No. 13-483

IN THE
Supreme Court of the United States

EDWARD LANE,
Petitioner,
v.

STEVE FRANKS, IN HIS INDIVIDUAL CAPACITY, AND SUSAN BURROW, IN HER OFFICIAL CAPACITY AS ACTING PRESIDENT OF CENTRAL ALABAMA COMMUNITY COLLEGE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae respectfully submit this brief in support of Petitioner, Edward Lane, encouraging the reversal of the judgment of the Eleventh Circuit, because the judgment below is inconsistent with both the Court's general historical approach to public employee speech and the specific approach to such speech that the Court adopted in *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

Amici are law professors[2] who teach and write about the constitutional rights of public employees and have published a number of scholarly articles on these topics.[3] *Amici* have no financial stake in the outcome of this case, and in this brief do not ask the Court to reconsider *Garcetti*. But we are troubled by the tendency in some courts of appeals to misread this Court's decision in *Garcetti* to articulate ever-

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* represent that all parties have consented to the filing of this brief by filing letters granting blanket consent to the filing of *amicus* briefs.

[2] A full list of the *Amici* appear in the Appendix to this brief. The names of educational institutions are provided for identification purposes only.

[3] A representative sample of *Amici* writings related to the issues before the Court include: Paul M. Secunda, *Whither the Pickering Rights of Federal Employees?*, 79 U. COLO. L. REV. 1101 (2008); Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing, and § 1983: A Critique of* Garcetti v. Ceballos, 42 U. RICH. L. REV. 561 (2007); and Scott R. Bauries & Patrick Schach, *Coloring Outside the Lines:* Garcetti v. Ceballos *in the Federal Appellate Courts*, 262 EDUC. L. REP. 357 (2011).

broadening readings of the narrow exemption from First Amendment protection the Court carved out. We file this brief to urge this Court to correct these rulings by clarifying the narrow nature of the exemption it recognized.

SUMMARY OF ARGUMENT

Garcetti v. Ceballos, 547 U.S. 410 (2006), excluded from the First Amendment's protections a very narrow category of public employee speech—speech *required* of the employee as a *contractual employment duty*. In this case, however, the Eleventh Circuit misread this very narrow exclusion to remove from the First Amendment's protections all public employee speech that *derives in any way* from the employee's work. Pet. App. 5a-7a. *Amici* urge the Court to reverse this erroneous construction of *Garcetti* and make clear that the First Amendment exemption recognized in *Garcetti* is an exceedingly narrow one.

Testimonial speech is quintessential "citizen speech" within the meaning of *Garcetti*. The duty of every citizen to respond to a subpoena with truthful testimony is unquestioned. In fact, as this Court has repeatedly recognized, it is the bedrock of our judicial system. Thus, it is beyond cavil that Petitioner's testimonial speech was speech as a citizen, rather than as an employee, and was therefore protected.

Further, the protection of public employees' testimonial speech preserves their role at the vanguard of the citizenry. Public employees have a uniquely valuable understanding of our public institutions, and they properly serve as the "eyes and ears" of the public in evaluating the performance of government institutions. Protecting public employees' testimonial speech from retaliation is therefore an essential condition for public accountability.

For all of these reasons, elaborated below, *Amici* urge the Court to reverse the Eleventh Circuit.

ARGUMENT

I. THE COURT SHOULD CLARIFY THE NARROW SCOPE OF THE FIRST AMENDMENT EXEMPTION IT CARVED OUT IN *GARCETTI*

This Court, beginning with *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563 (1968), has long recognized that a public employee's speech is protected as long as it addresses a matter of public concern, and as long as the employee's interests as a speaker and the public's interests as listeners are not outweighed by the government's interests in maintaining an effective and efficient workplace. *See id.* at 568; *Connick v. Myers*, 461 U.S. 138, 145-46 (1983); *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 414 (1979); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

The Court's most recent decision in this line of precedent, *Garcetti v. Ceballos*, 547 U.S. 410 (2006), articulated a categorical exemption from these well-established First Amendment protections for public employees. Under *Garcetti*, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 421. Thus, public employee speech made "pursuant to . . . official duties" categorically does not qualify for First Amendment protection, regardless of any showing of public interest that an employee might make.

Garcetti thus recognized a narrow exception to this Court's longstanding rule that public employee speech merits robust First Amendment protection. Under *Garcetti*, a public employer may condition employment on the employee's relinquishment of the right to speak as the employee pleases *when speaking is part of the employee's job duties*, and the employee is *engaging in that job-required speech*; in other words, when the speech in question is the employee's *work product*. *Id.* at 421-22. Rather than requiring a balancing of interests, when an employee is hired by the government to engage in speech, the government's interest in controlling the content and viewpoint of that speech categorically outweighs any independent interest the employee may have in making the speech, or that the public might have in hearing it.[4]

Under a proper understanding of the *Pickering-Garcetti* line of precedent, Petitioner's testimonial speech was clearly subject to First Amendment protection. First, as Petitioner explains, his testimony under oath in response to a subpoena in a criminal trial is and long has been protected speech under the First Amendment. Pet. Br. 13-25. When a witness testifies under a subpoena, it is true that the witness's discretion to make expressive choices is necessarily cabined to an extent. The witness may not choose *not to answer* (other than to claim the protections of the Fifth Amendment against self-incrimination or to avoid waiving another privilege), lest he be held in contempt of court. The witness also may not choose to *lie*, for, if he so chooses, he may be

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[4] *See* Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing, and § 1983: A Critique of* Garcetti v. Ceballos, 42 U. RICH. L. REV. 561 (2007).

subject to a criminal charge for perjury. Importantly, though, neither of these restrictions derives from the First Amendment. Rather, the First Amendment *tolerates* these restrictions on the otherwise "uninhibited, robust, and wide-open"[5] right to speak—or not to speak—as one pleases because of the vital government interest in fair trials.[6] Nevertheless, any witness, even one compelled to testify by subpoena, has the inherent discretion to make numerous expressive choices in crafting his testimony. Even a speaker sitting in the witness chair at trial does not give up his expressive interests in choosing the words, facial expressions, and body language through which he will deliver his responsive and truthful testimony.

Bolstering these expressive interests that lie with the *witness* are the interests of the *public* in hearing evidence concerning those accused of wrongdoing. The Court has long held that free speech protections exist for the benefit of both *speakers* and *listeners* in the public debate. *See*, *e.g.*, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."). Accordingly, removing testimonial speech from the First Amendment's scope—and therefore chilling witnesses from testifying—would inherently "'contract the spectrum of available knowledge'" on which the public can base its opinions.

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[5] *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").

[6] *Cf. Branzburg v. Hayes*, 408 U.S. 665 (1972) (declining to recognize a "reporter's privilege" not to testify regarding the identity of a source due to this vital interest).

Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 866-67 (1982) (plurality opinion) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965)).

Here, the public's First Amendment interest in hearing what Petitioner witnessed was especially strong. Indeed, this case involved allegations of criminal fraud against a sitting Alabama state legislator; allowing the public to hear Petitioner's testimony, including the way in which he truthfully described the facts he witnessed, is of paramount consideration. The public's political decision-making depends on its ability to receive such information, and the First Amendment protects Petitioner's speech in part to serve this public interest. Thus, it is beyond cavil, and was when Respondent made the decision to terminate Petitioner, that Petitioner's responsive and truthful testimonial speech was protected speech.

The Eleventh Circuit reached the wrong result in this case when it held that Petitioner's testimony "owe[d] its existence to [his] professional responsibilities" because Petitioner's testimony "touched only on acts he performed as part of his official duties," and was therefore speech made "pursuant to his official duties" within the meaning of *Garcetti*. Pet. App. 4a, 5a, 7a (internal quotations omitted). In framing the inquiry in this way, the Eleventh Circuit misread the narrow exemption from First Amendment protection that the Court carved out.[7] Though the *Garcetti* exemption does not rely on the high-value/low-value

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[7] *See* Scott R. Bauries & Patrick Schach, *Coloring Outside the Lines:* Garcetti v. Ceballos *in the Federal Appellate Courts*, 262 EDUC. L. REP. 357 (2011) (describing the proper scope of the *Garcetti* rule).

distinction familiar to other categorical exemptions from the First Amendment's protections,[8] it is operationally similar to these other exemptions, in that it removes a category of speech from the First Amendment's protection and does not allow for any showing of interests to restore this protection. When this Court exempts a category of speech from otherwise applicable First Amendment protections, the lower courts have an important responsibility faithfully to apply the exemption, a duty that includes reading the exemption narrowly.[9] Indeed, the very definition of exempt categories of speech under the First Amendment presupposes the categories' narrowness.[10]

The *Garcetti* Court's repeated use of the phrase "pursuant to official duties" and its variants can be read in light of the facts before the Court, and this reading provides the only context necessary fully to understand the exemption's narrow scope. The facts the Court considered established that (1) a legal memorandum that Mr. Ceballos, a calendar deputy employed by the Los Angeles District Attorney's Office, drafted recommending dismissal of a pending

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[8] *See* Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1 (identifying the then-existing exemptions and terming the process of categorical exclusion the "two-level theory").

[9] *See*, *e.g.*, Nadine Strossen, United States v. Stevens: *Restricting Two Major Rationales for Content-Based Speech Restrictions*, 2010 CATO SUP. CT. REV. 67 (arguing that the rationales supporting the exemption for child pornography should be limited to the special case of that form of speech and its inherently criminal character).

[10] *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.").

criminal case was the only speech at issue in the case, *Garcetti*, 547 U.S. at 415 ("[Mr. Ceballos] alleged petitioners violated the First and Fourteenth Amendments by retaliating against him based on his memo of March 2."); and (2) Mr. Ceballos drafted the memorandum pursuant to a specific job duty to draft legal memoranda, *id.* at 421 ("Ceballos does not dispute that he prepared the memorandum 'pursuant to his duties as a prosecutor'") (quoting Br. for Resp. at 4, *Garcetti v. Ceballos*, *supra*, No. 04-473 (U.S. filed July 22, 2005), 2005 WL 1801035).

Following a recitation of these facts, the Court clearly stated its holding: "We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.*

The Court stated that the locus or recipient of the speech is not a controlling or dispositive factor in the determination of whether the speech is protected. *Id.* at 420-21. For this proposition, the Court cited *Givhan v. Western Line Consolidated School District*. In *Givhan*, a public school employee complained internally to her supervisors about alleged race discrimination in personnel decision-making in her school. 439 U.S. at 412-13. Ms. Givhan made her statements about her own workplace, to her supervisors, and while she was in the course of her employment. Yet the Court unanimously held that her statements were protected. *Id.* at 413.

In deciding *Garcetti*, the Court explicitly relied on *Givhan*, distinguishing that case based on the facts—specifically, that Mr. Ceballos, unlike Ms. Givhan, had a *contractual duty* to make the speech for which

he was punished. *See Garcetti*, 547 U.S. at 421. When Mr. Ceballos spoke "pursuant to [his] official duties," *id.*, he spoke because his employment contract required him to speak. Thus, where the employee spoke, and to whom he spoke, has no bearing on the question whether he spoke "pursuant to . . . official duties."

Second, and more importantly to the instant appeal, the Court reaffirmed that whether a public employee's speech is related to the employee's job is also not a dispositive or controlling consideration in determining whether the speech is protected. *Id.* Quoting *Pickering*, the Court specifically noted the concern that would be presented if public employees were prevented from speaking about matters of which they have knowledge due to their employment:

> "Teachers 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. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." The same is true of many other categories of public employees.

Id. (quoting *Pickering*, 391 U.S. at 572).

Thus, contrary to the holding of the Eleventh Circuit below, an employee does not speak "pursuant to his official duties" merely because he speaks about his job, matters he learned of at work, or topics that are pertinent to his job. In fact, public employees' unique knowledge of public policy matters relating to their employment is one of the principal justifications for *protecting* their speech. *See infra* Part III.

In the Court's words, "[t]he controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy," and "Ceballos drafted his disposition memo because that is part of what he, as a calendar deputy, was employed to do." *Garcetti*, 547 U.S. at 421. The Court cited this factor—that Ceballos drafted the memorandum as a requirement of his job—as the factor "distinguish[ing] Ceballos' case from those in which the First Amendment provides protection against discipline." *Id.* Thus, a simple and straightforward reading of *Garcetti* reveals that it creates a categorical exemption from First Amendment protection that applies *only* to speech *required* by a public employee's job duties.[11]

The *Garcetti* opinion justified the exemption of job-required speech from the First Amendment in several ways. One of these justifications—that the speech "owes its existence" to the employee's job responsibilities, *id.*—has been read completely out of context in the Eleventh Circuit, causing that court greatly to expand the scope of the *Garcetti* exemption, in direct conflict with the careful reasoning of the Court in drawing boundaries around its holding, as outlined above. The "owes its existence" dictum appears just after the Court articulates the holding establishing the categorical exemption. In full context, the Court states that "[t]he significant point is that the memo was written pursuant to Ceballos' official duties.

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[11] *See Garcetti*, 547 U.S. at 422 ("Refusing to recognize First Amendment claims based on government employees' work product does not prevent them from participating in public debate. The employees retain the prospect of constitutional protection for their contributions to the civic discourse. This prospect of protection, however, does not invest them with a right to perform their jobs however they see fit.").

Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id.* at 421-22.

Read in context, this "owes its existence" language is simply another way of stating that "speaking" by drafting a legal memorandum was what Ceballos was hired to do. Despite this obvious meaning, the court below read the language out of context as creating an additional "but for the employee's employment" test that swallows the *Garcetti* "pursuant to . . . official duties" test whole. The Eleventh Circuit thus erroneously stated: "Even if an employee was not required to make the speech as part of his official duties, he enjoys no First Amendment protection if the speech 'owes its existence to [the] employee's professional responsibilities.'" Pet. App. 5a (quoting *Abdur-Rahman v. Walker*, 567 F.3d 1278, 1283, 1286 (11th Cir. 2009)) (alteration in original)

But the *Garcetti* Court took great pains to distinguish Mr. Ceballos from Mr. Pickering, who spoke *about what he observed and learned at his workplace* and identified himself *as a teacher* in doing so, and Ms. Givhan, who spoke to her own supervisors *about what she observed at her workplace* and did so *while at work*. Neither of these employees could have prevailed if any speech they would not have made *but for* their employment were excluded from the First Amendment's protections. The sole fact distinguishing Mr. Ceballos from these other two defendants was that neither Mr. Pickering nor Ms. Givhan was *required by their employment contracts* to engage in the speech for which they were punished. Petitioner

was not required by his job duties to testify in court, so his speech is as protected as Ms. Givhan's and Mr. Pickering's.

The Eleventh Circuit held that Petitioner's speech was unprotected because he did not speak "primarily in [his] role as a citizen" and because his "testimony touched only on acts he performed as part of his official duties," and therefore "owe[d] its existence" to his employment. Pet. App. 5a, 7a-8a (internal quotations omitted; first alteration in original). *Amici* more fully address in the next section the notion of speaking "in one's role as a citizen," but, as the foregoing discussion illustrates, the Eleventh Circuit's ruling conflicts directly with the Court's decision in *Garcetti*, expanding the *Garcetti* exemption to encompass the very speech that the Court specifically and carefully excluded from it. *Amici* therefore urge this Court, at a minimum, to correct the Eleventh Circuit's erroneous interpretation of *Garcetti*'s clear and narrow exemption of work-*required* speech as a general exemption of all work-*related* speech from the First Amendment's protections.

II. THE TRUTHFUL TESTIMONY OF A WITNESS AT A GRAND JURY PROCEEDING, OR A CRIMINAL OR CIVIL TRIAL, IS CITIZEN SPEECH WITHIN THE MEANING OF *GARCETTI*

As argued above, Lane's testimony pursuant to subpoena at the federal criminal trial was citizen speech within the meaning of *Garcetti*. But this case presents an opportunity to provide clarity in this area in a manner consistent with the rationale of *Garcetti*. *Amici* propose the following rule: the truthful testimony of a witness at a grand jury proceeding,

or a criminal or civil trial, whether or not pursuant to subpoena, is citizen speech under *Garcetti*.[12]

At the outset, the truthful testimony of witnesses in criminal trials, grand jury proceedings, and civil trials is citizen speech because citizens traditionally have a civic obligation to assist in criminal and civil litigation. This Court has articulated this civic obligation on many occasions. In *Piemonte v. United States*, 367 U.S. 556 (1961), this Court observed: "Every citizen . . . owes to his society the duty of giving testimony to aid in the enforcement of the law." *Id.* at 559 n.2. To the same effect is *United States v. Calandra*, 414 U.S. 338 (1974), where this Court stated: "The duty to testify has long been recognized as a basic obligation that every citizen owes his Government." *Id.* at 345. Much earlier, this Court also declared: "It is . . . beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned." *Blackmer v. United States*, 284 U.S. 421, 438 (1932).

Indeed, this obligation is so important to the administration of justice that this Court refused to recognize a privilege allowing newsmen to refuse to testify at grand jury proceedings and thereby avoid their obligation as citizens to "respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial." *Branzburg*, 408

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[12] *Amici* express no opinion on whether there may be circumstances where public employee testimony that is allegedly false should, like truthful testimony, be protected from employer discipline by the First Amendment unless it is knowingly or recklessly false. *See generally New York Times Co. v. Sullivan*, *supra*.

U.S. at 690-91. Even more dramatically, this Court held in *United States v. Nixon*, 418 U.S. 683 (1974), that the President's claim of executive privilege for confidential communications did not excuse him from his obligation to comply with a subpoena duces tecum.

In *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008), the Third Circuit observed: "The notion that all citizens owe an independent duty to society to testify in court proceedings is thus well-grounded in Supreme Court precedent." *Id.* at 229. It was for this reason that the Third Circuit ruled that the truthful testimony of a witness for the prosecution in a state criminal trial was citizen speech under *Garcetti*, even though the trial testimony arose out of the witness's official responsibilities as an employee. "That an employee's official responsibilities provided the initial impetus to appear in court is immaterial to his/her independent obligation as a citizen to testify truthfully." *Id.* at 231.

The Seventh Circuit reached a similar conclusion in *Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007), where a police officer gave deposition testimony in another police officer's First Amendment retaliation case pursuant to 42 U.S.C. § 1983. Using what it called *Garcetti*'s practical approach, the Seventh Circuit found it irrelevant for citizen speech purposes that his deposition testimony was about his official duties. "Being deposed in a civil suit pursuant to a subpoena was unquestionably not one of Morales' job duties because it was not part of what he was employed to do." *Id.* at 598. The Seventh Circuit had previously stated: "Assistance to prisoners and their lawyers in litigation is not part of a [prison] guard's official duties." *Fairley v. Fermaint*, 482 F.3d

897, 902 (7th Cir. 2006) (Easterbrook, J.). Thus, the testimony that prison guards gave in inmates' suits was protected from employer discipline under *Garcetti*.

The historical understanding therefore supports the conclusion that the testimony of an employee who testifies truthfully in a criminal trial, grand jury proceeding, or civil trial is citizen speech.[13]

Characterizing such speech as citizen speech also promotes self-government, a central purpose of the First Amendment. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948). As this Court declared in *New York Times Co. v. Sullivan*, "debate on public issues should be uninhibited, robust, and wide-open." 376 U.S. at 270. *See also* Harry Kalven, Jr., *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191. Criminal and civil trials directly advance this purpose because they involve the application and enforcement of legal principles established by democratically elected legislature to disputed facts. Such trials also involve the administration of justice in terms of promoting fairness and assuring that justice is done. In addition, criminal and civil trials are important components of self-government because citizens themselves directly participate. Society thus has a vital interest in hearing such speech.

Criminal trials and grand jury proceedings expressly implicate self-government because charges

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[13] Even truthful testimony in a torts or contracts case is citizen speech, we believe. Every citizen is potentially a plaintiff or a defendant in private civil litigation and has an obligation to promote fairness and justice by participating as a witness when called on to do so.

are brought and litigated by government prosecutors on behalf of the political community. Because of the importance of these proceedings in assuring fairness, discouraging perjury and bias, and providing community therapeutic value, this Court has held that the public has a First Amendment right to attend criminal trials. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). But civil trials often implicate self-government directly as well. This Court's decision in *NAACP v. Button*, 371 U.S. 415 (1963), stated that, for the NAACP, litigation was a form of political expression related to combating racial discrimination. *Id.* at 429-30. This Court made the same observation regarding the ACLU in connection with its civil liberties litigation. *See In re Primus*, 436 U.S. 412, 428 (1978).

Actions under 42 U.S.C. § 1983 similarly implicate self-government. In such cases, the plaintiff claims that these defendants have violated his or her constitutional rights and seeks to hold them accountable. Indeed, several of the circuit court decisions ruling that truthful testimony is citizen speech within the meaning of *Garcetti* involve prior testimony in § 1983 litigation. *See Fairley v. Fermaint*, *supra*; *Morales v. Jones*, *supra*; *Karl v. City of Mountlake Terrace*, 678 F.3d 1062 (9th Cir. 2012). Moreover, this Court recently held that the Petition Clause protects the right of a public employee to sue his or her employer under § 1983 for retaliation in violation of the First Amendment where the subject of the lawsuit is a matter of public concern. *See Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011).[14]

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[14] The Tenth Circuit has gone even further, stating: "We write today to reaffirm that the constitutionally enumerated right of a private citizen to petition the government for the

In short, truthful testimony in criminal trials, grand jury proceedings, and civil trials directly promotes the self-government rationale of the First Amendment. Such testimony occurs in governmental proceedings and, whether the testimony is voluntary or subpoenaed, provides information that is useful to the political community.[15]

Amici further maintain that treating truthful witness testimony in criminal trials, grand jury proceedings, and civil trials as citizen speech encourages truthfulness and prevents the distortion of the truth-seeking function of the judicial process.

Protecting the integrity of the judicial process is the reason this Court has ruled that *witnesses* accused of perjury at criminal trials are absolutely immune from damages liability under § 1983. *See generally* SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 §§ 7:40-7:41 (4th ed. 2013). In *Briscoe v. LaHue*, 460 U.S. 325 (1983), the plaintiffs sued police officers and a private party for allegedly testifying falsely at their respective criminal trials and thereby violating plaintiffs' rights to due process and to trial by an impartial jury. This Court held that all the defendants were protected by absolute witness immunity. It reasoned that, when § 1983 was enacted

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redress of grievances does not pick and choose its causes but extends to matters great and small, public and private." *Van Deelen v. Johnson*, 497 F.3d 1151, 1153 (10th Cir. 2007).

[15] Truthful testimony in criminal and civil trials also furthers the marketplace of ideas and truth-seeking rationale of the First Amendment by providing information of high value in judicial proceedings. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting, joined by Brandeis, J.) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market").

in 1871, the common-law background of absolute lay witness immunity was well-established. The underlying policy—the prevention of witness self-censorship so as to protect the judicial process—applied to witnesses who were targets of § 1983 litigation as well. Because witnesses, whether lay witnesses or police officers, play an important part in the judicial process, they, like judges, should be protected by absolute immunity. The Court concluded by applying a functional approach and emphasized the function of being a witness rather than the status of the witnesses as police officers.

This Court recently extended absolute witness immunity and the functional approach to all witnesses testifying before grand juries. In *Rehberg v. Paulk*, 132 S. Ct. 1497 (2012), the plaintiff sued the chief investigator in a district attorney's office under § 1983, accusing him of testifying falsely before three separate grand juries, each of which had separately indicted the plaintiff on various charges that were subsequently dismissed. This Court unanimously held that the defendant was protected by absolute witness immunity. The Court reasoned that the factors supporting absolute immunity at trials also applied to grand jury proceedings. In both situations, the concern was with depriving the tribunal of evidence because of fear of retaliatory litigation. In addition, absolute immunity made sense here because grand jury secrecy otherwise could be subverted.

Amici submit that the reasons for absolute witness immunity apply with equal if not greater force to truthful witness testimony at criminal trials, grand jury proceedings, and civil trials as citizen speech. The concern in witness immunity cases is the integrity of the judicial process, just as it is here. Potential

witnesses, whether public employees or not, should not be intimidated by the prospect of being sued in a separate lawsuit or, if they are public employees, by the prospect that they may lose their employment or otherwise be the subject of an adverse employment action. To paraphrase Justice Frankfurter in *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951), which applied absolute immunity to legislative acts such as holding hearings, we must not expect "uncommon courage" from citizens any more than we do from state legislators.

Amici's proposed rule is actually far more modest than the absolute witness immunity this Court has already recognized. Absolute immunity protects the witness from the need to defend even against the charge that he or she testified falsely.[16] In contrast, all that *Amici*'s proposed rule does is place *truthful* witness testimony at criminal trials, grand jury proceedings, and civil trials in the category of citizen speech. Subsequent First Amendment hurdles remain for such a plaintiff, including the public-concern inquiry, *Pickering* balancing, and causation-in-fact under *Mt. Healthy City School District Board of Education v. Doyle*, *supra*.

Finally, *Amici*'s proposed rule for citizen speech promotes the purposes of *Garcetti* by providing a clear standard to public employers and public employees. It will also minimize ad hoc judicial decision-making and reduce judicial intervention in employment disputes.

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[16] Thus, if Lane had been sued for damages under § 1983 by the state representative against whom he testified in the federal trials for allegedly testifying falsely, he would be protected by absolute witness immunity and would not even have to defend against this claim.

Under *Amici*'s proposed rule, public employers will know that the truthful testimony of their employees in criminal trials, grand jury proceedings, and civil trials is citizen speech under *Garcetti*. Such a rule avoids the uncertainty that this Court viewed as an impediment to public employers' managerial discretion. *See Garcetti*, 547 U.S. at 422-23. Similarly, it will provide guidance to public employees whose truthful testimony might otherwise be chilled by the threat of adverse employment consequences. In addition, federal and state courts will have a standard for implementing *Garcetti* in cases where such truthful testimony is the motivation for the alleged First Amendment violation.

In short, *Amici*'s proposed rule provides a clear standard consistent with *Garcetti*, the purposes of the First Amendment, this Court's approach to § 1983 witness immunity, and the integrity of the judicial process.

III. FIRST AMENDMENT PROTECTION FOR PUBLIC EMPLOYEE TESTIMONY PROMOTES GOVERNMENTAL ACCOUNTABILITY AND TRANSPARENCY, WHILE PROTECTING THE JUDICIAL FUNCTION FROM IMPAIRMENT

Robust First Amendment protection for sworn, truthful testimony also encourages public employees to testify, and to do so candidly. The rule that *Amici* propose in this brief—that truthful testimony of a witness at a criminal trial, grand jury proceeding, or civil trial is citizen speech under *Garcetti*—in turn promotes the public interest both in governmental transparency and in an unimpaired judicial system.

Public employees are at the "vanguard of the citizenry," as a class of persons best able to bring to

society's attention issues of government wrongdoing. *See* Paul M. Secunda, *Neoformalism and the Reemergence of the Right-Privilege Distinction in Public Employment Law*, 48 SAN DIEGO L. REV. 907, 911 (2011). Any rule that inhibits their testimony impairs that function, and thus risks permitting corruption to continue unchecked. Indeed, the Eleventh Circuit's rule—relying on an expansive notion of what it means for speech to "owe its existence" to the employee's professional responsibilities—conflicts directly with this "vanguard of the citizenry" principle: such a reading covers any speech that would not have happened but for the fact of public employment and necessarily closes the door to all whistleblower claims.

This expansive interpretation of *Garcetti* does nothing less than redefine this whole conception of what role public employees should play in ensuring the fair and efficient administration of government services. *See* Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 4 (2009). Conscientious public servants who wish to speak out and testify truthfully in the best interests of society would be unable to do so without jeopardizing their careers. Instead, they would face the dilemma of choosing between honesty under oath and protecting their livelihoods. Some employees might choose not to testify and remain silent, or might claim to have forgotten key details.

Those results would harm not only employees' individual interests, but also society's interest in public accountability. Because public employees have unique insights about topics that relate to their employment, they are crucial voices in public debate

—especially in cases, like this one, involving public corruption. *See id.* (arguing that not permitting public employee speech that sheds light on government wrongdoing "frustrates a meaningful commitment to republican government because it allows government officials to punish, and thus deter, whistleblowing and other on-the-job speech that would otherwise inform voters' views and facilitate their ability to hold the government politically accountable for its choices").

Additionally, the unique role that public employees play in a representative democracy is dictated by the sheer size of American government. It is literally impossible for "ordinary citizens to keep track of all the myriad departments that make up federal, state, and local government" to ensure that they are functioning as they should. Secunda, 48 SAN DIEGO L. REV. at 949. This case is a prime example: ordinary citizens would have little ability to determine that Representative Schmitz was earning a substantial paycheck without reporting for work at the CITY program; only a government employee could have discovered her corruption.[17]

The Court embraced the idea of public employees at the vanguard of the citizenry in *Pickering*. In particular, in allowing the school teacher in *Pickering* to speak out on legitimate matters of public concern through an editorial to the local newspaper,

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[17] *See Andrew v. Clark*, 561 F.3d 261, 273 (4th Cir. 2009) (Wilkinson, J., concurring) ("[A]s the state grows more layered and impacts lives more profoundly, it seems inimical to First Amendment principles to treat too summarily those who bring, often at some personal risk, its operations into public view. It is vital to the health of our polity that the functioning of the ever more complex and powerful machinery of government not become democracy's dark lagoon.").

the Court observed 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. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." 391 U.S. at 572. More recently in *City of San Diego v. Roe*, 543 U.S. 77 (2004) (per curiam), the Court reaffirmed "the right of employees to speak on matters of public concern, typically matters concerning government policies that are of interest to the public at large, *a subject on which public employees are uniquely qualified to comment*." *Id.* at 80 (emphasis added); *see also Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion) ("Government employees are often in the best position to know what ails the agencies for which they work").

Consistent with good government, then, it is crucial that public employees act as the eyes and ears of the citizenry when it comes to governmental operations. Government employees are "uniquely qualified to comment" on such matters of public concern and raise alarms when something is amiss not only because of their physical proximity to the problem, but also because of their special expertise in dealing with the governmental issues that come to their attention. In the testimonial context, they also provide courts with information needed to protect us all from public corruption and other types of government wrongdoing.

That principle applies fully here. Mr. Lane protected his community from public corruption by giving to the court the necessary information it needed to convict Ms. Schmitz for her misconduct.

It does not stretch the imagination to see that the consequence of the Eleventh Circuit's cramped holding is to chill other conscientious public employees from undertaking necessary, and perhaps unpopular, actions in the face of allegations of misconduct. Without the ability of public servants to bring to light government's baser practices, all citizens suffer from the resulting lack of government transparency and accountability. Overturning the Eleventh Circuit's holding is essential to call public employees back to the vanguard to protect us all from government fraud, waste, and abuse.

Not only does deterring employees from testifying prevent them from exposing corruption, but it actually encourages corruption in the first instance. This is because the people who engage in corruption are often supervisors or others who are in positions of power. If these supervisors know that their employees will be scared to report them, even under subpoena, then it creates an incentive for them not only to threaten their employees with retaliation, but also to engage in additional corrupt acts. Of course, many public supervisors are dedicated public servants who would never do anything corrupt no matter what the law says about testimony. But for those who are inclined to cheat, the Eleventh Circuit's holding provides some solace.

In addition to the importance of providing protection to public employees at the vanguard of the citizenry, it is also crucial that public employees be able to speak freely and truthfully about government malfeasance so that the judicial process is not distorted. Distortion of the litigation process occurs when public employees do not feel free to testify in various legal proceedings for fear of losing their

jobs.[18] This Court expressed analogous concerns in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), where the Court struck down as violative of the First Amendment a federally imposed restriction prohibiting Legal Services Corporation ("LSC")-funded attorneys, as a condition of the receipt of federal funds, from challenging the legality or constitutionality of existing welfare laws.

According to this Court, the restriction addressed not the government's own speech (the viewpoint of which the government is free to control), but instead impermissibly regulated private speech on the basis of viewpoint. This was because the purpose of the LSC program was to facilitate private speech, rather than promote a governmental message. The Court determined that the federal restriction on LSC attorneys' legal arguments was tantamount to controlling the judicial system in a way that distorted it "by altering the traditional role of the attorneys . . . [to] present all the reasonable and well-grounded arguments necessary for proper resolution of the case." *Id.* at 544-45. This Court thus concluded that, "[b]y seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power." *Id.* at 545.

No less than in *Velazquez*, "[t]he restriction imposed by the [lack of protection for public employee testimonial speech] threatens severe impairment of the judicial function." *Id.* at 546. Where public employees testify truthfully as citizens at criminal

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[18] The arguments made here concerning distortion of the litigation process are parallel and consistent with those contained in the discussion on witness immunity *supra* at Part II.

trials, grand jury proceedings, and civil trials, there is a serious risk of distortion of the legal process if they are fearful of the employment consequences of their testimony (which is clearly not government speech that "owes its existence" to the government employer). Such consequences tend to encourage lying or at least the shading of the truth. It is essential that the law instead provide these employees with a modicum of First Amendment free speech protection so that they may engage in "speech and expression upon which courts [may] depend for the proper exercise of the judicial power."

CONCLUSION

For the reasons set forth above, the judgment of the Eleventh Circuit should be reversed.

Respectfully submitted.

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