Fall 2017

Vol. 34, No. 4

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ILLINOIS PUBLIC EMPLOYEE RELATIONS REPORT

VOLUME 34 FALL 2017 ISSUE 4

The Illinois Public Employee Relations Report provides current, nonadversarial information to those involved or interested in employer-employee relations in public employment. The authors of bylined articles are responsible for the contents and for the opinions and conclusions expressed. Readers are encouraged to submit comments on the contents, and to contribute information on developments in public agencies or public-sector labor relations. The Illinois Institute of Technology and the University of Illinois at Urbana-Champaign are affirmative action/equal opportunities institutions.

Published quarterly by the University of Illinois School of Labor and Employment Relations at Urbana Champaign and Chicago-Kent College of Law.

(ISSN 1559-9892) 565 West Adams Street, Chicago, Illinois 60661-3691

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

By John E. Rumel

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Recent Developments is a regular feature of the Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the public employee collective bargaining statutes.

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

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I. INTRODUCTION

The United States Supreme Court's 2014 decision in *Lane v. Franks*[1] 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.[2] 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,[3] three Justices concurring,[4] 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, the opinion did not challenge, but instead, gave a narrow reading to the Court's 2006 decision in *Garcetti v. Ceballos*[5] which 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 from adverse employment action under the First Amendment.[6] 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,*[7] 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.[8] 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.[9] Also, due to the narrowness of its Opinion, the Court did not answer other related questions.[10]

This Article, drawing from and applying the principles relied upon by the Court in reaching its decision in *Lane*, will address 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. These 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.
- What result if a public employee, as part of his or her ordinary job responsibilities and pursuant to a subpoena or as a representative of his 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.
- 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.
- 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.
- 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.
- What result if, during testimony, the public employee unnecessarily discloses sensitive, confidential or privileged information? The public employee should not be protected from adverse employment action based on his or her testimony.

- 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.

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. Part III 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*. Part IV will conclude that 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.

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.[11] 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.[12]

Like many public agencies, the CITY program faced difficult financial times.[13] 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.[14] Lane discussed the matter with Schmitz but was unsuccessful in getting her to change this behavior.[15] 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[16] —presumably because of Schmitz's 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.[17] When Schmitz refused, Lane fired her.[18] Schmitz then told a co-worker that she would "get [Lane] back for firing her,"[19] 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.'"[20]

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.[21] Lane eventually testified before a grand jury concerning his reasons for firing Schmitz.[22] 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.[23] 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 the amount of hours she worked and the nature of the services she rendered.[24]

Schmitz's federal court trial commenced approximately six months after the indictment.[25] Having been subpoenaed, Lane testified at trial about the events leading up to his decision to fire Schmitz.[26] The jury was unable to reach a verdict, thereby causing the prosecutors to retry Schmitz.[27] Lane testified at Schmitz's retrial.[28] This time, the jury convicted Schmitz on all but one of the multiple counts concerning her having defrauded and stolen money from a program receiving federal funds.[29] 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.[30]

Meanwhile, the CITY program continued to experience budgetary difficulties.[31] As a result, Lane recommended to CACC's recently-hired president Steve Franks that he (Franks) lay off a number of CITY employees.[32] Franks did so, terminating twenty-nine CITY probationary employees, including Lane.[33] Because of ambiguity in the employees' probationary status, Franks quickly rescinded all but two of the twenty-nine employees' terminations.[34] 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.[35] Not long thereafter, CACC eliminated the CITY program and terminated its remaining employees.[36]

Lane sued Franks, in both his individual and official capacities, in federal court.[37] Lane alleged that Franks had violated his federal civil and constitutional rights under 42 U.S.C. § 1983 and the First Amendment by terminating Lane in retaliation for having testified against Schmitz.[38] "Lane sought damages from Franks in his individual capacity and sought equitable relief, including reinstatement, from Franks in his official capacity."[39]

The district court granted summary judgment in favor of Franks[40] and the Eleventh Circuit affirmed.[41] The Supreme Court granted certiorari[42] to resolve the split of opinions in the courts of appeals[43] 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."[44]

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.[45]

2. Guiding and Governing Principles

Writing for the Court, Justice Sotomayor foreshadowed the outcome of the decision with the opening words of the opinion.[46] She stated "Almost [fifty] years ago, this Court declared that citizens do not surrender their First Amendment rights by accepting public employment."[47] Citing to its seminal decision in *Pickering v. Board of Education*,[48] 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 concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'"[49] Similar to *Pickering*, the *Lane* 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."[50]

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 v. Myers*,[51] and *Garcetti*, which had set up threshold barriers to protecting public employees and their speech from retaliation by public employers.[52] Thus, in *Connick,* a case involving a questionnaire circulated internally by a disgruntled staff attorney in a prosecutor's

office, the Court 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.[53] 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, [54] 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.[55]

Having set the tone for what was to follow, the Court in *Lane* 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.[56]

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.'"[57] 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.[58]

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.[59] As to each issue, the Court did not have any difficulty ruling in Lane's favor.

a. The Citizen Speech v. Employee Speech Issue

As to the citizen speech issue, the Supreme 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."[60] In so holding, the Court disagreed with the Eleventh Circuit and grounded its conclusion on two separate bases.[61]

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."[62] 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 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.[63]

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.[64] 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).[65] 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."[66] Although the *Lane* Court stated that "*Garcetti* said nothing about speech" of the latter kind,[67] 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.'"[68]

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

> [T]he mere fact that a citizen's speech concerns information acquired by virtue of his public employment, does not transform that speech into 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.[69]

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."[70]

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."[71] 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.[72] The Court concluded that the Eleventh Circuit erred under the first subdivision of the first step in the analysis by failing to recognize that "Lane's sworn testimony [was] speech as a citizen."[73]

b. The Matter of Public Concern Issue

The Court then turned to the second subdivision of the first step, i.e., the issue of whether "Lane's testimony is also speech on a matter of public concern."[74] Given the nature of the case in which Lane testified, the Court had little trouble resolving the public concern issue in Lane's favor.[75]

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,"[76] the resolution of which inquiry turned on the "'content, form and context' of the speech."[77]

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."[78] 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.[79] 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.'"[80] 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."[81]

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.[82]

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.[83] 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."[84] 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."[85]

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.[86]

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.[87]

4. The Concurring Opinion

Justice Thomas, joined by Justices Scalia and Alito, wrote a brief concurring opinion.[88] 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.'"[89] 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[l] a [work] responsibility," . . . he spoke "as a citizen," not as an employee.[90]

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 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.[91]

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

A. The Significance, if any, of the Lane *Court's Use of the Term "Ordinary Job Responsibilities," Rather than the* Garcetti *Court's "Official Duties" Terminology*

The first question raised by the *Lane* opinion is a textual one. 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."[92]

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."[93] In contrast, the *Lane* majority and concurrence used the term "ordinary" as it pertained to job responsibilities or duties nine times.[94] 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.

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."[95] 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.[96]

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*."[97] 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 Garcetti's "official duties" requirement should be read narrowly.[98] 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"[99] —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*. Likewise, the Court did not address the meaning of the new term in its next public employee speech case.[100] 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.[101] 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 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, 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,[102] and on the substantive principle initially advanced in *Pickering* and resurrected in *Lane* that public employees serve an important role as a source of information about the operation of public entities, the Court should adopt and apply the phraseology that make the least incursion on public employee speech rights. Third, 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.

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 he or she provides truthful sworn testimony as part of his or her ordinary job responsibilities[103] 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).[104] 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.[105]

However, several cases decided prior to *Lane*, but after *Garcetti*, reached divergent results. Indeed, 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. Thus, the Third Circuit in *Reilly v. Atlantic City*,[106] had held "that truthful testimony in court" by a public employee "constituted citizen speech" protected under the First Amendment "not foreclosed by the 'official duties' doctrine enunciated in *Garcetti*."[107] In contrast, the Ninth Circuit in *Huppert v. City of Pittsburg*,[108] and the Seventh Circuit in *Tamayo v. Blagojevich*,[109] both held that testimony by a public employee given as part of their official duties was employee, not citizen, speech and, therefore, not protected under *Garcetti*.[110]

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 carve out an exception to *Garcetti*'s threshold limitation by protecting truthful testimony given as part of a public employee's ordinary job responsibilities. 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:

> 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 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.[111]

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*.[112] 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.[113]

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.[114] 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. If, however, the employee testifies truthfully, without the 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.

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*. 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,[115] or a matter of national security.[116] 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.[117] Thus, to borrow from *Lane*, when a public 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."[118]

In conclusion, 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 First Amendment protection as compelled, i.e., subpoenaed, testimony.[119] As with a number of the *Lane*'s unanswered questions, guidance can be found in pre-*Lane* authorities.

1. Protection of Voluntary Testimony as a Threshold Matter

Pre-*Lane*, several courts in the Second Circuit concluded that voluntary testimony should receive constitutional 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."[120] In addition, the Third Circuit, presaging the *Lane* Court's view that the need to protect uninhibited testimony and, in turn, the integrity of the judicial process is paramount, held that witnesses who appear voluntarily to testify in judicial proceedings must be free from employer retaliation under the First Amendment.[121] Only one panel in the Second Circuit, in an unpublished decision, held prior to *Lane* that voluntary testimony is not protected under the First Amendment.[122]

In sum, the vast majority of federal circuit court decisions pre-*Lane* 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, although essentially all pre-*Lane* courts have concluded, as a threshold matter, that voluntary sworn testimony is entitled to First Amendment protection, those same courts have also evaluated, consistent with *Lane*, the several interests raised by the *Pickering*-balancing test.[123] Interestingly, those courts reached divergent results. Thus, in *Green*, the Third Circuit, discounting the public's interest in truthful testimony when voluntary, not subpoenaed, testimony is involved and focusing on the "potential disruptiveness of the speech" – which involved testimony in favor of a member of a crime family member – on law enforcement departmental morale, held that the "risk of injury to the . . . Police Department outweighs the public interest favoring Green's speech."[124] However, in *Kinney v. Weaver*, the Fifth Circuit came to the opposite conclusion, holding – in a case involving testimony by two police officers adverse to their employer's interest in an excessive force case – that the public's interest in expert testimony about police misconduct and the existence of a factual dispute regarding whether police department officials could reasonably predict workplace disruption due to the officers' testimony precluded summary judgment in favor of the public officials under *Pickering*.[125]

Based on the Supreme Court's reasoning in *Lane*, there can be little 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. 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. 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.[126] 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 appellate courts have opined, protection of voluntary truthful sworn testimony should be subject to a *Pickering*-balancing analysis.[127] Given the importance of truthful sworn testimony, the Third Circuit in *Green*,[128] as a practical matter, made too much of the 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. 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[129]—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,[130] 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 at several judicial proceedings concerning corruption in a state program and misuse of state funds—involved a matter of public concern protected by the First Amendment under the *Pickering*/*Connick* standard.[131] However, courts of appeals and district courts—both before and after *Lane*—have been sharply divided over whether trial testimony, irrespective of the content of the testimony, constitutes a matter of public concern protectable under the First Amendment.

Prior to *Lane*, the Third and Fifth Circuits took the most expansive view regarding the question, holding that the sworn form and judicial or 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.[132] At the other end of the spectrum,

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 concern to the community).[133] 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 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.[134]

The post-*Lane* judicial results concerning the testimony/public concern standard have been equally mixed. One court, although dismissing a public employee's First Amendment retaliation claims on other grounds, cited to Third Circuit *per se* authority and that portion of the Supreme Court's holding in *Lane* focusing on the judicial context, agreed that the employee's participation in several law suits constituted protected speech.[135] Other post-*Lane* courts, however, have continued to reject the *per se* standard and have continued to hold that content matters.[136] 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."[137]

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 unanswered question 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;[138] 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.[139] The first purpose relates to context, and the second purpose relates to content.[140] In *Lane*, where the public employee testimony concerned corruption in the public sector workplace,[141] 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[142] —only the purpose of promoting truthful 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*,[143] 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- and post-*Lane* cases 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."[144] No post-*Lane* cases have discussed *Lane* concerning the resolution of these two issues; however, pre-*Lane* case law and at least one case decided after *Lane* but not discussing it, have all properly reached the conclusion that public employee testimony falling into these two categories would not be protected when assessed under *Pickering*.

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,[145] pre-*Lane* lower courts held that public employees who testify falsely in a judicial proceedings were not entitled to First Amendment protection from discharge by public employers.[146] Indeed, applying the Supreme Court's decision in *Waters v. Churchill*,[147] lower courts prior to *Lane* 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.[148] Courts largely based these later decisions concerning false testimony by 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:

> [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."[149]

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,[150] 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 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.[151] 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.[152] 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.[153]

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 not otherwise disrupting sensitive government operations—for objecting to public disclosure of law enforcement or national security investigations or operations.[154] As such, disclosure by public employees of confidential information,[155] 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,[156] 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."[157] 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.[158]

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.[159] 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*,[160] 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 his or her termination, a public employer 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.[161] 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.[162] 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.[163] 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.[164]

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 his or her continued employment, that admission may serve as a basis for the public employer to take adverse employment action against the employee. However, that general proposition must be limited by principles of causation, nexus of the misconduct to employment, and progressive discipline and/or due process.

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. The Court and lower courts should take guidance from *Pickering*'s fundamental teachings, as reinvigorated by the Court in *Lane*.

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[1] 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).

[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) (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.
[11] *Lane v. Franks*, 134 S. Ct. 2369, 2375 (2014).
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *See id*.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *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)).
[20] *Id.* (internal citations omitted).
[21] *Id.*
[22] *Id.*
[23] *Id.* (*citing United States v. Schmitz*, 634 F.3d 1247, 1256-57 (11th Cir. 2011)).
[24] *Id.* (*citing Schmitz*, 634 F.3d at 1257, 1260).
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.* at 2376.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *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.
[39] *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.
[40] *Id.* at 2376.
[41] *Id.* (citing *Lane v. Cent. Alabama Cmty. Coll.*, 523 Fed. App'x. 709, 712 (11th Cir. 2013)).
[42] *Id.* at 2377.
[43] *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).
[44] *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.
[45] *Lane*, 134 S. Ct. 2383.
[46] *See id.* at 2374.
[47] *Id.*
[48] 391 U.S. 563; *Lane,* 134 S. Ct at 2374 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)). In *Pickering*, 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.
[49] *Lane,* 134 S. Ct. at 2374 (quoting *Pickering*, 391 U.S. at 568) (alteration in original).
[50] *Id.* at 2374-75.
[51] 461 U.S. 138 (1983).
[52] *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* 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, 218 (2008) ("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.").
[53] *See Connick*, 461 U.S. at 143 (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,"); *id.* (stating 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.").
[54] *See Garcetti v. Ceballos*, 547 U.S. 410, 414-15 (2006).
[55] *Id.* at 424.
[56] *Lane*, 134 S. Ct. at 2378 (quoting *Garcetti*, 547 U.S. at 418).
[57] *Id.* (*quoting Garcetti*, 547 U.S. at 421).
[58] *Id.* at 2378 n.4 (citations omitted).
[59] *See Lane*, 134 S. Ct. at 2378.
[60] *Id.* at 2378.
[61] *Id.* at 2378-79.
[62] *Id.*
[63] *Id.* at 2379 (citations omitted).
[64] *See id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.* (alteration in original) (*citing and quoting Garcetti v. Ceballos,* 547 U.S. 410, 421 (2006)).
[69] *Id.* at 2379.

[70] *Id.* at 2379-80 (citations omitted) The Court further stated, "[P]ublic employees 'are uniquely qualified to comment' on 'matters concerning government policies that are of interest to the public at large.'"*Id.* at 2380.
[71] *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*, 547 U.S. at 410.
[72] *See Lane,* 134 S. Ct. at 2380.
[73] See *id.*
[74] *Id.*
[75] *See id.* ("Applying these principles, it is clear that Lane's sworn testimony is speech as a citizen.").
[76] *Id.* (internal quotations and citations omitted).
[77] *Id.* (*quoting Connick*, 461 U.S. at 147-48 (1983)).
[78] *Id.* (*citing and quoting Garcetti*, 547 U.S. at 425 (2006)) ("Exposing governmental inefficiency and misconduct is a matter of considerable significance.").
[79] *See id.*
[80] *Id.* (*quoting United States v. Alvarez*, 132 S. Ct. 2537, 2546 (2012) (plurality opinion)).
[81] *Id.* at 2380.
[82] *See id.* at 2373-77.
[83] *See id.* at 2377.
[84] *Lane*, 134 S. Ct. at 2380 (*quoting and citing Garcetti*, 547 U.S. at418 (2006)).
[85] *Id.* at 2381 (alteration in original) (internal quotations omitted) (quoting and citing *Connick*, 461 U.S. at 150-51 (1983)).
[86] *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 157 and accompanying text.
[87] *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.
[88] *Id.* at 2383-84.
[89] *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 58 and accompanying text.
[90] *Lane*, 134 S. Ct. at 2384 (alterations in original) (citations omitted).
[91] *Id.* (citations omitted).
[92] *See id.*; *see also Garcetti*, 547 U.S. at 421.
[93] *Garcetti*, 547 U.S. at 421. In his *Garcetti* dissent, Justice Breyer twice used the term "ordinary" as it pertained to job duties. *Id.* at 444, 449-50.
[94] *Lane*, 134 S. Ct. at 2375, 2377-79, 2381, 2383-84; *see also Mpoy v. Rhee*, 758 F.3d 285, 294-95 (D.C. Cir. 2014).
[95] *See Trustees v. Sons*, 27 Ill. 2d 63, 66, 187 N.E.2d 673, 674 (1963) (opining that where change in statutory language occurred inadvertently, legislature did not intend to change meaning of statute).
[96] *See, e.g.*, *Crawford v. Carroll*, 529 F.3d 961, 974 n.14 (11th Cir. 2008) (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).

[97] *See Dibrito v. City of St. Joseph*, 675 F. App'x 593, 596(6th Cir. 2017); *Mpoy*, 758 F.3d at 295; *Lynch v. Ackley*, 811 F.3d 569, 582 n.13 (2d Cir. 2016); , 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); *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.").

[98] *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.

[99] *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).

[100] *See Heffernan v. City of Patterson*, 136 S. Ct. 1412, 1414 (2016) (holding that fact that supervisor's mistaken that the employee was involved in the mayoral campaign was mistaken did not bar a First Amendment retaliation claim by the officer).

[101] *See Lefebrve v. Morgan*, No. 14-CV-5322 (KMK), 2016 WL 1274584, at *10 n.12 (S.D.N.Y. Mar. 31, 2016) (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).

[102] *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.").

[103] *See 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).

[104] Rule 30(b)(6), Fed. R.Civ. P. provides in pertinent part:

> 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.

[105] The closest a court has come to directly addressing the question expressly left open in *Lane* was in *Rayborn v. Bossier Par. Sch. Sys.*, 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.

[106] 532 F.3d 216 (3d Cir. 2008).

[107] *Id*. at 231.

[108] 574 F.3d 696 (9th Cir. 2009).

[109] 526 F.3d 1074 (7th Cir. 2008).

[110] *Huppert*, 574 F.3d at 707-08; *Tamayo*, 526 F.3d at 1092.

[111] *Lane,* 134 S. Ct. at 2379 (citations omitted); *see also supra* note 89.

[112] *See id*. at 2379-80.

[113] *Id* at 2380; *see supra* note 72 and accompanying text.

[114] 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.

[115] *See* Joseph Deloney, Note, *Protecting Public Employee Trial Testimony*, 91 CHI. KENT L. REV. 709, 734 (2016) ("If an employee discloses confidential information, although truthful, the government could take action without violating that employee's First Amendment rights.").

[116] *See* Lemay Diaz, Comment, *Truthful Testimony as the "Quintessential Example of Speech as a Citizen": Why* Lane v. Franks *Lays the Groundwork for Protecting Public Employee Truthful Testimony*, 46 SETON HALL L. REV. 565, 595 (2016) ("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.").

[117] Deloney, *supra* note 115, at 719.

[118] *Lane*, 134 S. Ct. at 2381.

[119] 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., Fla. 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).

[120] *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).

[121] *Green v. Philadelphia Hous. Auth.*, 105 F.3d 882, 886-89 (3d Cir. 1997); *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 III.C.2.

[122] *Kiehle v. County of Cortland*, 486 F. App'x 222, 224 (2d Cir. 2012).

[123] *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.

[124] *Green,* 105 F.3d 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, holding 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 indicated they did not trust applicant because he had testified for a defendant in a murder trial, the potential for extreme disruption of task force's functioning existed).

[125] *Kinney*, 367 F.3d 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).

[126] 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 115 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. 2369 (2014) (No. 13-483)). 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." Matt Wolfe, Comment, *Does the First Amendment Protect Testimony by Public Employees*?, 77

U. CHI. L. REV. 1473, 1500 (2010). In sum, the furtherance of important First Amendment purposes and protections should not turn on such arbitrary practical matters and distinctions.
[127] *See Kinney*, 367 F.3d at 382 (Jones, J., concurring in part and dissenting in part); *see also Green*, 105 F.3d at 887.
[128] *See Green*, 105 F.3d at 886, 888.
[129] *Id*. at 889-90; *see also Kinney*, 367 F.3d at 396-97, 398 (Jones, J., concurring in part and dissenting in part).
[130] *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).
[131] *Lane*, 134 S. Ct. at 2380-81.
[132] *See Pro v. Donatucci*, 81 F.3d 1283, 1288 (3d Cir. 1996) (citations omitted); *Johnston v. Harris Cty. Flood Control Dist*., 869 F.2d 1565, 1578 (5th Cir. 1989).
[133] *See Arvinger v. Mayor and City of Baltimore*, 862 F.2d 75, 79 (4th Cir. 1988); *Wright v. Ill.s 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).
[134] *Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917, 927 (9th Cir. 2004).
[135] *Falco v. Zimmer*, No. 13-1648, 2015 WL 7069653, at ** 1-3 and 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).
[136] *Moriates v. City of New York*, No. 13-CV-4845 (ENV) (LB), 2016 WL 3566656, at **1-2 and 5 (E.D.N.Y. June 15, 2016) (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) (finding that firefighter could not prove that his testimony in an arbitration over a coworker's termination involved a matter of public concern where firefighter could not recall the specifics of his testimony).
[137] *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)).
[138] *See Lane*, 134 S. Ct. at 2379.
[139] *See id*. at 2379-80.
[140] *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).
[141] *See id*. at 2380-81.
[142] *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).
[143] *Lane*, 134 S. Ct. at 2381.
[144] *Id*.
[145] 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).

[146] *See Gilchrist v. Citty*, 173 F. App'x 675, 684-85 (10th Cir. 2006); *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).

[147] 511 U.S. 661 (1994).

[148] *See Swetlik v. Crawford*, 738 F.3d 818, 828 (7th Cir. 2013) (citations omitted); *Wright v. Ill. 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).

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

[150] *Lane*, 134 S. Ct. at 2379-80.

[151] *See*, *e.g.*, *Orange v. Dist. of Columbia*, 59 F.3d 1267, 1272-73 (D.C. Cir. 1995) (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, Ala.*, 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).

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

[153] *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).

[154] *See Diaz*, *supra* note 116, at 595.

[155] *See*, 134 S. Ct. at 2381.

[156] *See infra* Part III.F.
[157] *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).
[158] *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).
[159] *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*, 2014 Ill. App. (1st) 133450 at ¶¶ 42-43, 20 N.E.3d 808, 816 (Ill. Ct. App. 2014).
[160] 429 U.S. 274, 283-84 (1977).
[161] *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).
[162] *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).
[163] *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).
[164] *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.*

RECENT DEVELOPMENTS

By Student Editorial Board:

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Recent Developments is a regular feature of the Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the public employee collective bargaining statutes.

I. IELRA DEVELOPMENTS

A. Arbitration

In *City Colleges Contingent Labor Organizing Committee and City Colleges of Chicago*, 34 PERI ¶ 24 (IELRB July 20, 2017), the IELRB held that an arbitration award was not binding because the procedures through which it was issued were fundamentally unfair. The City Colleges adopted a policy to avoid penalties due to re-employment of retirees. The union grieved the policy and the matter proceeded to arbitration. At the conclusion of the arbitration hearing, the union asked to make a closing oral argument and the employer asked to file a written brief. The arbitrator granted both requests.

Fifteen days prior to the deadline for the employer to file its brief, the arbitrator issued an award in which he noted that both parties had made oral closing arguments in lieu of filing briefs. The arbitrator sustained the grievance in part. The City Colleges' representative in the arbitration emailed the union's representative expressing concern that the arbitrator had issued the award before the deadline for the employer's brief. The union representative emailed the arbitrator and the City Colleges representative stating that the union had no objection to the arbitrator reopening the award to allow the arbitrator to consider the employer's brief. The arbitrator acknowledged his error and offered to convert his award to a draft and consider the employer's brief before issuing a final award. The employer objected and, at the request of the union, the arbitrator reissued his award as a final award. The employer refused to comply with the award.

The IELRB held that the award was not binding because of the fundamental unfairness resulting from the arbitrator's issuance of the award without waiting for and considering the employer's brief. The IELRB reasoned that the arbitrator's

error precluded the City Colleges from presenting its arguments before the arbitrator issued his award. The IELRB held that the arbitrator's offer to reopen the award did not cure the error because such a process could not ensure that the arbitrator would be able to ignore his initial ruling and give the matter a fresh consideration. Consequently, the IELRB concluded that City Colleges did not violate section 14(a)(8) of the IELRA by refusing to comply with the award.

B. Duty to Bargain

In *AFSCME Council 31 and Northern Illinois University*, 34 PERI ¶ 61 (IELRB Sept. 14, 2017), the IELRB held that Northern Illinois University violated section 14(a)(5) and (1) of the IELRA when it increased staff parking fees while negotiations with AFSCME for a first contract were going on. AFSCME had been certified as exclusive representative of a unit of clerical para-professional, technical and administrative employees. While negotiations for a first contract were on-going, the university announced an increase in fees for staff parking permits to take effect two months later. The union demanded to bargain and the parties agreed to discuss parking fees during their next regularly scheduled bargaining session. About a month following the announcement, new parking permits went on sale and at least one bargaining unit member paid the higher fee. The union demanded that the university rescind the fee increase as to the bargaining unit and reimburse any members who had already paid the higher fee. The university asked the union for any proposals it had on the matter. The union stated that discussion would be pointless until the status quo was reestablished.

The IELRB held that by unilaterally increasing parking fees, a mandatory subject of bargaining, the university breached its duty to bargain. The IELRB rejected the university's argument that the status quo with respect to parking fees included periodic fee increases. The IELRB observed that the university had increased parking fees in 2005, 2006, 2008 and 2011. It concluded that there was no regular pattern of increasing parking fees, which had not been increased for several years before the onset of bargaining and thus fee increases were not part of the status quo. The IELRB ordered the university to rescind the fee increase for bargaining unit members, make unit members whole and refrain from increasing parking fees without bargaining with the union.

C. Representation Proceedings

In *University of Illinois and Illinois Federation of Public Employees, Local 4408, and Metropolitan Alliance of Police Chapter 738*, 34 PERI ¶ 71 (IELRB Aug. 21, 2017), the IELRB held that a grant of a unit clarification petition does not trigger a

one-year certification bar to the filing of a representation petition. The university created the position of security officer and the Metropolitan Alliance of Police (MAP) filed a majority interest petition. The university opposed the petition arguing that a bargaining unit limited to security officers was not appropriate. The Illinois Federation of Public Employees (IFPE) filed a unit clarification position seeking to include the security officers in a unit of security guards that IFPE had historically represented. MAP withdrew its majority interest petition and filed a representation petition for a combined unit of security guards and security officers. The Executive Director granted the unit clarification petition, found that the security officers should be included in the security guards unit and ordered an election to determine the employees' choice of bargaining representative. IFPE filed exceptions to the Executive Director's order of the representation election, arguing that the unit clarification should have triggered a one-year certification bar to any representation petition.

The IELRB rejected IFPE's argument. The IERLB reasoned that a unit clarification petition is granted only where the positions added to the unit are so similar to the positions already in the unit that no election or majority interest proceeding is necessary to determine the desires of the employees in the new positions. In such circumstances, the bargaining representative does not need a year free from representation petitions to bargain on behalf of the newly added positions. Consequently, the IELRB affirmed the Executive Director's order and remanded for further proceedings.

II. IPRLA DEVELOPMENTS

A. Bargaining Units

In *Teamsters Local 700 and Illinois State Toll Highway Authority*, 34 PERI ¶ 41 (ILRB State Panel June 13, 2017), the ILRB State Panel reversed an Administrative Law Judge's decision granting a majority interest petition and held that a hearing was necessary to determine whether a bargaining unit of Intelligent Transportation System Field Technicians (ITS) was appropriate. The State Panel observed that where an employer has an established centralized personnel system if a unit limited to a portion of employees in the same job classifications or a portion of employees performing similar duties is presumed inappropriate. The ILRB observed that in the proceeding before the ALJ, the employer identified positions that were not already represented by an exclusive bargaining representative and that were similar to the ITS technicians that the union sought to represent. The ILRB held that the employer raised an issue of law or fact

concerning the application of the presumption of inappropriateness that required an evidentiary hearing and remanded to the ALJ to conduct such a hearing.

B. Scope of Bargaining

In *State of Illinois, Department of Central Management Services and Troopers Lodge 41, Fraternal Order of Police*, ILRB Case No. S-CB-16-023 (ILRB State Panel July 11, 2017), the ILRB State Panel held that health insurance premiums, deductibles, co-pays and out of pocket maximums are mandatory subjects of bargaining and the union did not commit an unfair labor practice when it submitted those issues to interest arbitration. The ILRB rejected the State's arguments that the State Employees Group Insurance Act, 5 ILCS 375, exempted these matters from bargaining. The State Panel observed that in 2004, section 15(a) of the IPLRA was amended to provide that the IPLRA controls in case of conflict with any other law "other than Section 5 of the State Employees Group Health Insurance Act." The State Panel reasoned that section 5 of the Group Health Insurance Act provides that contracts for health insurance are subject to appropriations and to the Illinois Procurement Code and requires the Director of Central Management Services to report to the Commission on Government Forecasting and Accountability on issues related to health insurance and procurement. The ILRB found it significant that the IPLRA exempts from its control over conflicting laws only Section 5 of the Group Health Insurance Act, not the entire Group Health Insurance Act. The ILRB reasoned that if the legislature had intended to preempt bargaining over health insurance entirely, it would have expressly so stated.

The State Panel also rejected State arguments that health insurance is specifically provided for in the Group Health Insurance Act and is therefore exempt from bargaining under section 7 of the IPLRA. The ILRB reasoned that the Group Insurance Act does not set premiums, deductibles, co-payments or out of pocket maximums and does not preclude collective bargaining.

The State Panel applied the three-part general test for determining whether a matter is a mandatory subject of bargaining established in C*entral City Education Ass'n v. IELRB*, 149 Ill.2d 496, 599 N.E.2d 892 (1992). The ILRB held that health insurance unequivocally affected wages, hours and terms and conditions of employment. Because health insurance affects the State's budget, the ILRB reasoned, it does raise an issue of inherent managerial authority, but the ILRB concluded that the benefits of bargaining with respect to premiums, deductibles, co-payments and out of pocket maximums outweighed the burdens on managerial authority. On the other hand, the State Panel reasoned, choice of vendor and

procurement of health care do not bear on wages, hours and terms and conditions of employment and, therefore, are permissive subjects of bargaining.

Member Snyder concurred in part and dissented in part. He would have held that premiums are a mandatory subject of bargaining but that deductibles, co-payments and out of pocket maximums are part of plan design that is a permissive subject. In his view, the State was obligated to present the union with a specific plan design and then bargain over premiums for that design.