No. 13-483

In the Supreme Court of the United States

EDWARD R. 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 *AMICI CURIAE* THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, INC. AND THE INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION FOR HUMAN RESOURCES IN SUPPORT OF RESPONDENT STEVE FRANKS

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INTEREST OF THE *AMICI CURIAE*[1]

The International Municipal Lawyers Association ("IMLA") is a non-profit, professional organization of over 2,500 local government entities, including cities, counties, and special district entities, as represented by their chief legal officers, state municipal leagues, and individual attorneys. Since 1935, IMLA has served as a national, and now international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the federal and state courts.

IMLA has a strong interest in apprising the Court of the significant adverse consequences facing the nation's local governments if the decision below is reversed. Local governments are collectively one of the nation's largest employers, and employ more people who are called upon to testify in court than any other employer. As such, local governments will be strapped with significant unanticipated and unbudgeted costs if the decision below is reversed by turning state court wrongful termination cases into federal constitutional torts. Private employers will face no similar ramifications. In addition to the economic consequences, the IMLA has a strong interest in

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Petitioner and both Respondents have filed blanket consents with this Court to the filing of all *amicus* briefs.

ensuring that local government employers are able to effectively manage their workplaces, and the Eleventh Circuit's decision supports their ability to do so without turning federal courts into super personnel grievance boards for public employees.

The members of the International Public Management Association for Human Resources ("IPMA-HR") are human resource professionals and human resource departments at the federal, state, and local levels of government. IPMA-HR has a long history of involvement in public sector employment litigation. The Association's members recognize the importance of maintaining the proper balance between the First Amendment rights of employees and the rights of public employers to ensure efficient and effective government operations.

SUMMARY OF THE ARGUMENT

The undersigned *Amici* condemn the retaliatory dismissal of a government employee by its employer for simply providing truthful testimony. *Amici* also condemn the discharge of employees who are subpoenaed to testify as fact witnesses whether they are government or private employees or whether they are witnesses to a crime, accident, or any other event.

But this case is not about whether a government employer should be allowed to dismiss an employee for testimony the employee provides. The issue here is whether a government employee should be permitted to assert a *constitutional* claim based on the First Amendment when that employee alleges that his or her employer retaliated for speech related to the performance of the employee's job duties. *Amici* submit

that providing such a right conflicts with the precedents from this Court and would have profoundly negative effects on the numerous government employers in this Country, as well as the general public as was so presciently noted by Judge O'Scannlain when he urged this Court to adopt the rule it did in *Garcetti v. Ceballos*, 547 U.S. 410 (2006) for on-the-job work related speech. *See Ceballos v. Garcetti*, 361 F.3d 1168, 1192-93 (9th Cir. 2004) (O'Scannlain, J., concurring), *rev'd*, 547 U.S. 410 (2006). Instead, consistent with *Garcetti* this Court should clarify that a public employee cannot assert a constitutional First Amendment cause of action for speech related to the performance of that employee's job duties.

For much of our nation's history, public employees could not assert a First Amendment cause of action against their employer for retaliation based on the employee's speech. While this Court subsequently "qualified" the absolute exclusion of the First Amendment from the government employment context, it has nevertheless been appropriately reluctant to expand the First Amendment's reach too far in recognition of the difference between the government acting as an employer and the government acting as a sovereign.

Consistent with its prior precedents, this Court's decision in *Garcetti* explained that the First Amendment does not provide a cause of action where a government employee acts pursuant to his or her job duties. The factual focus of *Garcetti* gave this Court no occasion to specifically address whether speech related to the performance of one's job duties that is made in a context where the employee does not typically speak as

part of their job duties is also outside the reach of the First Amendment, but this Court's precedents compel the same treatment for such speech. Furthermore, the analysis does not change because speech is made as part of testimony or in response to a subpoena; particularly given that protection of that speech will likely increase the litigation burden faced by local governments, and will lead to suffocating federal court oversight of government employment disputes.

Ultimately, this Court should decline Petitioner's invitation to move away from *Garcetti*. Constitutionalizing employee grievances like the one at issue here would "jeopardize the delicate balance" between the rights of public employees and the interests of government employers established by the relevant legislative bodies, and unnecessarily graft a rigid and inflexible framework over the government employment sphere. *See Enquist v. Oregon Dept. of Agr.,* 553 U.S. 591, 607 (2008).

Leaving cases such as this out of the constitutional realm will allow the democratic process to continue to tweak and tailor appropriate statutes to balance the public policy concerns this Court expressed in *Garcetti*. As *Garcetti* recognized, the public has an interest in some speech of government employees. *See Garcetti,* 547 U.S. at 419. Critically, however, it is *the public's* interest and therefore it is *the public's* job to express that interest through its democratically elected representatives. The Court can and should rely on the legislative process to ensure that the public's interest is protected in the manner the public determines most appropriate.

STATEMENT

Petitioner Edward Lane ("Lane") held a position as the Director of the Community Intensive Training for Youth Program ("CITY") at Central Alabama Community College ("CACC") from September 2006 to January 2009. Pet. App. at 2a-3a. The appointment was probationary. *Id.* at 10a. As part of his job, Lane ran CITY, including day-to-day operations, hiring and firing of employees, and making financial decisions. *Id.* at 10a.

Shortly after beginning his job at CITY, Lane discovered Suzanne Schmitz ("Schmitz") was listed on CITY's payroll but was not reporting for work and had not otherwise performed work for CITY. *Id.* at 2a, 11a. Evidently both of Lane's predecessors had sought to correct this problem, including enlisting the assistance of the College President who supported their efforts. *U.S. v. Schmitz*, 634 F.3d 1247, 1253-55 (11th Cir. 2011). Lane ultimately fired Schmitz on October 19, 2006, pursuant to his job responsibilities, after she refused to report to work. *Id.* Lane was not fired after taking that action. As the decision below recognized, "[n]o one disputes that Lane was acting pursuant to his official duties as CITY's Director when he investigated Schmitz's work activities, spoke with Schmitz and other CACC officials about Schmitz's employment, and ultimately terminated Schmitz's employment." *Id.* at 7a; *see also id.* at 10a.

On November 13, 2006, following an investigation by the FBI, Lane testified before a grand jury against Schmitz. *Id.* at 12a. Lane was not fired after he testified at the grand jury. Then again, in August of 2008, Lane was subpoenaed to testify and did testify in

Schmitz's criminal trial in federal court about his interactions with Schmitz in his capacity as her supervisor. Pet. App. at 2a-3a, 12a-13a. Lane's testimony concerned information that Lane learned while performing his duties as director of the CITY program and that led to his ultimate decision to fire Schmitz. Pet. App. at 3a. Specifically, "the subject matter of Lane's testimony touched only on acts he performed as part of his official duties." Pet. App. at 7a.

Approximately four months after Lane testified at Schmitz's 2008 criminal trial, on January 9, 2009, Respondent Steve Franks asserts that Lane was effectively laid off from his position, along with 28 other CITY employees for financial reasons. Pet. App. at 3a-4a, 12a-14a. The layoffs occurred at a time when nationwide layoffs were regular news in a period we refer to as the "Great Recession." U.S. DEPT. OF LABOR, U.S. BUREAU OF LABOR STATISTICS, REP. 1025, EXTENDED MASS LAYOFFS IN 2009 (2010), *available at* http://www.bls.gov/mls/mlsreport1025.pdf.[2] Respondent Steve Franks asserts that he thereafter rescinded the layoff of certain employees due to an ambiguity in their probationary service. *See* Pet. App. at 3a-4a, 16a. Approximately seven months later the entire CITY program upon which Petitioner's job was based was eliminated due to budgetary issues and the remaining employees were laid off. *Id.* at 15a-16a; *see also* Tracy Gordon, *State and Local Budgets and the*

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[2] In 2008 and 2009, the U.S. labor market lost 8.4 million jobs. *See The Great Recession*, THE STATE OF WORKING AMERICA, *available at* http://stateofworkingamerica.org/great-recession (last accessed April 7, 2014).

Great Recession, THE BROOKINGS INSTITUTION, Dec. 2012, *available at* http://www.brookings.edu/research/articles/2012/12/state-local-budgets-gordon (last accessed on April 7, 2014) (discussing dramatic drop in state and local revenues during Great Recession and noting that even with stimulus, "federal funds did not offset state and local revenue losses").

Sometime after Lane was dismissed he was again subpoenaed to testify and once again testified at Schmitz's February 2009 trial. Pet. App. at 12a-13a; *U.S. v. Schmitz*, 634 F.3d 1247, 1253-55 (11th Cir. 2011). Nearly two years later, and with no prior warning to his employer, Lane brought suit in district court alleging a First Amendment retaliation cause of action against Respondent Steve Franks. *See* Pet. App. at 18a; Resp. Steve Franks Br. at 13.[3]

[3] *Amici* submit that plausibility and rationality collide against the idea that Petitioner's employers: (1) did not fire him for ignoring their counsel on the issue of Schmitz's employment; (2) did not fire him for firing Schmitz; and (3) did not fire him for testifying at the Grand Jury in 2006, but instead waited over two years after he testified at the Grand Jury to base the firing decision on the fact that he testified about his termination of Schmitz for misconduct. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This is particularly so, given that such action would risk prosecution from the United States Attorney for obstruction of justice, especially if Lane believed his termination prior to the February 2009 trial was retaliatory.

ARGUMENT

I. The First Amendment Should Not Provide a Cause of Action Where an Employee Claims His or Her Employer Retaliated Against Speech Related to the Performance of the Employee's Job Duties.

Amici support Respondent Steve Frank's position that *Garcetti* should be read to support the "citizen analogue" framework for determining whether the First Amendment should apply to particular speech made by the employee.[4]

Amici further argue that this Court should not turn a state court wrongful termination case into a federal constitutional tort by limiting *Garcetti* as Petitioner and his *amici* suggest. Instead, this Court should clarify that pursuant to *Garcetti* public employees cannot assert a First Amendment cause of action based on retaliation for speech made by a public employee that is related to the performance of that employee's job duties.

A. The Application of the First Amendment to the Government Employment Context Is a Recent Development, and That Expansion Remains Only a Qualification to the Original Prohibition.

For much of our nation's history, government employers did not have to concern themselves with the application of the First Amendment to their

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[4] *Amici* also agree that Respondent Steve Franks is entitled to qualified immunity.

managerial decisions. *See Garcetti*, 547 U.S. at 417. Indeed, it was recognized that the First Amendment did not apply to government retaliation for employee speech. As Justice Holmes famously explained while sitting on the Supreme Judicial Court in Massachusetts, a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220 (1892) (Holmes, J.). That view reflected the view held by this Court for decades until as recently as 1952. *See, e.g., Adler v. Board of Education*, 342 U.S. 485 (1952).

In fact, the common and accepted practice for a significant portion of our nation's history actually conditioned government employment on the relinquishment of free-speech rights. *See United States Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers AFL-CIO*, 413 U.S. 548, 557 (1973) (describing "spoils system" under which federal employment "depend[ed] upon party service and changing administrations, rather than meritorious performance"). Even Thomas Jefferson once approved an order that prohibited officers of the Executive Branch from participating in "electioneering" or in any way attempting "to influence the votes of others." *Id.* (quoting 10 J. Richardson, Messages and Papers of the Presidents 98-99 (1899)).

In 1968, this Court qualified the established dogma by holding that "public employees do not surrender all their First Amendment rights by reason of their employment." *Garcetti*, 547 U.S. at 417 (citing *Pickering v. Bd. of Educ. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 568 (1968)). But even as it qualified the long-standing exclusion of the First

Amendment from the government employment context in *Pickering*, this Court still recognized that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering*, 391 U.S. at 568.

Following *Pickering*, the Court was careful to ensure that the critical distinction between the role of government as employer and sovereign was maintained, and that the First Amendment did not constitutionalize public employee grievances. Accordingly, in *Connick*, the Court held that the discharge of a former assistant district attorney for circulating a questionnaire did not violate the First Amendment and noted that "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Connick v. Myers,* 461 U.S. 138, 149 (1983). Likewise, in *Garcetti* this Court noted the prior established dogma and explained that it had been "qualified in important respects" such that "in certain circumstances" the First Amendment may protect public employee speech. *Garcetti*, 547 U.S. at 417. The Court then held that the facts before it did not suffice because "the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities." *Id.* at 424.

B. This Court Has Consistently Recognized That the Government Is Subject to Far Less Constitutional Restrictions When Acting As An Employer Than When Acting As a Sovereign.

The historical treatment of the First Amendment in the government employment context is due in large part to the unique role played by the government when acting as an employer and not a sovereign. This Court has consistently and regularly recognized that the critical distinction must be maintained because "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions" or "there would be little chance for the efficient provision of public services." *Garcetti,* 547 U.S. at 418. That is why this Court has traditionally "afford[ed] government employers sufficient discretion to manage their operations" and emphasized the importance of ensuring there is no "displacement of managerial discretion by judicial supervision." *Id.* at 422-23. As a result, the Court has explained that "the government as employer . . . has far broader powers than does the government as sovereign." *Waters v. Churchill*, 511 U.S. 661, 671 (1994).

In fact, in many contexts it has long been held that the Government is subject to a lower level of constitutional scrutiny when it is not exercising its power to legislate, regulate or license. *U.S. v. Kokinda*, 497 U.S. 720, 725 (1990) (citations and quotations omitted). Indeed, "[w]here the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the

heightened review to which its actions as a lawmaker may be subject." *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). This fundamental truth has been recognized "in many contexts, with respect to many different constitutional guarantees." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 94 (1990) (Scalia, J., dissenting).

But perhaps the most fundamental result of the unique role of the government specifically acting as employer is that this Court has repeatedly rebuffed attempts by public employees to "constitionalize the employee grievance." *Garcetti*, 547 U.S. at 420 (quoting *Connick*, 461 U.S. at 154). Accordingly, and "[g]iven the 'commonsense realization that government offices could not function if every employment decision became a constitutional matter,' 'constitutional review of government employment decisions must rest on different principles than review of . . . restraints imposed by the government as sovereign.'" *Enquist*, 553 U.S. at 599 (citations omitted).

C. The First Amendment Should Not Provide a Cause of Action Where the Speech at Issue Relates to the Performance of an Employee's Job Responsibilities.

Consistent with the above-cited precedents, this Court held in *Garcetti* 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." *Garcetti*, 547 U.S. at 421. According to the Court, "[r]estricting 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." *Id.* at 421-22 (emphasis added).

Here the speech offered in Petitioner's testimony clearly "owe[d] its existence to [his] professional responsibilities" while working as an employee of CACC. *See id*. His job was to run the CITY program, including day-to-day operations, hiring and firing of employees, and making financial decisions. Pet. App. at 10a. Part of those day-to-day operations included supervising and managing Schmitz. *Id.* at 2a, 11a. After he fired her pursuant to his duties, he was ultimately asked to testify about those duties and the circumstances that led to her termination. *Id.* at 12a.

His testimony concerned information he learned while performing his duties as director of the CITY program and "touched only on acts he performed as part of his official duties." Pet. App. at 3a, 7a. His speech in this context held no personal opinion; it merely recounted his interactions with Schmitz and others while performing his job. *See Ceballos*, 361 F.3d at 1188-89 (O'Scannlain, J., concurring) ("While it has rarely been stated explicitly by the Supreme Court, the implicit premise underlying the First Amendment's hostility toward viewpoint-driven rules abridging the freedom of speech is that such constraints impermissibly infringe upon individuals' freedom of choice to express *their personal* opinions or to otherwise express *themselves*.") (emphasis in original).

It is true, as Petitioner claims, that the statement at issue in *Garcetti* was made as a direct result of Ceballos' performance of his typical job duties. *Garcetti*, 547 U.S. at 421. Petitioner uses this fact to

criticize the decision below, Pet. Br. at 26-34, but just because this Court determined that the First Amendment did ***not*** apply to situations such as Ceballos' does not mean that all other job related speech is now covered by the First Amendment. In fact, the evolution of this area of law demonstrates the opposite to be true.

As *Garcetti* explained, the prior "unchallenged 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" has not been abandoned. *Garcetti*, 547 U.S. at 417; *see also supra* Part I.A. Instead, that default rule has simply "been qualified in important respects" and now "in certain circumstances" the First Amendment protects a public employee's right to speak as a citizen on matters of public concern. *Garcetti*, 547 U.S. at 417. After *Garcetti*, those "circumstances" clearly do not include speech made pursuant to a government employee's job duties where the employee was performing a task the employee typically performs as part of his or her job. *See id.* at 421. Given the factual focus in *Garcetti*, this Court did not discuss whether speech related to the performance of a government employee's job duties made in a context where the employee does not typically speak as part of his or her job duties is protected by the First Amendment.

This Court can now clarify *Garcetti* by holding that speech related to the performance of one's job duties is *also* not covered by the First Amendment even if that speech is made in a context where the employee does not typically speak as part of his or her job duties

because that speech "owes its existence" to the performance of that job duty. *See id.* at 421-22. This case presents a perfect opportunity for this Court to make such a clarification because Petitioner's testimony expressed no personal opinion and relayed solely factual information about the performance of his job duties. Pet. App. at 3a, 7a. As a result, he did not truly step outside his role as an employee by expressing any personal opinions.

Such a rule would not require a departure from this Court's decision in *Pickering* because government employees would be able to express their opinions on general information they learned while at work. *See Pickering*, 391 U.S. at 570-72. And, as in *Pickering*, they would be able to speak in public forums and in public debate and bring suit to advance the public's interest on matters of public concern. They would simply not be entitled to a constitutional cause of action based on the First Amendment for speech concerning the performance of their job duties. Such a rule would also align partially with the approach advocated by Co-Respondent Susan Burrow, because it would exclude from the First Amendment only speech related to what an employee had been paid by the government to do, and not more generally any information obtained in the course of employment. *See* Resp. Susan Burrow Br. at 14-21.

That clarification recognizes the fundamental truth that most government employers and employees would consider responding to a subpoena for testimony related to their job duties to be part of their job even if it is not formally described in an official policy. *See Garcetti,* 547 U.S. at 424-25 ("Formal job descriptions

often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is *neither necessary nor sufficient* to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.") (emphasis added).

D. The Fact That Lane's Speech Was Offered In a Testimonial Context and In Response to a Subpoena Should Not Alter the Analysis.

Petitioner and his *amici* focus on the claim that Petitioner testified truthfully, and claim that such speech must be protected by the First Amendment. While truthful speech has undoubtedly been an essential part of our democracy since its inception, it has also been subordinated for much of our nation's history to the interests of the government acting in the role of an employer. As noted above, the application of the First Amendment to the government employment context remains a relatively recent phenomenon. *See supra* Part I.A. As this Court explained in *Garcetti,* that historical treatment has not been wholly abandoned, but rather "qualified in important respects." *Garcetti,* 547 U.S. at 417.

Indeed, *Amicus Curiae* First Amendment Coalition cites to statements from both Thomas Jefferson and Justice Holmes in support of the historical appreciation of the importance of truthful speech. First Amendment Coalition Br. at 3. As noted above, however, both of those great men recognized that government in the role of the employer was ***not*** subject to the restrictions of the First Amendment. *See supra* Part I.A. Justice

Holmes is *particularly* known for his position that government employees cannot use the First Amendment to shield them from retaliatory action, *McAuliffe*, 155 Mass. at 220 (Holmes, J.), and Thomas Jefferson certainly acted in a manner consistent with that view. *See United States Civil Service Comm'n*, 413 U.S. at 557.

By constitutionalizing the employee grievance in the manner they advance, Petitioner and his *amici* would turn state court wrongful termination cases into federal constitutional torts and effectively seek to have the judiciary make nuanced and context-sensitive judgments about the quality of speech or its social appropriateness. Petitioner and his *amici* attempt to downplay the dangerous potential for increased and constitutionalized litigation by claiming meritless claims will be relatively easily disposed of, yet Petitioner's own implausible claim belies that argument, and as this court explained in *Enquist,* such arguments are "beside the point." *Enquist*, 553 U.S. at 608.

The practical problem of constitutionalized employment litigation is not whether claims will ultimately succeed, but "that governments will be forced to defend a multitude of such claims in the first place, and courts will be obliged to sort through them in a search for the proverbial needle in a haystack." *Id.*; *see also Garcetti*, 547 U.S. at 449 (Breyer, J., dissenting) ("the ability of a dissatisfied employee to file a complaint, engage in discovery, and insist that the court undertake a balancing of interests . . . itself may interfere unreasonably with both the managerial function . . . and with the use of other grievance –

resolution mechanisms, such as arbitration, civil service review boards, and whistle-blower remedies, for which employees and employers may have bargained or which legislatures may have enacted."). The resulting damage to the efficient functioning of state and local government employers would be particularly crippling because state litigation would become federalized and drain their already limited resources.

Petitioner and his *amici* create a viscerally appealing argument that in an environment of political correctness seeks to have the Court announce some form of immunity under the First Amendment for government employee testimony. Yet, that span of immunity surely cannot be protective of all speech. *See Ceballos*, 361 F.3d at 1191-92 (O'Scannlain, J. concurring) ("The majority's response is long on policy, but short on the law. Its argument is seductively simple: Because whistleblowers play an important role in rendering government accountable, the First Amendment must protect their whistleblowing activities. How can anyone disagree with that general principle? . . . This case – and the doctrine it ratifies – thus implicates more than the too-common tendency of well-intentioned jurists to squeeze a policy-oriented square peg into a round constitutional hole.") (citations omitted).

All agree that *un*truthful speech should get no protection, and we assume Petitioner would agree that testimonial speech admitting to a crime finds no First Amendment protection from criminal prosecution. But what about speech where employers should be able to dismiss employees for their testimony concerning the performance of their job duties: an employee divulging

his own misconduct on the job or where an employee admits in testimony during an administrative proceeding or a divorce to having an affair while on the clock?[5]

While Petitioner assumes that the truthful nature of an employee's testimony is known or easily knowable, the following hypothetical demonstrates that determining whether speech is truthful can be an uncertain and arduous inquiry. Suppose a city decides to employ armed police officers to protect its schools following the tragedies of school massacres. Police officers A, B and C are all employed to fill these positions. During a scuffle outside a school where all three are employed, the officers engage an unruly teenager who they ultimately arrest for resisting arrest and assault. Officers A and B testify in the criminal trial that the teenager was aggressive, assaulted Officer A, and was arrested for the assault and for resisting arrest. Officer C testifies that Officer A was actually the aggressor and that both A and B used force after the teen was subdued. The teenager is acquitted at trial and brings a Section 1983 action against the city and its Officers A and B. The officers all testify as they had in the criminal trial and a jury determines

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[5] *See, e.g., Krocka v. Police Bd. of City of Chicago*, 762 N.E.2d 577, 587 (Ill. App. Ct. 2001) ("The hearing officer heard Krocka state that he testified in federal court that he had patronized prostitutes while on duty, falsified his departmental health appraisal, consumed alcohol while on duty, and used vulgar language toward or about an assistant corporation counsel while in federal court. The Board also received a copy of Krocka's sworn federal court testimony.").

that none of the officers or the city have liability, rendering a defense verdict.

Due to the Great Recession and poor financial management, the city's new administration ends the program and Officers A, B and C are each laid off. All claim retaliation. Officer C claims retaliation for his testimony against the city and Officers A and B claim retaliation because they believe the city felt it should not have lost the criminal trial and that their testimony exposed the city to liability.

Under this scenario, a court might reach different conclusions over which testimony was truthful A's, B's, or C's. Under the rule proposed by the Petitioner only the officer whose testimony the court concludes was truthful finds the safe harbor of immunity from discharge. Establishing a rule based on such value judgments simply does not work.[6]

II. Providing a First Amendment Cause of Action for Speech Related to the Performance of One's Job Duties Would Amount to Constitutionalizing the Employee Grievance and Harm Government Employers and the Public at Large.

Petitioner and his *amici* would have this court believe that by not extending the First Amendment to

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[6] Additionally, Petitioner's focus on subpoenas would not assist in that situation if all of the officers were subpoenaed. In any event, the relative ease with which a subpoena can be obtained makes it an odd choice on which to base constitutional distinctions. *See, e.g.,* R.I. GEN. LAWS ANN. § 9-17-3 (West 2013) (providing that even a notary public can issue a subpoena).

provide public employees with a cause of action against their employers for retaliating against their testimonial speech their employers will have the right to terminate them with impunity. But we are not writing on a blank slate here. Numerous statutory and common law remedies exist to provide public employees relief under such circumstances. *See Garcetti*, 547 U.S. at 425 (explaining that a "powerful network of legislative enactments – such as whistle-blower protection laws and labor codes [are] available to those who seek to expose wrongdoing.").

By attempting to constitutionalize the employee grievance in the manner they propose, Petitioner and his *amici* "jeopardize the delicate balance" Federal, State and local governments have struck concerning the treatment of whistleblowers. *See Enquist,* 553 U.S. at 607.

A. Constitutionalizing the Employee Grievance As Petitioner Requests Would Needlessly Enshrine a Rigid and Unchangeable Cause of Action Into the Government Employment Context to Address a Perceived Problem Better Left to the Democratic Process.

"[N]ot every procedure that may safeguard protected speech is constitutionally mandated." *Waters*, 511 U.S. at 670. Petitioner and his *amici* advance a "problem" that they assert is in need of a solution, but numerous non-constitutional remedies are available to address a retaliatory dismissal of an employee in response to his or her testimony. Furthermore, because they are not constitutional remedies, they are flexible to adapt to the changing

interests sought to be advanced by the public as expressed through their elected representatives.

1. Numerous Statutory and Common Law Remedies are Available to Address Petitioner's Perceived Problem.

All fifty states, and the District of Columbia, have enacted some form of whistleblower protection laws. *See* Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of Whistleblower Protection*, 38 AM. BUS. L.J. 99, 108 (2000).[7] Most states have adopted a general comprehensive whistleblower law, but some have elected to target specific provisions of the law or particular industries. *Id.*; *see, e.g.,* N.M. STAT. ANN. § 28-17-19 (Michie 1999); VA. CODE ANN. §§ 40.1-51.2 (Michie 2013).

Additionally, several municipalities have adopted ordinances that protect whistleblowers. *See, e.g.*, ST. PAUL ADMIN. CODE § 42.01; DENVER MUN. CODE § 2-106. State statutes also commonly extend whistleblower protections to municipal, as well as state, employees. *See, e.g.*, ARK. CODE ANN. § 21-1-601 *et seq*. (Michie 2013); LA. REV. STAT. ANN. § 42:1169 (West 2013); MISS. CODE ANN. § 25-9-171 *et seq*. (2013).

To be sure, these laws and their treatment in each state are not uniform. The Florida whistleblower statute, for example, requires the employee to show a

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[7] *See also Ceballos*, 361 F.3d at 1192 (O'Scannlain, J., concurring) ("How strange it must now be for the hundreds, if not the thousands, of legislators throughout this country who have voted to enact or to retain [whistleblower] laws now to discover that their votes were essentially meaningless").

violation of a statute. *See Taylor v. Memorial Health Systems, Inc.*, 770 So.2d 752, 754 (Fla. App. 5 Dist. 2000) (interpreting FLA. STAT. ANN. § 448.102 (West 1981 & Supp. 1995)). Some states require the employee to first inform their employer of the problem to afford the employer an opportunity to correct it. *See, e.g.,* N.H. REV. STAT. ANN. § 275-E:2 (2014). Some states do not protect whistleblowers who act in "consideration of personal benefit." PA. STAT. ANN. tit. 43, § 1422 (West 2014); W. VA. CODE, § 6c-1-2 (2014); *see also* WIS. STAT. 230.83(2) (2013) (offering protection under certain circumstances). Different states have allocated the burden of proof differently as well. *Compare Davidson v. Commonwealth, Dept. of Military Affairs*, 152 S.W.3d 247, 251 (Ky. App. 2004) *with Raphael v. Okyiri*, 740 A.2d 935, 957 (D.C. 1999).

Other States have also adopted whistleblower statutes that apply specifically to the employees of municipal governments. *See, e.g.*, CAL. GOV'T CODE § 53298(a) *et seq.* (West 2014); WASH. REV. CODE ANN. § 42.41.010 *et seq.* (West 2014). In fact, Connecticut, for example, provides greater protection for employees of lower levels of government than for employees of the State. *See* CONN. GEN. STAT. ANN. § 31-51m(b) (West 2014).

Amicus Government Accountability Project ("GAP") asserts that the existing protections for employees are insufficient because "existing state whistleblower protection laws are a patchwork" and "[o]n the state level, protections vary widely with respect to the categories of government employees covered, the employee activity that can constitute protected

'whistleblowing,' and other requirements." Gov. Accountability Project Br. at 3-4, 16-17.

But what *Amicus* GAP fails to appreciate is that those nuances and variations are the appropriate product of the democratic process in our federal system. Rather than a one-size-fits-all solution to the competing concerns inherent in the encouragement of whistleblowing, the various States have taken different approaches to balance the competing concerns of potential whistleblowers and their employers. *See Smith v. Robbins*, 528 U.S. 259, 273 (2000) (noting this Court's "established practice, rooted in federalism, of allowing the States wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy.").

Petitioner similarly claims that existing protections are insufficient simply because Petitioner's whistleblower claim failed below. *See* Pet. Br. at 23 n.7. But the citizens of Alabama have made a policy decision not to extend certain whistleblower protections to certain employees. They are free by legislative action to weigh the interests of employers and employees and fashion their own solution to the issue.

While *Amicus* GAP and Petitioner decry the potentially disparate treatment of whistleblowers, they offer no explanation as to why government employees should be afforded *constitutional* relief for whistleblowing in the form of the First Amendment while their private employee counterparts are left to rely solely on statutory relief. Indeed, *Amicus* GAP laments the fact that "Enron was able to engage in retaliation against employee whistleblowers based on

a gap in then-existing law." Gov. Accountability Project Br. at 16 (citing *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1162 (2014)). But Enron was not a government employer, so the First Amendment would not have afforded any relief to those employees even under the expansive application offered by Petitioner and his *amici*.

Additionally, whistleblower statutes are not the only remedy available for government employees who have been retaliated against for their testimony as "[a] majority of states have adopted a public-policy exception to the employment-at-will rule. The public-policy exception states that an employee will have a claim for wrongful discharge if the discharge contradicts public policy." Genna H. Rosten, Annotation, *Wrongful Discharge Based on Public Policy Derived From Professional Ethics Codes*, 52 A.L.R. 5th 405 (1997). While Alabama has not recognized the public policy exception to at-will employment, it has recognized the implied contract exception and the covenant of good faith and fair dealing exception. *See* Charles J. Muhl, *The Employment-At-Will Doctrine: Three Major Exceptions*, MONTHLY LABOR REVIEW 4 (2001), *available at* http://www.bls.gov/opub/mlr/2001/01/art1full.pdf; *Ex Parte Amoco Fabrics and Fiber Co.*, 729 So.2d 336 (Ala. 1998); *Hoffman-La Roche, Inc. v. Campbell*, 512 So.2d 725 (Ala. 1987). In fact, Alabama is one of only eleven states to recognize the covenant of good faith exception. *See* Muhl, *supra* at 4. Additionally, Alabama has specifically outlawed witness tampering and defined the crime broadly as the "attempt[] to induce a witness" to "[t]estify falsely or unlawfully withhold testimony, or [a]bsent himself from any official proceeding to which he has been

legally summoned." ALA. CODE § 13A-10-124 (2014). Furthermore, it is a reckless employer who terminates a federal witness in retaliation for testimony in a criminal trial so as to subject themselves to criminal liability for obstruction of justice. *See, e.g.,* 18 U.S.C. §§ 1512-14 (2014).[8]

It is simply not the case that the absence of First Amendment protection here means that government employers will gain the "right" to retaliate against their employees for testimony they give. Those employers will remain subject to the existing rules and regulations applicable to them. *See Garcetti*, 547 U.S. at 425 (explaining that a "powerful network of legislative enactments – such as whistle-blower protection laws and labor codes [are] available to those who seek to expose wrongdoing."). In fact, the testimonial context is a particularly appropriate one in which to rely on existing statutes, as retaliatory dismissal for truthful testimony could specifically implicate obstruction of justice and witness tampering statutes that would not be relevant with other claims of retaliatory discharge. *See, e.g.,* 18 U.S.C. §§ 1512-14 (2014); ALA. CODE § 13A-10-124 (2014).

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[8] The Schmitz case was a highly publicized and significant prosecution involving political corruption in Alabama. The United States prevailed after a lengthy investigation and two criminal trials in bringing Schmitz to justice and in exposing a corrupt legislature. Nothing in Petitioner's or his *amici*'s submissions suggest that Petitioner ever sought protection from the United States Attorney under these laws, nor is there any reason to believe that if noticed, the United States Attorney would have declined to protect Petitioner. *Amici* suggest the claim of retaliation here was an afterthought, discrediting the plausibility of Petitioner's lawsuit. *See Ashcroft*, 556 U.S. at 678.

2. Federal, State, and Local Legislatures Are the Appropriate Bodies to Address Petitioner's Perceived Problem to the Extent Existing Remedies Fall Short.

This Court has recognized the importance of legislatures in fashioning the appropriate remedies available to government employees. In *Enquist* this Court rejected the employee's attempt to "jeopardize the delicate balance governments have struck between the rights of public employees and the government's legitimate purpose in promot[ing] efficiency and integrity in the discharge of official duties." *Enquist,* 553 U.S. at 607 (citations and quotations omitted). The Court offered the example of the Civil Service Reform Act, which covers most federal employees but specifically excludes some groups of employees from its protection as an example of the legislative process finding a better solution. *Id.* (citing 5 U.S.C. § 2302(a)(2)(C) (2004)).

According to the Court, applying the Equal Protection Clause to review allegedly arbitrary employment action would "undo[] Congress's (and the States') careful work." *Id.* Quoting a First Amendment employment context case, the Court explained that its decision was guided by "the 'common-sense realization that government offices could not function if every employment decision became a constitutional matter.'" *Id.* (quoting *Connick*, 461 U.S. at 143). Petitioner and his *amici* seek to fashion a one-size-fits-all remedy, but fail to see that doing so would "jeopardize the delicate balance governments have struck" in enacting whistleblower statutes and other protections against retaliatory discharge. *See id.*

The Enron example provided by *Amicus* GAP demonstrates precisely why the "problem" presented by Petitioner and his *amici* does not require a *constitutional* solution. As this Court explained in its recent decision in *Lawson v. FMR LLC*, following the Enron scandal "Congress identified the lack of whistleblower protection as 'a significant deficiency' in the law" and enacted Section 806 of Sarbanes–Oxley to "address[] th[at] concern." 134 S. Ct. 1158, 1162-63 (2014); *see also* 18 U.S.C. § 1514A (2010). In that same decision the Court responded to concerns raised by one of the parties and noted that if its interpretation of a provision of that statute generated a flood of claims "Congress c[ould] easily fix the problem by amending § 1514A explicitly to remove personal employees of public company officers and employees from the provision's reach." *Lawson*, 134 S. Ct. at 1173. Of course, such a revision would not be possible with a *constitutional* resolution of the issue.

So while the statutory protection at the time of the Enron scandal may have proved inadequate, the relevant legislative body was able to adjust to experience and fashion a new statutory remedy to strike a more appropriate balance between the interests of the employer and the interests of the potential whistleblower employees. In doing so, it had access to all the policy tools unique to the legislative branch of government to weigh all relevant considerations when reaching the appropriate balance. Likewise, if this Court's most recent decision in *Lawson* jeopardizes Congress's delicate balance in Sarbanes-Oxley, Congress is free to amend it to stem any flood of claims that could result.

The "powerful network of legislative enactments" presently available are more than sufficient to address Petitioner's perceived problem, and if more is required the democratically elected legislatures can pass additional statutes. *Garcetti,* 547 U.S. at 425.[9] More critically, legislatures are free to flexibly address the problem in a comprehensive manner to ensure a "delicate balance" is struck between the needs of the government and the needs of its employees. *See Enquist,* 553 U.S. at 607. Such a balance includes making appropriate distinctions between types of employees, types of criticisms, areas of employment, and other relevant factors in a way not achievable in the court system.

That flexibility has never been more important than now, as concerns grow concerning the dramatic expansion in the number of meritless whistleblower actions that have been brought against government employers. *See* Richard D. Alaniz, *Managing the Rise of Baseless Whistleblower Retaliation Claims*, ACCOUNTING WEB, July 12, 2013, *available at* http://www.accountingweb.com/print/222071 (last accessed April 7, 2014) (noting "according to OSHA's own

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[9] For example, the public response and resulting legislation following this Court's decision in *Kelo v. City of New London, Connecticut*, 545 U.S. 469 (2005) demonstrates how quickly the public can act through its legislative bodies when it perceives a problem with a recent judicial interpretation as long as the interpretation permits such legislative remedies. *See* Larry Morandi, *Eminent Domain Legislation: Post-Kelo Update*, NAT'L CONFERENCE OF STATE LEGISLATURES, Jan. 1, 2012, *available at* http://www.ncsl.org/documents/natres/EminentDomainPost-Kelo.pdf (last accessed April 7, 2014) (discussing amendments of laws and state constitutions in response to the *Kelo* decision).

statistics, a mere 2 percent of claims were found to merit agency action"). Time will tell if this wave of baseless whistleblower actions is a serious issue in need of a legislative response, or simply the product of the most recent recession; but what is unquestionably true is that the fact that such causes of action are statutory and not constitutional means they can be adjusted and adapted as society sees fit.

In addition to providing a malleable and adjustable framework rather than a fixed and rigid constitutional tort, the legislature, with access to hearings, public comment, and other policy tools, can fashion remedies that are clear and easy to follow by both employers and employees alike. It is no secret that judicial tests and limits can sometimes be difficult to predict and follow in practice. It is further no secret that the pace of judicial change can often be glacial and fall significantly behind the needs of society.

As *Garcetti* acknowledged, the public has an interest in "receiving the well-informed views of government employees engaging in civic discussion." *Garcetti*, 547 U.S. at 419. But the advancement of the public's interest in that regard is better left to the public to address through its democratically elected legislatures. It is not the province of this Court to craft solutions to such policy issues, particularly in light of the policy tools available to legislative bodies to fashion and later adjust the perfect remedies to problems presented. *See Ceballos*, 361 F.3d at 1192-93 (O'Scannlain, J., concurring).

As this Court has recognized, "[t]he relations between the United States and its employees have presented a myriad of problems with which the

Congress over the years has dealt . . . Government employment gives rise to policy questions of great import, both to the employees and to the Executive and Legislative Branches." *U.S. v. Gilman*, 347 U.S. 507, 509 (1954). In declining to create a new nonstatutory *Bivens* remedy in that context, this Court explained that Congress had already created "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations." *Bush v. Lucas*, 462 U.S. 367, 388 (1983). The Court explained that Congress was in a "far better position" to consider the policy ramifications of a new ground for relief because "it . . . may inform itself through factfinding procedures such as hearings that are not available to the courts." *Id.* at 389. The Court declined to create a new *Bivens* action "permit[ing] a federal employee to recover damages from a supervisor who ha[d] improperly disciplined him for exercising his First Amendment rights . . . because [the Court was] convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it." *Id.* at 390.

In light of this, it is not surprising that this Court's decision in *Garcetti* recognized that while "[e]xposing governmental inefficiency and misconduct is a matter of considerable significance," the sound judgment of public employers and a "powerful network of legislative enactments – such as whistle-blower protection laws and labor codes – [are] available to those who seek to expose wrongdoing." 547 U.S. at 425. Those protections, and numerous others, "protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions." *Id.* at 426. An additional extension of the First Amendment

into the government employment context was therefore unwarranted in that case. It is equally unwarranted in this case.

If this Court nevertheless remains concerned that the rule proposed by the undersigned would stifle legitimate citizen speech, this Court could still adopt that rule but add to it a "safe harbor" option akin to the one found in the rule suggested by Professor Kermit Roosevelt III in an article that sought to quell the lament in the world of academia and at the Plaintiff's bar over the decision in *Garcetti*:

> [T]he solution I prefer, the problem of the blurry line between speech as a citizen and speech as an employee could be solved by creating a safe harbor for employees who want to speak as citizens. Such a safe harbor could require that the employees speak to the public, do so outside the workplace, and make clear that they are not speaking for their employer. Speech in this safe harbor would, ideally, be protected not by the anemic *Connick-Pickering* balancing test but by something closer to the ordinary First Amendment analysis, with carveouts for speech that either demonstrably disrupts working relationships or suggests an unfitness for the job.
>
> This would be a space where we could approach true parity between government employees and ordinary citizens. This approach would use the First Amendment to protect speech that has First Amendment value. It would leave protection of other speech to devices that are

> tailored to the needs of the different circumstances in which it occurs.

Kermit Roosevelt III, *Not as Bad as You Think: Why* Garcetti v. Ceballos *Makes Sense*, 14 U. PA. J. CONST. L. 631, 659-60 (2012) (citations omitted).

B. Constitutionalizing the Employee Grievance As Petitioner Requests Would Engender Significant Legal Uncertainty for Government Employers and Lead to Suffocating Judicial Oversight.

As this Court explained in *Enquist*, "absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." 553 U.S. at 600 (quoting *Connick*, 461 U.S. at 147). Accordingly, in that case the Court reasoned that "ratifying a class-of-one theory of equal protection in the context of public employment would impermissibly 'constitutionalize the employee grievance.'" *Id.* at 609 (quoting *Connick*, 461 U.S. at 154). The Court's reasoning was consistent with its prior determination that "[t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." *Id.* (quoting *Bishop v. Wood*, 426 U.S. 341, 350 (1976)).

Petitioner proposes a rule that truthful testimony related to matters of public concern that is not offered pursuant to the employee's official duties is protected by the First Amendment. According to Petitioner, "[i]n such cases, employers may impose discipline for the testimony only if they show that the testimony's

disruptive effects on the workplace outweigh the employee's interest in testifying, and society's interest in hearing the testimony." Pet. Br. at 8. Such a test would place an intolerable litigation burden on government employers and severely impact the proper and efficient function of those employers. Professor Roosevelt insightfully noted this difficulty:

> Generally speaking, our First Amendment doctrine is good at making the government keep its hands off. It is not good at supervising nuanced and context-sensitive judgments about the quality of speech or its social appropriateness; indeed, the Court's decisions repeatedly proclaim that the Amendment does not allow the government to make such judgments. But the government cannot be hands-off with its employees and agnostic as to the quality of their work product: employers must be able to evaluate employee job performance. *Garcetti's* carveout is sensible in terms of both First Amendment values and managerial efficiency.

Roosevelt, *supra* at 659 (citations omitted).

In addition to the inquiry of whether testimony can be considered part of the employee's official duties, Petitioner's rule would require searching inquiry of numerous questions. It would need to be determined: (1) whether the testimony at issue is even truthful testimony – an often subjective determination; (2) whether the matter testified to is an issue of public concern; (3) whether the testimony's disruptive effects outweigh the employee's interest in testifying; (4) whether the testimony's disruptive effects outweigh

society's interest in hearing the testimony; (5) what the employee's interest in testifying even is; and (6) what society's interest in hearing the testimony even is. These numerous and searching inquiries must all be considered, according to Petitioner's rule, prior to a government employer deciding whether to dismiss an employee. Furthermore, any one of these inquiries could generate or prolong significant litigation from a disgruntled employee.

Under such a system, federal courts would become super personnel boards charged with the unenviable task of sifting through numerous grievances to find any merit in the disputes before them. As constitutional causes of action, such grievances would be federalized, rigid, and unchangeable, and bring with them to federal court a myriad of attendant state law claims that do not belong there.

CONCLUSION

For the foregoing reasons and the reasons contained in Respondent Steve Franks' brief, the decision of the court below should be affirmed.

Respectfully submitted,

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