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## ARTICLES

### PUBLIC EMPLOYEE SPEECH: ANSWERING THE UNANSWERED AND RELATED QUESTIONS IN *LANE V. FRANKS*

*John E. Rumel\**

#### I. INTRODUCTION

The United States Supreme Court's 2014 decision in *Lane v. Franks*<sup>1</sup> stands for an important, albeit relatively unremarkable and uncontroversial, proposition in the annals of public employee speech jurisprudence: Under the First Amendment, public employees are protected from retaliation by public employers when the employee, after having been subpoenaed to testify, provides truthful sworn testimony on a matter of public concern, when testifying is not part of his or her ordinary job responsibilities.<sup>2</sup> Indeed, to state *Lane*'s holding suggests its validity. Thus, as far as Supreme Court decisions go, *Lane* was an easy case, with Justice Sotomayor writing for a unanimous Court,<sup>3</sup> three Justices concurring,<sup>4</sup> and a relatively brief and straightforward analysis.

Easy case or not, the *Lane* Court's majority opinion is noteworthy for both how it arrived at its holding, and what it did not decide. First,

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1. 573 U.S. \_\_\_, 134 S. Ct. 2369 (2014).

2. *Id.* at 2374-75. The issue under *Lane* and, indeed, under the vast majority of public employee speech cases is not whether the speech is protected in general under the First Amendment. It clearly is. Rather, the question is whether the speech, although generally protected, is protected from retaliatory adverse employment action. Thus, to the extent that the Article uses the shorthand phrase "protected under the First Amendment" or words to that effect, the latter (and not the former) meaning is intended.

3. *Id.* at 2374.

4. *Id.* at 2374, 2383 (Thomas, J., joined by Scalia, J. and Alito, J., concurring).

the opinion did not challenge, but instead, gave a narrow reading to the Court's 2006 decision in *Garcetti v. Ceballos*,<sup>5</sup> which had held that, when a public employee speaks as part of his or her official duties, the employee is speaking as an employee and not as a citizen, and that, therefore, the speech is not protected under the First Amendment.<sup>6</sup> Second, the *Lane* opinion, in reaching a result protecting public employee speech, resurrected and applied principles from its seminal decision in *Pickering v. Board of Education of Township High School District 205, Will County*<sup>7</sup> (i.e., that speech by public employees on matters related to their employment holds special value precisely because those employees gain knowledge of matters that are of public concern through their employment—which may not be possessed by non-employees—and that, as such, the public at large benefits from constitutionally protecting that speech and not allowing retaliation against those same employees).<sup>8</sup> Third, the opinion did not grapple with, and expressly left for another day, a more difficult doctrinal and policy question than the one it decided (i.e., whether public employees will be protected from public employer retaliation when they testify under the above circumstances and in the same manner when testifying *is* part of their ordinary job responsibilities).<sup>9</sup> Also, the Court, due to the narrowness of its Opinion, did not answer other, related questions.<sup>10</sup>

As a threshold matter, and as numerous judges and scholars have noted, *Garcetti* was wrongly decided for several, closely-connected reasons.<sup>11</sup> To begin with, *Garcetti* created an ill-advised “official

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5. See *id.* at 2379 (explaining that the Court of Appeals for the Eleventh Circuit applied a broad reading of *Garcetti* in holding that when Lane testified, he did not speak as a citizen, but rather as an employee); see also *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

6. *Garcetti*, 547 U.S. at 421-22.

7. See *Lane*, 134 S. Ct. at 2380, 2383; see also *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

8. See *Pickering*, 391 U.S. at 571-72 (using teachers as an example of the essential need to “speak out freely”); see also Helen Norton, *Government Workers and Government Speech*, 7 FIRST AMEND. L. REV. 75, 86 (2008) [hereinafter Norton, *Government Workers*] (opining that public employee speech should be protected “because of its instrumental value to the public as listeners”).

9. *Lane*, 134 S. Ct. at 2378 n.4 (emphasis added).

10. See *id.* at 2376 n.2 (Lane brought claims under a state whistleblower statute, as well as under 42 U.S.C. § 1985 that the Court did not reach.).

11. *Garcetti v. Ceballos*, 547 U.S. 410, 427-28 (2006) (Souter, J., joined by Stevens, J. and Ginsburg, J., dissenting); see also Scott R. Bauries & Patrick Schach, *Coloring Outside the Lines: Garcetti v. Ceballos in the Federal Appellate Courts*, 262 WEST'S EDUC. L. REP. 357, 358, 358 n.4 (2011) (criticizing the *Garcetti* decision for the limitations it placed on public employee speech rights); Martha McCarthy, *Garcetti v. Ceballos: Another Hurdle for Public Employees*, 210 WEST'S EDUC. L. REP. 867, 876 (2006) (discussing how Justice Stevens rejected the majority's opinion in *Garcetti* and argued that government employees are “still citizens while they are in the office”).

duties” threshold test which, if satisfied, takes public employee speech outside of First Amendment protection, rather than treating speech made pursuant to a public employee’s official duties as a public employer-favoring factor in balancing the speech rights of the employee with the interests of his or her employer under *Pickering*.<sup>12</sup> In addition, by categorically dividing public employee speech between protected citizen speech and unprotected employee speech, *Garcetti* formalistically and artificially engaged in line drawing where, as a practical matter, the citizen and employee roles often overlap in the workplace.<sup>13</sup> Furthermore, *Garcetti* improperly focused on the public employee’s role and duties rather than the content of the speech.<sup>14</sup> Specifically tied to the immediately preceding point, *Garcetti* disserved the two primary reasons for protecting public employees from retaliation by public employers when the employee engages in speech on a matter of public concern: First, vis-a-vis the exercise of constitutional protections, public

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12. See *Garcetti*, 547 U.S. at 429-30 (Souter, J., joined by Stevens, J. and Ginsburg, J., dissenting); *Trusz v. UBS Realty Inv’rs, LLC*, 123 A.2d 1212, 1213-14 (Conn. 2015) (applying a modified form of the *Pickering/Connick* balancing test, rather than the *Garcetti* official duties threshold test, to public employee retaliation cases under the free speech provisions of the Connecticut Constitution); McCarthy, *supra* note 11 at 878 (noting specifically that *Pickering* has not been overturned by *Garcetti*, but much fewer circumstances now trigger the balancing test under *Pickering*); Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and Sec. 1983: A Critique of Garcetti v. Ceballos*, 42 U. RICH. L. REV. 561, 563, 595 (2008) [hereinafter Nahmod, *Public Employee Speech*] (explaining that under the *Pickering/Connick* balancing test, public employees who report illegal conduct to their supervisors act within First Amendment norms); Sara J. Robertson, Note, *Lane v. Franks: The Supreme Court Frankly Fails to go Far Enough*, 60 ST. LOUIS U. L.J. 293, 313-14 (2016) (suggesting that the Court discard the precedent employed by *Garcetti*).

13. See *Garcetti*, 547 U.S. at 427 (Steven, J., dissenting); Charles W. “Rocky” Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173, 1194-98 (2007) (“Although the *Garcetti* rule superficially promotes predictability by adopting a categorical prerequisite to the balancing process, its distinction between ‘official duty’ and non-official public employee speech is not self-evident.”); see also Helen Norton, *Constraining Public Employee Speech: Government’s Control of its Workers’ Speech to Protect its Own Expression*, 59 DUKE L.J. 1, 33 (2009) [hereinafter Norton, *Constraining*]; Nahmod, *Public Employee Speech*, *supra* note 12, at 562; Bauries & Schach, *supra* note 11, at 357-58, 364; Paul M. Secunda, *Garcetti’s Impact on the First Amendment Rights of Federal Employees*, 7 FIRST AMEND. L. REV. 117, 123 (2008) [hereinafter Secunda, *Garcetti’s Impact*] (quoting *Garcetti*, 547 U.S. at 427) (Stevens, J., dissenting) (“The notion that there is a categorical difference . . . is quite wrong.”)).

14. See *Garcetti*, 547 U.S. at 430 (Souter, J., joined by Stevens, J. and Ginsburg, J., dissenting) (citations omitted) (explaining the differences in *Givhan v. W. Line Consol. Sch. Dist.*); Brenda R. Kallio & Richard T. Geisel, *To Speak or Not to Speak: Applying Garcetti and Whistleblower Laws to Public School Employee Speech*, 264 WEST’S ED. L. REP. 517, 528-529 (2011); Julian W. Kleinbrodt, Note, *Pro-Whistleblower Reform in the Post-Garcetti Era*, 112 MICH. L. REV. 111, 119 (2013).

employees hold their employment as a right, not a privilege;<sup>15</sup> and second, as alluded to above, public employees are often in the best or only position to gain knowledge and disclose information about matters of public concern by virtue of their employment in the public sector workforce.<sup>16</sup> For these and other reasons, *Garcetti* should be overruled forthwith.<sup>17</sup>

However, having heaped scorn, not praise, upon *Garcetti*, but assuming the Supreme Court does not bury *Garcetti* any time soon, application of the principles relied upon by the Court in reaching its decision in *Lane* should be the guiding light in resolving the unanswered and related questions embedded in the *Lane* decision. As alluded to above, those principles include recognizing public employees' rights to enjoy job security when exercising their First Amendment rights, as well as their important role in reporting on matters of public concern and testifying truthfully under oath in judicial and other public proceedings. Those open questions, which were either expressly reserved in—or raised by the facts underlying—the Court's opinion in *Lane* and this Article's answers to those questions, are as follows:

- What is the significance, if any, of the *Lane* Court's use on multiple occasions of the term "ordinary job responsibilities" in contrast to the *Garcetti* Court's reference to "official duties" concerning limiting First Amendment protection for public employee speech? Although not free from doubt, the Supreme Court's use of the term "ordinary job responsibilities" in *Lane* will likely narrow the scope of public employee speech excepted from First Amendment protection.<sup>18</sup>

- What result if a public employee, as part of his ordinary job responsibilities and pursuant to a subpoena or as a representative of his

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15. See Sheldon Nahmod, *Academic Freedom and the Post-Garcetti Blues*, 7 FIRST AMEND. L. REV. 54, 56 & nn. 8, 9 (2008) ("[A]ll such speech and scholarship, inherently made pursuant to official employment duties, is unprotected by the First Amendment.") [hereinafter Nahmod, *Post-Garcetti Blues*]; Paul M. Secunda, *Neoformalism and the Reemergence of the Right-Privilege Distinction in Public Employment Law*, 48 SAN DIEGO L. REV. 907, 915 (2011) [hereinafter Secunda, *Neoformalism*] (arguing that *Garcetti*, by in effect causing public employees to forfeit their First Amendment rights when speaking as part of their official duties, resurrects the discredited unconditional conditions/rights-privilege doctrine in public employee speech cases).

16. See *Garcetti*, 547 U.S. at 429 (Souter, J., joined by Stevens, J. and Ginsburg, J., dissenting); Norton, *Constraining*, *supra* note 13, at 31; Sabrina Niewialkowski, Note, *Is Social Media the New Era's "Water Cooler"? #Notifyouareagovernmentemployee*, 70 U. MIAMI L. REV. 963, 983 (2016); Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment*, 94 B.U. L. REV. 449, 528 (2014).

17. For articles collecting scholarship both praising and criticizing *Garcetti*, see Bauries & Schach, *supra* note 11, at 358 n.4 (citing e.g., Secunda, *Garcetti's Impact*, *supra* note 13; Secunda, *Neoformalism*, *supra* note 15).

18. See *infra* notes 117-32 and accompanying text.

or her employer, provides truthful sworn testimony about a matter of public concern? As in *Lane*, and assuming *Garcetti* continues to set a threshold limit on the free speech rights of public employees, a public employee's testimony under these circumstances should be protected under the First Amendment, subject to *Pickering* balancing.<sup>19</sup>

- What result if a public employee testifies as part of those same ordinary job responsibilities about the same subject matter, but does so voluntarily? The answer should be no different (i.e., the employee's speech should be protected under the First Amendment, but again subject to *Pickering* balancing).<sup>20</sup>

- What result if the content of a public employee's sworn truthful testimony does not relate to a matter of public concern? Although a close question, given the importance of promoting truth-seeking in judicial and administrative proceedings, public employees should be protected from retaliation by their employers even when the content of their testimony does not involve a matter of public concern.<sup>21</sup>

- What result if a public employee's testimony is false or erroneous? Generally speaking, the public employee should not be protected from adverse employment action under the First Amendment.<sup>22</sup>

- What result if, during testimony, the public employee unnecessarily discloses sensitive, confidential or privileged information? Likewise, the public employee should not be protected from adverse employment action based on his or her testimony.<sup>23</sup>

- What result if a public employee admits to wrongdoing while testifying? As long as the public employee is afforded progressive discipline and due process, the wrongdoing has a nexus to the employee's job responsibilities, and the employee has not been granted immunity in exchange for his or her testimony, the public employee's admission of wrongdoing while testifying will constitute cause for adverse employment action against the employee.<sup>24</sup>

Part II of this Article will discuss the *Lane* case in detail, summarizing the facts, lower court proceedings and the Supreme Court's decision, including both the majority and concurring opinions.<sup>25</sup> Part III

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19. See *infra* notes 133-72 and accompanying text.

20. See *infra* notes 173-213 and accompanying text.

21. See *infra* notes 214-46 and accompanying text.

22. See *infra* notes 247-55 and accompanying text.

23. See *infra* notes 256-65 and accompanying text.

24. See *infra* notes 266-74 and accompanying text.

25. See *infra* Part II.

will discuss and answer in detail the above-listed unanswered and related questions stemming from *Lane*, reaching both public employer-favoring and public employee-favoring results guided by the principles that drove the Court's decision in *Lane*.<sup>26</sup> Part IV will conclude that, assuming *Garcetti* is not revisited soon by the Supreme Court, reliance on the legal and policy principles emphasized by the Court in *Lane* will further the values underlying the protection of public employee speech in the sworn testimony context.<sup>27</sup>

## II. *LANE V. FRANKS*

### A. *The Facts and Lower Court Proceedings*

Edward Lane was a public employee hired by Central Alabama Community College ("CACC") on probationary status to serve as its Director of Community Intensive Training for Youth ("CITY"), a program for underprivileged youth.<sup>28</sup> As Director, Lane's job responsibilities included managing the day-to-day operation of the CITY program, hiring and firing employees, and overseeing the program's finances.<sup>29</sup>

Like many public agencies, the CITY program faced difficult financial times.<sup>30</sup> In reviewing the program's finances, Lane learned that Suzanne Schmitz, an Alabama State Representative employed by the program, had not been reporting to her assigned CITY office.<sup>31</sup> Lane

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26. See *infra* Part III.

27. See *infra* Part IV. *Garcetti* did not shut off all remedies for aggrieved public employees; rather, it foreclosed First Amendment claims for employees who suffer retaliation and adverse employment action for speaking as part of their official duties about matters of public concern. See *Garcetti v. Ceballos*, 547 U.S. 410, 420-22 (2006). Thus, the majority in *Garcetti* was quick to point out that the Court's holding did not prevent public employees from pursuing non-First Amendment claims under state whistleblower and labor statutes and the like. *Id.* at 425-26. *But cf. id.* at 439-41 (Souter, J., dissenting). Some scholars believe that the Court's focus on alternative, non-First Amendment remedies will inure to the benefit of public employees. See Elizabeth Dale, *Employee Speech & Management Rights: A Counterintuitive Reading of Garcetti v. Ceballos*, 29 BERKELEY J. EMP. & LAB. L. 175, 215-18 (2008). Other scholars have taken the position that state whistleblower and labor statutes are insufficient to protect public employees from retaliation by their employers. See Ruben J. Garcia, *Against Legislation: Garcetti v. Ceballos and the Paradox of Statutory Protection for Public Employees*, 7 FIRST AMEND. L. REV. 22, 26, 42 (2008); Martha M. McCarthy & Suzanne E. Eckes, *Silence in the Hallways: the Impact of Garcetti v. Ceballos on Public School Educators*, 17 B.U. PUB. INT. L.J. 209, 232-33 (2008).

28. *Lane v. Franks*, 573 U.S. \_\_\_, 134 S. Ct. 2369, 2375 (2014).

29. *Id.*

30. *Id.*

31. *Id.*

discussed the matter with Schmitz but was unsuccessful in getting her to change this behavior.<sup>32</sup> When Lane took the matter to CACC's president and its attorney, they warned Lane that firing Schmitz could have negative consequences for both him and CACC<sup>33</sup>—presumably because of Schmitz' status as a state representative.

These warnings notwithstanding, Lane went back to Schmitz and instructed her to show up at her assigned office in Huntsville to perform her job as a counselor.<sup>34</sup> When Schmitz refused, Lane fired her.<sup>35</sup> Schmitz then told a co-worker that she would "get [Lane] back for firing her,"<sup>36</sup> and that, if Lane ever appeared before the state legislature to request money for the CITY program, "she would tell him, '[y]ou're fired.'"<sup>37</sup>

Schmitz's termination led to several investigations into her conduct while she was employed with the CITY program, including one by the Federal Bureau of Investigation.<sup>38</sup> Lane eventually testified before a grand jury concerning his reasons for firing Schmitz.<sup>39</sup> A little over a year later, the grand jury indicted Schmitz on multiple counts of mail fraud and theft relating to her having allegedly and improperly taken money from a program receiving federal funds.<sup>40</sup> Specifically, the indictment alleged that Schmitz had received over \$175,000 in federal funds even though she performed little to no work for the CITY program and further alleged that Schmitz had submitted false time sheets concerning her amount of hours worked and the nature of the services rendered.<sup>41</sup>

Schmitz's federal court trial commenced approximately six months after the indictment.<sup>42</sup> Having been subpoenaed, Lane testified at trial about the events leading up to his decision to fire Schmitz.<sup>43</sup> The jury was unable to reach a verdict, thereby causing the prosecutors to retry Schmitz.<sup>44</sup> Lane again testified at Schmitz's retrial.<sup>45</sup> This time, the jury

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32. *See id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* (internal quotations omitted) (quoting *Lane v. Cent. Alabama Cmty Coll.*, No. CV-11-BE-0883-M, 2012 WL 5289412, at \*1 (N.D. Ala. Oct. 18, 2012)).

37. *Id.* (internal citations omitted).

38. *Id.*

39. *Id.*

40. *Id.* (citing *United States v. Schmitz*, 634 F.3d 1247, 1256-57 (11th Cir. 2011)).

41. *Id.* (citing *Schmitz*, 634 F.3d at 1257, 1260).

42. *Id.*

43. *Id.*

44. *Id.*

convicted Schmitz on all but one of the multiple counts concerning her having defrauded and stolen money from a program receiving federal funds.<sup>46</sup> The district court sentenced Schmitz to thirty months in prison, and ordered her to forfeit and make full restitution of the money fraudulently stolen from the CITY program.<sup>47</sup>

Meanwhile, the CITY program continued to experience budgetary difficulties.<sup>48</sup> As a result, Lane recommended to CACC's recently-hired president Steve Franks that he (Franks) layoff a number of CITY employees.<sup>49</sup> Franks did so, terminating twenty-nine CITY probationary employees, including Lane.<sup>50</sup> Because of ambiguity in the employees' probationary status, Franks quickly rescinded all but two of the twenty-nine employees' terminations.<sup>51</sup> Franks, however, did not reinstate Lane, based on Franks' stated belief that, because Lane was a director of the CITY program and not simply an employee, he could be treated differently than the other probationary employees.<sup>52</sup> Not long thereafter, CACC eliminated the CITY program and terminated its remaining employees.<sup>53</sup>

Lane eventually sued Franks, in both his individual and official capacities, in federal court.<sup>54</sup> Lane alleged that Franks had violated his federal civil and constitutional rights under 42 U.S.C. section 1983 and the First Amendment by terminating Lane in retaliation for having testified against Schmitz.<sup>55</sup> "Lane sought damages from Franks in his individual capacity and sought equitable relief, including reinstatement, from Franks in his official capacity."<sup>56</sup>

The district court granted summary judgment in favor of Franks.<sup>57</sup> Although the court concluded that there were genuine issues of material fact concerning Franks' motivation for terminating Lane's employment,

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45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 2376.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* Lane also brought claims against CACC, claims under a state whistleblower statute and 42 U.S.C. § 1985 in the same action. *Id.* at 2376 n.2.

56. *Id.* at 2376. Because Franks retired and was eventually replaced by Susan Burrow as President of CACC during the pendency of Lane's lawsuit, Lane's official capacity claims against Franks became claims against Burrow. *Id.* at 2376 n.3.

57. *Id.* at 2376.

the court held that Franks was entitled to qualified immunity on Lane's claim for damages.<sup>58</sup> Specifically, the district court reasoned that "'a reasonable government official in [Franks'] position would not have had reason to believe that the Constitution protected [Lane's] testimony.'"<sup>59</sup> In so holding, the district court relied on the Supreme Court's decision in *Garcetti v. Ceballos*,<sup>60</sup> which held that "'when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes.'"<sup>61</sup> Applying *Garcetti*, the district court "found no violation of clearly established law because Lane had 'learned of the information that he testified about while working as Director at [CITY],' such that his 'speech [could] still be considered as part of his official job duties and not made as a citizen on a matter of public concern.'"<sup>62</sup>

Relying on a broad interpretation of *Garcetti*, the Eleventh Circuit affirmed.<sup>63</sup> Specifically, the court of appeals reasoned that, "[e]ven if an employee was not required to make the speech as part of his official duties, he enjoys no First Amendment protection if his speech 'owes its existence to [the] employee's professional responsibilities' and is 'a product that the "employer himself has commissioned or created.'"<sup>64</sup> Applying this standard, the court of appeals concluded that, "Lane spoke as an employee and not as a citizen because he was acting pursuant to his official duties when he investigated Schmitz'[s] employment, spoke with Schmitz and CACC officials regarding the issue, and terminated Schmitz."<sup>65</sup> The court likewise agreed with the district court on the qualified immunity issue, holding that Franks would be entitled to qualified immunity because the First Amendment right alleged by Lane was not clearly established at the time of his termination.<sup>66</sup>

The Supreme Court granted certiorari<sup>67</sup> to resolve the split of

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58. *Id.* (citing *Lane v. Cent. Alabama Cmty. Coll.*, No. CV-11-BE-0883-M, 2012 WL 5289412, at \*10 (N.D. Ala. Oct. 18, 2012)).

59. *Id.* (quoting *Lane*, 2012 WL 5289412, at \*12) (alterations in original).

60. 547 U.S. 410 (2006).

61. *Lane*, 134 S. Ct. at 2376 (quoting *Garcetti*, 547 U.S. at 421 and *Lane*, 2012 WL 5289412, at \*10).

62. *Id.* (quoting *Lane*, 2012 WL 5289412 at \*10) (alterations in original).

63. *Id.* (citing *Lane v. Cent. Alabama Cmty. Coll.*, 523 Fed. App'x. 709, 710 (11th Cir. 2013)).

64. *Id.* (quoting *Lane*, 523 Fed. App'x. at 711 and *Abdur-Rahman v. Walker*, 567 F.3d 1278, 1283 (11th Cir. 2009)).

65. *Id.* at 2376-77 (citing *Lane*, 523 Fed. App'x. at 712).

66. *Id.* at 2377 (citing *Lane*, 523 Fed. App'x. at 711 n.2).

67. *Id.* at 2377.

opinions in the courts of appeals<sup>68</sup> on the question of “whether public employees may be fired—or suffer other adverse employment consequences—for providing truthful subpoenaed testimony outside the course of their ordinary job responsibilities.”<sup>69</sup>

## B. *The Supreme Court’s Decision*

### 1. The Outcome/Result

In a unanimous opinion, with three Justices concurring, the Supreme Court reversed the Eleventh Circuit’s decision as to Lane’s section 1983 and First Amendment claims against Franks’ successor, Burrow, in her official capacity, affirmed the decision on qualified immunity grounds as to those same claims against Franks in his individual capacity, and remanded the case to the lower courts for further proceedings consistent with the Court’s opinion.<sup>70</sup>

### 2. Guiding and Governing Principles

Writing for the Court, Justice Sotomayor foreshadowed the outcome of the decision with the opening words of the opinion.<sup>71</sup> She stated “[a]lmost [fifty] years ago, this Court declared that citizens do not surrender their First Amendment rights by accepting public employment.”<sup>72</sup> Citing to its seminal decision in *Pickering v. Board of Education*,<sup>73</sup> the Court pointed out that, in the context of public employee speech, a “careful balance” is needed “between the interests of the [employee], as a citizen, in commenting upon matters of public

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68. *Id.* at 2377 (comparing *Lane*, 523 Fed. App’x. at 712, with *e.g.*, *Reilly v. Atlantic City*, 532 F.3d 216, 231 (3d Cir. 2008)). By granting certiorari, the Court, in effect, agreed to resolve an issue that Justice Souter had identified in his dissenting opinion in *Garcetti* (i.e., whether a “claim relating to truthful testimony in court must . . . be analyzed independently to protect the integrity of the judicial process.”) *Garcetti v. Ceballos*, 547 U.S. 410, 444 (2006) (Souter, J., dissenting).

69. *Lane*, 134 S. Ct. at 2377. In framing the question in this manner, the Supreme Court did not accept the Eleventh Circuit’s premise that Lane’s speech was undertaken within the scope of his broadly defined official duties. *See infra* note 89 and accompanying text.

70. *Lane*, 134 S. Ct. 2383.

71. *See id.* at 2374.

72. *Id.*

73. 391 U.S. 563; *Lane*, 134 S. Ct. at 2374 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)). In *Pickering v. Board of Education*, the Court held that a school board violated the First Amendment rights of a public school teacher by firing him after he wrote a letter to the school board criticizing the board and superintendent’s handling of school financing and revenue matters. 391 U.S. at 564-65.

concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”<sup>74</sup> Similar to *Pickering*, the Court struck the balance in favor of Lane and other public employees, holding that the “the First Amendment . . . protects a public employee who provided truthful sworn testimony, compelled by subpoena, outside the course of his ordinary job responsibilities.”<sup>75</sup>

By leading with and emphasizing the compatibility of public employee speech with public employment and the *Pickering* balancing test, the Court resurrected first principles that had been stated, but given short shrift, in its two previous major public employee speech cases—*Connick* and *Garcetti*, which had set up threshold barriers to protecting public employees and their speech from retaliation by public employers.<sup>76</sup> Thus, in *Connick v. Myers*,<sup>77</sup> a case involving a questionnaire circulated internally by a disgruntled staff attorney in a prosecutor’s office, the Court had clarified its decision in *Pickering* by holding that no balancing of the employee’s interest in speech with the public employer’s interest in efficiently providing its public services was necessary, unless the employee first demonstrated that the speech involved a matter of public concern.<sup>78</sup> More recently in *Garcetti*, where a mid-level prosecutor prepared an internal memorandum as part of his official duties, which described purported misconduct by a law enforcement officer in swearing out a warrant affidavit and recommending dismissal of the case, the Court determined that the prosecutor was speaking as an employee, not as a citizen and, as such, his speech was not protected under the First Amendment.<sup>79</sup>

Having set the tone for what was to follow, the Court in *Lane* then

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74. *Lane*, 134 S. Ct. at 2374 (quoting *Pickering*, 391 U.S. at 568) (alteration in original).

75. *Id.* at 2374-75.

76. See Rodric B. Schoen, *Pickering Plus Thirty Years: Public Employees and Free Speech*, 30 TEX. TECH. L. REV. 5, 18 (1999) (“*Connick* teaches that in future public employee-free speech cases, the threshold judicial issue is whether the speech resulting in termination pertains to a matter of public concern.”); see also McCarthy & Eckes, *supra* note 27, at 218 (“The Supreme Court in *Garcetti* establishes a new threshold question courts must ask when determining whether a public employee’s expression will be subject to the *Pickering* balancing test.”).

77. 461 U.S. 138 (1983).

78. See *id.* at 143, 146 (Agreeing with prosecutor *Connick* that, with one exception, “no balancing of interests is required in this case because *Myers*’ questionnaire concerned only internal office matters and that such speech is not upon a matter of ‘public concern,’ as the term was used in *Pickering*,” and stating further that “*Pickering*, its antecedents, and its progeny, lead us to conclude that if *Myers*’ questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge.”).

79. See *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006).

reiterated the two-step analytical framework for evaluating whether public employee speech is constitutionally protected, which it had first enunciated in *Garcetti*:

The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.<sup>80</sup>

The Court next restated the distinction between citizen speech and employee speech that drove its decision in *Garcetti*, explaining that although “speech as a citizen may trigger protection . . . ‘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.’”<sup>81</sup> At this juncture, the Court again stated the narrow question before it, pointing out both what it was deciding and what it was not:

It is undisputed that Lane's ordinary job responsibilities did not include testifying at court proceedings. . . . For that reason, Lane asked the Court to decide only whether truthful sworn testimony that is not part of an employee's ordinary job responsibilities is citizen speech on a matter of public concern. . . . We accordingly need not address in this case whether truthful sworn testimony would constitute citizen speech under *Garcetti* when given as part of a public employee's ordinary job duties, and express no opinion on that matter today.<sup>82</sup>

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80. *Lane*, 134 S. Ct. at 2378 (quoting *Garcetti*, 547 U.S. at 418).

81. *Id.* (quoting *Garcetti*, 547 U.S. at 424).

82. *Id.* at 2378 n.4 (citations omitted). Given the Court's threshold determination that Lane's ordinary job responsibilities did not include testifying in judicial proceedings, the Court's opinion could have been even narrower. As discussed above, the Court's decision in *Garcetti* interposed an additional threshold inquiry which left public employee speech made as part of the employee's

### 3. The Legal Standard Applied

The Court subdivided the first step of the two-step inquiry, analyzing first whether Lane's testimony at Schmitz's trial constituted speech as a citizen, as opposed to speech as an employee, and second, whether Lane's testimony involved a matter of public concern.<sup>83</sup> As to each issue, the Court did not have any difficulty ruling in Lane's favor.<sup>84</sup>

#### *a. The Citizen Speech v. Employee Speech Issue*

As to the citizen speech issue, the Court started with its conclusion, holding that "[t]ruthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes . . . even when the testimony relates to his public employment or concerns information learned during that employment."<sup>85</sup> In so holding, the Court disagreed with the Eleventh Circuit and grounded its conclusion on two separate bases.<sup>86</sup>

First, the Court took the Eleventh Circuit to task for minimizing "the nature of sworn judicial statements," and for "ignor[ing] the obligation borne by all witnesses testifying under oath."<sup>87</sup> On this point, the Court opined as follows:

Sworn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the

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official duties unprotected from retaliation, but continued to protect non-official duty speech as citizen speech. See *supra* notes 70-74 and accompanying text. Categorizing speech as official duty/employee speech or non-official duty/citizen speech may prove difficult in a particular case. See Caroline A. Flynn, Note, *Policeman, Citizen, or Both? A Civilian Analogue Exception to Garcetti v. Ceballos*, 111 MICH. L. REV. 759, 769 (2013); see also Trusz v. UBS Realty Inv'rs, LLC, 123 A.3d 1212, 1224-25 (Conn. 2015) The Court did not suggest in *Garcetti* that there is some third category of public employee speech between employee and citizen speech in which the speech might fall. As such, once the Court decided that Lane's testimony was not included in his official duties, the Court could have tersely held that *Garcetti*'s threshold test was not a barrier to First Amendment protection and moved on to the public concern threshold and *Pickering*-balancing tests.

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

84. *Id.* at 2378-80 ("We hold, then, that Lane's truthful sworn testimony at Schmitz'[s] criminal trials is speech as a citizen on a matter of public concern.").

85. *Id.* at 2378.

86. *Id.* at 2378-79.

87. *Id.*

truth. When the person testifying is a public employee, he may bear separate obligations to his employer—for example, an obligation not to show up to court dressed in an unprofessional manner. But any such obligations as an employee are distinct and independent from the obligation, as a citizen, to speak the truth. That independent obligation renders sworn testimony speech as a citizen and sets it apart from speech made purely in the capacity of an employee.<sup>88</sup>

Second, the Court disagreed with the Eleventh Circuit's conclusion that, because Lane's testimony was based upon information learned during the course of his employment with, or related to his position at CACC and CITY, *Garcetti* required that Lane's speech be treated as employee, rather than citizen, speech.<sup>89</sup> On this point, the Court distinguished *Garcetti* by noting that the prosecutor in that case had prepared the internal memorandum regarding law enforcement misconduct for his supervisors recommending dismissal of a particular case as part of his "official responsibilities," (i.e., as part of the "tasks he was paid to perform" as a government employee).<sup>90</sup> In contrast, the Court characterized Lane's testimony as "speech that simply relates to public employment or concerns information learned in the course of public employment."<sup>91</sup> Although the *Lane* Court stated that "*Garcetti* said nothing about speech" of the latter kind,<sup>92</sup> it immediately reinforced its holding by noting that "[t]he *Garcetti* Court made explicit that its holding did not turn on the fact that the memo at issue 'concerned the subject matter of [the prosecutor's] employment,' because '[t]he First Amendment protects some expressions related to the speaker's job.'"<sup>93</sup>

The Court, having distinguished and clarified its holding in *Garcetti*, held as to the "relatedness/official duties" issue that:

[T]he mere fact that a citizen's speech concerns information acquired by virtue of his public employment, does not transform that speech into

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88. *Id.* at 2379 (citations omitted).

89. *See id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* (alteration in original) (citing and quoting *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006)).

employee—rather than citizen—speech. The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties.<sup>94</sup>

The Court—again, harkening back to *Pickering* and emphasizing a rationale for protecting public employee speech based on information garnered in the course of public employment which had been minimized in *Garcetti*—further bolstered its holding as follows:

It bears emphasis that our precedents dating back to *Pickering* have recognized that speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment. In *Pickering*, for example, the Court observed that “[t]eachers are . . . the members of the community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely without fear of retaliatory dismissal.”<sup>95</sup>

Further supporting its decision concerning the breadth of *Garcetti*'s holding and the importance of public employee speech in corruption cases like *Lane*, the Court noted the anomaly that would occur if the speech often necessary to prosecute those cases (i.e., speech learned at work), could not “form the basis for a First Amendment retaliation claim.”<sup>96</sup> The Court further noted the “impossible position” a public employee would be in if forced to choose between testifying truthfully about corruption witnessed in the workplace, and avoiding loss of his or her job due to possible retaliation.<sup>97</sup> The Court concluded that the Eleventh Circuit erred under the first subdivision of the first step in the

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94. *Id.* at 2379.

95. *Id.* at 2379-80 (citations omitted) (“[P]ublic employees ‘are uniquely qualified to comment’ on ‘matters concerning government policies that are of interest to the public at large.’”).

96. *See id.* at 2380. Of course, *Garcetti* involved possible corruption by law enforcement officers learned by a prosecutor during the course of his work (i.e., during the performance of his official duties). Thus, the very anomaly that the *Lane* Court decried had already occurred in *Garcetti*. *See id.*; *see also* *Garcetti v. Ceballos*, 547 U.S. 410, 410 (2006).

97. *See Lane*, 134 S. Ct. at 2380.

analysis by failing to recognize that “Lane’s sworn testimony [was] speech as a citizen.”<sup>98</sup>

*b. The Matter of Public Concern Issue*

The Court then turned to the second subdivision of the first step, the issue of whether “Lane’s testimony is also speech on a matter of public concern.”<sup>99</sup> Given the nature of the case in which Lane testified, the Court had little trouble resolving the public concern issue in Lane’s favor.<sup>100</sup>

The Court first laid out the well-settled standard for determining whether speech was on a matter of public concern (i.e., whether the speech could be “fairly considered as relating to any matter of political, social, or other concern to the community, or when it is [on] a subject of legitimate news interest,”<sup>101</sup> the resolution of which inquiry turned on the “‘content, form and context’ of the speech”).<sup>102</sup>

As to the content of Lane’s testimony, the Court easily concluded that Lane’s testimony about “corruption in a public program and misuse of state funds—obviously involves a matter of significant public concern.”<sup>103</sup> As to the form and context of Lane’s speech, the Court stated that the fact that the speech occurred as “sworn testimony in a judicial proceeding,” bolstered its conclusion that the speech involved a matter of public concern.<sup>104</sup> Specifically, the Court opined that “[u]nlike speech in other contexts, testimony under oath has the formality and gravity necessary to remind the witness that his or her statements will be the basis for official governmental action, action that often affects the rights and liberties of others.”<sup>105</sup> Based on this reasoning, the Court held that “Lane’s truthful sworn testimony at Schmitz’[s] criminal trials [constituted] speech . . . on a matter of public concern.”<sup>106</sup>

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98. *See id.*

99. *Id.*

100. *See id.* (“Applying these principles, it is clear that Lane’s sworn testimony is speech as a citizen.”).

101. *Id.* (internal quotations and citations omitted).

102. *Id.* (quoting *Connick v. Myers*, 461 U.S. 138, 147-48 (1983)).

103. *Id.* (citing and quoting *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006)) (“Exposing governmental inefficiency and misconduct is a matter of considerable significance.”).

104. *See id.*

105. *Id.* (quoting *United States v. Alvarez*, 567 U.S. \_\_\_, 132 S. Ct. 2537, 2546 (2012) (plurality opinion)).

106. *Id.* at 2380.

c. *Pickering Balancing*

If the Court had little difficulty resolving the public concern issue, it had the same or less level of trouble disposing of the second step inquiry in public employee cases—the *Pickering* balancing issue.<sup>107</sup>

The Court started its analysis of the second step by reiterating the governing legal standard which it had stated or alluded to at the outset of its opinion.<sup>108</sup> Thus, the Court repeated that, “[u]nder *Pickering*, if an employee speaks as a citizen on a matter of public concern, the next question is whether the government had ‘an adequate justification for treating the employee differently from any other member of the public’ based on the government’s needs [as] an employer.”<sup>109</sup> The Court then delineated the government’s interest under *Pickering*, pointing out that “government employers often have legitimate interest[s] in the effective and efficient fulfillment of [their] responsibilities to the public, including promot[ing] efficiency and integrity in the discharge of official duties, and maintain[ing] proper discipline in public service.”<sup>110</sup>

Applying these standards, the Court found the government employer’s proof completely wanting, thus concluding that the Eleventh Circuit had erred:

[T]he employer’s side of the *Pickering* scale is entirely empty: Respondents do not assert, and cannot demonstrate, any government interest that tips the balance in their favor. There is no evidence, for example that Lane’s testimony at Schmitz’[s] trials was false or erroneous or that Lane unnecessarily disclosed any sensitive, confidential, or privileged information while testifying. In these circumstances, we conclude that Lane’s speech is entitled to protection under the First Amendment.<sup>111</sup>

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107. See *id.* at 2373-77.

108. See *id.* at 2377; see also *supra* notes 71-80 and accompanying text.

109. *Lane*, 134 S. Ct. at 2380 (quoting and citing *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006)).

110. *Id.* at 2381 (alteration in original) (internal quotations omitted) (quoting and citing *Connick v. Myers*, 461 U.S. 138, 150-51 (1983)).

111. *Id.* at 2381. The Court also noted that “quite apart from *Pickering* balancing, wrongdoing that an employee admits to while testifying may be a valid basis for termination or other discipline.” *Id.* at 2381 n.5; see *infra* note 266 and accompanying text.

#### d. Conclusion

As discussed previously, the Court, having ruled that Lane's testimony constituted protected speech as a citizen under the First Amendment, also found and concluded that Franks was entitled to qualified immunity on Lane's claims against him in his individual capacity, and remanded the case for further proceedings so that the lower courts could address Lane's claims against Franks' successor Burrow.<sup>112</sup>

#### 4. The Concurring Opinion

Justice Thomas, joined by Justices Scalia and Alito, wrote a brief concurring opinion.<sup>113</sup> The concurring justices noted that the "discrete question" presented for decision by the Court was "whether a public employee speaks 'as a citizen on a matter of public concern,' when the employee gives '[t]ruthful testimony under oath . . . outside the scope of his ordinary job duties.'"<sup>114</sup> According to the concurring opinion:

Answering that question requires little more than a straightforward application of *Garcetti*. . . . The petitioner in this case did not speak "pursuant to" his ordinary job duties because his responsibilities did not include testifying in court proceedings . . . and no party has suggested that he was subpoenaed as a representative of his employer. Because petitioner did not testify to "fulfil[I] a [work] responsibility," . . . he spoke "as a citizen," not as an employee.<sup>115</sup>

Like the majority opinion, the concurring justices delineated the questions that were not before—and, therefore, not decided by—the Court, stating as follows:

We . . . have no occasion to address the quite different

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112. See *Lane*, 134 S. Ct. at 2376-77. Although *Lane* was the proverbial "easy case" as far as Supreme Court cases go, the Court held that Franks was entitled to qualified immunity because Lane's First Amendment rights were not clearly established, and the question concerning those rights were not "beyond debate" at the time Franks terminated Lane's employment. *Id.* at 2376, 2383.

113. *Id.* at 2383-84.

114. *Id.* at 2383 (quoting *Garcetti*, 547 U.S. at 418); see also *id.* at 2374, 2378; *Connick*, 461 U.S. at 143; cf. *supra* note 82 and accompanying text.

115. *Lane*, 134 S. Ct. at 2384 (alterations in original) (citations omitted).

question whether a public employee speaks “as a citizen” when he testifies in the course of his ordinary job responsibilities. For some public employees—such as police officers, crime scene technicians, and laboratory analysts—testifying is a routine and critical part of their employment duties. Others may be called to testify in the context of particular litigation as the designated representatives of their employers. The Court properly leaves the constitutional questions raised by these scenarios for another day.<sup>116</sup>

### III. THE UNANSWERED (AND RELATED) QUESTIONS AFTER *LANE V. FRANK*

#### A. *The Significance, if any, of the Lane Court’s Use of the Term “Ordinary Job Responsibilities,” rather than Garcetti Court’s “Official Duties” Terminology*

The first question raised by the *Lane* opinion is a textual one. Specifically, it stems from the Supreme Court’s shift from the term “official duties,” used in *Garcetti* to the term “ordinary job responsibilities,” used in *Lane* to define the exception to First Amendment protection for speech, to use *Garcetti*’s phrase, “ow[ing] its existence to a public employee’s professional responsibilities.”<sup>117</sup>

In *Garcetti*, the Court majority used the term “official duties” to demarcate speech by public employees that would go unprotected under the First Amendment, and never once used the term “ordinary job responsibilities.”<sup>118</sup> In contrast, the *Lane* majority and concurrence used the term “ordinary” as it pertained to job responsibilities or duties nine times.<sup>119</sup> Neither the *Lane* majority nor concurrence commented on the change in verbiage, let alone explained whether the Court’s shift in language was intended as a shift in meaning.<sup>120</sup>

116. *Id.* (citations omitted).

117. *See id.*; *see also Garcetti*, 547 U.S. at 421.

118. *Garcetti*, 547 U.S. at 421; *see also* Lemay Diaz, Comment, *Truthful Testimony as the “Quintessential Example as Speech as a Citizen”: Why Lane v. Franks Lays the Groundwork for Protecting Public Employee Truthful Testimony*, 46 SETON HALL L. REV. 565, 586 (2016). In his dissent, Justice Breyer twice used the term “ordinary” as it pertained to job duties. *Garcetti*, 547 U.S. at 444, 449-50.

119. *Lane*, 134 S. Ct. at 2375, 2377-79, 2381, 2383-84; *see also* Mpooy v. Rhee, 758 F.3d 285, 294-95 (D.C. Cir. 2014).

120. *See infra* note 123 and accompanying text.

It is, of course, possible that the Court's use of the term "ordinary job responsibilities" in *Lane* was inadvertent and not intended to change the line drawn between protected and unprotected public employee speech by the *Garcetti* Court's use of the term "official duties."<sup>121</sup> This view would be supported by the similarity of the two terms and the fact that neither the *Lane* majority nor concurrence commented upon the change in language. However, this interpretation would run contrary to the axiom that a court's change in language concerning the governing legal standard signals an intent to change the meaning of the legal standard.<sup>122</sup>

More likely, in shifting from the term "official duties" in *Garcetti* to "ordinary job responsibilities" in *Lane*, the Court intended to say something about the line demarcating protected and unprotected speech as it pertains to the employee's role in the workplace. Certainly, a strong argument can be made that the Court's "use of the adjective 'ordinary' . . . could signal a narrowing of the realm of employee speech left unprotected by *Garcetti*."<sup>123</sup> However, focusing more on the Eleventh Circuit decision it was reversing, the *Lane* Court may have used the term "ordinary" less to signal a narrowing in meaning from what it had said in *Garcetti*, and more to clarify for lower courts that

121. See *Trustees of Schs., etc. v. Sons*, 187 N.E.2d 673, 674 (Ill. 1963) (opining that where change in statutory language occurred inadvertently, legislature did not intend to change meaning of statute).

122. See, e.g., *Crawford v. Carroll*, 529 F.3d 961, 974 n.14 (11th Cir. 2008) (showing that where the Supreme Court used different language in a Title VII retaliation case than in a Title VII discrimination case, the legal standard in each case was held to be different); *State v. Parks*, 866 So.2d 172, 174 (Fla. Dist. Ct. App. 2004) ("[W]hen the legislature amends a statute by omitting or including words, it is to be presumed that the legislature intended the statute to have a different meaning than that accorded it before the amendment."); *United States v. Brewer*, 9 M.J. 509, 512 (A.F. Ct. M. R. 1980) (where a court used different language than previously, new terminology would be held to change the legal standard).

123. See *Dibrito v. City of St. Joseph*, No. 16-1357, 2017 WL 129033, at \*3 (6th Cir. Jan. 13, 2017); *Mpoy*, 758 F.3d at 295; *Lynch v. Ackley*, 811 F.3d 569, 582 n.13 (2d Cir. 2016); *Alves v. Bd. of Regents of the Univ. Sys. of Georgia*, 804 F.3d 1149, 1163 (11th Cir. 2015); *Boulton v. Swanson*, 795 F.3d 526, 534 (6th Cir. 2015); *Gibson v. Kirkpatrick*, 773 F.3d 661, 668 (5th Cir. 2014); *Diaz*, *supra* note 118, at 585 (citations omitted); see also *Hagan v. City of New York*, 39 F. Supp. 3d 481, 510 (S.D.N.Y. 2014) (emphasis in original) ("[T]he question is not whether an employee's speech is made pursuant to any official duty, but whether it is made pursuant to one of his ordinary official duties."). But cf. *Brown v. Office of State Comptroller*, 211 F. Supp. 3d 455, 464 n.3 (D. Conn. 2016) (*Hagan's* "interpretation of *Lane* is too broad."). Although the above-discussed cases suggest only that the Supreme Court's use of the term "ordinary" in *Lane* "could signal" a change in the legal standard from *Garcetti*, one commentator has read *Mpoy* and *Hagan* as definitively supporting the conclusion that "[k]ey language in *Lane* reins in the scope of *Garcetti* so that only on rare occasions will truthful testimony fall within the ordinary job duties of public employees." See *Diaz*, *supra* note 118, at 585 (citations omitted).

Garcetti's "official duties" requirement should be read narrowly.<sup>124</sup> The Third Circuit, without resolving the issue, has stated without explanation that "*Lane* may broaden *Garcetti*'s holding by including 'ordinary' as a modifier to the scope of an employee's job duties"<sup>125</sup>—although that judicial assertion seems clearly wrong and could only possibly be correct if the Supreme Court intended to broaden *Garcetti* by replacing, rather than modifying, the term "official" with the term "ordinary."

Ultimately, the Supreme Court did not define or comment upon its use of the term "ordinary job responsibilities" in *Lane*.<sup>126</sup> Likewise, the Court did not address the meaning of the new term in its next public employee speech case.<sup>127</sup> Also, lower courts have been able to avoid the definitional issue by concluding that the speech in the case before them fell within the meaning of both the *Garcetti* and *Lane* terminology, or instead, ruled in favor of a public official on qualified immunity grounds.<sup>128</sup> For these reasons, there is no definitive judicial guidance on the subject.

Because the Supreme Court gave no explanation for its shift in language from *Garcetti*'s "official duties" standard to *Lane*'s "ordinary job responsibilities" test, accurately predicting the threshold standard that the Court will use—a standard based on the roles and duties of the affected public employee—to limit public employee speech rights, is extremely problematic. However, several guiding principles may be

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124. See *Flora v. Cty. of Luzerne*, 776 F.3d 169, 179 (3d Cir. 2015) (declining to reach the question of "whether *Lane* modified or merely clarified *Garcetti*" in terms of the official duties standard); see also Joseph Deloney, Note, *Protecting Public Employee Trial Testimony*, 91 CHI. KENT L. REV. 709, 710-11 n.13 (2016) (By shifting from the term "official duties" to "ordinary job responsibilities," "[t]he [*Lane*] Court seemed to refine its conception of *Garcetti* and unequivocally reject the broad interpretation adopted by the Eleventh Circuit." (citations omitted)).

125. *Dougherty v. Sch. Dist. of Philadelphia*, 772 F.3d 979, 990 (3d Cir. 2014) (emphasis added). Inexplicably, the Third Circuit quotes the D.C. Circuit's above-quoted statement in *Mpoy* concerning *Lane*'s narrowing the *Garcetti* official duties standard as support for its statement in *Dougherty*. *Flora*, 776 F.3d at 178 (quoting *Mpoy*, 758 F.3d at 294-95).

126. See *Lane v. Franks*, 573 U.S. \_\_\_, 134 S. Ct. 2369, 2384 (2014).

127. See *Heffernan v. City of Patterson*, 578 U.S. \_\_\_, 136 S. Ct. 1412, 1414 (2016) (holding that the supervisor's mistaken belief that the officer was involved in the mayoral campaign did not bar a First Amendment retaliation claim by the officer).

128. See *Lefebvre v. Morgan*, No. 14-CV-5322 (KMK), 2016 WL 1274584, at \*10 n.12 (S.D.N.Y. Mar. 31, 2016) (showing where public employee's speech "was related to the heart of his job responsibilities," any possible distinction between *Garcetti* and *Lane* standards did not affect the court's analysis); *Cory v. City of Basehor*, 631 F. App'x. 526, 529 (10th Cir. 2015) ("Mr. Cory's reports did not merely 'concern' his duties, but were made 'within the scope' of his duties as a police officer."); *Gibson*, 773 F.3d 661 at 668-69 (not reaching the question of whether *Lane* altered *Garcetti*, since a "clearly established" standard for qualified immunity dictated the result in favor of the individual defendant); *Mpoy*, 758 F.3d at 295-96 (likewise not reaching the question after concluding defendants were entitled to qualified immunity).

articulated. First, to the extent that the Court continues to limit those speech rights with a *Garcetti*-type barrier, it is likely that the Court will adopt one standard. Given that the Court predicated its decision in *Garcetti* on a bright-line distinction between unprotected public employee speech and protected citizen speech,<sup>129</sup> it would make little sense to draw that line based on the official duties of the employee in cases when the employee is not testifying under oath, and on the ordinary job responsibilities of that same public employee when judicial or administrative testimony is involved. Second, based on the general principle that exceptions to First Amendment protections should be narrowly construed,<sup>130</sup> and on the substantive principle initially advanced in *Pickering* and resurrected in *Lane* that public employee's serve an important role as a source of information about the operation of public entities,<sup>131</sup> the Court should adopt and apply the phraseology that make the least incursion on public employee speech rights. Third, as courts and commentators have noted, based on a textual reading of the two phrases, *Lane*'s "ordinary job responsibilities"—and particularly the term "ordinary"—formulation leaves less public employee speech unprotected than *Garcetti*'s "official duties" formulation.<sup>132</sup>

For these reasons, as long as the Court continues to carve out an exception to public employee First Amendment protection premised on the scope of the employee's job duties, it should apply *Lane*'s narrower ordinary job responsibilities standard to public employee speech cases.

### *B. Testimony as Part of a Public Employee's Ordinary Job Responsibilities/Official Duties*

As of this writing, there have not been any post-*Lane* cases discussing the question expressly left open by both the majority and concurrence in *Lane*, (i.e., whether a public employee speaks as a citizen—and cannot be retaliated against by a public employer—when

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

130. See *Morgan v. Swanson*, 659 F.3d 359, 408 n.24 (5th Cir. 2011) ("[T]he Supreme Court in recent years has made it clear that the First Amendment has a broad reach, limited only by narrow, traditional carve-outs from its protection.").

131. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968); *Lane*, 134 S. Ct. at 2379.

132. See *Robertson*, *supra* note 12, at 303 (quoting *Lane*, 134 S. Ct. at 2378) ("[W]hether 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 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.").

he or she provides truthful sworn testimony as part of his or her ordinary job responsibilities<sup>133</sup> or, as specifically anticipated by the concurrence, as a result of being designated as a witness by the employer under Federal Rule of Civil Procedure 30(b)(6)).<sup>134</sup> In other words, no post-*Lane* cases have addressed the issue of whether truthful testimony by public employees which occurs as a result of their ordinary job responsibilities constitutes an exception to *Garcetti*'s official duties threshold limitation.<sup>135</sup> However, several cases decided prior to *Lane*, but after *Garcetti*, reached divergent results and in so doing, shed light on the issue.<sup>136</sup>

The first major case addressing the "official duties/truthful sworn testimony" issue involved infamous former Illinois Governor Rod Blagojevich in *Tamayo v. Blagojevich*.<sup>137</sup> Plaintiff Tamayo was

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133. See *Lane*, 134 S. Ct. at 2384 (Thomas J., Scalia J., and Alito J., concurring); *Crystal v. Barrett*, No. JKB-14-3989, 2015 WL 5698534, at \*7 (D. Md. Sept. 25, 2015) (noting that *Lane* left open the question of whether testimony pursuant to a public employee's ordinary job responsibilities constitutes protected speech and leaving the question open itself at an early stage in the proceedings).

134. *Lane*, 134 U.S. at 2384. Section 30(b)(6) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. . . . The persons designated must testify about information known or reasonably available to the organization.

FED. R. CIV. P. 30(b)(6).

135. See *Boulton v. Swanson*, 795 F.3d 526, 534 (6th Cir. 2015) (citations omitted) (only addressing whether speech was within scope of employee's job responsibilities); see also *Cory v. City of Basehor*, 631 Fed. App'x 526, 530 (10th Cir. 2015) (citations omitted) (same). The closest a court has come to directly addressing the question expressly left open in *Lane* was in *Rayborn v. Bossier Parish School System*, 198 F. Supp. 3d 747 (W.D. La. 2016). In *Rayborn*, a public school nurse alleged that school officials retaliated against her when, among other things, she turned over her notes concerning a student in response to a subpoena. *Id.* at 758-59. Focusing on the fact that the nurse's official duties included maintaining records concerning her nursing activities, the district court was "not persuaded" by the nurse's attempt, based on the notes having been subpoenaed, "to analogize their constitutional status to that of the testimony protected in *Lane*." *Id.* at 759. In rejecting the nurse's First Amendment claim, the court was unclear on whether it was distinguishing her subpoenaed notes from *Lane*'s trial testimony or, instead, was deciding the open question in *Lane* in favor of the public employer. Clarity eventually may be obtained on this issue, since, as of this writing, *Rayborn* is pending on appeal to the Fifth Circuit.

136. See Robertson, *supra* note 12, at 299. Because of the difficulty in the application of the *Garcetti* rule, lower courts struggled with whether or not speech falls within the scope of "official duties," or is otherwise subject to First Amendment protection. *Id.*

137. 526 F.3d 1074 (7th Cir. 2008).

appointed by defendant Blagojevich as Interim Administrator of the Illinois Gaming Board (“IGB”).<sup>138</sup> Tamayo quickly became at odds with the Governor’s Office and the Illinois Department of Revenue (“IDOR”).<sup>139</sup> Tamayo eventually publicly testified before the Illinois House Gaming Committee about the Governor and the IDOR’s alleged interference with IGB operations, their alleged misuse of public funds, and their alleged attempts to influence the outcome of licensing investigations and sales of casinos.<sup>140</sup> Shortly thereafter, Blagojevich appointed an entirely new IGB which, in turn, prevented Tamayo from performing her duties as Interim Administrator.<sup>141</sup> The IGB eventually relegated Tamayo to her prior position in the IGB and diminished her former duties in her old position even further.<sup>142</sup> Tamayo then brought claims against Blagojevich and two other Illinois state officials, alleging, among other claims, that they had constructively discharged her in violation of her First Amendment rights.<sup>143</sup> The district court dismissed Tamayo’s entire complaint.<sup>144</sup>

On appeal, the Seventh Circuit reversed in part and affirmed in part.<sup>145</sup> Specifically, the court of appeals affirmed the district court’s dismissal of Tamayo’s First Amendment retaliation claim based on—and without differentiating the case from—*Garcetti*.<sup>146</sup> Thus, the court of appeals held as follows:

When, as here, a complaint states that the senior administrator of an agency testified before a committee of the legislature charged with oversight of the agency about allegedly improper political influence over that agency, the natural reading of such an allegation is that the official, in so informing the legislators, was discharging the responsibilities of her office, not appearing as “Jane Q. Public.” Reporting alleged misconduct against an agency over which one has general supervisory responsibility is part of the duties of such an office. . . . Here, . . . a natural reading of the

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138. *Id.* at 1078.

139. *Id.*

140. *Id.* at 1079.

141. *Id.*

142. *Id.*

143. *Id.* at 1079-80.

144. *Id.* at 1080-81.

145. *Id.* at 1078, 1092-93.

146. *Id.* at 1091-92 (citations omitted).

complaint is that Ms. Tamayo testified before the House Gaming Committee because of the position she held within the agency; she testified about matters within the scope of her job duties as Interim Administrator. Accordingly, we must conclude that Ms. Tamayo's testimony was given as an employee and not as a citizen; therefore, her speech is not protected under the First Amendment.<sup>147</sup>

Five weeks later, the Third Circuit took up the "official duties/sworn truthful testimony" issue in *Reilly v. Atlantic City*.<sup>148</sup> Plaintiff Reilly, a former Atlantic City police officer, allegedly suffered adverse employment action in retaliation for his having participated in an investigation and testifying at the trial of Munoz, a friend of Defendant Atlantic City police official, Flipping.<sup>149</sup> Reilly then brought suit against the City, Flipping, and two other officials alleging, among other claims, violation of his First Amendment rights.<sup>150</sup>

After the district court denied the defendants' motion for summary judgment on Munoz's First Amendment claims, the court of appeals affirmed.<sup>151</sup> In so holding, the Third Circuit distinguished the case from *Garcetti*, stating as follows:

Here, however, Reilly, as an Atlantic City police officer, assisted a state investigation of a fellow officer and testified for the prosecution at the subsequent trial. Thus, the speech at issue on this appeal, Reilly's trial testimony, appears to have stemmed from his official duties in the investigation. . . .<sup>152</sup>

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147. *Id.* at 1092.

148. 532 F.3d 216, 227-28 (3d Cir. 2008).

149. *Id.* at 219-20.

150. *Id.* at 219-20, 222.

151. *Id.* at 233, 237.

152. *Id.* at 231. The district court made no findings on whether testifying at trial was part of Reilly's official duties and the parties disputed the issue on appeal. *Id.* at 227. The Third Circuit assumed in the above-quoted passage that testifying was part of Reilly's official job responsibilities, and other courts have assumed that *Reilly* stands for that proposition. *See id.* at 231; *see, e.g.,* Huppert v. City of Pittsburgh, 574 F.3d 696, 708 (9th Cir. 2009) (noting that the Third Circuit found that "Reilly's speech was pursuant to his job duties"), *overruled on other grounds*, *Dahlia v. Rodriguez*, 735 F.3d 1060, 1080 (9th Cir. 2013); *Whitfield v. Chartiers Valley Sch. Dist.*, 707 F. Supp. 2d 561, 573 (W.D. Pa. 2010) (characterizing *Reilly* as involving "whether courtroom testimony given pursuant to a government employee's official duties is still protected by the First Amendment post-*Garcetti*"). In *Lane*, however, and notwithstanding this prior history, the Supreme

Because *Garcetti* offers no express instruction on the application of the First Amendment to the trial testimony of a public employee, we turn to the settled principles . . . : “[t]he duty to testify has long been recognized as a basic obligation that *every citizen* owes his Government.” The citizen’s obligation to offer truthful testimony in court is necessary to protect the integrity of the judicial process and to insulate that process from outside pressure. Much as the duty to testify is not vitiated by one’s role as a newsman, . . . or as the President of the United States, . . . the citizen’s obligation to testify truthfully is no weaker when one is employed by the government in any other capacity. Thus, the act of offering truthful testimony is the responsibility of every citizen, and the First Amendment protection associated with fulfilling that duty of citizenship is not vitiated by one’s status as a public employee. That an employee’s official responsibilities provided the initial impetus to appear in court is immaterial to his/her independent obligation as a citizen to testify truthfully.<sup>153</sup>

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Court cited to *Reilly*, along with Eleventh Circuit’s decision in *Lane* itself, as cases embodying “discord among the [c]ourts of [a]ppeals as to whether public employees may be fired—or suffer other adverse employment consequences—for providing truthful testimony *outside* the course of their ordinary job responsibilities.” See *Lane v. Franks*, 573 U.S. \_\_\_, 134 S. Ct. 2369, 2377 (2014) (emphasis added); see *supra* note 82 and accompanying text.

153. *Reilly*, 532 F.3d at 231 (citations omitted). In reaching its decision, the Third Circuit stated, “we are aware of no precedential appellate decision after *Garcetti* answering the question whether truthful trial testimony arising out of the employee’s official responsibilities constitutes protected speech.” *Id.* at 230. In a footnote at the end of that statement, the court stated that “the Seventh Circuit recently held that a plaintiff’s testimony at a legislative hearing was not protected because it ‘was given as an employee and not as a citizen. . . .’ That issue is distinct from the one before us on appeal.” *Id.* at 230 n.5 (quoting *Tamayo v. Blagojevich*, 526 F.3d 1074, 1092 (7th Cir. 2008)). Testimony before the legislature should not be treated differently than testimony before a judicial tribunal. See *Dahm v. Flynn*, 60 F.3d 253, 258 (7th Cir. 1994) (arguing that testimony before a legislative committee is protected); see also *Piesco v. City of New York, Dept. of Pers.*, 933 F.2d 1149, 1157 (2d Cir. 1991) (reaching the same conclusion as the *Dahm* case). Thus, to the extent that the Third Circuit thought that *Tamayo* was distinguishable from *Reilly* because *Tamayo* involved testimony before a legislative committee, while *Reilly* involved testimony in court, that distinction is not material. See *Whitfield*, 707 F. Supp. 2d at 577 (“The fact that plaintiff’s sworn testimony was given at a school board hearing, as opposed to inside a courtroom, is a distinction without a difference.”); accord *Robinson v. Balog*, 160 F.3d 183, 189 (4th Cir. 1998) (“By responding to the Board’s invitation to testify at a public hearing and by cooperating with law enforcement investigators, Robinson and Marc spoke not in their ‘capacity as . . . public employee[s],’ . . . but as ‘citizen[s] upon matters of public concern.’”). Whether the testimony is

The Third Circuit “concluded that Reilly’s truthful testimony in court constituted citizen speech and that his claim is not foreclosed by the ‘official duties’ doctrine enunciated in *Garcetti*.”<sup>154</sup>

A year later, the Ninth Circuit took up the issue in *Huppert v. City of Pittsburg*.<sup>155</sup> In *Huppert*, a police officer alleged that he was retaliated against by city officials after, among other things, he testified before a grand jury investigating potential corruption in the Pittsburg Police Department (“PPD”).<sup>156</sup> Over a strong dissent (which relied in part on *Reilly*),<sup>157</sup> the court affirmed the district court’s grant of summary judgment on Huppert’s First Amendment claim, stating:

[I]t is manifest that California expects such testimony from its police officers. As the California Court of Appeal made clear: “When police officers acquire knowledge of facts which will tend to incriminate any person, it is their duty to disclose such facts to their superiors and to testify freely concerning such facts when called upon to do so before any duly constituted court or grand jury.” Testifying before a grand jury charged with investigating corruption is one part of an officer’s job. . . . Therefore, any speech Huppert gave during his grand jury testimony was “pursuant to his duties as a [police officer],” and that speech is not protected by the First Amendment.<sup>158</sup>

After reaching its conclusion, the Ninth Circuit, replicating the unadorned analysis of *Garcetti* articulated by the Seventh Circuit in

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delivered in a judicial, legislative or administrative forum, consistent with the obligation noted in *Lane*, society, the tribunal and the parties affected by the decisions emanating from it all have significant interests in the receipt of truthful testimony. See *supra* note 82 and accompanying text.

154. *Reilly*, 532 F.3d at 231; *accord Morales v. Jones*, 494 F.3d 590, 598 (7th Cir. 2007); *Walker v. Town of Hennessey*, 951 F. Supp. 2d 1263, 1274 (W.D. Okla. 2013) (concluding based in part on “persuasive reasoning of the Third Circuit in *Reilly*,” that a police officer’s prospective testimony in a homicide case, which arose out of his “official responsibilities,” constituted protected speech).

155. 574 F.3d 696, 698 (9th Cir. 2009).

156. See *id.* at 703.

157. *Id.* at 710, 721 (Fletcher, J., dissenting).

158. *Id.* at 707-08 (alteration in original) (emphasis in original) (citations omitted); see also *Green v. Barrett*, 226 F. App’x 883, 886 (11th Cir. 2007) (discussing Green’s testimony regarding “official duties”); *Deprado v. City of Miami*, 446 F. Supp. 2d 1344, 1346-47 (S.D. Fla. 2006) (finding speech was not that of a private citizen).

*Tamayo*, went on to state that:

We decline to follow the Third Circuit's decision in *Reilly*. There, the Third Circuit . . . instead of finding that [Reilly's testifying in a trial against another police officer] was obviously speech pursuant to Reilly's job duties, the court took a swift turn to conclude that truthful testimony is never part of a police officer's duties. This is in sharp contradiction to the Supreme Court's holding in [*Garcetti*], which drew a distinct line between speech pursuant to one's job duties and speech in a private capacity. By first finding that Reilly's speech was pursuant to his job duties, but subsequently concluding that it was protected by the First Amendment, the *Reilly* court impermissibly began chipping away at the plain holding in [*Garcetti*].<sup>159</sup>

Thus, prior to the Supreme Court leaving the "ordinary job responsibilities/truthful testimony" question unanswered in *Lane*, the appellate courts were essentially evenly split on the issue.<sup>160</sup>

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159. *Huppert*, 574 F.3d at 708 (citations omitted). Contrary to the Ninth Circuit's assertion, the Third Circuit in *Reilly* did not conclude that truthful testimony is never part of a police officer's duties. *Id.*; *Reilly*, 532 F.3d at 231. Rather, the *Reilly* Court concluded that "[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 . . . ." *Reilly*, 532 F.3d at 231 (emphasis added) (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006)). Thus, the Third Circuit stated only that a public employee's act of testifying goes beyond or is in addition to the performance of the employee's job duties. *See id.* at 231. As such, the Ninth Circuit's characterization of *Reilly* in *Huppert* is inaccurate on this point. *See Huppert*, 574 F.3d at 708; *see also* John G. Mulligan, Note, *Huppert, Reilly, and the Increasing Futility of Relying on the First Amendment to Protect Employee Speech*, 19 WM. & MARY BILL RTS. J. 449, 456 (2010) (characterizing the Ninth Circuit's statement as "seemingly misstat[ing] the Third Circuit's holding"). Another panel of the Ninth Circuit roundly criticized *Huppert* for its evaluation of the "official duties" issue. *See Dahlia v. Rodriguez*, 689 F.3d 1094, 1102-04 (9th Cir. 2012). An en banc panel of the Ninth Circuit eventually "overrule[d] *Huppert* to the extent that it improperly relied on a generic job description and failed to conduct the 'practical,' fact-specific inquiry [regarding defining a public employee's official duties] required by *Garcetti*." *Id.* at 1071.

160. *Compare e.g., Huppert*, 574 F.3d at 708 with *Reilly*, 532 F.3d at 231. In contrast, pre-*Lane* commentators were much more in accord. To be sure, one pre-*Lane* commentator took a middle ground position, arguing that a public employee who testified either voluntarily or under subpoena and not on behalf of his employer, should be protected under the First Amendment and not be deemed unprotected official-duty speech, but that testimony given on behalf of the government as part of the public employee's job duties should not be protected under *Garcetti*. *See* Matt Wolfe, Comment, *Does the First Amendment Protect Testimony by Public Employees?*, 77 U. CHI. L. REV. 1473, 1473, 1491 (2010). However, most pre-*Lane* commentators took the position that all truthful testimony provided by a public employee—not just truthful testimony falling outside the scope of a

Based largely on the Supreme Court's decision in *Lane* and on its reliance on *Pickering*, the Supreme Court and post-*Lane* lower courts should side with the Third Circuit's decision in *Reilly* and carve out an exception to *Garcetti*'s threshold limitation by protecting truthful testimony given as part of a public employee's ordinary job responsibilities.<sup>161</sup> Several reasons support this proposed outcome.

First, the added factor of sworn testimony in judicial or administrative proceedings meaningfully and substantively distinguishes the question left unanswered in *Lane* from the public employee speech in *Garcetti*—an unsworn internal memorandum—and indeed, all other public employee speech cases not involving testimony before a tribunal. Sworn testimony is different. As quoted previously, but worth repeating, the *Lane* Court emphasized that:

Sworn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and to society at large, to tell the truth. When the person testifying is a public employee, he may bear separate obligations to his employer. . . . But any such obligations as an employee are distinct and independent from the obligation, as a citizen, to speak the truth. That independent obligation renders sworn testimony speech as a citizen and sets it apart from speech made purely in the capacity of an employee.<sup>162</sup>

Related, the duty to provide truthful sworn testimony raises the quasi-Catch-22/Hobson's choice dilemma for public employees pointed out by the Court in *Lane* and by both pre- and post-*Lane*

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public employee's official duties—should be treated as citizen speech and protected under the First Amendment. See Adelaida Jasperse, Note, *Constitutional Law—Damned if You Do, Damned if You Don't: A Public Employees Trilemma Regarding Truthful Testimony*, 33 W. NEW ENG. L. REV. 623, 625-26, 651-55 (2011); Jody L. Rodenberg, Note, *Freedom of Speech and the "Catch-22" for Public Employees in the Ninth Circuit – Huppert v. City of Pittsburgh*, 63 S.M.U. L. REV. 259, 264 (2010); Leslie Pope, Comment, *Huppert v. City of Pittsburgh: The Contested Status of Police Officers' Subpoenaed Testimony after Garcetti v. Ceballos*, 119 YALE L.J. 2143, 2148-49 (2010).

161. For an article likewise suggesting that truthful testimony on matters of public concern pursuant to ordinary job duties is protected citizen speech and taking the position that the seeds of this conclusion can be found in the Supreme Court's decision in *Lane* itself, see Diaz, *supra* note 118, at 566, 597.

162. *Lane v. Franks*, 573 U.S. \_\_\_, 134 S. Ct. 2369, 2379 (2014) (citations omitted); see also *supra* note 88.

commentators.<sup>163</sup> Thus, as Justice Sotomayor wrote for the Court in *Lane*, a rule

conclud[ing] 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 of 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.<sup>164</sup>

This dilemma will exist whether a public employee is testifying as part of his or her ordinary job responsibilities or, specifically, as a Rule 30(b)(6) designee of his employer or not.<sup>165</sup> Moreover, whichever choice a public employee makes will be detrimental to both the employee and society at large. If the employee testifies falsely or less than candidly, the employee may face perjury charges or, at the very least, the opprobrium and scorn of the court and anyone who observes or learns of his or her testimony. Likewise, as pointed out by the Court in *Lane* and *Pickering*, false testimony will deprive society (and the judge, jury and parties before the court) of valuable, accurate information from a public employee who may be ideally or uniquely suited to provide the testimony.<sup>166</sup> If, however, the employee testifies truthfully, without the

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163. See *id.* at 2379-80. In another article, post-*Lane* commentator Deloney agrees with pre-*Lane* commentators Jasperse and Rodenberg, and post-*Lane* commentator Diaz, that sworn testimony pursuant to a public employee's ordinary job responsibilities should be protected citizen speech. See Deloney, *supra* note 124, at 711-12; Jasperse, *supra* note 160, at 623-24; Rodenberg, *supra* note 160, at 264.

164. *Lane*, 134 S. Ct. at 2380; see *supra* note 97 and accompanying text.

165. See Deloney, *supra* note 124, at 731 ("The fact-finding function of trials is undermined no less because persons providing false or misleading testimony are public servants acting in the course of their ordinary job duties rather than outside the scope of their daily responsibilities."); see also *supra* note 134 and accompanying text. For this reason, and although testifying as a Rule 30(b)(6) representative of an employer might be considered, to paraphrase Justice Sotomayor in *Lane*, quintessential speech as an employee, the above-discussed dilemma—the importance of truthful sworn testimony to the judicial and administrative process and society's need for information about matters of public concern—all militate in favor of protecting public employees from retaliation even when their testimony is pursuant to a Rule 30(b)(6) designation.

166. See *Lane*, 134 S. Ct. at 2377. In *Lane*, the court held "[i]t bears emphasis that our precedents dating back to *Pickering* have recognized that speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment." *Id.* at 2379. "In *Pickering*, for

security of First Amendment protection, he or she runs the risk of being retaliated against by his employer. Although society (and the above-mentioned stakeholders) will initially receive the benefit of the *Pickering*-promoted information, society (and future judicial or administrative tribunal stakeholders) will ultimately be disserved as public employees chill their own speech and/or censor themselves because of the very real specter of adverse employment consequences.<sup>167</sup>

In addition, much like in *Lane*, the individual speaker's and society's interest in truthful sworn testimony given by public employees as part of their ordinary job responsibilities will seldom be outweighed by public employers' interest in managerial efficiency or control under *Pickering*.<sup>168</sup> In what should be relatively rare instances, the importance of truthful testimony and its role in maintaining the integrity of the judicial or administrative process and promoting public awareness about matters of public concern may be sufficiently counterbalanced by a public employer's (and society's) legitimate interest in maintaining confidentiality concerning an ongoing investigation by law enforcement,<sup>169</sup> or a matter of national security.<sup>170</sup> And, in those relatively rare circumstances, the court itself will have the ability to protect the public employer's interest by determining, prior to the testimony, whether the evidence is admissible or, specific to the issue before it, determining whether the government's interest in confidentiality outweighs the public employee's interest as a citizen, and society's interest in having the employee testify truthfully about a matter of public concern.<sup>171</sup> Thus, to borrow from *Lane*, when a public

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example, the Court observed that "[t]eachers are . . . the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation 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." *Id.* (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 572 (1969)). Most recently, the Court again observed that public employees "are uniquely qualified to comment" on "matters concerning government policies that are of interest to the public at large." *San Diego v. Roe*, 543 U.S. \_\_\_, 125 S. Ct. 521, 523 (2004).

167. See Deloney, *supra* note 124, at 730; see also Diaz, *supra* note 118, at 590, 592.

168. See *Lane*, 134 S. Ct. at 2381 (concluding that "the employer's side of the *Pickering* scale [was] entirely empty").

169. See Deloney, *supra* note 124, at 734 ("If an employee discloses confidential information, although truthful, the government could take action without violating that employee's First Amendment rights."); see also *infra* note 228 and accompanying text.

170. See Diaz, *supra* note 118 at 595 ("Perhaps in some rare circumstance, such as in the realm of national security, the government in its role as an employer may articulate an important government interest requiring utmost confidentiality. And under such circumstances, the government employer may truly possess a strong managerial discretionary interest in curtailing the public employee's speech.").

171. Deloney, *supra* note 124, at 719.

employee testifies truthfully as part of his or her ordinary job responsibilities, “the employer’s side of the *Pickering* scale” will almost always be “entirely empty.”<sup>172</sup>

In conclusion, as long as the Supreme Court continues to adhere to its decision in *Garcetti*, courts should carve out an exception to *Garcetti*—tempered only rarely by *Pickering* balancing—by protecting public employees from retaliation and adverse employment consequences when they testify truthfully about a matter of public concern as part of their ordinary job responsibilities.

### C. Voluntary/Non-Compelled Testimony

As with the “ordinary job responsibilities/truthful sworn testimony” question, few, if any, post-*Lane* cases have discussed whether voluntary testimony should enjoy the same protection as compelled (i.e., subpoenaed) testimony under the First Amendment.<sup>173</sup> Again, pre-*Lane* case law, as well as the rationale underlying the Court’s holding in *Lane* (and pre- and post-*Lane* scholarship) provides some guidance.

#### 1. Protection of Voluntary Testimony as a Threshold Matter

Several courts in the Second Circuit have concluded that voluntary testimony should receive First Amendment protection, succinctly stating that “[v]oluntarily appearing as a witness in a public proceeding or a lawsuit is a kind of speech that is protected by the First Amendment.”<sup>174</sup> However, the best explication of this principle comes from the Third Circuit.<sup>175</sup>

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172. *Lane*, 134 S. Ct. at 2381.

173. Two post-*Lane* cases have addressed voluntary, as opposed to compelled, statements, but neither case discussed whether voluntary testimony would receive the same First Amendment protection from retaliation as the subpoenaed testimony in *Lane*. Neither case is on point on the “voluntary vs. compelled testimony” question. See *Helget v. City of Hays*, No. 13-2228-KHV, 2015 WL 1263118, at \*11 (D. Kan. Mar. 19, 2015) (factual showing that a voluntary sworn affidavit caused the court to assume, without deciding, that plaintiff’s speech was a matter of public concern), *aff’d on other grounds*, 844 F.3d 1216 (10th Cir. 2017); see also *Wagner v. Lee Cty., Florida Bd. of Cty. Comm’rs*, No. 2:14-cv-29-FtM-38CM, 2014 WL 4145500, at \*4 (M.D. Fla. Aug. 21, 2014) (explaining that this case differs from *Lane* in that the statements involved voluntary internal statements, not judicial testimony).

174. *Kaluczky v. City of White Plains*, 57 F.3d 202, 210 (2d Cir. 1995) (citations omitted); accord *Caruso v. City of New York*, 973 F. Supp. 2d 430, 448 (S.D.N.Y. 2013); *Jackler v. Byrne*, 658 F.3d 225, 239 (2d Cir. 2011) (citations omitted); *Frisenda v. Inc. Vill. of Malverne*, 775 F. Supp. 2d 486, 510 (E.D.N.Y. 2011).

175. See *Green v. Philadelphia Hous. Auth.*, 105 F.3d 882, 886-89 (3d Cir. 1997).

In *Green v. Philadelphia Housing Authority*, Plaintiff Green, who was an officer in the Defendant Housing Authority police drug task force, voluntarily appeared to testify—on his own time, in civilian clothes and with consent of his immediate supervisor—as a character witness at a bail hearing for the son of a friend.<sup>176</sup> However, after he was introduced at the hearing and learned that the criminal defendant, Keller, was charged with participating in organized crime, he “told Keller he could not be associated with the case and left the hearing without testifying.”<sup>177</sup> That same day, an unidentified officer informed Green’s higher-level supervisor that “Green had appeared as a character witness for a member of the Stanfa crime organization.”<sup>178</sup> Subsequently, the Deputy Chief of the Housing Authority Police Department and its Chief of Police transferred Green from his task force position to a regular patrol position where his duties were greatly diminished.<sup>179</sup>

Green brought suit against the Housing Authority and its officials alleging, among other claims, that the defendants had violated his First Amendment rights by transferring him in retaliation for his having appeared at the bail hearing.<sup>180</sup> At trial, the Deputy Chief and Chief testified that they did not believe that Green himself was a member of organized crime, but made the decision to transfer Green because his appearance at the bail hearing might embarrass or discredit the image of the Housing Authority or put Green in danger.<sup>181</sup> The trial court dismissed Green’s claims at the close of evidence.<sup>182</sup> The Court of Appeals affirmed, but recognized, as a threshold matter, that Green’s voluntary appearance at the bail hearing was a matter of public concern protected from retaliation under the First Amendment.<sup>183</sup>

The Third Circuit started its analysis by acknowledging that “a public employee’s appearance as a witness, even in the absence of actual testimony, is ‘speech’” under the First Amendment.<sup>184</sup> The court of

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176. *Id.* at 884.

177. *Id.*

178. *Id.*

179. *See id.*

180. *Id.*

181. *Id.* at 884-85.

182. *Id.* at 885.

183. *Id.* at 885-87, 890. The issue of whether testimony in court is invariably a matter of public concern or only a matter of public concern when the testimony relates to a political, social or other concern to the community is a separate unanswered question emanating from *Lane* and will be addressed at Part IV.E. *See infra* Part III.D.

184. *Green*, 105 F.3d at 885 (citing *Pro v. Donatucci*, 81 F.3d 1283, 1291 (3d Cir. 1996)).

appeals, simultaneously distinguishing voluntary from compelled testimony and anticipating the Supreme Court's rationale in *Lane* for protecting sworn testimony, initially stated as follows:

Although in practical terms it may be inconsequential whether a witness has been subpoenaed (one can "volunteer" to receive a subpoena), there would appear to be a conceptual distinction that turns on a witness's will or desire to testify, especially in this context where the witness is a law enforcement officer. It should matter, therefore, whether a police officer chooses to interject himself into a bail hearing, which is an adversary proceeding, as a character witness for a defendant. On the other hand, there is a compelling reason to find Green's appearance to be a matter of public concern regardless of its voluntary nature. That reason, of course, is the integrity of the truth seeking process.<sup>185</sup>

The court then dug deeper into what would become the *Lane* Court's rationale for protecting testimony compelled by subpoena, stating that:

For guidance we will turn . . . to a line of cases . . . holding a public employee's truthful testimony, even if voluntary, is inherently a matter of public concern protected by the First Amendment. As the Fifth Circuit observed, "When an employee testifies before an official government adjudicatory or fact-finding body he speaks in a context that is inherently of public concern. Our judicial system is designed to resolve disputes, to right wrongs. We encourage uninhibited testimony, under penalty of perjury, in an attempt to arrive at the truth. We would compromise the integrity of the judicial process if we tolerated state retaliation for testimony that is damaging to the state. Identical concerns are implicated by Green's voluntary appearance at Keller's bail hearing, where the court depends upon accurate testimony by those familiar with

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185. *Id.* at 886.

the defendant in order to determine whether the defendant is likely to flee or endanger the community. The utility of uninhibited testimony and the integrity of the judicial process would be damaged if we were to permit unchecked retaliation for appearance and truthful testimony at such proceedings. Not only would “the first amendment right of the witness be infringed by this type of coercion, the judicial interest in attempting to resolve disputes by arriving at the truth would be in jeopardy. Furthermore, a witness who succumbed to any real or imagined coercion could also be subject to a charge of perjury.”<sup>186</sup>

The court concluded by stating that it could “discern no reason why a voluntary appearance would eliminate the public interest. Therefore, we hold that Green’s voluntary appearance as a character witness is a matter of public concern.”<sup>187</sup>

In contrast, the only post-*Garcetti*/pre-*Lane* decision that has held, as a threshold matter, that voluntary testimony is not protected under the First Amendment is *Kiehle v. County of Cortland*.<sup>188</sup> In *Kiehle*, the Plaintiff, a Department of Social Services (“DSS”) caseworker, brought a retaliatory discharge claim alleging that the County and several of its officials violated her First Amendment rights after they fired her for voluntarily testifying at a family court hearing.<sup>189</sup> In an unpublished opinion, the Second Circuit upheld her firing, concluding as follows:

[A]t the Family Court hearing, Kiehle testified that the Family Court petitioner—a mother seeking to re-obtain custody of her daughter—was able to adequately supervise, and was not neglectful of, her children.

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186. *Id.* at 886-87 (citations omitted).

187. *Id.* at 887; *accord* *Kinney v. Weaver*, 367 F.3d 337, 361-62, 362 n.28 (5th Cir. 2004) (expert witnesses received subpoenas, but testified voluntarily); *see also* *Worrell v. Henry*, 219 F.3d 1197, 1201, 1204-05 (10th Cir. 2000) (expert witness for criminal defendant); *Tedder v. Norman*, 167 F.3d 1213, 1214-15 (8th Cir. 1999) (voluntary deposition testimony). The Third Circuit in *Green* did not terminate its analysis by concluding that voluntary testimony was invariably protected under the First Amendment; rather the court of appeals in *Green*—and the courts of appeals in the other cases cited above—went on to analyze whether the speech was protected under the *Pickering*-balancing test. *See Green*, 105 F.3d at 887-89; *see also Kinney*, 367 F.3d at 358-67; *Worrell*, 19 F.3d at 1205-09; *Tedder*, 167 F.3d at 1214-15. This aspect of the analysis will be taken up at Part F. *See infra* Part IV.F.

188. 486 F. App’x 222, 224 (2d Cir. 2012).

189. *Id.* at 223.

Kiehle recommended that the child be returned to the mother. Kiehle's testimony was offered voluntarily, for the petitioner, without a subpoena. When she took the stand, Kiehle introduced herself as a DSS caseworker, and her conclusions were based on information she obtained during the course of her public employment. Further, while taking a position in her testimony that was contrary to DSS's position in the proceeding, Kiehle did not distinguish her personal views from those of DSS. . . . Kiehle did not testify as a private citizen on a matter of public concern at the Family Court hearing; rather, she testified as a government employee—as a DSS caseworker. “[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.” Thus, the district court did not err in granting summary judgment to defendants.<sup>190</sup>

In sum, the majority of federal circuit court decisions pre-*Lane* have agreed that, as a threshold matter, truthful voluntary testimony on a matter of public concern should be protected under the First Amendment.

## 2. Voluntary Testimony and Pickering Balancing

As noted above, essentially all pre-*Lane* courts that have concluded, as a threshold matter, that voluntary sworn testimony is entitled to First Amendment protection have also evaluated, consistent with *Lane*, the several interests raised by the *Pickering*-balancing test.<sup>191</sup> Interestingly,

190. *Id.* at 223-24 (quoting in part *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006)).

191. See *Green*, 105 F.3d at 887-89; see also *Kinney*, 367 F.3d at 358-67, 362 n.28; *Worrell*, 219 F.3d at 1201, 1204-09; *Tedder*, 167 F.3d at 1214-15. Both pre- and post-*Lane* commentators have likewise concluded that voluntary sworn testimony regarding matters of public concern should be protected under the First Amendment, subject only to *Pickering* balancing. See *Deloney*, *supra* note 124, at 712 (“This Note . . . adopts an approach that would classify compelled or voluntary testimonial speech, in a criminal or civil context, as per se ‘citizen speech,’ speaking to a ‘matter of public concern.’ From there, courts would apply the [*Pickering*] balancing test . . . to determine whether a public employee’s First Amendment free speech rights were unconstitutionally infringed upon.”); *Wolfe*, *supra* note 160, at 1474, 1501 (protecting voluntary sworn testimony not given on employer’s behalf, but recognizing that “the public employer potentially could still discipline the

those courts have reached divergent results.

Again, *Green* is a good starting point. In *Green*, the Third Circuit, after concluding that voluntary testimony should not be treated differently than compelled testimony for purposes of threshold First Amendment protection, but picking up on its initial sentiment that the two types of testimony are different, determined that application of the *Pickering*-balancing test to the facts in *Green* caused plaintiff *Green* not to be protected from retaliation under the First Amendment.<sup>192</sup> The Court of Appeals began its analysis by specifically noting the interests at stake and stating that, “[i]f *Green*’s court appearance could potentially disrupt the work of the Housing Authority Police Department, and this potential for injury outweighs the public’s interest in *Green*’s speech, then judgment for the defendants is proper.”<sup>193</sup> The court turned next to the public’s interest in protecting *Green*’s speech, discounting the public interest when voluntary, not subpoenaed, testimony is involved:

In weighing the competing interests, we begin with the proposition that all court appearances are matters of public concern. That is so because all court appearances implicate the public’s interest in the integrity of the truth seeking process and the effective administration of justice. But at the same time, it would appear that the strength of the public’s interest can vary based on the nature of the court appearance. It is of some moment, therefore, that *Green* appeared voluntarily, not in response to a subpoena. As we have held, a voluntary court appearance is a matter of public concern. We encourage voluntary testimony so that parties and courts have access to all available information and witnesses. But the public interest favoring subpoenaed testimony is even stronger. It implicates not only the integrity of the truth seeking process and the effective administration of justice, but also the public’s interest in protecting court-ordered conduct. As *Green* appeared voluntarily, it

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employee in the name of workplace efficiency under *Pickering*”); see also Robertson, *supra* note 12, at 311-14 (agreeing that voluntary testimony should be protected and suggesting that *Garcetti*’s official duties threshold standard be jettisoned in favor of assessing employee duties as part of employer interest under *Pickering*).

192. See *Green*, 105 F.3d at 887-89.

193. *Id.* at 887 (citing *Waters v. Churchill*, 511 U.S. 661, 679-81 (1994) (“weighing First Amendment ‘value’ of speech against ‘the potential disruptiveness of the speech’”)).

would seem that the public's interest in his court appearance is somewhat more limited than it would be if his appearance were subpoenaed.<sup>194</sup>

The court then took up the governmental interest underlying its decision to discipline Green, analyzing the facts and concluding in favor of the Housing Authority Police Department as follows:

In comparison, the interests of the Housing Authority Police Department as employer are very significant. They include successfully fighting drugs and crime, protecting the safety of its officers and other members of the community, fostering trust and confidence among its officers and between its officers and other law enforcement drug units, and protecting the Housing Authority Police Department's reputation. . . . These interests merit substantial protection, and any risk of departmental injury or disruption weighs heavily under the *Pickering* balancing test. We agree with the district court that there was a risk of departmental injury based on the "potential disruptiveness of the speech." First, an unnamed police officer telephoned Rosenstein to report Green's appearance at Keller's hearing. Second, Green testified at trial he heard comments from co-workers and friends that "[g]uys wouldn't want to work with me because they were afraid that I knew people in the mob. . . ." Finally, because of the nature of DETF work, any perceived breach of trust and security could reasonably constitute a threat to the DETF, its officers and its relationships with other police drug units and the community it serves. This risk of injury to the Housing Authority Police Department outweighs the public interest favoring Green's speech.<sup>195</sup> Judgment as a

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194. *Id.* at 888 (citations omitted).

195. *Id.* at 888-89 (alteration in original) (citations omitted). There are several similar decisions. *See, e.g., Tedder*, 167 F.3d at 1215 (where voluntary testimony substantially undermined the relationship between the plaintiff and his supervisor, the supervisor reasonably believed that the testimony was provided in violation of agency policy, and testimony could disrupt the employer's relationships with other law enforcement agencies, the court held the testimony unprotected under *Pickering*); *Worrell*, 219 F.3d at 1208-09 (where drug agents with whom applicant for drug task force coordinator would have had to work with had they indicated they did not trust applicant because he had testified for a defendant in a murder trial, the potential for extreme disruption of task

matter of law for defendants is proper under *Pickering*.<sup>196</sup>

In contrast, the Fifth Circuit came to the opposite conclusion under *Pickering* in *Kinney v. Weaver*.<sup>197</sup> There, East Texas Police Academy (“ETPA”) instructors Kinney and Hall served as expert witnesses, voluntarily testifying for a civilian plaintiff against other police officers in a civil rights action alleging excessive force.<sup>198</sup> Not long after Kinney and Hall testified, a number of cities and counties and their police chiefs and sheriffs allegedly boycotted their classes and attempted to have the two instructors removed from their positions.<sup>199</sup> Kinney and Hall brought several claims against the public entities and officials alleging, among other things, that they had violated the First Amendment by retaliating against the two instructors based on their having voluntarily testified in the excessive force case.<sup>200</sup> The district judge denied the police officials’ motion for summary judgment on Kinney’s and Hall’s First Amendment claims.<sup>201</sup>

Eventually hearing the matter en banc, the Fifth Circuit affirmed the district court’s ruling on the First Amendment claims.<sup>202</sup> Applying *Pickering*, the Fifth Circuit first evaluated Kinney’s and Hill’s (and the public’s) interests:

[W]e conclude that Kinney and Hall present an

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force’s functioning existed). In addition, given the strong government interest involved in the above-discussed *Kiehle* matter, the Second Circuit could have just as easily resolved that case in favor of the DSS under *Pickering*, instead of on threshold First Amendment protection grounds under *Garcetti*. See *supra* notes 188-90 and accompanying text.

196. *Green*, 105 F.3d at 889. Certainly, a strong and persuasive argument can be made that the Housing Authority Police Department’s interest should have been minimized to a level below Green’s and the public’s interest in Green testifying. See *id.* This argument is based on Green having obtained consent to testify from his immediate supervisors, and his having made the decision to not testify as a character witness once he learned in court that the son of his friend was charged with participating in organized crime. *Id.* However, the Court of Appeals for the Third Circuit summarily dispatched Green’s arguments premised on consent and equitable estoppel, stating that, “a public employee in a sensitive position like Green cannot turn a blind eye to the possible consequences of his voluntary testimony. The responsibility must lie with Green to investigate the nature of the criminal charges, and to bear any risks associated with his voluntary court appearance.” *Id.* at 889 & n.8.

197. 367 F.3d 337, 360, 374 (5th Cir. 2004) (en banc).

198. *Id.* at 341-42.

199. *Id.* at 342, 344.

200. *Id.* at 345-46.

201. *Id.* at 340, 346.

202. *Id.* at 346.

extremely strong First Amendment interest. The weight of the First Amendment interest is, of course, not measured solely by the instructors' own personal gain, if any, from speaking. It is, rather, a function of the social value of that speech. This court has emphasized the great First Amendment significance of speech bearing on official misconduct, "especially when it concerns the operation of a police department." Indeed, 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. Kinney and Hall, two experienced law enforcement trainers with expertise in weapons and the use of force, are ideally placed to offer valuable public comment about excessive force and the adequacy of police training and supervision, the key issues in the Kerrville trial. Moreover, as the district court pointed out, "[i]ndividuals will have a hard time succeeding in an excessive force case without the assistance of experts who are intimately acquainted with police procedures." Expert testimony is thus essential both in providing victims with "the only realistic avenue for vindication of constitutional guarantees," as well as in serving [section] 1983's parallel deterrent function. We thus conclude that Kinney and Hall have a particularly weighty First Amendment interest on their side of the *Pickering* scales.<sup>203</sup>

Turning next to the police officials' interests, the Fifth Circuit opined as follows:

With regard to the question whether the plaintiffs' speech impaired the Police Officials' training operations, the district court concluded . . . that the defendants had not identified any damage to the efficiency of their operations brought about by Kinney's

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203. *Id.* at 361-62 (citations omitted). Notably, unlike the Third Circuit in *Green*, the Fifth Circuit did not discount Kinney's and Hill's (and the public's) interest due to the voluntary nature of the two instructors' testimony. Compare *id.* with *Green v. Philadelphia Hous. Auth.*, 105 F.3d 882, 888-89 (3d Cir. 1997).

and Hall's testimony. . . . This finding is not itself determinative, for we . . . are mindful of the fact that a prudent administrator will often wish to take action before a risk ripens into an actual workplace disruption. The key limitation on preemptive action, however, is that the officials' predictions of disruption must be *reasonable*. . . . The district court addressed the issue of whether disruption was a reasonable prospect, and its conclusion was that "[t]here are genuine issues of fact remaining in this case as to whether the plaintiffs' expert testimony could legitimately cause any disruptions in the defendants' operations." We are not free to disregard that conclusion in this appeal.<sup>204</sup>

For these reasons, the Fifth Circuit affirmed the district court's denial of the police officials' motion for summary judgment seeking to prevail under the *Pickering*-balancing test.<sup>205</sup>

Based on the Supreme Court's reasoning in *Lane*, there can be little

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204. *Kinney*, 367 F.3d at 364-65 (alteration in original) (emphasis in original) (citations omitted). The police officials also pointed to the workplace disruption caused by the police officials boycotting Kinney's and Hill's courses at the ETPA. *Id.* at 363-64. The court of appeals refused to place that fact on the police officials' side of the *Pickering* scales, stating that "[t]he question is whether the plaintiffs' testimony posed a threat to the Police Officials' ability to deliver police services, not whether the Police Officials caused a disruption in response to it." *Id.* at 364. Likewise, the court rejected the argument that Kinney and Hill had undermined the police officials' interest in loyalty and esprit de corps by testifying against police officers in the excessive force case. *Id.* at 366. In this regard, the court stated as follows:

The Police Officials' charge of disloyalty makes sense only if Kinney and Hall owe fealty to law enforcement universally. Indeed, the Police Officials' stated view is that one is disloyal—and has committed an unforgivable "sin"—whenever one testifies against law enforcement officers anywhere. A concept of loyalty that sweeps so broadly is not one that may legitimately trump compelling interests in speaking on matters of public concern.

*Id.*

205. *Id.* at 374; accord *Melton v. City of Oklahoma City*, 879 F.2d 706, 714 (10th Cir. 1989) (finding that where a police officer voluntarily testified for a judge who was a criminal defendant, the public interest in truthful testimony outweighed the public entities' interest in confidentiality or possible disruption under *Pickering*); *Minten v. Weber*, 832 F. Supp. 2d 1007, 1020-24 (N.D. Iowa 2011) (holding that where a police officer offered to voluntarily testify against a sheriff in a civil suit brought by plaintiffs alleging that denial of their applications for concealed weapon permits violated their First Amendment rights, the public's interest in encouraging testimony disclosing misconduct by the sheriff outweighed the police department's interest in operational efficiency and harmony); *Lynch v. City of Philadelphia*, 166 F. Supp. 2d 224, 229-31 (E.D. Pa. 2001) (distinguishing *Green*, and where, assuming police officer voluntarily testified at subordinate officers' criminal trials, plaintiff's (and public's) interest in truthful testimony was not outweighed by minimal disruption caused to police department's operations).

legitimate dispute that the majority of pre-*Lane* courts got it right: whether testimony is voluntary or pursuant to a subpoena, two important purposes would be served by placing all truthful sworn testimony by a public employee pertaining to a matter of public concern within the ambit of the First Amendment's protection against retaliation. First, as made clear by the Third Circuit in *Green* and by the high Court in *Lane*, the integrity of the judicial process—and, specifically, the pursuit of truth in criminal and civil cases—remains a paramount societal goal irrespective of whether a witness's testimony is compelled by subpoena or voluntary.<sup>206</sup> Second, as resurrected by the Court in *Lane* and stressed in this Article, the ability of public employees to serve as sources of information about corruption and other matters of public concern is wholly unrelated to whether they testify voluntarily or are compelled to testify via subpoena and cannot be gainsaid.<sup>207</sup> Both of these important purposes would be disserved if public employers were allowed to retaliate against public employees who provide truthful sworn testimony under the happenstance that their testimony was voluntary, rather than compelled via subpoena.<sup>208</sup> Thus, all truthful sworn testimony by public employees—and not just testimony compelled by subpoena—regarding matters of public concern should generally be protected under the First Amendment.

However, as most courts and commentators have opined, protection of voluntary truthful sworn testimony should be subject to a *Pickering*-balancing analysis.<sup>209</sup> Given the importance of truthful sworn testimony, the Third Circuit in *Green*,<sup>210</sup> as a practical matter, made too much of the

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206. See Deloney, *supra* note 124, at 732 n.207 (citations omitted) (“Testimony, whether voluntary or compelled, should be protected. Truthful testimony aids in the judicial process and serves the public good regardless of the method by which it was obtained.”).

207. See *id.*; see also Robertson, *supra* note 12 at 311 (“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.”).

208. As pointed out by one commentator, “many witnesses are compelled by subpoena arbitrarily,” since “[a]ttorneys ‘issue subpoenas to witnesses who would have voluntarily attended even absent a subpoena.’” Deloney, *supra* note 124, at 732 n.207 (quoting Brief for Am. Civil Liberties Union & the Am. Civil Liberties Union of Alabama as Amici Curiae Supporting Petitioner at 13, *Lane v. Franks*, 134 S. Ct. 2377, (2014) (No. 13-483)). Likewise, another commentator has pointed out that “if a subpoena is required for the testifying employee to maintain his First Amendment rights, the testifying employee will always refuse to testify unless subpoenaed.” Wolfe, *supra* note 160, at 1500. In sum, the furtherance of important First Amendment purposes and protections should not turn on such arbitrary practical matters and distinctions.

209. See *Kinney*, 367 F.3d at 382 (Jones, J., concurring in part and dissenting in part); see also *Green v. Philadelphia Hous. Auth.*, 105 F.3d 882, 887 (3d Cir. 1997); Deloney, *supra* note 124 at 733; Robertson, *supra* note 12 at 303.

210. See *Green v. Philadelphia Hous. Auth.*, 105 F.3d 882, 886, 888 (3d Cir. 1997).

difference in the public's interest in compelled, as opposed to voluntary testimony. After all, for First Amendment purposes, the public's interest in sworn testimony depends, not on whether the testimony is compelled, but rather, whether the testimony is inaccurate or perjured.<sup>211</sup> That said, a public employer's interest in effectively and efficiently delivering the public services concerning which it has been tasked cannot be ignored. As pointed out in *Green* and other cases which have struck the balance against protecting public employees from adverse employment consequences based on their voluntary testimony, issues of confidentiality, chain of command, employee discipline and employer image<sup>212</sup>—particularly in law enforcement, but also for other public employers—are appropriately factored into the mix when assessing a public employee's right to First Amendment protection for testifying on a matter of public concern. Ultimately, though, as in *Kinney* and other public employee-favoring cases,<sup>213</sup> the *Pickering*-balance should only cede to public employers when the incursion on their efficiency and effectiveness is grounded in reasonable, factually-supported prediction or actuality of disruption to the operation of public employers.

#### *D. Testimony Whose Content Does Not Involve a Matter of Public Concern*

The *Lane* Court had little difficulty concluding that both the content and context of Lane's speech—truthful testimony concerning corruption in a state program and misuse of state funds at several judicial proceedings—involved a matter of public concern protected by the First Amendment under the *Pickering/Connick* standard.<sup>214</sup> However, courts of appeals and district courts—both before and after *Lane*—have been sharply divided on the question of whether trial testimony, irrespective of the content of the testimony, constitutes a matter of public concern protectable under the First Amendment.<sup>215</sup>

Prior to *Lane*, the Third and Fifth Circuits took the most expansive view regarding the question, holding that the sworn form and judicial or

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211. See Robertson, *supra* note 12 at 311-13 ("So long as the testimony provided is truthful and not misleading, the First Amendment should bar employer discipline even in instances of voluntary testimony.").

212. See *Green*, 105 F.3d at 889-90; see also *Kinney*, 367 F.3d at 396-97, 398 (Jones, J., concurring in part and dissenting in part).

213. See *Kinney*, 367 F.3d at 367; *Tedder v. Norman*, 167 F.3d 1213, 1214-15 (8th Cir. 1999); *Melton v. City of Oklahoma City*, 879 F.2d 706, 714 (10th Cir. 1989).

214. *Lane v. Franks*, 573 U.S. \_\_\_, 134 S. Ct. 2369, 2380-81 (2014).

215. See *infra* notes 216-40 and accompanying text.

formalized context of testimony made it *per se* a matter of public concern, even where the content of the speech involves a purely private matter.<sup>216</sup> For example, in *Johnston v. Harris County Flood Control District*, Plaintiff Johnston brought a section 1983-First Amendment claim against his employer, alleging that the district terminated his employment in retaliation for his (Johnston's) testimony in support of a co-employee's Equal Employment Opportunities ("EEO") claim.<sup>217</sup> Notwithstanding that the content of Johnston's testimony did not constitute a matter of public concern under *Connick*, the district court found in Johnston's favor on his First Amendment retaliation claim.<sup>218</sup> The Fifth Circuit affirmed, initially stating that:

Johnston's testimony at the EEO hearing meets the public concern requirement. HCFD's description of Johnston's testimony is correct: Johnston testified about a personnel dispute between HCFD and one of its employees. In contrast, HCFD's conclusion that the testimony was not of public concern is incorrect, for HCFD ignores the context in which Johnston spoke. As a general rule, when a public employee speaks about matters that are of personal interest only, the speech does not address matters of public concern. Under certain circumstances, however, the context in which the employee speaks may be sufficient to elevate the speech to the level of public concern.<sup>219</sup>

The court of appeals went on to foretell the Supreme Court's rationale for protecting truthful testimony in *Lane*, opining as follows:

When an employee testifies before an official government adjudicatory or fact-finding body he speaks in a context that is inherently of public concern. . . . We would compromise the integrity of the judicial process if we tolerated state retaliation for testimony that is damaging to the state. If employers were free to retaliate against employees who provide truthful, but

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216. See *Pro v. Donatucci*, 81 F.3d 1283, 1288 (3d Cir. 1996) (citations omitted); see also *Johnston v. Harris Cty. Flood Control Dist.*, 869 F.2d 1565, 1578 (5th Cir. 1989).

217. *Johnston*, 869 F.2d at 1568.

218. *Id.* at 1576-78.

219. *Id.* at 1577 (citation omitted).

damaging, testimony about their employers, they would force the employees to make a difficult choice. Employees either could testify truthfully and lose their jobs or could lie to the tribunal and protect their job security. . . . The goal of grand jury proceedings, of criminal trials, and of civil trials is to resolve a dispute by gathering the facts and arriving at the truth, a goal sufficiently important to render testimony given in these contexts speech “of public concern.”<sup>220</sup>

Similarly, in *Pro v. Donatucci*, Plaintiff Pro worked in the Court Clerk’s Office under Defendant Donatucci’s supervision.<sup>221</sup> When Donatucci’s wife subpoenaed Pro to testify in her divorce action against Donatucci, Pro appeared in court, but was not called to testify.<sup>222</sup> Donatucci was present in court and saw Pro there.<sup>223</sup> Shortly thereafter, Donatucci terminated Pro’s employment.<sup>224</sup> Pro then brought suit against Donatucci under section 1983, alleging that he fired her in retaliation for activity protected by the First Amendment, specifically, her appearance as a potential witness at the divorce proceeding.<sup>225</sup> The district court denied Donatucci’s motion for summary judgment predicated on a qualified immunity defense.<sup>226</sup> Relying on the Fifth Circuit’s decision in *Johnston*, the Third Circuit affirmed,<sup>227</sup> holding that Pro’s appearance at the divorce proceedings, even without testifying, “constituted protected speech because, contextually, the speech was on a matter of public concern.”<sup>228</sup>

At the other end of the spectrum, several more circuits prior to *Lane*, including the Fourth, Seventh, Eighth and Eleventh Circuits, held that sworn testimony in a judicial or other proceeding will only constitute a matter of public concern where the content of the speech addresses a matter of public concern, (such as, a political, social or other

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220. *Id.* at 1578.

221. *Pro v. Donatucci*, 81 F.3d 1283, 1285 (3d Cir. 1996).

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *See id.* at 1286.

227. *Id.* at 1290-92.

228. *Id.* at 1291. Courts and commentators have properly made clear that, where truthful testimony is deemed a matter of public concern because of its context, rather than its content, the public employee must still prevail under the *Pickering*-balancing test to be protected under the First Amendment. *See, e.g., id.*; *see also* Jasperse, *supra* note 160, at 650-51.

concern to the community).<sup>229</sup> Thus, in *Wright v. Illinois Department of Children and Family Services*, Plaintiff Wright, a social worker, was disciplined for, among other things, testifying critically of her department in a child abuse proceeding.<sup>230</sup> Wright responded by asserting several claims against her public employer, including a section 1983-First Amendment retaliation claim, upon which the district court granted summary judgment against her.<sup>231</sup> The Seventh Circuit reversed and remanded Wright's First Amendment claim,<sup>232</sup> but stated as follows:

Drawing on Fifth Circuit cases, Wright suggests that we ought to conclude that an employee who testifies before an official government adjudicatory or fact-finding body speaks in a context that is inherently of public concern. Although we share our colleagues' concern for the integrity of the judicial process, our cases have rejected a blanket rule according absolute First Amendment protection to communications made in the course of a lawsuit. Such a rule would contravene both the rationale of cases like *Connick* and *Pickering* that public employee speech is protected against employer retaliation only if it addresses matters of public concern and the premise of *McDonald v. Smith*, that there is no sound basis for granting greater constitutional protection to statements made under the Petition Clause than to other run-of-the-mill speech or expression. In short, airing private gripes in the form of a complaint or testimony cannot alter their status as private gripes.<sup>233</sup>

And, between these two doctrinal poles, the Ninth Circuit has held:

[A] public employee's testimony addresses a matter of public concern if it contributes in some way to the resolution of a judicial or administrative proceeding in

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229. See *Arvinger v. Mayor and City of Baltimore*, 862 F.2d 75, 79 (4th Cir. 1988); *Wright v. Illinois Dep't of Children & Family Servs.*, 40 F.3d 1492, 1505 (7th Cir. 1994); *Padilla v. South-Harrison R-II Sch. Dist.*, 181 F.3d 992, 997 (8th Cir. 1999) (citations omitted); *Morris v. Crow*, 142 F.3d 1379, 1382-83 (11th Cir. 1998) (citations omitted).

230. *Wright*, 40 F.3d at 1497, 1494-95.

231. *Id.* at 1495.

232. *Id.* at 1509.

233. *Id.* at 1505 (citations omitted).

which discrimination or other significant government misconduct is at issue—even if the speech itself would not otherwise meet the *Connick* test were we to consider it in isolation.<sup>234</sup>

The post-*Lane* judicial results concerning the testimony/public concern standard have been equally mixed.<sup>235</sup> In *Falco v. Zimmer*, Plaintiff Falco, a police chief in Hoboken, New Jersey, suffered loss of stipends, salary and overtime compensation after he filed a lawsuit complaining about the compensation issues and testified adversely to Defendant Zimmerman, the Mayor of Hoboken, concerning those same compensation issues and about Zimmerman's political animus toward him in a lawsuit brought by another Hoboken employee against him and the City.<sup>236</sup> Although the district court dismissed Falco's complaint, including his First Amendment retaliation claims, the court, citing to Third Circuit *per se* authority and to that portion of the Supreme Court's holding in *Lane* focusing on the judicial context, stated that "[d]efendants do not contest that Plaintiff's participation in the law suits constitute protected speech activity. The Court accordingly agrees that Plaintiff engaged in protected speech."<sup>237</sup>

Other post-*Lane* courts, however, have continued to reject the *per se* standard and have continued to hold that content matters. Thus, in *Moriates v. City of New York*, Plaintiff Moriates alleged that the

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234. *Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917, 927 (9th Cir. 2004). For pre-*Lane* scholarly works collecting cases and discussing the Circuit split on the testimony/public concern issue, see Jasperse, *supra* note 160, at 637-43; Scott E. Michael, Comment, "Lie or Lose Your Job!" *Protecting a Public Employee's First Amendment Right to Testify Truthfully*, 29 HAMLINE L. REV. 413, 415, 425-37 (2006). Based on a desire to further the integrity of the judicial process and its truth-seeking mission, and to protect public employees from retaliation, both of these pre-*Lane* commentators have concluded that truthful testimony by public employees, irrespective of whether its content involves a matter of public concern, should be protected under the First Amendment. See Michael, *supra* note 234, at 415 ("The Supreme Court should adopt a standard holding that truthful testimony by a public employee should *per se* qualify as a matter of public concern . . ."); see also Jasperse, *supra* note 160, at 625-26 ("[T]ruthful testimony in general, and particularly compelled truthful testimony, should receive First Amendment safeguards, and its protection should not be predicated on 'matters of public concern . . .'").

235. See *infra* notes 236-40 and accompanying text.

236. *Falco v. Zimmer*, No. 13-1648, 2015 WL 7069653, at \*1-3 (D.N.J. Nov. 12, 2015).

237. *Id.* at \*8 (citations omitted); see also *Helget v. City of Hays, Kansas* No. 13-2228-KHV, 2015 WL 1263118, at \*11 (D. Kan. Mar. 19, 2015) (noting pre-*Lane* split in the case law, but, under *Lane*, even though "standing in isolation, the content of plaintiff's speech may not have raised a matter of public concern," district court assumed, but did not decide, that speech in sworn affidavit in co-worker's civil case was a matter of public concern), *aff'd on other grounds*, 844 F.3d 1216 (10th Cir. 2017).

defendant police department retaliated against her after she had testified at various administrative and disciplinary hearings for a fellow officer.<sup>238</sup> The district court distinguished *Lane* and rejected Moriates's contention that her speech involved a matter of public concern:

Plaintiff's reliance on *Lane v. Franks* . . . is woefully misplaced. The plaintiff in [*Lane*] provided sworn testimony in open court, compelled by subpoena, at a criminal proceeding against a corrupt government official. Nothing of the sort is, or, the record suggests, could be, pled here. All that can be gleaned from these bare allegations is that Moriates appeared on behalf of coworkers at disciplinary hearings relating to workplace policy violations. Given the complete failure to identify what Moriates said at these hearings or why, it is impossible to know if she spoke on a matter of public concern. Plaintiff's characterization of these hearings, and that they were internal disciplinary actions, make it deeply improbable that these episodes involved matters of public concern. The short of it is that plaintiff's conclusory allegations about matters which are not of "public concern" do not plausibly plead a [section] 1983 First Amendment retaliation claim.<sup>239</sup>

Lastly, as it did pre-*Lane*, the Ninth Circuit has arguably continued to apply a middle ground test post-*Lane*, citing to and quoting its *Alpha Energy* decision to the effect that "a public employee's testimony addresses a matter of public concern if it contributes in some way to the resolution of a judicial or administrative proceeding in which discrimination or other significant government misconduct is at issue."<sup>240</sup>

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238. *Moriates v. City of New York*, No. 13-CV-4845 (ENV) (LB), 2016 WL 3566656, at \*1-2 (E.D.N.Y. June 15, 2016).

239. *Id.* at \*5 (citations omitted); see also *Meza v. Douglas Cty. Fire Dist.*, No. 2:15-CV-115-RMP, 2016 WL 3746568, at \*4 (E.D. Wash. July 8, 2016) (where a firefighter was allegedly terminated in retaliation for having testified at a disciplinary hearing in relation to alleged workplace policy violations of a fellow employee and union member, the district court found that testimony did not involve matters of public concern).

240. *Stillwell v. City of Williams*, 831 F.3d 1234, 1239 (9th Cir. 2016) (quoting *Alpha Energy Savers Inc. v. Hansen*, 381 F.3d 917, 927 (9th Cir. 2004)). Inexplicably, in quoting from *Alpha Energy*, *Stillwell* omitted language at the end of the above-quoted language stating that the public employee's speech would be protectable as a matter of public concern "even if the speech itself

Whether public employee testimony whose content does not involve a matter of public concern should be protected because of the context in which the speech occurs raises the most difficult of the unanswered questions in *Lane*. As discussed previously, *Lane* emphasized two reasons for protecting public employees from retaliation for testifying truthfully: first, to protect and promote the truth-seeking function of the judicial and administrative processes,<sup>241</sup> and; second, to ensure that the public at large has a source of information concerning the operation of a public employer—and, specifically, issues of corruption and other matters of public concern—that may on occasion only be provided by public employees.<sup>242</sup> The first purpose relates to context, and the second purpose relates to content.<sup>243</sup> In *Lane*, where the public employee testimony concerned corruption in the public sector workplace,<sup>244</sup> both purposes were served. However, in cases where the content of the public employee’s testimony does not involve a matter of public concern—such as *Johnston*, where the testimony related to a personnel issue involving the public employer, and, in *Pro*, where the plaintiff appeared in a case, a divorce proceeding, that did not involve the employer’s operations, let alone corruption or wrongdoing in the public sector workplace<sup>245</sup>—only the purpose of promoting truthful

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would not otherwise meet the *Connick* test were we to consider it in isolation.” See *id.*; see also *Alpha Energy Savers*, 381 F.3d at 927. The post-*Lane* scholarship on the testimony/public concern is sparse, but one commentator has agreed with pre-*Lane* commentators that all testimony, irrespective of its content, should be protectable under the First Amendment. See Deloney *supra* note 124, at 712 (proposing “a rule that provides for an exception to Garcetti when the speech at issue is trial or grand jury testimony and adopts an approach that would classify compelled or voluntary testimonial speech, in a criminal or civil context, as *per se* ‘citizen speech’ speaking to a ‘matter of public concern’”).

241. See *Lane v. Franks*, 573 U.S. \_\_\_, 134 S. Ct. 2369, 2379 (2014).

242. See *id.* at 2379-80.

243. See *id.* at 2381 (The circumstances under which the speech is uttered relates to context, whereas the information contained in the speech relates to its content).

244. See *id.* at 2380-81.

245. See *Johnston v. Harris Cty. Flood Control Dist.*, 869 F.2d 1565 (5th Cir. 1989); *Pro v. Donatucci*, 81 F.3d 1283 (3d Cir. 1996). Certainly, an argument can be made that speech by a public employee on any matter—public or private and whether or not involving testimony—otherwise protectable under the First Amendment should not subject the employee to adverse employment consequences. See Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1, 6 (1987) (proposing a public employee speech doctrine that “abandons the ‘matter of public concern’ requirement and extends the first amendment to all worker speech, regardless of the topic”). After all, retaliation by an employer against an employee who speaks out about working conditions or the like in a non-disruptive manner has no place in the public (or private) sector workplace. However, after *Connick*, this view of public employee speech protection has never been the law. It would also depart from first principles, enunciated in *Pickering* and reaffirmed in *Lane*, that “the first amendment interest to be protected is that public employees be allowed to exercise the right ‘they would otherwise enjoy as

testimony would be served.

The question then becomes whether service of this latter purpose is sufficient to protect public employees from retaliation by public employers under the First Amendment. The answer must be that it does. Stakeholders to judicial and administrative proceedings—the public at large, the courts and tribunals, and the parties to the proceedings—are entitled to truthful testimony in furtherance of the fact-finding and truth-seeking goals of those proceedings. Likewise, public employees, irrespective of whether their testimony involves a matter of public concern about the operation of their employers, should not be placed in the “impossible position” described by the Court in *Lane*<sup>246</sup> (i.e., testify falsely and commit perjury or testify truthfully and lose their job). For these reasons, context alone under the *per se* rule described in pre-*Lane* cases such as *Johnston* and *Pro*, and post-*Lane* cases such as *Falco*, should be sufficient to cause truthful testimony to be protected under the First Amendment.

*E. False or Erroneous Testimony or Unnecessary Disclosure of Sensitive, Confidential or Privileged Information*

The *Lane* Court suggested in dicta that the outcome of the case might have been different under the *Pickering*-balancing test if “Lane’s testimony at Schmitz’[s] trials was false or erroneous or that Lane unnecessarily disclosed any sensitive, confidential, or privileged information while testifying.”<sup>247</sup> No post-*Lane* cases have discussed *Lane* concerning the resolution of these two issues; however, pre-*Lane* case law, at least one case decided after *Lane* but not discussing it, and post-*Lane* commentators have all properly reached the conclusion that public employee testimony falling into these two categories would not be protected when assessed under *Pickering*.<sup>248</sup>

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citizens to comment on matters of public interest”—all to the benefit of the public at large. Stephen Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43, 76 (1988) (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)). However, this broader issue need not be resolved to answer the narrower question of whether sworn testimony concerning matters not of public concern should be protected under the First Amendment.

246. *Lane*, 134 S. Ct. at 2381.

247. *Id.*

248. See *infra* notes 250, 252-54 and 256-62 and accompanying text.

### 1. False or Erroneous Testimony

Although the Supreme Court has not resolved whether false statements made outside of court may constitute protected speech under the First Amendment and lower courts are divided on the issue,<sup>249</sup> pre-*Lane* lower courts have held that public employees who testify falsely in a judicial proceedings are not entitled to First Amendment protection from discharge by public employers.<sup>250</sup> Indeed, applying the Supreme Court's decision in *Waters v. Churchill*,<sup>251</sup> lower courts prior to *Lane* have held that, where a public employer reasonably, but mistakenly, believes that a public employee testified falsely, the employer may fire the employee without offending the First Amendment.<sup>252</sup> Courts have largely based these later decisions concerning false testimony by

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249. In *Pickering*, the Supreme Court stated that “we have no occasion to pass upon the additional question whether a statement that was knowingly or recklessly false would, if it were neither shown nor could reasonably be presumed to have had any harmful effects, still be protected by the First Amendment.” *Pickering*, 391 U.S. at 574 n.6 (citation omitted). Although the Court has stated in dicta that “an employee’s false criticism of his employer on grounds not of public concern may be cause for his discharge,” *Connick v. Myers*, 461 U.S. 138, 147 (2008), the question left open in *Pickering* concerning false statements about matters of public concern “has yet to arise in a government-employee retaliation case before the Supreme Court.” *Spacecon Specialty Contractors, LLC v. Bensinger*, 713 F.3d 1028, 1052-53 (10th Cir. 2013) (Hartz, J., dissenting) (citations omitted). Lacking Supreme Court guidance, lower courts have split on the issue. Some courts have held that false statements are *per se* unprotected under the First Amendment. See, e.g., *Westmoreland v. Sutherland*, 662 F.3d 714, 721 (6th Cir. 2011) (citations omitted) (“*Pickering* balancing is not required if it is determined that the employee made statements with knowledge of, or reckless indifference to, their falsity.”); *Brenner v. Brown*, 36 F.3d 18, 20 (7th Cir. 1994) (“Any adverse employment action suffered by plaintiff was not the result of any protected speech; instead, it was a reasonable response by her employer to outrageous and unsupported defamatory remarks.”). In contrast, other courts have rejected a *per se* approach, holding that false statements should be analyzed under the *Pickering*-balancing test. See, e.g., *Johnson v. Multnomah Cty., Oregon*, 48 F.3d 420, 424 (9th Cir. 1995) (“[T]he recklessness of the employee and the falseness of the statements should be considered in light of the public employer’s showing of actual injury to its legitimate interests, as part of the *Pickering* balancing test.”); *Brasslett v. Cota*, 761 F.2d 827, 840 (1st Cir. 1985) (examining “pertinent interest to be weighed” concerning the speech); see also Leslie S. Blickenstaff, Note, *Don’t Tip the Scales! The Actual Malice Standard Unjustifiably Eliminates First Amendment Protection for Public Employees’ Recklessly False Statements*, 80 MINN. L. REV. 911, 912 nn.4-6 (1996) (collecting cases regarding the split in the circuits).

250. See *Gilchrist*, 173 F. App’x at 684-85; *Lynch v. City of Philadelphia*, 166 F. Supp. 2d 224, 230 (E.D. Pa. 2001) (finding that where “no indication that [police officer] testified falsely or in a manner which would undermine” the police department, there was a genuine issue of material fact whether the speech was protected under the *Pickering*-balancing test).

251. 511 U.S. 661 (1994).

252. See *Swetlik v. Crawford*, 738 F.3d 818, 828 (7th Cir. 2013) (citations omitted); *Wright v. Illinois Dep’t of Children & Family Servs.*, 40 F.3d 1492, 1506 (7th Cir. 1994) (citations omitted); see also *Waters*, 511 U.S. at 685 (Souter, J., concurring) (asserting that the reasonableness test in the plurality opinion was approved by a majority of the Court and, therefore, constitutes a holding).

applying *Pickering*, increasing the weight allocated to the public employer's interest and reducing the weight allocated to the public employee's interest on the *Pickering* scales as follows:

[I]f an employee has presented false testimony both sides of the *Pickering* balance may be significantly altered. As the First Circuit has recognized, "an employer has a greater interest in curtailing erroneous statements than correct ones, and still a greater interest in curtailing deliberate falsehoods," and "[c]orrespondingly, an employee's interest in making public statements is heightened according to their veracity."<sup>253</sup>

Similarly, one post-*Lane* commentator, discussing *Lane* and *Pickering*, and acknowledging that public employees will usually prevail on First Amendment retaliation claims when they testify truthfully on matters of public concern, has recognized that the result may be different when the employees testifies falsely:

That is not to say that there will never be instances where the government is permitted to take action against employees for their trial testimony. Testimony that is later revealed to be false would provide the government with a lawful basis for terminating the employee or taking other adverse action.<sup>254</sup>

Unlike in *Lane*, where truthful sworn testimony was properly viewed as critical to both the integrity of the judicial process and society's interest in protecting sources of information about matters of public concern,<sup>255</sup> and was subject to essentially no counterbalancing on the public employer's side of the *Pickering* scales, false or erroneous testimony by a public employee should be allocated essentially no weight—either absolutely or in the *Pickering*-balancing process. False or erroneous testimony debases the judicial truth-seeking process. Likewise, that same testimony does not further—and, indeed, may undermine—society's interest in learning about and ferreting out

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253. *Wright*, 40 F.3d at 1505 (quoting *O'Connor v. Steeves*, 994 F.2d 905, 916 n.8 (1st Cir. 1993)).

254. Deloney, *supra* note 124, at 734.

255. *Lane v. Franks*, 573 U.S. \_\_\_, 134 S. Ct. 2369, 2379-80 (2014).

corruption in the government workplace. For these reasons, false or erroneous testimony should not protect a public employee from retaliation under the First Amendment.

## 2. Unnecessary Disclosure of Sensitive, Confidential or Privileged Information

Prior to the Supreme Court's decision in *Lane*, lower courts applied *Pickering* to routinely reject First Amendment retaliation claims by public employees seeking to challenge discharge or other adverse employment action based on the employees' having disclosed—albeit not while testifying—confidential or sensitive information held by the public employer.<sup>256</sup> Pre-*Lane* decisions concerning the same question in the context of employer retaliation in response to sworn testimony in judicial proceedings are scarce or nonexistent—although one court has suggested that a police bureau's pre-authorization requirement for officers wishing to serve as an expert witness might have been saved from First Amendment infirmity if it had been narrowly tailored to protect a municipality's legitimate interest in preventing disclosure of confidential information.<sup>257</sup>

Post-*Lane* decisions have similarly rejected First Amendment retaliation claims by public employees who disclosed public employer confidential information in settings outside of testifying in court.<sup>258</sup> *Collins v. Gusman*<sup>259</sup> is most instructive on this point. There, Plaintiff Collins, a deputy sheriff, brought a First Amendment retaliation claim against Defendant Gusman, the sheriff of Orleans Parish, for preventing

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256. See, e.g., *Orange v. Dist. of Columbia*, 59 F.3d 1267, 1272-73 (D.C. Cir. 1995), cited in Rosalie Berger Levinson, *Silencing Government Employee Whistleblowers in the Name of "Efficiency,"* 23 OHIO N. U. L. REV. 17, 41-42, 42 n.121 (1996) (alteration in original) (although noting that although university administrator's "disclosure of questionable billing practices . . . involved a 'matter of public concern' . . . the government's interest in protecting the integrity of its [ongoing] investigation into fraud clearly outweighed whatever interest [the administrator] had in disclosing confidential information."); see also *Signore v. City of Montgomery, Alabama*, 354 F. Supp. 2d 1290, 1295-97 (M.D. Ala. 2005) (in a case involving a police department employee's disclosure of theft of a department vehicle to a newspaper reporter, the employee's speech was not entitled to protection under the First Amendment since his interest was outweighed by the city's interest in ensuring efficient investigations by preserving, as confidential, details of a vehicle theft while the criminal investigation, and possibly internal affairs investigation, were ongoing.); *Barnhill v. Bd. of Regents of UW Sys.*, 479 N.W.2d 917, 926-28 (Wis. 1992) (reaching the same result as *Signore*, where a public university employee disclosed confidential survey results to a reporter).

257. See *Swartzwelder v. McNeilly*, 297 F.3d 228, 239 (3d Cir. 2002).

258. See *Delano v. City of Buffalo*, 45 F. Supp. 3d 297, 308, 310 (W.D.N.Y. 2014); *Collins v. Gusman*, No. 14-234, 2015 WL 1468298, at \*6 (E.D. La. Mar. 30, 2015).

259. 2015 WL 1468298, at \*1.

him from returning to work after he (Collins) had taken a photograph of a crime scene depicting horrific conditions at the parish prison and disseminated it to an advocacy organization who, in turn, provided it to the local press.<sup>260</sup> Citing *Lane* and *Pickering*, the district court granted summary judgment in favor of Gusman, opining that

[P]laintiff's interest in commenting on matters of public concern, although significant, is outweighed by the government's interest in the efficient provision of government services. As an initial matter, plaintiff's speech was made possible by his violation of the Sheriff's Office's prohibition on the possession of cell phones within the prison. Plaintiff's distribution of the photograph without prior authorization constituted a second violation of departmental policy. These violations were especially egregious given that the photograph at issue depicted evidence and the crime scene in a then-open criminal prosecution. The Sheriff's Office also produced uncontroverted evidence that plaintiff's distribution of the photograph caused significant disruption to Orleans Parish Prison operations.<sup>261</sup>

Similarly, one post-*Lane* scholar, characterizing *Lane* as raising questions at the intersection of whistleblowing and the First Amendment commented that, "if there is evidence that an employee disclosed any sensitive, confidential or privileged information those disclosures might provide the government with an adequate justification to still prevail . . . ." <sup>262</sup>

The government, acting as a public employer, will occasionally have a legitimate interest in preventing a public employee from testifying truthfully about a matter of public concern that will outweigh the employee, the judicial system, and society's interest in obtaining truthful testimony from that employee. As discussed previously, this interest may arise where the government has legitimate reasons—including not compromising the confidentiality of an ongoing operation, maintaining the safety of public officials and employees, or

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260. *See id.*

261. *Id.* at \*5-6 (citations omitted)

262. Michael Z. Green, *Do Disclosures Prohibited by Law Torment Federal Whistleblowers after Maclean?*, 30 No. 13 WESTLAW J. EMP. 5, \*5 (2016).

not otherwise disrupting sensitive government operations—for objecting to public disclosure of law enforcement or national security investigations or operations.<sup>263</sup> As such, disclosure by public employees of confidential information,<sup>264</sup> although often preventable by the government by appearing at the proceedings at which the public employee will testify and objecting to the employee’s testimony regarding legitimately confidential subjects, may properly cause a public employee to lose under the *Pickering*-balancing test. Under those circumstances, and as discussed below,<sup>265</sup> that legitimate interest will provide an employer with cause for taking adverse employment action against the employee.

#### *F. Public Employee Admission of Wrongdoing While Testifying*

Toward the close of its opinion, the *Lane* Court noted that “quite apart from *Pickering* balancing, wrongdoing that an employee admits to while testifying may be a valid basis for termination or other discipline.”<sup>266</sup> Post-*Lane*, two district courts have applied the above-quoted “wrongdoing” language, but concluded that sufficient factual issues existed in each case such that pre-trial motions by public sector employees could not be granted.<sup>267</sup>

*Lane*’s “wrongdoing” dicta stems from two, related legal principles. First, it stands for the proposition that, generally speaking, misconduct by a public employee may give his or her employer just or good cause to take adverse employment against the employee.<sup>268</sup> Second, it may relate to the Supreme Court’s causation analysis in First Amendment retaliation cases set forth in *Mount Healthy City School District Board of Education v. Doyle*,<sup>269</sup> where the Court held that, even if a public employee has demonstrated that his or her protected speech was a substantial or motivating factor in their termination, a public employer

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263. See *Diaz*, *supra* note 118, at 595.

264. See *Lane v. Franks*, 573 U.S. \_\_\_, 134 S. Ct. 2369, 2381 (2014).

265. See *infra* Part III.F.

266. *Lane*, 134 S. Ct. at 2381 n.5. One judge, discussing *Lane*, has stated, “[a]lthough the act of testifying is protected, the testimony itself is not privileged.” See *Avila v. Los Angeles Police Dept.*, 758 F.3d 1096, 1106 (9th Cir. 2014) (Vinson, J., dissenting).

267. *Calpin v. Lackawanna Cty.*, No. 3:16-2013, 2017 WL 590277 (M.D. Pa. 2017); *Lumpkin v. Aransas Cty., Texas*, No. 2:15-CV-190, 2016 WL 7734607, at \*7 (S.D. Tex. 2016).

268. See, e.g., *Lujan v. City of Santa Fe*, 89 F. Supp. 3d 1109, 1158-59 (D.N.M. 2015) (citing *Selmeczki v. New Mexico Dep’t of Corr.*, 129 P.3d 158, 163 (N.M. Ct. App. 2006)); *Woods v. City of Berwyn*, 20 N.E.3d 808, 817 (Ill. Ct. App. 2014).

269. 429 U.S. 274, 283-84 (1977).

may still avoid liability by showing by a preponderance of the evidence that it would have terminated the employee even in the absence of the protected speech.<sup>270</sup> However, even if a public employer sustains its evidentiary burden on the causation issue, a public employee's admission during testimony that he or she engaged in wrongdoing—particularly when it involves relatively innocuous, albeit criminal, off-duty conduct or speech—should not lead to adverse employment action against the employee in every instance.<sup>271</sup> Likewise, a public employer must adhere to any applicable progressive discipline and/or due process requirements when disciplining or discharging a public employee who admits to wrongdoing while testifying.<sup>272</sup> And, if a public employee has reached an agreement with his or her employer that the employee's testimony about the misconduct will not cause him or her adverse employment consequence, then the public employer must honor that agreement.<sup>273</sup>

Certainly, if a public employee admits while testifying that he or she engaged in wrongdoing, and the employee has not received any kind of promise from his or her employer that the testimony will not be used against him concerning his or her continued employment, that admission may serve as a basis for the public employer to take adverse employment action against the employee.<sup>274</sup> However, that general proposition must be limited by principles of causation, nexus of the misconduct to employment, and progressive discipline and/or due process.

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270. *Id.* at 287; *see also* *Rivers v. New York City Hous. Auth.*, 176 F. Supp. 3d 229, 245 (E.D.N.Y. 2016) (collecting cases on issue of whether the longstanding *Mt. Healthy* “substantial motivating factor” or recently-articulated Title VII “but-for” causation test applies to First Amendment retaliation claims).

271. *See* John E. Rumel, *Beyond Nexus: A Framework for Evaluating K-12 Teacher Off-Duty Conduct and Speech in Adverse Employment or Licensure Proceedings*, 83 U. CIN. L. REV. 685, 705 (2015).

272. *See In re Stallworth*, 26 A.3d 1059, 1061, 1067, 1070 (N.J. 2011) (progressive discipline); *see also* *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985) (due process).

273. *See* *United States v. Anderson*, 450 A.2d 446, 449 n.1 (D.C. Ct. A. 1982) (citing *Garrity v. New Jersey*, 385 U.S. 493 (1967)). This type of agreement would be akin to a “Reverse *Garrity*” warning, albeit in the public employment setting. A Reverse *Garrity* warning “informs the employee that while a refusal to testify might have disciplinary or employment consequences, neither the statement itself, nor fruits of the statement will be used against him in any criminal proceedings.” *Id.*

274. *See Frequently Asked Questions*, GARRITY RIGHTS, <http://www.garrytirights.org/faq.html> (last visited Apr. 18, 2017).

## IV. CONCLUSION

The Supreme Court left unanswered far more questions than it resolved in *Lane v. Franks*. The Court, however, by resurrecting and reemphasizing first principles from *Pickering*—that public employees should be protected under the First Amendment from retaliation by their employers because the employees are often uniquely situated to report on corruption and other matters of public concern in the public sector workplace—provided the compass by which courts should navigate the difficult terrain posed by those open questions in the sworn testimony context. Although the Court could more fully serve the public and appropriately protect public employees by abandoning the ill-advised official duties standard enunciated in *Garcetti*, unless and until it does so, the Court and lower courts should take guidance from *Pickering*'s fundamental teachings, as reinvigorated by the Court in *Lane*.

