speech as a Public Employee and Citizen Speech Is Undefined and Ambiguous

Like distinguishing between speech in the ordinary course of one's job duties and outside of one's job duties, the distinction created between citizen speech and public employee speech makes little sense. "The notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment is quite wrong."¹⁵³ A citizen employed by the government is nonetheless a citizen,¹⁵⁴ and that citizenship should be placed first, over the secondary identification as a public employee. Cashing a government paycheck is an inadequate justification to discount a speaker's interest in commenting on a matter of public concern, and the First Amendment rests on something more.¹⁵⁵

The Supreme Court has even professed having the responsibility of ensuring "citizens are not deprived of fundamental rights by virtue of working for the government."¹⁵⁶ However, the Court is failing in upholding that responsibility to the citizens of our country who happen to be public employees. By limiting constitutional protections of public employees that are to be provided to all citizens, the Court is effectively depriving over twenty-two million citizens of their fundamental right to free speech. Overall, the premise that a person could be speaking as a citizen in one regard, and as an employee in another, is a total fallacy. In order to restore all constitutional protections to public employees, the fantasy-based distinction between citizen speech and employee speech should also be entirely discarded.

3. Voluntary Testimony Should Also Be Afforded First Amendment Protection

So long as the testimony provided is truthful and not misleading, the First Amendment should bar employer discipline even in instances of voluntary testimony. While the employer certainly has an interest in controlling the information released by its employees, First Amendment protection should transcend merely subpoenaed testimony and also extend to testimony that is voluntarily provided. The policy rationales advanced by the Court on the importance of testimony¹⁵⁷ apply whether the testimony provided is compelled or un compelled.

Public employees who witness corruption or possess valuable information obtained through their employment should be able to testify voluntarily without being hampered by fear of employment consequences. "[T]ruthful

153. *Garcetti*, 547 U.S. at 427 (Stevens, J., dissenting).

154. *Id.* at 419.

155. *Id.* at 428–29 (Souter, J., dissenting).

156. *Connick*, 461 U.S. at 147.

157. *See supra* Part IV(B)(1) for an explanation of the Court's policy on protecting testimony.

speech is at the apex of the constitutional safeguard; [and] truthful speech about matters of public concern and the conduct of public officials [should be] especially protected; and that truthful testimony in court, in particular, may not serve as the basis for public sanction.”¹⁵⁸ Stephen Kohn of the National Whistleblower Center further articulated, “The right of every American citizen to truthfully testify about criminal activities, including fraud in government contracting, is a cornerstone to democracy.”¹⁵⁹ The Supreme Court even admits the importance of public employees disseminating information based on their unique positions. “There is considerable value . . . in encouraging, rather than inhibiting, speech by public employees. For ‘[g]overnment employees are often in the best position to know what ails the agencies for which they work.’”¹⁶⁰ So much emphasis has been placed on the importance of a public employee’s ability to speak out on important matters to combat negative externalities being inflicted on the public, but the Court again falls short in implementing these policy rationales.

Because of public employees’ intimate knowledge of the internal aspects of governmental affairs, they have the ability to testify to ideas and information that can hold the government accountable to the public.¹⁶¹ This is especially true considering the recent influx of revelations of government corruption.¹⁶² However, when public employees hesitate to expose affairs of government and cooperate with the prosecution to bring the perpetrators to justice, society bears

158. Brief for the First Amendment Coalition as Amicus Curiae Supporting Petitioner at 2, *Lane v. Franks*, 134 S. Ct. 2369 (2014) (No. 13-483).

159. Robert Barnes, *Supreme Court Rules Public Employees Are Protected from Retaliation for Testimony*, WASH. POST (June 19, 2014), http://www.washingtonpost.com/national/supreme-court-rules-public-employees-are-protected-from-retaliation-for-testimony/2014/06/19/cd9df368-f7bf-11e3-a606-946fd632f9f1_story.html [<http://perma.cc/7VMQ-4WQP>]; see also Press Release, Serv. Emps. Int’l Union, *supra* note 134 (“It is unfortunate that the Supreme Court didn’t go even further and establish a clear rule that truthful sworn testimony by public service workers should never be the basis for any retaliatory action by a public employer. Public service workers who are brave enough to stand up and speak out to improve public services should always be protected from retaliation.”).

160. *Lane v. Franks*, 134 S. Ct. 2369, 2377 (2014) (quoting *Waters v. Churchill*, 511 U.S. 661, 674 (1994)).

161. Howard L. Zwickel, *In Support of an Implied State Constitutional Free Speech Tort in Public Employment Retaliation Cases*, 78 ALB. L. REV. 33, 34 (2015).

162. Mark Mazzetti & Michael S. Schmidt, *Ex-C.I.A. Worker Says He Disclosed U.S. Surveillance*, N.Y. TIMES, June 10, 2013, at A1, A13 (covering the National Security Agency surveillance exposure by Edward Snowden); Emmarie Huettelman, *Sentencing Set for Today for Manning in Leaks Case*, N.Y. TIMES, Aug. 21, 2013, at A14 (covering the sentencing of Bradley Manning who was behind the “WikiLeaks” scandal); Emily Wax-Thibodeaux, *At VA Health Facilities, Whistleblowers Still Fear Retaliation*, WASH. POST (Mar. 5, 2015), http://www.washingtonpost.com/politics/at-va-health-facilities-whistleblowers-still-fear-retaliation/2015/03/05/a6-774bda-b944-11e4-9423-f3d0a1ec335c_story.html [<http://perma.cc/47J2-YUF9>] (covering the VA hospital whistleblowers).

the costs through the loss of potentially crucial information that can reform government, promote efficiency, lead to greater transparency, and improve peoples' lives.¹⁶³ It is ineffective to rely on another government actor, such as a prosecutor, to issue a subpoena to procure a government employee's testimony on matters of public concern. Therefore, the Court should take its own policy professions to heart¹⁶⁴ and expand *Lane's* holding to also protect public employees testifying voluntarily from fear of job reprisals.

V. THE PROPOSAL: SIMPLIFY THE INQUIRY AND RETURN TO *PICKERING'S* ROOTS

In addition to leaving the doctrine in a disheveled state, the *Lane* Court missed the opportunity to simplify and correct the inquiry into whether a public employee's speech is covered by the First Amendment. The Court needs to take a long look at its precedent, namely *Garcetti*, and correct the errors it has made in unnecessarily narrowing the constitutional protection afforded to public employees. To do this, I propose the Court revert to an inquiry similar to that used in *Pickering* and discard the imaginative distinctions employed by the *Garcetti* Court.¹⁶⁵

First, I suggest the Court completely eliminate the peculiar distinction between speech as an employee and speech as a citizen. This eradication includes ridding the test of the "official duties" doctrine that focuses on whether the speech is part of the employee's ordinary job duties or not. Justice Souter similarly stated:

Nor is there any reason to raise the counterintuitive question whether the public interest in hearing informed employees evaporates when they speak as required on some subject at the core of their jobs. . . . 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. . . . This is not a whit less true when an employee's job duties require him to speak about such things: when, for example, a public auditor speaks on his discovery of embezzlement of public funds, when a building inspector makes an obligatory report of an attempt to bribe him, or when a law enforcement officer expressly balks at a superior's order to violate constitutional rights he is sworn to protect. (The [*Garcetti*] majority, however,

163. *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) ("[P]ublic employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues.").

164. *See, e.g., Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006) ("Exposing governmental inefficiency and misconduct is a matter of considerable significance.").

165. *Id.* at 416, 444. These distinctions include the difference between speech as an employee and speech as a citizen as well as distinguishing between speech if it is within the ordinary course of an employee's job duties or not. *Id.*

places all these speakers beyond the reach of the First Amendment protection against retaliation.) Nothing, then, accountable on the individual and public side of the *Pickering* balance changes when an employee speaks “pursuant” to public duties.¹⁶⁶

Therefore, the analysis should instead focus on whether the speech is on a matter of public concern as the sole threshold question.¹⁶⁷ If the speech surpasses that simple inquiry, the *Pickering* balancing test should then be applied. This balancing test depends on a careful balance “between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”¹⁶⁸ If the government cannot support its burden and adequately justify why the employee should be treated differently based on its needs as an employer, the public employee’s speech should be afforded protection by the First Amendment.¹⁶⁹

The proposed test is superior to the current doctrine for a number of reasons. First and foremost, the proposed test is simple and straightforward. It removes the ambiguous and confounding dichotomy of “employee speech” versus “citizen speech.” It also eliminates the factual inquiry into what an employee’s ordinary job duties entail and minimizes the opportunity for employer manipulation in this regard.¹⁷⁰ A test with a streamlined application will aid lower courts, and reduce the confusion that is currently occurring and has since the *Garcetti* decision.¹⁷¹ The test also provides better notice to employees and employers alike of what conduct falls within constitutional boundaries so they can adjust their behavior accordingly.¹⁷²

In addition to the administrative justifications, the proposed test also more effectively aligns with the Court’s own policy goals. With the ouster of many of the threshold inquiries and heavier focus on the balancing of employee and employer interests, the Court will have the opportunity to better promote its

166. *Id.* at 433 (Souter, J., dissenting) (internal citations omitted).

167. By removing this “pursuant to employment” threshold inquiry, at least when it comes to situations involving testimony, a plethora of previously disqualified, yet likely valid, situations then may proceed to the balancing test.

168. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968).

169. Brief for Alliance Defending Freedom as Amicus Curiae Supporting Petitioner at 3, *Lane v. Franks*, 134 S. Ct. 2369 (2014) (No. 13-483) (“A public employee should receive full First Amendment protection when speaking on matters of public concern unless the employer can demonstrate that such speech disrupts implementation of the employer’s business operations.”).

170. *Garcetti*, 547 U.S. at 431 n.2 (Souter, J., dissenting). Justice Souter suggested employers, in response to the Court’s decision in *Garcetti*, will be motivated to “expand stated job descriptions to include more official duties and so exclude even some currently protectable speech from First Amendment purview.” *Id.*

171. Fisk, *supra* note 6.

172. Baumgardner, *supra* note 7, at 52.

own professed policy goals. The Court has routinely made statements like “[t]he importance of public employee speech is especially evident in the context of . . . a public corruption scandal,”¹⁷³ but the application of current doctrine has barred constitutional protection to public employees attempting to expose corruption in the course of their job duties or through voluntary testimony.¹⁷⁴ This hypocrisy can be better avoided without the formalistic distinctions employed in the current doctrine and a more personalized inquiry into the situation at issue. While the proposed test may require more inquiry by the Court into the interests at stake, it is worth it, even necessary, in order to uphold the fundamental rights afforded to all citizens via the Constitution.¹⁷⁵

While the current test is in need of immediate mending, the Court will be unable to correct its errors until it grants certiorari to another case involving the same issue. However, when presented with the next opportunity, the Court should take a more policy-driven approach and entirely eliminate the “official duties” doctrine established by *Garcetti*. Instead, the inquiry should be centered on the importance of constitutional protection for public employees speaking out against their employers on matters of public concern.¹⁷⁶ While the employer still has an “interest in controlling the operation of its workplaces,”¹⁷⁷ this interest can be protected sufficiently by applying the *Pickering* balancing test. The proposed test protects both the interests of the employee and the interests of the employer without making public employees surrender their constitutional rights by way of their choice of employment.

CONCLUSION

While *Lane v. Franks* ultimately was decided correctly, the ruling was not a total victory for free speech in the way that it could have been.¹⁷⁸ The Supreme Court erred in not going far enough in establishing new precedent

173. *Lane v. Franks*, 134 S. Ct. 2369, 2380 (2014).

174. See *Garcetti*, 547 U.S. at 413–24 (finding a district attorney who was retaliated against after exposing governmental misconduct via a written memorandum was not protected by the First Amendment because the memorandum was “pursuant to” his official job duties).

175. *Id.* at 434 (Souter, J., dissenting) (“[W]hen constitutionally significant interests clash, resist the demand for winner-take-all; try to make adjustments that serve all of the values at stake.”).

176. Hudson Jr., *supra* note 14, at 38; see *Roth v. United States*, 354 U.S. 476, 484 (1957) (The First Amendment “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people”); *Lane*, 134 S. Ct. at 2377 (“Speech by citizens on matters of public concern lies at the heart of the First Amendment This remains true when speech concerns information related to or learned through public employment.”).

177. *Lane*, 134 S. Ct. at 2377.

178. David L. Hudson Jr., *Court Limits Garcetti—at Least a Little*, FIRST AMEND. CTR. (July 8, 2014), <http://www.firstamendmentcenter.org/court-limits-garcetti-at-least-a-little> [<http://perma.cc/8T5Z-C69S>].

and protections for public employees. Thus, *Lane* is merely the first of no doubt many decisions that will have to continue to clarify and refine *Garcetti*.

There are some duties that arise out of citizenship that are more important than protecting a public employer's interests. While there will certainly always be limitations or circumstances in which the First Amendment should not bar discipline by the employer, such as if the employee testifies falsely or misleadingly, the interests of the employee and his or her duties as a citizen should ascend the happenstance of their employer. The *Lane* Court was correct in declaring the First Amendment protects testimony of a public employee on a matter of public concern, which is not part of his or her job duties, from governmental discipline. However, this was the perfect opportunity for the Court to take a stance to further protect disadvantaged employees from their powerful government employers. The constitutional rights of any United States citizen should not be cast aside merely based on his or her public employment.

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