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 THE NATIONAL EDUCATION ASSOCIATION, SERVICE EMPLOYEES INTERNATIONAL UNION, AND AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

This brief *amici curiae* in support of Petitioner Edward Lane is submitted, with the consent of the parties,[1] on behalf of the National Education Association ("NEA"); Service Employees International Union ("SEIU"); and American Federation of State, County, and Municipal Employees, AFL-CIO ("AFSCME").

NEA is a nationwide employee organization with approximately three million members, the vast majority of whom serve as educators and education support professionals in our nation's public schools, colleges, and universities. As education professionals, NEA's members are deeply committed to ensuring that public school students, their teachers, and other education professionals have the freedom to speak openly about issues, especially controversial ones, and that their freedom to deliberate and engage over such topics is central to the education process. NEA and its members further believe that when public sector employees give sworn testimony, such testimony is necessarily a matter of public concern and may not be the basis for any adverse employment action against the employee.

SEIU is a labor organization that represents over two million men and women working in health care, property services, and public services throughout the United States. As reflected in its Mission Statement, SEIU is committed to building a civil society in which the voices of workers and their families are heard at every

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[1] Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of the brief.

level of government in support of economic opportunity and social justice.

AFSCME is a labor organization with 1.6 million members in hundreds of occupations who provide vital public services in 46 states, the District of Columbia, and Puerto Rico. AFSCME advocates for fairness in the workplace, excellence in public services, and prosperity and opportunity for all working families.

SUMMARY OF ARGUMENT

Individuals do not forfeit their First Amendment rights as a condition of accepting public employment. There are certain categories of low-value public-employee speech against which a government employer may take adverse action—such as where the speech does not involve matters of public concern or the speech is within the employer's legitimate proprietary control. Outside of those limited categories, however, the First Amendment generally requires that a court conduct a balancing inquiry that accounts both for the interests of the employee and the public in the speech at issue and for the government employer's ability to operate effectively.

Judged by those standards, a public employee's truthful sworn testimony will almost *always* merit protection against employer retaliation. That is because an employee's truthful testimony necessarily implicates public concerns, and a government employer has no legitimate reason for retaliating against an employee for such truthful testimony—even (unlike the case here) when such testimony can be characterized as part of a particular public employee's job duties.

The nature of the interests at stake therefore calls for a categorical rule prohibiting retaliation against truth-

ful testimony, rather than a case-by-case balancing. A rule that would leave public employees with any degree of uncertainty as to whether they can speak the truth under oath without fear of employer retaliation is insufficient to protect the important First Amendment interests involved; public employees should be free of the apprehension of potential disciplinary action that could result in something less than the full and truthful disclosure of facts that sworn testimony is meant to elicit. And because public employees may be called upon to testify in such a great variety of contexts and different proceedings, a rule that fails to adequately protect them against employer retaliation could greatly impair the integrity and functioning of government processes.

Where the interests of employees and the public at large weigh so obviously in favor of protecting the exercise of First Amendment rights, this Court has not hesitated to create rules that provide broad protection. Therefore, this Court should hold without reservation that truthful testimony by public employees enjoys First Amendment protection against employer retaliation.

ARGUMENT

THE FIRST AMENDMENT PREVENTS A GOVERNMENT EMPLOYER FROM RETALIATING AGAINST A PUBLIC EMPLOYEE FOR PROVIDING TRUTHFUL SWORN TESTIMONY.

Government employees are not obliged, simply by virtue of having entered public service, to completely relinquish their First Amendment rights. *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 465 (1995); *see also City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) (per curiam); *Pickering v. Bd. of Educ.*, 391

U.S. 563, 568 (1968). This Court long ago rejected the "dogma . . . that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Connick v. Myers*, 461 U.S. 138, 143 (1983). It recognized instead that "[t]here are some rights and freedoms so fundamental to liberty that they cannot be bargained away in a contract for public employment." *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2493 (2011).

To be sure, certain speech by public employees can be curtailed on the premise that "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions" in order to secure "the efficient provision of public services." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). Yet even then, it would be inaccurate to suggest that such employee speech "is totally beyond the protection of the First Amendment." *Connick*, 461 U.S. at 147. For example, there is no suggestion that the government could jail or fine the Petitioner for providing the truthful testimony at issue here. *See generally Brandenburg v. Ohio*, 395 U.S. 444 (1969).

The question in a case such as this, then, is whether the speech at issue, albeit entitled to some level of protection under the First Amendment, falls into an area that gives the public employer the categorical prerogative to discharge, discipline, or take other adverse action against the employee in retaliation for the speech. *See*, *e.g.*, *Roe*, 543 U.S. at 84; *Garcetti*, 547 U.S. at 421. If no categorical limitation on the speech applies, then at the very least a court must conduct a balancing of interests that accounts for the interests of the employee in the speech, the value of the speech, and the effect, if

any, of the speech on the government employer's ability to operate efficiently and effectively. *See Pickering*, 391 U.S. at 568.

This Court has recognized two circumstances in which a public employee's otherwise protected speech may be categorically restricted. First, where employee speech involves no matter of public concern—such as personal gripes about internal office matters—the government employer may take action without conducting the balancing normally required under *Pickering*. *See Roe*, 543 U.S. at 84; *Connick*, 461 U.S. at 143. Second, because government employers need "a significant degree of control over their employees' words and actions," they may restrict employees' speech made "pursuant to their official duties." *Garcetti*, 547 U.S. at 418, 421.

The Petitioner's brief demonstrates that Lane's truthful sworn testimony in a grand jury proceeding and criminal trial does not fit within either of these categorical exclusions from *Pickering*'s balancing test and that, when *Pickering* balancing is properly applied, Lane's speech undoubtedly deserves protection from employer sanction. *See* Br. of Pet. Lane at 17-25.

But we would go further than that. The nature of the interests at stake is such that the balance will almost *always* call for protecting truthful testimony against employer retaliation. On the one hand, testimony, by furthering the search for the truth, inherently implicates public concerns; on the other, as a rule a government employer can have no legitimate, efficiency-based reason for retaliating against an employee for such truthful testimony. Consequently, the protection of truthful testimony should not depend on a case-by-case

balancing of interests. Rather, even where—unlike in this case—sworn testimony can be characterized as part of a particular public employee's job duties, the public interests that are served by ensuring public employees that their truthful testimony cannot cost them their jobs call for a categorical rule against employer retaliation.[2]

A. A Public Employee's Truthful Sworn Testimony Necessarily Involves a Matter of Public Concern.

There can be no question that, as a general matter, sworn testimony enjoys protection under the First Amendment. *See Butterworth v. Smith*, 494 U.S. 624, 633-34 (1990); *cf. also Perry v. Sindermann*, 408 U.S. 593, 598 (1972) (noting that the plaintiff's protected speech consisted, in part, of sworn testimony before legislative committees). When a public employee provides such testimony truthfully, that speech act necessarily involves a matter of public concern, such that under *Connick* and its progeny, public employers cannot be given free rein to retaliate against an employee for having told the truth under oath.

In *Connick* and the subsequent cases in which this Court has developed the concept of speech on matters

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[2] We focus our discussion on cases where an employer retaliates against the giving of truthful testimony because the employer would prefer that the truth not be known. That is what is alleged here and in most public employee First Amendment retaliation cases. This is not to suggest that only testimony that is found to have been fully accurate is entitled to protection against adverse employment actions. Cases where the factual accuracy of testimony is disputed may require a more complex analysis.

of "public concern," the circumstances in which a government employer is free to retaliate against employee speech have been carefully defined in terms that clearly do *not* apply to truthful sworn testimony. In *Connick*, an assistant district attorney, dissatisfied with her supervisor's decision to transfer her to another division, circulated an intra-office questionnaire that solicited her colleagues' views on a variety of workplace issues, including the transfer policy, office morale, and the level of confidence in the office's supervisors. *See* 461 U.S. at 141. With the exception of a question that asked whether others felt pressure to work in political campaigns, this Court found that the questionnaire touched only on internal workplace grievances, not on matters of public concern. Accordingly, the Court held that no *Pickering* balancing was required, as such case-by-case scrutiny would ignore the "common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Id.* at 143.

Next, in *Roe*, this Court addressed a First Amendment claim by a police officer who was fired for off-duty activity that included displaying and selling videos on the internet showing him stripping off a police uniform and engaging in sexual activity. On those facts, the Court had "no difficulty in concluding that Roe's expression does not qualify as a matter of public concern under any view of the public concern test." 543 U.S. at 84.

The public-concern test articulated in *Connick* and applied in *Roe* is aimed at ensuring that the functioning of government offices is not inhibited by speech that holds little value to the public at large. *See Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (*Connick* recog-

nized that "restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest," and therefore the "First Amendment protections [of purely private speech] are often less rigorous."). In *Connick*, that concern focused on how granting protection to the airing of workaday office grievances—speech that conveys no important information to the public—would effectively "require a public office to be run as a roundtable for employee complaints over internal office affairs." 461 U.S. at 149. And in *Roe*, the Court emphasized the government employer's legitimate interest in restricting low-value speech about non-work concerns, such as Roe's homemade pornography, that might be "detrimental to the mission and functions of the employer." 543 U.S. at 84.

None of those concerns is present when the speech at issue is truthful sworn testimony. Such speech is not a matter of private or trivial concern because, as this Court has noted, it is furnished for the purpose of influencing "official governmental action, action that often affects the rights and liberties of others." *United States v. Alvarez*, 132 S. Ct. 2537, 2546 (2012). As such, testimony necessarily implicates public concern with respect to the proper functioning of the government's truth-seeking processes. "[T]he means used to achieve justice must have the support derived from public acceptance of both the process and its results," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) (plurality opinion), and "[t]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts," *United States v. Nixon*, 418 U.S. 683, 709 (1974). If public employees could testify candidly only at the risk of losing their

jobs, the public could hardly have faith that a proceeding would produce "full disclosure of all the facts." *Id.*

What is at risk here is not only public trust in the process by which the government enforces the law, but the integrity of the process itself. A "fundamental goal of our legal system" is "arriving at the truth." *United States v. Havens*, 446 U.S. 620, 626 (1980). Without full and truthful testimony, the courts lack one of the necessary elements for "proper exercise of the judicial power." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001)*; see also Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009) (emphasizing the "vital state interest" in "maintain[ing] the integrity of the judiciary and the rule of law").[3]

Given the public importance of providing truthful sworn testimony—both to the particular proceeding in which the testimony is offered, and to the administration of justice writ large—it is safe to say that, absent extraordinary circumstances, such speech should always qualify as a matter of public concern. This speech is of obvious "concern to the community," *Connick*, 461 U.S. at 146, on a "subject of general interest and of value and concern to the public," *Snyder*, 131 S. Ct. at 1216 (quoting *Roe*, 543 U.S. at 83-84).

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[3] The public interest in truthful sworn testimony is not confined to judicial proceedings, but extends to other proceedings in which sworn testimony is given, such as administrative hearings, arbitrations, and certain legislative hearings. *See, e.g.*, *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002) ("[A] fair and expeditious resolution of the underlying controversy [is] a goal of arbitration systems and judicial systems alike"). In all of these proceedings, truthful sworn testimony is an essential part of the process by which the government seeks to secure a fair resolution of matters presented for decision.

Respondent Burrow acknowledges that Lane's testimony in the corruption case involved a matter of public concern, *see* Br. of Resp. Burrow at 19-21, but argues that this Court should decline to adopt a categorical rule that all truthful testimony by a government employee qualifies for the same treatment, *see id.* at 25-27. In particular, Burrow contends that some employee testimony might not warrant protection against employer retaliation because it could involve "opinions," "speculat[ion]," and "testi[mony] about extraneous matters," or might "otherwise exceed the scope of the societal expectation that [employees should] merely testify truthfully." *Id.* at 25. Burrow also argues that a bright-line rule is inconsistent with this Court's holding in *Borough of Duryea* that the Petition Clause does not prohibit the firing of a government employee based on a lawsuit against his employer that does not involve a matter of "public concern." 131 S. Ct. at 2497.

Burrow is wrong on both counts. First, proceedings in which testimony is taken under oath are not unrestricted platforms on which a witness may express any view on any subject she wishes. In a trial, for example, testimony consists of answers made in response to specific questions, and its relevance is subject to judicial oversight. *See* Fed. R. Evid. 401, 402 & 403. Similar constraints apply in other proceedings where testimony is taken under oath. Thus, the concern that a government employee will use the occasion of her testimony to launch irrelevant personal attacks against others, *see* Br. of Resp. Burrow at 19-21, is fanciful.

Second, this Court's holding in *Borough of Duryea* has no bearing on whether sworn testimony in a government proceeding qualifies as a matter of public con-

cern. An employee is under no legal or societal obligation to file a grievance or petition, and an employee's decision to take such action does not, standing alone, implicate the broader public concern in the truth-seeking function that is implicated by proceedings in which testimony is taken under oath. Furthermore, the fact that testimony has been deemed relevant in such a proceeding gives the speech an importance—as determined by an impartial tribunal—that does not inhere in every grievance or petition that any individual may choose to pursue. There consequently are good reasons for extending broader protection to testimony than to petitions.

B. This Court's Decision in *Garcetti* Does Not License a Government Employer to Retaliate Against Public Employees for Giving Truthful Testimony.

Nor does the Court's decision in *Garcetti* categorically strip a public employee's sworn testimony from protection against employer retaliation. In cases, such as this one, where providing testimony is not within the employee's job duties, *Garcetti* is wholly inapplicable. And even where a public employee's job duties do include giving testimony, *Garcetti*'s underlying rationale does not allow a government employer to retaliate against the employee for having told the truth in her testimony.

1. *Garcetti* is plainly inapplicable where, as here, giving sworn testimony is not part of a public employee's job duties.

At the outset, the decision below thoroughly botches the relevant inquiry under *Garcetti* by focusing nar-

rowly on whether the subject matter of Lane's testimony "owe[d] its existence" to Lane's job, Pet. App. 5a, and concluding that Lane was subject to discharge because his testimony "touched only on acts he performed as part of his official duties," *id.* at 7a. The Eleventh Circuit's error arises from its attempt to dissect an isolated "sentence[] of the United States Reports as though [it] were the United States Code." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993).

To be sure, the "owes its existence" formulation is drawn from language in *Garcetti*. 547 U.S. 421-22. But that passage does not mean—as the Eleventh Circuit appeared to assume—that a government employer can restrict its employees' speech on a matter of public concern whenever the speech deals with facts learned by virtue of the employment. That is evident from the fact that the *Garcetti* Court "acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees," and noted that speech by public employees—who are "the members of a community most likely to have informed and definite opinions" about the operation of government services—is crucial "for informed, vibrant dialogue in a democratic society." *Id.* at 419 (citations and quotation marks omitted).

As this Court put it in *Roe*:

> Were [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues. 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.

543 U.S. at 82 (citation omitted).

The Eleventh Circuit's misguided reading of *Garcetti* must therefore be rejected. Where, as here, giving sworn testimony is not part of an employee's job duties, and the only connection between the testimony and a government job is that the facts described in the testimony were learned on the job, *Garcetti* is simply inapplicable and does not permit the employer to take adverse action.[4] *Garcetti* protects a government employer's legitimate interest in directing and controlling the performance of an employee's job—whether the job performance consists of conduct or of speech—but *Garcetti* in no way grants government employers *carte blanche* to direct or control *everything an employee may say* about what happens in the workplace. This point is so obvious, in fact, that Respondent Burrow concedes it and asks that the judgment below be reversed on this basis. *See* Br. of Resp. Burrow at 16-21.

2. Even where a public employee's job duties include giving testimony, *Garcetti* does not allow a government employer to retaliate against the employee for giving truthful testimony.

Even in circumstances where a public employee's job duties *do* include providing sworn testimony, *Garcetti* should not be read to license the employer to

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[4] Because *Garcetti* is so plainly inapplicable to Lane's circumstances, we agree with Petitioner's submission that Respondent Franks is not entitled to qualified immunity. *See* Br. of Pet. Lane at 34-45. Lane's First Amendment right to be free of employer retaliation was clearly established at the time of the offending conduct.

discharge or discipline an employee in retaliation for providing that testimony.

Garcetti's holding concerning speech made "pursuant to" a public employee's professional duties derives from the need for government employers to retain "control over what the employer itself has commissioned or created." 547 U.S. at 421-22. This Court reasoned that, if a government employer were not permitted to exercise "a significant degree of control over [its] employees' words and actions . . . , there would be little chance for the efficient provision of public services." *Id.* at 418. Thus, for speech to be categorically unprotected against employer sanction under *Garcetti*, it must be speech that the government employer has a legitimate proprietary interest in directing or controlling.[5]

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[5] This Court has referred to the kind of speech that cannot be restricted under *Garcetti* as "citizen" speech. *See*, *e.g.*, *Borough of Duryea*, 131 S. Ct. at 2493-94. But as we have observed, the distinction between purely private speech and speech on a matter of public concern rests on the different *interests* that are implicated by these two classes of speech. *See supra* at 6-11. The concept of "citizen" speech may serve as a useful shorthand for the kinds of interests that are implicated by speech on a matter of public concern, but it would be a mistake to view the protection of employee speech as dependent on a determination that an individual was acting in the *status* of a citizen. After all, the First Amendment does not protect speech on matters of public concern only when it comes from citizens. *See*, *e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 343 (2010) ("The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'"). This Court has acknowledged that the government may not retaliate against corporations or other non-citizens who contract with the government

A public employee's truthful testimony does not, however, implicate the proprietary and efficiency-related concerns that warrant treating some forms of employee expression as unprotected against employer retaliation. This Court has repeatedly emphasized that providing lawful testimony is a *civic* duty, independent of any job duty. *See*, *e.g.*, *Blair v. United States*, 250 U.S. 273, 281 (1919) (declaring that "the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned"); *Blackmer v. United States*, 284 U.S. 421, 438 (1932) (observing that 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"). Accordingly, this is not a situation in which there is "no relevant analogue to speech by citizens who are not government employees." *Garcetti*, 547 U.S. at 424. Government employees and non-government employees alike are called upon to give testimony when they possess knowledge of events that are relevant to the disposition of a government proceeding.

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based solely on their speech. *See Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Academy*, 551 U.S. 291, 299-300 (2007) (applying *Pickering* balancing to speech by a private high school); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996) (same with regard to corporate contractor's refusal to support particular political candidates). Thus, as used in *Garcetti* and its progeny, "citizen speech" denotes—not the identity or intent of particular speakers—but a class of speech that is not subject to the public employer's traditional exercise of legitimate proprietary control because of the public concerns that are implicated by the speech.

Furthermore, even if an employee's truthful testimony has some effect on government operations, that does not mean that the government employer would have a legitimate proprietary interest in controlling or punishing the speech. *See Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (noting that a government employer's restriction on employee speech must be "justif[ied] . . . on *legitimate* grounds") (emphasis added). As the Seventh Circuit has correctly observed: "Even if offering (adverse) testimony is a job duty, courts rather than employers are entitled to supervise the process. A government cannot tell its employees what to say in court, *see* 18 U.S.C. § 1512, nor can it prevent them from testifying against it." *Fairley v. Andrews*, 578 F.3d 518, 525 (7th Cir. 2009).[6]

Finally, granting protection to truthful sworn testimony would not commit "courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors." *Garcetti*, 547 U.S. at 423. Courts already supervise the setting and process for taking testimony, and adjudicating a claim that an em-

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[6] It is for this reason that one of *Garcetti*'s core concerns—that protecting certain employee speech would be "inconsistent with sound principles of federalism and the separation of powers," 547 U.S. at 423—is completely inapplicable to truthful sworn testimony. In those instances, it is the *failure* to protect such speech that threatens to upset the separation of powers, namely, by allowing one branch of government (often the executive) to leverage its authority as employer in a manner that undermines the functioning and integrity of another branch, such as the judiciary. *See In re Michael*, 326 U.S. 224, 227 (1945) (noting that perjured testimony "is at war with justice" because it can cause a court to render a "judgment not resting on truth").

ployee has been subjected to retaliation for truthful sworn testimony involves no "displacement of managerial discretion by judicial supervision." *Id.*

Respondent Burrow, however, contends that *Garcetti*'s concern for a public employer's proprietary interest remains "just as relevant when an employee testifies in court." Br. of Resp. Burrow at 23. Burrow notes, for example, that an employee's truthful testimony might reveal some kind of misconduct or malfeasance that should not be insulated from employer discipline. Such concerns are misguided. To hold that the First Amendment protects an employee from being subjected to retaliation for having given truthful testimony would *not* bar an employer from disciplining or firing an employee for *conduct* that was revealed in such testimony.

C. This Court Should Hold as a Rule That a Government Employer May Not Discharge or Otherwise Punish a Public Employee in Retaliation for the Message She Conveyed in Truthful Sworn Testimony.

1. As we have shown, there is no justification for categorically licensing a public employer to retaliate against employees for giving truthful sworn testimony, regardless of whether such testimony was given as part of the employee's job duties. Instead, such retaliation against protected speech must, at least, be scrutinized according to the balancing of interests prescribed by this Court's decision in *Pickering*. And, from our discussion up to this point, the result of that balancing should be obvious: apart from extraordinary circumstances that are absent both here and in the vast mine run of public-employee-testimony cases, the balancing of interests

tips decisively in favor of protecting the employee speech.

Pickering mandates an evaluation of the "balance between the interests of the [public 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 public services it performs through its employees." 391 U.S. at 568. In conducting that balancing of interests, this Court has noted that "the manner, time, and place of the employee's expression" and "the context in which [it] arose" are also relevant. *Rankin*, 483 U.S. at 388.

The interests of an employee in providing truthful sworn testimony are obviously significant. The obligation to provide such testimony is a civic duty of the highest order. *See Blair*, 250 U.S. at 281; *Blackmer*, 284 U.S. at 438. Moreover, if an employee were to yield to employer pressure to forsake giving truthful testimony, the result would be tremendous personal jeopardy for the employee. *See* 18 U.S.C. § 1621 (federal offense of perjury); *see also Havens*, 446 U.S. at 626 ("[W]hen defendants testify, they must testify truthfully or suffer the consequences.").

Together with the employee's interest in being free to testify truthfully, the public has a vital interest in receiving the benefit of truthful testimony, which extends not only to the subject matter of testimony in a particular case but also to the proper administration of justice in general. *See Nixon*, 418 U.S. at 709. The combined interests that favor protecting sworn testimony against employer retaliation are therefore of great weight.

In contrast, a government employer's legitimate and efficiency-based interests in restricting or punishing an

employee's truthful sworn testimony will—if they exist at all—be vanishingly small. A government employer certainly has no legitimate interest in suborning perjury. *See Fairley*, 578 F.3d at 525. And, any legitimate interest the employer might have in the testimony is attenuated by the fact that the testimony is given in a governmental proceeding that furnishes a context and manner of delivering speech that is outside the traditional supervisory realm of a workplace. *See Rankin*, 483 U.S. at 388.

Respondent Burrow complains that lower court decisions have "given exceedingly short shrift to the *Pickering* balancing test when addressing employee testimony." Br. of Resp. Burrow at 28 (citing, *Chrzanowski v. Bianchi*, 725 F.3d 734, 741-42 (7th Cir. 2013), *petition for cert. filed*, 82 U.S.L.W. 3282 (U.S. Oct. 18, 2013) (No. 13-1498), and *Reilly v. Atlantic City*, 532 F.3d 216, 231 (3d Cir. 2008)). But such treatment is well deserved when, even by Burrow's own admission, a government employer's legitimate interests will "rarely" outweigh the employee's interest in giving truthful sworn testimony. *Id.*

Burrow posits a handful of scenarios in which she maintains that a government employer's interests might be significant enough to warrant retaliation against an employee for sworn testimony. But Burrow's hypotheticals do not withstand analysis. For example, Burrow suggests that a police officer's testimony might cause such discord with another officer that the two "can no longer work together," and the employer should therefore be "free to reassign, demote, or fire" the testifying officer. *Id.* This begs the question why, if a reassignment were in order in such circumstances,

the officer to be reassigned should be the one who, without fault, was called upon to give truthful testimony. In any event, it is doubtful that a mere reassignment of partners would be a sufficiently adverse action to support a First Amendment claim. *Cf. Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 71 (2006). And, given that such measures would address any concern about strife between officers, the employer would not have a sufficiently weighty interest to demote or fire the testifying officer.

Burrow also recycles the prospect that an employee's sworn testimony might reveal misconduct, incompetence, or other facts that would warrant discipline or discharge. But, as we have explained, it would not be retaliation for an employer to take action based on *conduct that was revealed* as a result of truthful testimony. A claim would arise only when the motivation for the adverse action was the employer's desire to retaliate against the employee for telling the truth under oath.

2. Given the considerations detailed above, this Court should hold that a public employee's truthful sworn testimony is broadly protected against employer retaliation.

A broadly protective rule will ensure that public employees can properly discharge their duties when called upon to testify. Respondent Burrow has been unable to describe any situation in which the legitimate interests of a government employer would be served by retaliating against an employee due to the employer's desire to suppress the message the employee truthfully conveyed under oath. Perhaps the mind of man is capable of imagining such a situation, although none occurs to us. But the mere theoretical possibility that some such unusual

circumstance might arise does not justify any rule by this Court that truthful testimony is not protected. Just as public employees should be free to testify without fear of a subsequent damages action, *see Briscoe v. LaHue*, 460 U.S. 325 (1983), so too should an employee be able to testify free of the uncertainty and apprehension of potential disciplinary action that might make the employee distort or shade this testimony in order to please an employer who does not wish the truth to be known, *see id.* at 333-34.

A great deal rides on enabling government employees to carry out these civic duties faithfully, without being dissuaded by fear of retaliation. There are tens of millions of individuals employed in the public sector nationwide, the largest categories of whom are in education, health and hospitals, and police protection.[7] These three categories alone made up sixty-four percent of all public employees, or approximately 14.2 million of the 22.2 million people employed in the public service in this country.[8] And within these three categories are millions of potential witnesses in any number of judicial or other proceedings.

In most states, educators—a category that includes teachers, principals, school nurses, administrators, school social workers, and guidance counselors—are obligated to report suspected child maltreatment or

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[7] *See* U.S. Census Bureau, *Annual Survey of Public Employment & Payroll Summary Report: 2011* at 3-4 (Aug. 22, 2013), *available at* http://www2.census.gov/govs/apes/2011_summary_report.pdf.

[8] *Id.*

abuse.[9] Such reporting often results in those educators being asked to appear in court as witnesses.[10] Similarly, many states require hospital personnel and law enforcement to report suspected abuse, again likely resulting in requests to testify.[11] Teachers may also be called to testify in administrative hearings dealing with matters arising under the Individuals with Disabilities Education Act,[12] hospital workers may have necessary information pertaining to hospital sanitation or medical malpractice claims, and police officers will undoubtedly be involved in a range of matters that lead to the giving of sworn testimony, including the circumstances surrounding the arrest and detention of suspected or convicted criminals, or fraud or corruption involving other officers or police personnel.

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[9] U.S. Dep't of Health & Human Servs., *The Role of Educators in Preventing and Responding to Child Abuse and Neglect*, at 29-30 (2003), *available at* https://www.childwelfare.gov/pubs/usermanuals/educator/educator.pdf.

[10] *Id.*

[11] *See, e.g.*, Mich. Comp. Laws § 722.623 (requiring physicians, physician's assistants, medical examiners, nurses, individuals licensed to provide emergency medical care, and other health care professionals, as well as law enforcement officers, to report suspected child abuse or neglect); Va. Code Ann. § 63.2-1509 (establishing reporting requirements for "[a]ny person licensed to practice medicine," "[a]ny hospital resident or intern, and any person employed in the nursing profession," a number of other health-related professionals, and "[a]ny law-enforcement officer").

[12] *See* 20 U.S.C. § 1415 (authorizing procedural safeguards under the Act, including the ability to file a complaint and an opportunity for an "impartial due process hearing").

Other categories of public employees also are likely to be essential witnesses in a variety of proceedings. Corrections officers may be indispensable witnesses in proceedings stemming from civil rights complaints filed by inmates. Fire protection employees may be needed to testify regarding the causes of a fire. Electric, gas, or water supply employees may be called upon to provide information regarding utility failures or accidents that result in government investigations or civil lawsuits.

If each of these 22.2 million government workers feared retaliation by his or her employer for providing truthful sworn testimony in judicial or other proceedings, the integrity and functioning of government processes would suffer serious damage.

Where the interests of employees and the public at large weigh so obviously in favor of protecting the exercise of First Amendment rights, this Court has not hesitated to create rules that provide broad protection. For example, when it comes to employer policies that amount to political patronage or party-affiliation requirements, this Court has declared such arrangements unlawful without requiring a detailed case-by-case analysis. *See Rutan v. Republican Party*, 497 U.S. 62 (1990); *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976). The same has been true for employer-mandated declarations of religious belief, *see Torcaso v. Watkins*, 367 U.S. 488 (1961); for loyalty oaths, *see Elfbrandt v. Russell*, 384 U.S. 11 (1966); and for political oaths, *see Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).

Here, as in those other contexts, a rule that leaves an individual uncertain whether he can speak the truth without being subjected to punishment is insufficient

to protect the important First Amendment interests at stake. Accordingly, this Court should hold without reservation that truthful sworn testimony by public employees enjoys First Amendment protection against employer retaliation.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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