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

INTRODUCTION

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

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

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

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

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

4. *Id.* at 2378–80.

5. *See id.*

6. Catherine Fisk, *Guest Blog: Catherine Fisk on Lane v. Franks*, HAMILTON AND GRIFFIN ON RIGHTS

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

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

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

A. Constitutional and Statutory Freedom of Speech Protections

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

8. *See infra* Part IV.
9. U.S. CONST. amend. I.
10. *See id.*
11. *E.g.*,

proceeds to the second inquiry: the balancing test. The Court then determined whether the government employer had an adequate justification for treating the employee differently than any other member of the general public,[24] weighing the employee's interest against the employer's interest. Under the *Pickering*

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

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

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

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

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

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

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

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

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

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

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

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

62. *Kiehle*, 486 F. App'x at 224.

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

Just a few months after the conclusion of the first trial, Lane was fired by CACC.[73] In 2011, Lane commenced an action in response to his termination

created.'"[81] Therefore, the fact that "Lane testified about his official activities

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

1. Citizen Speech or Employee Speech

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

Furthermore, the Court criticized the Eleventh Circuit for improperly interpreting *Garcetti* too broadly in concluding Lane did not speak as a citizen, and instead as a government employee, when testifying.[96]4.5(ch or.7(n)( )] T)5.7(i0043 Tc0 Tw7.02 0 0 7.02

public concern.[111] Additionally, the inquiry relies on the "'content, form, and

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

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

A. The Holding Ultimately Gets It Right

Before addressing the abundant shortcomings of the Court's opinion in *Lane v. Franks*, it is important to address its achievements. In a rare unanimous decision expanding an employee's constitutional rights,[125] the Court correctly

this result required little more than an application of *Garcetti v. Ceballos*.[131] Lane testified in a manner that was neither pursuant to his job duties nor done

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

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

The *Lane* Court made clear that providing "[s]worn testimony in judicial proceedings is a quintessential example of speech as a citizen . . . ."[140] Why, then, should a police officer or crime scene technician[141] be treated differently when they have the same "obligation, to the court and society at large, to tell the truth[?]"[142] There is no significant distinction between Lane's testimony and testimony provided to fulfill a job responsibility.[143] Extending the protection beyond mere "speech as a citizen," and instead protecting all truthful testimony, continues to meaningfully protect sworn testimony.[144] Furthermore, the obligation to be truthful remains. "[T]he government employer's interest in hiring and firing does not outweigh the need for [public employees] to offer truthful sworn testimony without fear of repercussion."[145] Most importantly, public employees who testify as a critical part of their employment duties should not be fearful that they could be terminated or retaliated against for providing truthful sworn testimony. Promoting such a policy is deeply troubling.

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

139. *Id.* at 2378–79.

140. *Id.* at 2379.

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

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

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

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

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

3. Voluntary Testimony Should Also Be Afforded First Amendment Protection

So long as the testimony provided is truthful and not misleading, the First Amendment should bar employer discipline even in instances of voluntary testimony. While the employer certainly has an interest in controlling the information released by its employees, First Amendment protection should transcend merely subpoenaed testimony and also extend to testimony that is voluntarily provided. The policy rationales advanced by the Court on the importance of testimony[157] apply whether the testimony provided is compelled or uncompelled.

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

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

154. *Id.* at 419.

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

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

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

speech is at the apex of the constitu

the costs through the loss of potentially crucial information that can reform government, promote efficiency, lead to greater transparency, and improve peoples' lives.[163] It is ineffective to rely on another government actor, such as a prosecutor, to issue a subpoena to procure a government employee's testimony on matters of public concern. Therefore, the Court should take its own policy professions to heart[164] and expand *Lane*'s holding to also protect public employees testifying voluntarily from fear of job reprisals.

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

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

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

> Nor is there any reason to raise the counterintuitive question whether the public interest in hearing informed employees evaporates when they speak as required on some subject at the core of their jobs. . . . The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it. . . . This is not a whit less true when an employee's job duties require him to speak about such things: when, for example, a public auditor speaks on his discovery of embezzlement of public funds, when a building inspector makes an obligatory report of an attempt to bribe him, or

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

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

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

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

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

167. By removing this "pursuant to employment" threshold inquiry, at least when it comes to situations involving testimony, a plethora of previ

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

There are some duties that arise out of citizenship that are more important than protecting a public employer's interests. While there will certainly always be limitations or circumstances in which the First Amendment should not bar discipline by the employer, such as if the employee testifies falsely or misleadingly, the interests of the employee and his or her duties as a citizen should ascend the happenstance of their employer. The *Lane* Court was correct in declaring the First Am