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PROTECTING PUBLIC EMPLOYEE TRIAL TESTIMONY

JOSEPH DELONEY *

INTRODUCTION

In a number of jurisdictions, public employees can be deprived of First Amendment protection and placed in a seemingly impossible situation.¹ This situation could potentially force persons to lie under oath and thus commit perjury in order to satisfy their State employer's wishes, or tell the truth and risk retaliation at the hands of their State employer.

For public employee speech to receive First Amendment coverage,² the employee's speech must have been made as a "citizen upon matters of public concern."³ The Supreme Court, in *Garcetti v. Ceballos*, held that when a person speaks "pursuant to official duties," that person is not speaking as a citizen on a matter of public concern, but rather as an employee.⁴ Thus, the Court concluded that "the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities."⁵

Without a comprehensive framework for determining when an employee had spoken "pursuant to official duties," lower courts were left to struggle with the question.⁶ Lower courts particularly differed in applying

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1. Matt Wolfe, *Does the First Amendment Protect Testimony by Public Employees?*, 77 U. CHI. L. REV. 1473, 1490 (2010).

2. Throughout the article, I distinguish First Amendment "coverage" from "protection." "Coverage" means that the speech at issue is covered under First Amendment because it meets the criteria of "citizen speech on matters of public concern." *E.g.*, Lane v. Franks, 134 S. Ct. 2369, 2374 (2014) (citing *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cty., Ill.*, 391 U.S. 563, 568 (1968)). In contrast, "protection" means that after conducting a *Pickering* analysis, the employee's First Amendment interest outweighs the government's interest in managerial control. *Lane*, 134 S. Ct. at 2380–81. Therefore, the speech is protected by the First Amendment.

3. *Connick v. Myers*, 461 U.S. 138, 147 (1983).

4. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

5. *Id.* at 424.

6. See Keane A. Barger, Note, *Be a Liar or You're Fired! First Amendment Protection for Public Employees Who Object to Their Employer's Criminal Demands*, 66 VAND. L. REV. 1541, 1553–55 (2013) (examining the different factors and tests used by lower courts in the wake of *Garcetti* to determine whether an employee's speech was made pursuant to official duties). The Court in *Garcetti*

Garcetti to situations in which a public employee provided sworn, truthful, trial testimony both pursuant to and outside of his or her job responsibilities.⁷ The difficulty in assessing such cases led to questionable results.⁸ For example, in *Deprado v. City of Miami*, a police officer alleged that he faced adverse employment actions after testifying before a grand jury about police misconduct, specifically that a member of the SWAT team had planted evidence in a shooting incident.⁹ The district court found that the First Amendment did not protect the officer's trial testimony, because the police officer spoke pursuant to his official duties.¹⁰

In order to resolve some of the discord among lower courts, the Supreme Court took up *Lane v. Franks*.¹¹ In *Lane*, the Court affirmatively answered the "discrete question"¹² of whether the First Amendment protects a public employee who provides truthful sworn testimony *outside* of their "ordinary jobs responsibilities"¹³ from adverse employment conse-

declined to adopt a comprehensive framework for determining whether speech was made pursuant to official duties and instead suggested that the inquiry was a practical one. *Garcetti*, 547 U.S. at 424.

7. See Adelaida Jasperse, Note, *Constitutional Law—Damned If You Do, Damned If You Don't: A Public Employee's Trilemma Regarding Truthful Testimony*, 33 W. NEW ENG. L. REV. 623, 641–44 (discussing the post-*Garcetti* circuit split regarding whether First Amendment protections should be extended to an employee who provides truthful sworn testimony pursuant to his or her official duties).

8. See *Huppert v. City of Pittsburgh*, 574 F.3d 696, 708 (9th Cir. 2009), *overruled by* *Dahlia v. Rodriguez*, 735 F.3d 1060, 1071 (9th Cir. 2013). Although later overruled, the Ninth Circuit in *Huppert* held that the First Amendment did not protect a police officer's trial testimony regarding corruption among his fellow officers because the officer testified pursuant to his official duties. *Huppert*, 574 F.3d at 706; *see also* *Green v. Barrett*, 226 F. App'x 883, 884 (11th Cir. 2007). In *Green*, the chief jailer at the county jail testified at a hearing before the county superior court regarding whether a convicted murderer currently housed at the jail should be moved to a maximum-security prison. *Id.* at 884. At the hearing, the jailer testified that many of the cell door locks were broken and that she did not think the jail was suitable to house the prisoner in question. *Id.* The guard was fired for her testimony. *Id.* The court held that because the speech was made pursuant to official duties, her First Amendment rights were not violated. *Id.*

9. *Deprado v. City of Miami*, 446 F. Supp. 2d 1344, 1345 (S.D. Fla. 2006), *aff'd*, 246 F. App'x 769 (11th Cir. 2008).

10. *Id.* at 1346.

11. *Lane v. Franks*, 134 S. Ct. 2369, 2377 (2014). The Court in *Lane* explained it "granted certiorari to resolve discord among the Courts of Appeals as to whether employees may be fired—or suffer other adverse employment consequences—for providing truthful subpoenaed testimony outside the course of their ordinary job responsibilities." *Id.* The Court then cited to the Eleventh Circuit's decision in *Lane v. Franks* (the decision being appealed to the Court) and the Third Circuit's decision in *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008). *Id.* The Court's decision to cite to *Reilly* is somewhat curious because in that case the Third Circuit expressed that it was analyzing the plaintiff's claim as if he had testified pursuant to official duties: "Reilly, as an Atlantic City police officer, assisted a state investigation of a fellow officer and testified for the prosecution at the subsequent trial. Thus, the speech at issue on this appeal, Reilly's trial testimony, appears to have stemmed from his official duties in the investigation." *Reilly*, 532 F.3d at 231. For further discussion, see *infra* Part II.

12. *Lane*, 134 S. Ct. at 2384 (Thomas, J., concurring).

13. This was a shift from *Garcetti's* language of "pursuant to official duties." Compare *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (holding the First Amendment does not protect speech by public employees made "pursuant to their official duties") (emphasis added), with *Lane*, 134 S. Ct. at 2378 (holding the First Amendment protects a public employee's speech made "outside the scope of his

quences.¹⁴ In its opinion, the Court emphasized the limited nature of its holding, and specifically declined to answer whether the First Amendment protected a public employee that provides truthful, subpoenaed testimony *during the course of his or her ordinary job duties*.¹⁵

Despite the Court's correct holding in *Lane*, public employees that testify as part of their ordinary job responsibilities remain without First Amendment safeguards. This is troubling. The integrity of the judicial system depends on its ability to sort fact from fiction. This vital, if not primary, function of the judicial system is undermined when a person faces external pressures that could potentially cause them to give false or misleading testimony. Moreover, the public employees that are most vulnerable under the Court's current doctrine are persons whose testimony the judicial system absolutely depends on for accurate and truthful statements.¹⁶ For example, police officers, state and federal regulators, and forensic analysts that regularly testify during grand jury proceedings and trials remain unprotected simply because these employees testify as part of their ordinary job duties. And although the government must be able to regulate the conduct of its employees and retain control over employee behavior, the employee's interest as a citizen cannot be ignored.

Every *citizen*—irrespective of employment status—bears the obligation to provide truthful testimony whenever he or she takes the stand. This is a legal duty and one not easily escaped.¹⁷ Because of this duty, it is necessary to recognize the concurrent roles the employee occupies when testifying before an adjudicatory body: government employee *and* citizen. Once these dual roles are acknowledged, it becomes clear that from time to time an individual's interest as a government employee and interest as a citizen will be diametrically opposed to one another. On the one hand, employees will be legally obligated to tell the truth when testifying, even if damaging to their employer. On the other hand, if employees provide such testimony,

ordinary job responsibilities") (emphasis added). The Court seemed to refine its conception of *Garcetti* and unequivocally reject the broad interpretation adopted by the Eleventh Circuit. See *infra* Section I.D.

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

15. *Id.* at 2378 n.4 ("We . . . need not address in this case whether 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 the matter today.")

16. See Brief for Am. Civil Liberties Union & the Am. Civil Liberties Union of Ala. as Amici Curiae Supporting Petitioner at 10, *Lane v. Franks*, 134 S. Ct. 2377 (2014) (No. 13–483), 2014 WL 950813 [hereinafter ACLU Brief] ("In fact, if anything, the public has an especially strong interest in according protection to witnesses who regularly testify on behalf of the government. Juries give great weight to the testimony of such witnesses, yet the witnesses are at the same time at unique risk of reprisal for giving truthful testimony that is adverse to the government's interests.")

17. *Blackmer v. United States*, 284 U.S. 421, 438 (1932).

then they can potentially face adverse employment action, such as termination.

Therefore, in order to accommodate these competing interests while still allowing the government to exert managerial control over its employees, *Garcetti's* complete bar to First Amendment claims based on speech made in the course of an employee's ordinary job duties should not apply to testimonial speech—speech made before a grand jury, at criminal or civil trials, or when under oath during a judicial proceeding.

This Note proposes a rule that provides for an exception to *Garcetti* when the speech at issue is trial or grand jury testimony and adopts an approach that would classify compelled or voluntary testimonial speech, in a criminal or civil context, as *per se* “citizen speech” speaking to a “matter of public concern.” From there, courts would apply the typical balancing test the Supreme Court articulated in *Pickering v. Board of Education*, discussed *infra*, to determine whether a public employee's First Amendment free speech rights were unconstitutionally infringed upon.¹⁸ Furthermore, this Note will argue that, in light of *Lane*, that such a rule would strike the proper balance between the competing interest of the State and the employee, and provide a workable framework for courts to analyze these types of cases.

To that end, in Part I, this Note will examine several of the Supreme Court's leading decisions regarding First Amendment rights to freedom of speech in the public employee context. Drawing from the cases discussed in Part I, Part II will synthesize the Court's guiding principles for analyzing First Amendment claims in the public employee context. Part III will examine the Seventh Circuit's decision in *Chrzanowski v. Bianchi*¹⁹ and the Third Circuit's decision in *Reilly v. City of Atlantic City*.²⁰ Utilizing these cases in conjunction with *Lane*, this Note will argue that an adoption of this Note's proposed rule would sufficiently protect the government's interest in maintaining efficiency and control over its employees, while still protecting the employee's First Amendment interests as a citizen commenting on a matter of public concern.

18. In *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cty., Ill.*, 391 U.S. 563, 574–75 (1968), the Court articulated the foundational test for determining whether the First Amendment prohibited a government employer from taking adverse employment action against an employee based on the employee's speech. For further discussion, see *infra* Part I.A.

19. *Chrzanowski v. Bianchi*, 725 F.3d 734 (7th Cir. 2013).

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

I. FROM *PICKERING* TO *LANE*

For many years, public employee First Amendment protections were severely degraded.²¹ As Justice Holmes put it, “[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”²² In other words, the individual forfeited rights that, but for the person’s public employment, ordinarily would be protected by the First Amendment. This “unchallenged dogma,”²³ however, began to change in the 1950s and mid-1960s.²⁴ And in the late 1960s, the prevailing notion of Justice Holmes’s time—that because of their employment, public employees give up First Amendment protections—finally came to a head, and was put to rest in the Court’s leading decision concerning modern freedom of speech protections in the public employee context—*Pickering v. Board of Education*.²⁵

A. *Pickering v. Board of Education*

In 1968, the Supreme Court decided *Pickering v. Board of Education*, one of its seminal cases regarding public employees’ First Amendment rights to freedom of expression. At issue in *Pickering* was whether a teacher’s letter to the editor published in a local newspaper was protected First Amendment speech.²⁶ In the letter, Marvin Pickering, a public school teacher, criticized the local Board of Education for a proposed sale of district bonds in order to finance new athletic facilities at the high school.²⁷ The letter also personally criticized the district’s superintendent.²⁸ Upset with Pickering’s letter, the Board fired Pickering.²⁹ Pickering eventually appealed his dismissal to the Illinois Supreme Court, which rejected his claim.³⁰ The Supreme Court of the United States reversed, finding that Pickering’s First Amendment rights had been violated.³¹

21. See, e.g., *Adler v. Bd. of Educ.*, 342 U.S. 485, 496 (1952).

22. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (1892), abrogated by *O’Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996).

23. *Connick v. Myers*, 461 U.S. 138, 143 (1983).

24. See, e.g., *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 609-10 (1967).

25. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cty., Ill.*, 391 U.S. 563, 574-75 (1968).

26. *Id.* at 564-65.

27. *Id.* at 566.

28. *Id.*

29. *Id.*

30. *Id.* at 567-68.

31. *Id.* at 565.

In its decision, the Court first reaffirmed the principle that public employees' constitutional rights may not be subjected to unreasonable restrictions or conditions as part of their employment or as a requisite of employment.³² But the Court also noted that the "State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."³³ Thus the Court concluded that, the central issue in cases concerning public employee First Amendment speech is to "arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."³⁴

The Court began its balancing test by initially distinguishing between the true and false statements contained in the letter.³⁵ Regarding the statements that could be taken as true, the Court unequivocally rejected that those statements provided a basis for Pickering's dismissal.³⁶ The Court reasoned that these statements in no way disrupted the efficiency of the school or its proper function because the statements were aimed at the Board and the school superintendent, none of whom worked directly with Pickering.³⁷ As such, the Board could not adequately show that the statements were so disruptive that they provided a basis for Pickering's dismissal.³⁸

As for the statements considered false, the Court found those too were protected.³⁹ The Court determined that the Board had shown neither any evidence suggesting there was actual reputational harm to the Board nor a resultant controversy or conflict among the Board, teachers, administrators, or residents of the district.⁴⁰ And Pickering's false statements were not made recklessly or knowingly.⁴¹ Consequently, the Board only had a minimal interest in limiting Pickering's contribution to public discourse as a citizen.

32. *Id.* at 568.

33. *Id.*

34. *Id.*

35. *Id.* at 570.

36. *Id.*

37. *Id.* at 569–70.

38. *Id.*

39. *Id.* at 570–71.

40. *Id.*

41. *Id.* at 574.

The Court then assessed Pickering's interests that were implicated when he wrote the letter. Critical to the Court's analysis was the fact that Pickering was speaking on a matter of "public concern" in his letter. The public concern the Court identified was "whether a school system required additional funds."⁴² Considering the nature of the "public concern," the Court determined that "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent."⁴³ The Court concluded that, "it is essential" that teachers be able to comment on such matters "without fear of retalia[tion]" from their employer.⁴⁴ As such, Pickering had a significant interest in commenting on a matter of public concern when he wrote his letter to the newspaper.

Because Pickering had a significant interest in commenting on school funding and the government could show little to no institutional disruption, the Court struck the balance in Pickering's favor. Accordingly, the Court held that the Board did indeed violate Pickering's First Amendment rights when it fired him for expressing his dissatisfaction in his letter to the editor.⁴⁵

The Court's opinion in *Pickering* is significant because it laid the foundational framework for analyzing First Amendment freedom of speech issues in the context of public employment. The *Pickering* balancing test weighs the employee's interests as a citizen commenting on a matter of public concern with the state's interests as an employer in promoting efficiency.⁴⁶ However, in laying out this template by which to analyze these types of claims, the Court did not provide exact tests or definitions for lower courts to follow in analyzing what constitutes "matters of public concern" or "citizen" speech. Moreover, in reaching its conclusion, the Court's reasoning seemed driven by the fact that Pickering was commenting on a matter of public interest. Although the Court did characterize the case as one about a "teacher [making] erroneous public statements upon issues then currently of public attention," there was little attention focused on whether Pickering was commenting as a citizen or employee.⁴⁷

42. *Id.* at 571.

43. *Id.* at 572.

44. *Id.*

45. *Id.* at 574–75.

46. *Id.* at 568.

47. *Id.* at 572.

B. Connick v. Meyers

The Court, in *Connick v. Myers*,⁴⁸ attempted to clarify some of the ambiguity left in the wake of *Pickering*. In *Connick*, the Court was asked to determine whether the First Amendment prohibited a State employee from being terminated over a survey circulated around her office concerning internal office affairs.⁴⁹ The Court held that it did not.⁵⁰

Shelia Myers was an Assistant District Attorney in New Orleans working in the criminal division.⁵¹ After five years, Myers was informed that she was going to be transferred to a different division of criminal court.⁵² Myers objected to the transfer and expressed her concerns to her supervisors and peers.⁵³ Additionally, Myers drafted and distributed a questionnaire to her fellow employees.⁵⁴ In the survey, she solicited their opinions regarding the office transfer policy, office morale, the need for a grievance committee, the level of confidence they had in supervisors, and whether employees felt pressured to work in political campaigns.⁵⁵ Myers' immediate supervisor learned of the questionnaire and informed District Attorney, Harry Connick, that Myers was attempting a "mini-insurrection."⁵⁶ As a result of circulating the survey, Myers was fired.⁵⁷

Myers brought suit alleging she was fired for exercising her First Amendment rights in distributing the questionnaire.⁵⁸ The Court began analyzing Myers' claim by reiterating the central tenant of *Pickering*: the Court must attempt to find "a balance between the interest of the [employee], as a citizen . . . [and] as an employer, in promoting the efficiency of the public services it performs through its employees."⁵⁹ The Court then proceeded to point out that the district court misunderstood *Pickering*'s requirement that the employee speak "as a citizen, in commenting upon matters of public concern."⁶⁰ After recounting cases in which employee

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

49. *Id.* at 140.

50. *Id.* at 142.

51. *Id.* at 140.

52. *Id.*

53. *Id.*

54. *Id.* at 141.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 142.

60. *Id.* at 143.

speech had been characterized as a “matter[] of public concern,”⁶¹ the Court came to the conclusion “that if Myers’ questionnaire cannot be fairly characterized as constituting speech on a matter of public concern,” then there would be no reason to inquire into the reasons for her termination.⁶² In other words, whether the employee spoke on a matter of public concern is a threshold question that must be addressed before proceeding to the *Pickering* balancing test.

Accordingly, the Court held that when a public employee speaks not as a citizen upon matters of public concern, but rather as employee upon matters of personal interest, the courts are not the proper place to review a personnel decision taken by an agency.⁶³ To determine whether the employee speech touches on a matter of public concern, the Court instructed that the speech be analyzed by accounting for its “content, form, and context . . . as revealed by the whole record.”⁶⁴ Further, it also suggested that a “public concern” was “any matter of political, social, or other concern to the community.”⁶⁵ Lastly, the Court noted that the question of whether the employee’s speech met the threshold inquiry of public concern is one of law, not fact.⁶⁶

Applying those principles, the Court found that only one portion of Myers’ questionnaire—the portion asking whether employees felt pressure to join political campaigns—touched on a matter of public concern.⁶⁷ As for the other questions within the survey, the Court held that those did not meet the “public concern” threshold.⁶⁸ Rather, these questions were “mere extensions” of Myers’ personal displeasure of being transferred.⁶⁹ Myers’ questions did not expose that the District Attorney’s office was failing to discharge its duties or defying the public confidence.⁷⁰ Thus, the district

61. The Court noted it had protected employee speech in *Perry v. Sindermann*, 408 U.S. 593, 598 (1972) (protecting a college professor’s speech before a state legislature) and *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284 (1977) (holding that a teacher’s memorandum given to a local radio station, which in turn reported the contents of the memo as a news item was protected speech). Moreover, the Court observed that in, *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415–16 (1979), “[a]lthough the subject-matter of the [employee’s] statements were not the issue before the Court, it is clear that her statements concerning the school district’s allegedly racially discriminatory policies involved a matter of public concern.” *Connick*, 461 U.S. at 146.

62. *Id.*

63. *Id.*

64. *Id.* at 147–48.

65. *Id.* at 146.

66. *Id.* at 148 n.7.

67. *Id.* at 149.

68. *Id.* at 148.

69. *Id.*

70. *Id.*

court erred in determining that as a whole the questionnaire touched on a matter of public concern. The Court also expressed concern that government efficiency would be compromised if every employee complaint had the potential to evolve into a constitutional claim.⁷¹

Despite the fact that the questionnaire did minutely touch on a matter of public concern, the Court found that under the *Pickering* balancing test Connick was justified in terminating Myers.⁷² First, the Court in clear terms noted that the government's burden, for proving that the termination of the employee was justified, varied with the nature of employee's speech.⁷³ The Court then identified the government's legitimate purpose as "promot[ing] efficiency and integrity in the discharge of official duties, and . . . maintain[ing] proper discipline in the public service."⁷⁴ From there, the Court noted the need for good working relationships in the District Attorney's office, and concluded that Myers' questionnaire undermined the government's legitimate interests.⁷⁵ The time, place, and manner in which Myers delivered the questionnaire weighed against her, because the process by which Myers' presented her concerns and questionnaire to her fellow employees detracted from office efficiency.⁷⁶ Finally, the context in which the dispute arose also weighed in favor of the government.⁷⁷ Myers circulated the survey questioning the very policy being applied to her, which further undermined her claim.⁷⁸ As such, the Court found that "weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office."⁷⁹ Thus, Myers' First Amendment rights were not violated.⁸⁰

Connick made explicit what was already somewhat apparent⁸¹ from *Pickering*:⁸² For a court to entertain a public employee's First Amendment

71. *Id.* at 149.

72. *Id.* at 154.

73. *Id.* at 150.

74. *Id.* at 150–51 (internal citations omitted).

75. *Id.* at 151.

76. *Id.* at 152–53. In *Rankin v. McPherson*, the Court reaffirmed that in performing the *Pickering* balancing test, "the statement will not be considered in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

77. *Connick*, 461 U.S. at 153.

78. *Id.*

79. *Id.*

80. *Id.* at 154.

81. *Id.* The Court in *City of San Diego v. Roe* subsequently explained that the concern of government operations being compromised if all employee speech was subject to a *Pickering* analysis "prompted the Court in *Connick* to explain the threshold [public concern] inquiry (implicit in *Pickering* itself)." *City of San Diego v. Roe*, 125 S. Ct. 521, 525 (2004).

claim, the employee must have been speaking as a citizen commenting on a matter of public concern.⁸³ If that condition is not met, then the employee's claim must fail, and there is no need to balance the competing interests of the government and the employee under *Pickering*.⁸⁴ In addition, the Court reiterated the need to weigh the employee's interests and the State interest in relation to the speech at issue, emphasizing that the State's burden for justifying its action depends on the nature of the speech at issue.⁸⁵ Further, the Court provided some guideposts for determining what touched on a matter of public concern and how to weigh the employee and State's competing interests.⁸⁶

C. Garcetti v. Ceballos

Over twenty years later, the Court, in a controversial decision, revisited the issues surrounding public employee First Amendment claims in *Garcetti v. Ceballos*.⁸⁷ In *Garcetti*, a Deputy District Attorney, Richard Ceballos, was informed that an affidavit used as the basis for a search warrant contained serious misrepresentations.⁸⁸ After learning of this information, Ceballos investigated the affidavit for himself and concluded the same.⁸⁹ Ceballos brought this to the attention of his supervisors and prepared a memorandum recommending dismissal of the case based on this information.⁹⁰ After a meeting between Ceballos, his supervisors, and the officer that provided the affidavit, Ceballos' supervisors decided to proceed with the prosecution of the case.⁹¹ Ceballos eventually was called as a witness by the defense during a motion to traverse, in which he expressed his observations concerning the affidavit.⁹²

82. *Roe* also clarified what the Court thought constituted "public concern." In *Roe*, a police officer was discharged for producing pornographic material in which he appeared in his police uniform. *Id.* at 522. The Court stated "that public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication." *Id.* Reversing the Ninth Circuit, the Court held that *Roe's* speech clearly did not touch on a matter of public concern. *Id.* at 526. Therefore, the First Amendment did not cover the officer's video. *Id.* Consequently, there was no need for the district court to apply *Pickering's* balancing test. *Id.*

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

84. *Id.* at 143, 146.

85. *Id.* at 150.

86. *See id.*

87. *Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006); Jessica Reed, *From Pickering to Ceballos: The Demise of the Public Employee Free Speech Doctrine*, 11 N.Y. CITY L. REV. 95, 108 (2007).

88. *Garcetti*, 547 U.S. at 413–14.

89. *Id.*

90. *Id.* at 414.

91. *Id.*

92. *Id.* at 414–15.

Ceballos alleged that in the wake of this incident he suffered adverse employment actions such as being transferred and passed up for promotion.⁹³ Ceballos eventually filed suit in federal district court. He argued that his employer violated his First Amendment rights by retaliating against him based on the memorandum recommending dismissal of the case.⁹⁴ Reversing the Ninth Circuit, the Supreme Court held that Ceballos' memorandum was not protected speech.⁹⁵

Citing *Pickering* and *Connick*, the Court presented a two-part test used to determine whether a public employee's speech was constitutionally protected.⁹⁶ First, it must be determined "whether the employee spoke as a citizen on a matter of public concern. . . . If the answer is no, the employee does not have a First Amendment cause of action based on his or her employer's reaction to the speech."⁹⁷ But, if the employee has spoken as a citizen on a matter of public concern, then a potential "First Amendment claim arises."⁹⁸ The government then must have "an adequate justification for treating the employee differently from any other member of the general public."⁹⁹

The Court then went on to explain that individuals who enter public service necessarily give up some liberties enjoyed by citizens that are not employees of the government.¹⁰⁰ This is so because the government, as an employer, needs to exert a certain amount of control over its employees in order to maintain efficiency and orderly administration of services.¹⁰¹ Further, public employees are in "trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions."¹⁰² However, the Court also acknowledged, "a citizen who works for the government is nonetheless a citizen."¹⁰³ Further, when an employee speaks as a citizen on a matter of public concern, "they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively."¹⁰⁴ The Court also noted the societal benefits that flow from public em-

93. *Id.* at 415.

94. *Id.*

95. *Id.* at 417.

96. *Id.* at 418.

97. *Id.* (citations omitted).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 418–19.

102. *Id.* at 419.

103. *Id.*

104. *Id.*

ployees being able to speak openly on matters concerning the community.¹⁰⁵

The Court then turned to Ceballos' memorandum. According to the Court, the fact that Ceballos drafted his memorandum and voiced his concerns in the office was not dispositive.¹⁰⁶ The fact that Ceballos' memorandum touched on the subject matter of his employment was also nondispositive.¹⁰⁷ Instead, the case turned on the fact that Ceballos' "expressions were made *pursuant* to his duties as a calendar deputy."¹⁰⁸ Ceballos was not acting as a citizen while "conducting his daily professional activities" which included drafting disposition memorandums.¹⁰⁹ Thus, "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties that the employee might have enjoyed as a private citizen."¹¹⁰ Further, the Court explained that the government had "heightened interests in controlling speech made by an employee in his or her professional capacity."¹¹¹ Consequently, the Court held that when an employee speaks pursuant to official duties, the First Amendment does not prevent the government from taking adverse employment action against the employee for his or her speech.¹¹²

In reaching its decision, the Court declined to adopt a comprehensive test to determine whether an employee spoke "pursuant to official duties" because there was no serious debate that Ceballos indeed made his expression pursuant to his employment duties.¹¹³ The Court instead provided that the "proper inquiry is a practical one."¹¹⁴ And, it added that overly broad job descriptions would not suffice in determining what constituted an employee's job duties.¹¹⁵

An ostensibly straightforward rule emerged from *Garcetti*: Speech made pursuant to a public employee's official duties is not protected First Amendment speech. Without a concrete framework, however, lower courts have applied the rule in varying ways, which has led to questionable outcomes.¹¹⁶ Adding a further complication was the Court's determination that

105. *Id.* at 419–20.

106. *Id.* at 420.

107. *Id.* at 421.

108. *Id.* (emphasis added).

109. *Id.* at 422.

110. *Id.* at 421–22.

111. *Id.* at 422.

112. *Id.* at 421.

113. *Id.* at 424.

114. *Id.*

115. *Id.* at 424–25.

116. *See generally supra* note 8.

the government had a heightened interest when the speech at issue “owes its existence to a public employee’s professional responsibilities.” Moreover, many commentators that examined *Garcetti*’s future application in a wide variety of contexts were critical of the Court’s categorical bar to First Amendment claims for public employee speech made pursuant to official duties.¹¹⁷

D. Lane v. Franks

The *Lane v. Franks* litigation began in the Middle District of Alabama in 2011, but the events that precipitated the lawsuit stem back to 2006.¹¹⁸ In 2006, Edward Lane was hired by Central Alabama Community College (“CACC”) to be the Director of the Community Intensive Training for Youth (“CITY”).¹¹⁹ CITY was a statewide program in Alabama that provided services to underserved youth.¹²⁰ Lane was hired on a probationary basis.¹²¹ As CITY’s director, Lane was responsible for typical managerial functions, such as hiring and firing employees, overseeing the day-to-day operations, and making decisions regarding CITY’s finances.¹²²

Prompted by CITY’s financial difficulties, Lane conducted an extensive audit of the program and its expenses.¹²³ At the conclusion of his audit, Lane discovered that Suzanne Schmitz, an Alabama State Representative, had not been reporting to her post at her local CITY office.¹²⁴ Lane attempted to resolve the matter with Representative Schmitz, but his attempts were ineffective.¹²⁵ In response, Lane brought the matter to the attention of CACC’s president and attorney, who both warned Lane not to fire Representative Schmitz because of potential negative consequences for both him and CACC.¹²⁶

Despite the warning, Lane fired Schmitz.¹²⁷ Schmitz’s firing caught the attention of the FBI, which opened up an investigation into Schmitz’s

117. Outside of public employees that typically testify as part of their ordinary job duties, commentators opined that *Garcetti* could impinge, for example, on academic freedom in the academic setting. Sheldon Nahmod, *Academic Freedom and the Post-Garcetti Blues*, 7 FIRST AMEND. L. REV. 54, 54 (2008).

118. *Lane v. Franks*, 134 S. Ct. 2369, 2375 (2014).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

employment with CITY.¹²⁸ Schmitz was later indicted, and Lane eventually testified against Schmitz at a grand jury proceeding and twice at her trial.¹²⁹

Steve Franks eventually took over CITY, which continued having financial difficulties.¹³⁰ Lane suggested that Franks terminate some employees to shore up the programs' finances.¹³¹ Franks fired CITY's probationary employees.¹³² Thereafter, Franks re-hired many of the probationary employees; Lane was not included.¹³³ Franks claimed that he did not rescind Lane's termination because of his testimony against Schmitz.¹³⁴

Lane eventually sued Franks, alleging that he was discharged because of his testimony against Schmitz¹³⁵—a violation of his First Amendment rights.¹³⁶ The Eleventh Circuit affirmed the District Court's grant of summary judgment in favor of Franks.¹³⁷ Relying on *Garcetti*, the Eleventh Circuit reasoned that Lane had been acting pursuant to his official duties when he investigated and later testified against Schmitz.¹³⁸ The Eleventh Circuit also erroneously concluded that although Lane testified about his duties compelled by subpoena in the litigation context, his speech still did not warrant First Amendment protection.¹³⁹

Reversing the Eleventh Circuit's decision, the Supreme Court first reiterated *Pickering*'s guiding principles: In order to determine which interest should prevail when the government seeks to curtail its employee's speech, the court must balance the interest of the government as an employer in promoting efficiency and the employee's interest as a citizen in commenting on a matter of public concern.¹⁴⁰ The Court then recounted *Garcetti*'s "pursuant to official job duties" inquiry to determine whether the speech was made as a citizen on a matter of public concern or as an employee.¹⁴¹

Turning to Lane's speech, the Court first determined that Lane spoke as a citizen on a matter of public concern.¹⁴² The Court explained, "Truth-

128. *Id.*

129. *Id.* Schmitz' first trial resulted in a mistrial. She was tried again and convicted. *Id.* at 2375

130. *Id.* at 2376.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 2367–77.

139. *Id.* at 2377.

140. *Id.*

141. *Id.* at 2378.

142. *Id.*

ful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes.”¹⁴³ The Court noted that “[s]worn testimony in judicial proceedings is a quintessential example of speech as a citizen” because “anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth.”¹⁴⁴ This obligation is independent of any obligations the employee may have to the government as its employer.¹⁴⁵

The Court then explained how the Eleventh Circuit read *Garcetti* far too broadly.¹⁴⁶ The Court specifically rejected the notion that an employee is speaking pursuant to official job duties merely because the speech relates to information learned through the course of his employment.¹⁴⁷ Instead, the critical question is “whether the speech at issue is itself ordinarily within the scope of an employee’s duties, not whether it merely concerns those duties.”¹⁴⁸ By using the language “ordinary job duties,” the Court narrowed and clarified *Garcetti*’s holding insofar as it rejected an expansive interpretation of the language “pursuant to official job duties.” Additionally, the Court noted that under the Eleventh Circuit’s reading of *Garcetti*, public employees would be placed in a difficult situation when they learned of public corruption, because that information would necessarily be learned through their employment.¹⁴⁹ As such, the employee would be torn between obligations to its employer and its obligation to testify truthfully.¹⁵⁰

The Court then held that the content, form, and context all pointed towards a finding that Lane’s speech was on a matter of public concern.¹⁵¹ The content of the speech—government corruption—was a matter of “significant public concern.”¹⁵² Additionally, the form and context of the speech cemented the conclusion that it was on a matter of public concern because “testimony under oath has the formality and gravity necessary to remind the witness that his or her statements will be the basis for official government action”¹⁵³ The Court then balanced the employee’s interest against that of the government’s and found that the scale weighed

143. *Id.*

144. *Id.* at 2379.

145. *Id.* The Court noted that perjury is a federal crime under 18 U.S.C. § 1623.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 2380.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

heavily in favor of Lane.¹⁵⁴ There was no evidence that the speech was neither false nor erroneous nor did it unnecessarily disclose privileged information.¹⁵⁵ Moreover, it did not undermine efficiency of services or of office relationships.¹⁵⁶ Thus, the Court found that Lane's testimony was protected.¹⁵⁷

II. GUIDING PRINCIPLES

Several important principles emerge from the cases discussed above. First, the principal task for courts is to balance the government's interests as an employer and the employee's interests as a citizen speaking on a matter of public concern.¹⁵⁸ This balancing is rooted in the need for government efficiency in providing public services, which would be compromised if every employment decision turned into a constitutional claim.¹⁵⁹ However, the *Pickering* balancing test seeks to reconcile that with the fact that public employees occupy a unique role in society. Public employees are often in the best position to expose government corruption and comment on matters concerning the public.¹⁶⁰ Because of the public employee's unique role, the employee's interests in speaking as a citizen are tied to the public's interest in remaining informed as to the integrity of government operations.¹⁶¹

In order to guide this analysis, courts, as a threshold matter, must examine whether the speech was made as a citizen speaking on a matter of public concern or as an employee.¹⁶² If the person was speaking as a citizen on a matter of public concern, then the possibility of a First Amendment claim arises.¹⁶³ Conversely, if the speech is made purely in the capacity as an employee, then the employee has no First Amendment claim based on the government's reaction to the speech.¹⁶⁴ To distinguish between citizen speech and employee speech, courts should look to whether the speech was made pursuant to the employee's ordinary duties, meaning, more or less,

154. *Id.* at 2381.

155. *Id.*

156. *Id.*

157. *Id.*

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

159. *Id.* at 568; *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

160. *See, e.g., Garcetti*, 547 U.S. at 418–19.

161. *E.g., Lane*, 134 S. Ct. at 2377.

162. *E.g., Garcetti*, 547 U.S. at 418.

163. *E.g., id.*

164. *E.g., id.*

what the employee does on a day-to-day basis or as required by their ordinary job duties.¹⁶⁵ The mere fact that an employee learns of information through his or her employment does not automatically render the speech at issue “employee speech.”¹⁶⁶ But speech which subject matter is derived from or related to the individual’s role as a public employee is to be distinguished from speech that owes its existence to the person’s ordinary, professional job responsibilities.¹⁶⁷ Furthermore, an employee’s job description is not conclusive evidence to show that the employee was acting as an employee.¹⁶⁸ Instead, the inquiry is a practical one, suggesting that the employee’s actual day-to-day activities or ordinary activities must be examined for a proper analysis of the case.¹⁶⁹

The next question becomes whether the speech was on a matter of public concern. Generally, matters of public concern consist of “any matter of political, social, or other concern to the community.”¹⁷⁰ This inquiry is guided by the content, form, and context of the speech at issue.¹⁷¹ If the court concludes that the employee spoke as a citizen on a matter of public concern, the issue turns to whether the government had “an adequate justification for treating the employee differently from any other member of the general public.”¹⁷² The government’s burden in justifying the action taken against the employee varies with how substantially the employee’s speech involves matters of public concern.¹⁷³ Thus, if the employee speech indisputably relates to a matter of public concern, then “a stronger showing [of government interests] may be necessary.”¹⁷⁴ On the other hand, if the citizen speech only minutely touches on a matter of public concern, then the government will have less of a burden in justifying its actions.¹⁷⁵ If the government cannot adequately justify its employment action taken against

165. Compare *id.* at 421 (holding the First Amendment does not protect speech by public employees made “pursuant to their official duties”) (emphasis added), with *Lane*, 134 S. Ct. at 2378 (holding the First Amendment protects a public employee’s speech made “outside the scope of his *ordinary job responsibilities*”) (emphasis added).

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

167. *Id.*

168. See *Garcetti*, 547 U.S. at 424–25.

169. See *id.*

170. *Connick v. Myers*, 461 U.S. 138, 146 (1983).

171. *Id.* at 147–48.

172. *Garcetti*, 547 U.S. at 418 (citing *Pickering v. Bd. of Educ. of Twp. High School Dist. 205, Will Cty., Ill.*, 391 U.S. 563, 568 (1968)).

173. *Connick*, 461 U.S. at 150.

174. *Lane v. Franks*, 134 S. Ct. 2369, 2381 (2014) (quoting *Connick*, 461 U.S. at 152).

175. *Connick*, 461 U.S. at 151–52.

the employee for his or her speech, then there has been an unconstitutional infringement on that employee's First Amendment rights.¹⁷⁶

III. REILLY, CHRZANWSKI, AND TRIAL TESTIMONY

The Third Circuit's decision in *Reilly v. City of Atlantic City* and the Seventh Circuit's decision in *Chrzanowski v. Bianchi* are instructive and persuasive cases illustrating the need to provide special protections to compelled trial testimony made during the course of a public employee's ordinary duties. In both cases, the court recognized the dual role a public employee occupies when providing sworn testimony—a sentiment that the Supreme Court later reiterated in *Lane*. And a critical aspect to both *Reilly* and *Chrzanowski* was that the speech was made under oath during either a trial or grand jury proceeding, thereby transforming the public employee's speech from merely employee speech to citizen speech. In reaching their conclusions, both courts carefully scrutinized *Garcetti*, and found that its categorical bar to claims made pursuant to an employee's job duties did not apply to public employees' trial testimony made pursuant to their professional responsibilities.

These cases help to demonstrate that a *per se* rule characterizing trial testimony made during the course of an employee's ordinary job duties as "citizen speech on a matter of public concern" and existing doctrine surrounding public employee First Amendment rights are not in tension. Moreover, despite the Supreme Court specifically passing on the issue addressed in *Chrzanowski* and *Reilly*, *Lane* does indeed echo principles articulated in those cases, underscoring the conclusion that public employee trial testimony made during the course of ordinary job responsibilities deserves First Amendment coverage.

A. *Reilly v. City of Atlantic City*

Six years prior to *Lane*, the Third Circuit took up *Reilly v. City of Atlantic City*. There, Reilly, an Atlantic City police officer, assisted a state investigation into corruption among the Atlantic City police department.¹⁷⁷ Reilly testified in a criminal case against a fellow officer.¹⁷⁸ Several officers harbored animosity towards Reilly for his participation in the trial.¹⁷⁹ Years later, Reilly was charged with creating a hostile work environment

176. See *Lane*, 134 S. Ct. at 2380–81.

177. *Reilly v. City of Atlantic City*, 532 F.3d 216, 220 (3d Cir. 2008).

178. *Id.* at 220.

179. *Id.* at 261.

and engaging in inappropriate conduct towards a subordinate.¹⁸⁰ After an extensive hearing was held, an independent hearing officer concluded that only a four-day suspension was appropriate due to mitigating circumstances.

Despite the independent hearing officer's conclusion, Reilly's supervisor—a friend of the officer against whom Reilly testified—recommended that Reilly be demoted in rank with a 90-day suspension or retire as sergeant immediately. Reilly retired. He then filed suit against his supervisor and the police department, alleging that he was forced to retire not because of his most recent disciplinary action, but because he exercised his First Amendment rights by testifying in his fellow officer's criminal trial years earlier.¹⁸¹ The city, on the other hand, argued that his speech was made pursuant to his official duties, and therefore not constitutionally protected. Affirming the district court, the court held that Reilly's truthful trial testimony made pursuant to his official responsibilities deserved First Amendment coverage.¹⁸²

In coming to this conclusion, the court noted that Reilly's testimony appeared to have stemmed from his official duties in the investigation. However, the court reasoned that *Garcetti* offered no express instruction on the First Amendment's application to a public employee's trial testimony that arises out of his or her job duties.¹⁸³ Thus, relying on well-settled law that dictates *every* citizen must provide testimony if compelled, the court determined that Reilly was indeed acting as a citizen when he testified at trial and not “simply performing his or her job duties.”¹⁸⁴ Rather, Reilly was “acting as a citizen and is bound by the dictates of the court and the rules of evidence,” and “the First Amendment protection associated with fulfilling that duty of citizenship is not vitiated by one's status as public employee.”¹⁸⁵ Moreover, the court concluded that protecting truthful testimony “promotes the ‘individual and societal interests’ served when citizens play their vital role in the judicial process.”¹⁸⁶

180. *Id.*

181. *Id.* at 219. Reilly contended his supervisor's promotion was the first opportunity for him to take action against Reilly for his testimony. *Id.* at 221. In the years preceding Reilly's disciplinary charge, Reilly's mentor, who was also involved in the criminal trial, was still in the department. *Id.* at 220–21. Reilly alleged that after his mentor was promoted to chief-of-police and was no longer in the department, his supervisor began to demean him in front of other officers. *Id.*

182. *Id.* at 231.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

B. Chrzanowski v. Bianchi

In *Chrzanowski v. Bianchi*, the Seventh Circuit addressed a similar issue to that in *Reilly*, and concluded that the First Amendment protects truthful, subpoenaed, trial testimony.¹⁸⁷ In that case, Chrzanowski was an Assistant State's Attorney.¹⁸⁸ In connection with a criminal investigation against the State's Attorney, Chrzanowski testified during a grand jury proceeding and the prosecutor's case-in-chief.¹⁸⁹ Allegedly, as a result of testifying against his supervisor, Chrzanowski's employment with the State's Attorney was terminated. Chrzanowski brought suit, alleging that his First Amendment rights had been violated.¹⁹⁰

Reversing the district court, the Seventh Circuit held that the First Amendment protected the plaintiff's speech for two reasons. First, the court reasoned that *Garcetti* did not bar the plaintiff's First Amendment claim because testifying before a grand jury was not part of the plaintiff's ordinary daily activities as a State's Attorney. The court chided the district court for concluding the testimony was made pursuant to his official duties solely because the subject matter of his testimony related to his job as a State's Attorney.¹⁹¹

But more importantly, the court explained that even if testifying was part of the State's Attorney's ordinary job responsibilities, he spoke as a citizen on a matter of public concern when testifying before the grand jury.¹⁹² In reaching this conclusion, the court found that the reasoning underpinning *Garcetti*'s categorical bar to First Amendment claims based on speech made "pursuant to official duties" inapplicable to cases involving subpoenaed grand jury or trial testimony.¹⁹³

According to the court, *Garcetti* did not protect speech made pursuant to official duties because such speech is of a different character than citizen speech. First, "restrictions on [employee] speech 'do not infringe any liberties the employee might have enjoyed as a private citizen.'"¹⁹⁴ Second,

187. *Chrzanowski v. Bianchi*, 725 F.3d 734, 742 (7th Cir. 2013).

188. *Id.* at 736.

189. *Id.*

190. *Id.*

191. *Id.* at 739–40. That sentiment was later echoed in *Lane* when the Court explained, "the 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." *Lane v. Franks*, 134 S. Ct. 2369, 2379 (2014). The central focus of the inquiry should be on whether the speech was part of the employee's ordinary job responsibilities. In other words, subject matter is not the dispositive factor in characterizing speech as either citizen or employee.

192. *Chrzanowski*, 725 F.3d at 741.

193. *Id.*

194. *Id.* (quoting *Garcetti*, 547 U.S. at 421–22).

“restrictions on [employee] speech in no way undermine the potential societal value . . . [because] employees ‘retain the prospect of constitutional protection for their contributions to the civic discourse.’”¹⁹⁵ Lastly, “a contrary approach . . . would ‘commit state and federal courts to . . . [an] intrusive role, mandating oversight of communications between . . . employees and their supervisors during the course of official business,’ and would ‘displace managerial discretion.’”¹⁹⁶ Taking each justification underlying *Garcetti* in turn, the court determined each to be inapplicable.

First, the *Chrzanowski* court found that the individual has a strong interest in complying with the demands of a subpoena because failure to do so can result in incarceration.¹⁹⁷ Next, unlike typical speech made pursuant to official duties, the public has a strong interest in hearing truthful testimony from government employees because such speech “often provides society with information that is essential for democratic self-governance.”¹⁹⁸ Moreover, threats against or punishment of retaliation for subpoenaed testimony would chill the employee’s contributions to the civic discourse.¹⁹⁹ Finally, *Garcetti*’s hesitation about courts interfering with the government’s managerial discretion is of little consequence in cases of speech made pursuant to a subpoena because there is hardly any legitimate managerial interest in dissuading an employee from testifying when compelled to testify by subpoena. Consequently, this led the court to hold that subpoenaed trial testimony constituted citizen speech.²⁰⁰

C. Trial Testimony Is Citizen Speech

Although decided without the guidance of *Lane*, both *Reilly* and *Chrzanowski* illustrate the need to characterize trial testimony as citizen speech, even if such speech arises during the course of a public employee’s ordinary duties. As the *Chrzanowski* court noted, the underlying justifications for not affording speech made in the course of an employee’s ordinary job duties is misplaced when applied to truthful testimony conducted during judicial proceedings.

First and foremost, not affording truthful trial testimony protection undermines the integrity of the judicial system. As the *Chrzanowski* court recognized, truthful testimony “is necessary to protect the integrity of the

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 742.

199. *Id.*

200. *Id.*

judicial process and to insulate that process from outside pressure.”²⁰¹ It stands to reason that allowing the government to act uninhibited in its reaction to an employee’s truthful trial testimony places an undue influence on the employee. Employees are either, depending on the demands of the employer, potentially left to commit perjury, remain mute and be held in contempt, or tell the truth and face their government employer’s retaliation. The Supreme Court echoed this sentiment in *Lane* and noted that an employee would be placed in a compromising position if torn between loyalty to his employer or the truth.²⁰² Considering the great emphasis courts have placed on the importance of truthful trial testimony to the integrity of the judicial system,²⁰³ allowing the government to take an adverse employment action against an employee for his or her truthful testimony, although part of his or her daily duties, is inconsistent with the notion that the judicial system acts as society’s truth seeking institution.

Protecting truthful trial testimony because it was made outside of an employee’s ordinary job duties, rather than during the course of such duties, is a flawed distinction. The fact-finding function of trials is undermined no less because persons providing false or misleading testimony are public servants acting in the course of their ordinary job duties rather than outside the scope of their daily responsibilities. Moreover, the public has an especially significant interest in ensuring that persons who regularly testify as a part of their ordinary public duties are protected from adverse employment action, because they are more likely to be influential on jurors and others.²⁰⁴

Additionally, characterizing trial testimony made during an employee’s ordinary job duties as employee speech rather than citizen speech ignores the dual roles and independent obligations the person taking the stand bears. As *Lane*, *Reilly*, and *Chrzanowski* make clear, a government employee is not simply an employee when providing trial testimony. Instead, the employee acts as a citizen because of the liberty interest at stake once he or she takes the stand. The Supreme Court and many lower courts have reiterated that it is incumbent on a witness to testify truthfully and aid in

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

202. *Lane v. Franks*, 134 S. Ct. 2369, 2380 (2014) (“Such a rule would place public employees . . . in an impossible position, torn between the obligation to testify truthfully and the desire to avoid retaliation and keep their jobs.”).

203. *Reilly*, 532 F.3d at 231.

204. ACLU Brief, *supra* note 16, at 10.

the judicial process.²⁰⁵ This duty is not lost simply by the nature of one's employment; nor are persons shielded from perjury prosecution as result of providing false testimony simply because of their employment status. By divorcing the concurrent roles people play—as citizens and employees—while testifying, employees are left in a severely vulnerable position.

Although under the proposed rule, trial testimony would be considered *per se* citizen speech, the government is not left without protections. As the Court noted in *Lane*, employees taking the stand are not free from all obligations to the government as their employer. The employee could possibly be reprimanded for disclosing privileged or confidential information. But these concerns need not be addressed when determining whether the person taking the stand spoke as an employee or citizen. Instead, that inquiry should be saved for a *Pickering* analysis, which affords the government with an opportunity to offer a legitimate reason for taking its actions.

Finally, truthful trial testimony should be considered “citizen speech” regardless of whether it was part of the employee’s ordinary duties because the justifications for leaving employee speech unprotected are not applicable to trial testimony. Although the Court in *Lane* did clarify the scope of *Garcetti*’s “pursuant to official job duties” language, the Court did not call into question the underlying justifications of *Garcetti*’s categorical bar to such claims. Instead, it merely clarified that speech which subject matter stems from one’s employment does not automatically qualify as employee speech. Thus, although the court squarely rejected an excessively broad reading of “pursuant to official duties,” *Chrzanowski* still provides forceful arguments demonstrating the inapplicability of *Garcetti*’s theoretical underpinnings when applied to trial testimony.²⁰⁶ Although *Chrzanowski* arises out of the context of a subpoena, its reasoning also applies even if the testimony is voluntary.²⁰⁷

205. *Lane*, 134 S. Ct. at 2379 (“Sworn judicial testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testified in court bears an obligation, to the court and society at large, to tell the truth.”).

206. See *supra* Part III.B.

207. Testimony, whether voluntary or compelled, should be protected. Truthful testimony aids in the judicial process and serves the public good regardless of the method by which it was obtained. ACLU Brief, *supra* note 16, at 11. Whether the testimony was voluntary or compelled does not bear on the employee’s role as a citizen when testifying. *Id.* at 12–13. Moreover, in both the civil and criminal context, many witnesses are compelled by subpoena arbitrarily. Attorneys “issue subpoenas to witnesses who would have voluntarily attended even absent a subpoena.” *Id.* at 13. Thus, regardless of whether the testimony was procured by subpoena or voluntarily, when an employee testifies at trial, that speech should be characterized as “citizen speech” and a matter of “public concern.”

D. Trial Testimony Is Always a Matter of Public Concern

The Supreme Court has held that speech touches on a matter of public concern when it can “be fairly considered as relating to any matter of political, social, or other concern to the community.”²⁰⁸ To guide analysis of whether the speech in question touches on a matter of public concern, courts examine the “content,” “form,” and “context” of the speech.²⁰⁹ For many of the same reasons why trial testimony should always be considered “citizen speech,” trial testimony always meets the “public concern” requirement.

The “form” and “context” in which trial testimony takes place is enough to elevate the speech to a matter of public concern. The speech is made orally under oath (form) and during a judicial proceeding (context). These factors weigh heavily towards categorically recognizing trial testimony as a matter of public concern. As the Supreme Court has noted, “unlike 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.”²¹⁰

There should be no inquiry into the content of the employee’s speech in determining whether it touches on a matter of public concern because the context and form in which sworn judicial statements occur make it a matter of public concern.²¹¹ A witness should be able to speak freely and truthfully without fear of reprisal. When aiding in the judicial process, a foundation of self-government, employee speech should always be protected regardless of the content. The content of the speech will eventually be scrutinized under a *Pickering* analysis. At that time, the content of the speech must necessarily be weighed as a factor in determining whether the government had a sufficient reason to justify its response to the testimony. A rule providing that trial testimony constituted a *per se* matter of public concern—even if made during the course of a public employee’s ordinary duties—would still leave the government in a position to exercise a

208. *Connick v. Myers*, 461 U.S. 138, 146 (1983).

209. *Id.* at 147–48.

210. *United States v. Alvarez*, 132 S. Ct. 2537, 2546 (2012).

211. Several circuit courts have held that trial or grand jury testimony is always a matter of public concern. *See Reilly v. City of Atlantic City*, 532 F.3d 216, 229 (3d Cir 2008) (holding that “trial testimony is offered ‘in a context that is inherently of public concern.’”); *Johnston v. Harris Cty. Flood Control Dist.*, 869 F.2d 1565, 1578 (5th Cir. 1989) (holding that “[w]hen an employee testifies before an official government adjudicatory or fact-finding body he speaks in a context that is in inherently of public concern.”).

significant degree of managerial discretion in response to its employee's speech.

Some concern can be expressed over whether the government would ever prevail under the *Pickering* analysis, and whether lower courts would provide cursory reasoning when the speech at issue was truthful testimony. Indeed, in adopting a bright line rule providing First Amendment coverage to trial testimony, it may be possible that the government will have a difficult time prevailing under a *Pickering* analysis. But if the government's only justification for taking action against that employee is because of the truthful content of the employee speech, then the employee's interest, and the public's interest in hearing such speech, should place a significant obstacle for the government to overcome in justifying why it took adverse action against the employee.

That is not to say that there will never be instances where the government is permitted to take action against employees for their trial testimony. Testimony that is later revealed to be false would provide the government with a lawful basis for terminating the employee or taking other adverse action. If an employee discloses confidential information, although truthful, the government could take action without violating that employee's First Amendment rights. In a similar vein, should an employee reveal his or her own misconduct or some other information while testifying that would warrant disciplinary action, the government would be able to take employment action. In such an event, the misconduct revealed as a result of the testimony would provide a lawful basis for taking disciplinary action, not the testimony that revealed the misconduct or incompetence. Moreover, as *Pickering* instructs, the burden on the government in justifying its actions will vary depending on the extent to which the employee speaks to matters of public concern. Accordingly, when speech touches on a matter of public concern solely because it is trial testimony, and the content of the testimony is not of significant public interest, the government will have a lowered burden in justifying its actions.

In essence, this rule attempts to provide a framework that affords a court the flexibility necessary to balance the competing interests on a case-by-case basis without *Garcetti*'s rigidity, which has caused some questionable outcomes. By categorically extending First Amendment coverage to trial testimony, the employee is able to speak freely and without fear of reprisals from their employer. On the other hand, the government still is afforded an opportunity to offer legitimate reasons for treating the employee differently than that of an ordinary citizen under a *Pickering* analysis. Such a system would ensure that the government's managerial discretion

and interest in maintaining efficiency is preserved, while simultaneously safeguarding that the employee's First Amendment rights are not unconstitutionally violated.

IV. CONCLUSION

Public employees' First Amendment rights to speak freely and truthfully before a tribunal should not be dependent on whether the speech is made pursuant to their ordinary duties. As discussed above, providing special protections to trial testimony is necessary to protect judicial integrity and ensure that employees are not placed under an undue burden when taking the stand. Withholding First Amendment protection based on whether the speech was in the course of one's ordinary job duties is a distinction that does not stand up to scrutiny when applied to trial testimony. Consequently, courts should deem an employee a "citizen" speaking to a "matter of public concern" when he or she is testifying truthfully during a court proceeding regardless of whether it was part of his or her ordinary job duties.

