NO. 13-483

IN THE

Supreme Court of the United States

EDWARD LANE,

Petitioner,

v.

STEVE FRANKS,

Respondent.

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

BRIEF OF *AMICUS CURIAE* ALLIANCE DEFENDING FREEDOM IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS[1]

Alliance Defending Freedom is a non-profit, public interest legal organization that provides strategic planning, training, funding, and direct litigation services to protect our first constitutional liberty—religious freedom. Since its founding in 1994, Alliance Defending Freedom has played a role, either directly or indirectly, in many cases before this Court, including: *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011); *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); as well as hundreds more in lower courts.

Additionally, Alliance Defending Freedom is counsel in two cases pending before the Court this term: *Galloway v. Town of Greece*, 681 F.3d 20 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 2388 (U.S. May 20, 2013); and *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (U.S. Nov. 26, 2013).

Many of these cases involve the proper application of the Free Speech Clause in educational

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[1] The parties granted mutual consent to the filing of all *amicus curiae* briefs and that consent is on file with the Clerk of Court. As required by Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

or employment contexts. Public employees who wish to share their faith inside and outside the office are often victims of unlawful retaliation due to their protected expression. Recognizing that the Court's decision in this case could have an impact on the ability of faculty at public universities to protect their First Amendment rights, Alliance Defending Freedom submits this *amicus curiae* brief to raise awareness of these issues.

SUMMARY OF THE ARGUMENT

Since the Court decided *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the lowers courts have been in disarray over how much constitutional protection public employees should receive, with the central disagreement revolving around what constitutes a public employee's job duties. This case is a perfect example of that confusion. Respondent Steve Franks and Central Alabama Community College did not employ Petitioner Edward Lane to testify on their behalf in court proceedings. Rather, they employed him to run a program for at-risk youth. But when Lane learned of government corruption on the job and testified about that corruption outside the workplace after receiving a federal subpoena, Franks fired him. The Eleventh Circuit sanctioned Frank's decision because Lane testified in court about information he discovered while on the job. It did so by reading expansively his job duties and concluding that he spoke as an employee who deserved no First Amendment protection.

This case presents a good opportunity for the Court to explain the limitations of and provide

clarity to its ruling in *Garcetti*. A person who works for the government and is subpoenaed to testify in a civil or criminal proceeding, like Mr. Lane, should receive full First Amendment protection from possible adverse employment actions resulting from that testimony. The Eleventh Circuit's holding that a public employee deserves no such protection reveals a fundamental problem with *Garcetti*. At the core of that problem is an overly broad job duties test that serves as a carte blanch for employers to discipline employees when they utter disagreeable messages outside the workplace. The job duties test, as demonstrated by this case and similar cases, lends itself to multiple interpretations and inconsistency in the law. In particular, it enables loyalty oaths and endangers academic freedom.

When deciding the merits of Mr. Lane's claims—which warrant reversal of the Eleventh Circuit's decision—the Court should take the opportunity to clarify the public employee speech doctrine announced in *Garcetti*, especially the job duties test. A public employee should receive full First Amendment protection when speaking on matters of public concern, unless the employer can demonstrate that such speech disrupts implementation of the employer's business operations.

ARGUMENT

I. *GARCETTI*'S BROAD JOB DUTIES TEST HAS LED TO WIDE DISAGREEMENT IN THE CIRCUITS.

In *Garcetti*, the Court held 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." 547 U.S. at 421. Richard Ceballos was a calendar deputy in the Los Angeles County District Attorney's Office. *Id.* at 413. He wrote an internal memorandum expressing his concerns about inaccuracies in an affidavit used to obtain a search warrant. Afterward, he suffered a series of retaliatory employment actions. *Id.* at 414-15. The Court ruled that he deserved no First Amendment protection because his speech was related to his job duties.

The Court acknowledged that "public employees do not surrender all their First Amendment rights by reason of their employment," *id.* at 417, but when "a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom," *id.* at 418. In balancing societal interests served by employees speaking as citizens on matters of public concern with the needs of government employers attempting to perform important public functions, the Court ruled that the "controlling factor" in deciding whether a public employee's speech receives First Amendment protection is whether "his expressions were made pursuant to his [job] duties." *Id.* at 421.

Garcetti describes a job duty as anything that "owes its existence to a public employee's professional responsibilities" and something that "the employer itself has commissioned or created." *Id.* at 421-22. When Ceballos "went to work and performed the tasks he was paid to perform, [he]

acted as a government employee" and his speech was not protected. *Id.* at 422. The reason for this is that "[o]fficial communications have official consequences, creating a need for substantive consistency and clarity" that promotes the "employer's mission." *Id.* at 422-23. But the Court declined to "articulate a comprehensive framework for defining the scope of an employee's duties," stating instead that the inquiry is a "practical one." *Id.* at 424. This has left lower courts in disarray[2] because the job duties test "lends itself to multiple interpretations." *Weintraub v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 593 F.3d 196, 205 (2d Cir. 2010) (Calabresi, J., dissenting).

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[2] *See*, *e.g.*, Caroline A. Flynn, Note, *Policeman, Citizen, or Both? A Civilian Analogue Exception to* Garcetti v. Ceballos, 111 MICH. L. REV. 759, 771 (2013) ("But this language does not create a satisfactory standard for lower courts to apply to the facts of other cases, as the past six years of post-*Garcetti* decisions have illustrated. Some courts, for instance, apply a standard that asks whether the employee's speech is required by her job; others ask whether the speech aids or furthers the employee's execution of her responsibilities in some way.") (citing cases); Thomas Keenan, Note, *Circuit Court Interpretations of* Garcetti v. Ceballos *and the Development of Public Employee Speech*, 87 NOTRE DAME L. REV. 841, 842 (2011) ("Though the circuits do share a number of tests, *Garcetti*'s nebulous language has allowed great leeway for courts to adopt their own unique approaches. As a result, the process of resolving a public employee's scope of employment for First Amendment purposes often varies with the jurisprudence of the individual circuits. More importantly, even where a court can plainly ascertain the scope of employment, *Garcetti*'s categorical holding provides no leeway for speech of such public importance that it may deserve constitutional protection despite the fact that it exists because of the employee's official duties.").

The lack of a comprehensive framework for determining a public employee's job duties has resulted in conflict among the circuits. Some circuits do not heed the "practical" inquiry into job duties called for by *Garcetti*, 547 U.S. at 424. For example, the Fifth, Tenth, and D.C. Circuits hold that the question of whether a public employee has spoken as a citizen or as an employee, which requires evaluation of his job duties, is a question of law for the courts to decide, not a question of fact for a jury. *See Charles v. Grief*, 522 F.3d 508, 513 n.17 (5th Cir. 2008); *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192, 1202-03 (10th Cir. 2007); *Wilburn v. Robinson*, 480 F.3d 1140, 1149 (D.C. Cir. 2007). By contrast, the Third, Seventh, and Eighth Circuits hold the opposite—that whether a public employee spoke as a citizen or as an employee is a question of fact for a jury to resolve. *See Reilly v. City of Atlantic City*, 532 F.3d 216, 227-228 (3d Cir. 2008); *Davis v. Cook Cnty.*, 534 F.3d 650, 653 (7th Cir. 2008); *Casey v. City of Cabool*, 12 F.3d 799, 803 (8th Cir. 1993). And the Ninth Circuit holds that this is a mixed question of law and fact. *See Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1129 (9th Cir. 2008).

This conflict illustrates the need for further clarity from the Court on *Garcetti*'s job duties holding. While there was "no dispute that Ceballos' internal memorandum had been written in execution of Ceballos's official employment responsibilities," most cases are not so clear. *Posey*, 546 F.3d at 1127; *see id.* ("Here there is room for precisely such debate regarding whether [the employee] wrote and delivered his letter in execution of his official

employment duties."). As construed currently, *Garcetti* is ill-suited to serve as a general rule governing public employee speech.[3] Its "bright-line rule [is] designed to automatically privilege the interests of the government employer at the expense of the speaker and the public." Flynn, *supra* note 2 at 772. *Garcetti*'s job duties test should not be a hard and fast rule that places a burden on employees to prove a compelling reason for deviation. Rather the general rule should be that public employee speech is protected by the First Amendment, unless the employer can demonstrate compelling justification that the speech deserves no protection *vis-à-vis* its relation to an employee's job duties.

II. *GARCETTI*'S BROAD JOB DUTIES TEST IS QUICKLY ERODING THE FREEDOM OF PUBLIC EMPLOYEES TO SPEAK.

Garcetti's rule—that public employees enjoy no First Amendment protection for speech related to their job duties—has led to results offensive to the Constitution, such as the case at bar. Even aside from the question of whether the job duties question is one of fact or law, the lower courts interpret *Garcetti*'s rule as one that applies in every situation unless the employee can articulate a compelling

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[3] *See* Flynn, *supra* note 2 at 769 ("[I]nstead of adhering to a doctrine that allows courts to make a meaningful assessment of whether a public employee had actually spoken as a citizen, the *Garcetti* Court opted for an inflexible dichotomy. To the *Garcetti* Court, if a public employee spoke in her role as an employee, she could not have been speaking concurrently as a citizen. But the Court should have resisted the urge to put the speaker in one box or the other.").

exception. But, as in this case, those exceptions are few and far between. In other words, while *Garcetti* claims that public employees do not forfeit all their First Amendment rights, the lack of clarity in the holding has resulted in a rule where public employees enjoy virtually no First Amendment protection because much of their speech can be classified as job-related. The case at bar and examples from faculty speech cases demonstrate these problems and the need for clarity from the Court.

A. The *Garcetti* Job Duties Test Sanctions Employer Loyalty Oaths.

In the decision below, Mr. Lane's truthful courtroom testimony about things he learned on the job, which was compelled by subpoena, led his employer to fire him. The Eleventh Circuit, applying *Garcetti*, allowed the employer to broadly define Lane's job duties and denied Lane First Amendment protection because his testimony "owe[d] its existence" to his professional responsibilities. Pet. App. 5a; *see also Garcetti*, 547 U.S. at 421-22.

The conclusion of the Eleventh Circuit in this case and other circuits allows public employers to tailor employee's job duties to avoid liability. In fact, much like the game Six Degrees of Kevin Bacon, the Eleventh Circuit's ruling shows that if an employer can find a way to connect an employee's speech to his job duties, even if far removed, then that employer is justified in taking whatever action necessary to punish the employee. *See*, *e.g.*, *Abdur-Rahman v. Walker*, 567 F.3d 1278, 1289-90 (11th Cir. 2009)

(Barkett, J., dissenting) ("[T]he majority broadly applies *Garcetti*'s 'owes its existence' language to eliminate constitutional protection for *all* of the employees' statements regarding [sewer overflow], and in doing so effectively nullifies the Court's admonishment that the fact that speech relates to the subject matter of the employee's job is non-dispositive.") (emphasis in original). Instead of allowing public employers to create job descriptions sufficiently broad to regulate all of their employees' speech, this Court should clarify that *Garcetti* applies only in particular situations, not that it always applies unless one can find a compelling exception. In other words, the Court should return to the balancing test adopted in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). *Garcetti*'s rule that public employees deserve no First Amendment protection when doing their jobs only makes sense in limited situations where public employees disrupt the mission objectives of their employer.

The Eleventh Circuit's ruling in this case recalls efforts by public employers last century to impose loyalty oaths on employees. In the 1950s and 1960s, this country experienced a widespread effort to require public employees, especially those employed by educational institutions, to swear loyalty oaths to the state and reveal groups with which they associated. *Connick v. Myers*, 461 U.S. 138, 144 (1983). This Court roundly rejected those efforts as infringing the fundamental liberties of speech and association. *See*, *e.g.*, *Wieman v. Updegraff*, 344 U.S. 183 (1952) (holding state cannot require employees to establish loyalty by denying past affiliation with Communists).

"[N]either federal nor state government may condition employment on taking oaths that impinge on rights guaranteed by the First and Fourteenth Amendments respectively, as for example those relating to political beliefs." *Cole v. Richardson*, 405 U.S. 676, 680 (1972) (citing *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154 (1971); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *Connell v. Higginbotham*, 403 U.S. 207, 209 (1971) (Marshall, J., concurring in result)). Derivative of that axiom is a commitment that public employment may not "be conditioned on an oath that one has not engaged, or will not engage, in protected speech activities" including criticism of "institutions of government." *Cole*, 405 U.S. at 680 (citing cases).

As this Court restated last term, the government "may not deny a benefit [such as public employment] to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2328 (2013) (citation and quotation marks omitted). If the government is providing money to an organization, it cannot require that organization to adopt a particular message on an issue of public concern. *See id.* at 2330 ("By demanding that funding recipients adopt—as their own—the Government's view on an issue of public concern, the condition by its very nature affects 'protected conduct outside the scope of the federally funded program.'") (citation omitted). In the same way, if the government is providing someone with a job, it cannot require that person to adopt a particular viewpoint outside the workplace, even when that

viewpoint concerns facts learned on the job, and especially when that viewpoint addresses an issue of public concern.

The Eleventh Circuit's decision below contradicts that precedent and empowers government employers to define job duties so broadly that employees cannot comment on any public concern, whether inside or outside the workplace. Mr. Lane was subject to nothing short of a political litmus test (after all, the Alabama state senator at the center of the fraud charges pledged to get him fired) when he was forced to testify in court. Pet. App. 2a. Essentially, the Eleventh Circuit implied that "a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943). Government employees should not fear reprisal for exercising their constitutional rights and obligations outside the workplace.

B. The *Garcetti* Job Duties Test Threatens Academic Freedom.

Faculty speech provides another example of why the Court should clarify and limit *Garcetti*. "The essentiality of freedom in the community of American universities is almost self-evident . . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."

Id. (quotation marks omitted). In fact, the Court in *Garcetti* acknowledged the "additional constitutional interests that [were] not fully accounted for by" its ruling. 547 U.S. at 425. Thus, the Court declined to "decide whether the [job duties] analysis . . . would apply in the same manner to a case involving speech related to scholarship or teaching." *Id.*

Despite the Court's previous clarion calls to protect faculty speech and academic freedom, since *Garcetti*, the lower courts have struggled with how much First Amendment protection faculty deserve. For example, the University of North Carolina-Wilmington denied a promotion to a faculty member because the university disagreed with the content of his speech in columns written for the conservative website Townhall.com. *Adams v. Trs. of Univ. of N.C.-Wilmington*, 640 F.3d 550 (4th Cir. 2011). The Fourth Circuit ruled correctly that *Garcetti* should not "apply in the academic context of a public university" and that the professor could receive First Amendment protection. *Id.* at 562; *see also id.* at 564 ("Applying *Garcetti* to the academic work of a public

university faculty member under the facts of this case could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment.").

Following the Fourth Circuit's lead, the Ninth Circuit considered recently whether a professor at Washington State University who distributed a pamphlet and drafts of an in-progress book could assert a First Amendment retaliation claim against his employer. *Demers v. Austin*, No. 11-35558, --- F.3d ---, 2014 WL 306321, at *1 (9th Cir. Jan. 29, 2014). The court held that *Garcetti* does not apply to "teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor." *Id.* at *7. Thus, the professor's pamphlet and book drafts were protected speech.

In contrast to the Fourth and Ninth Circuits, other courts have not protected public university faculty speech to the same degree. The Sixth Circuit, citing *Garcetti*, refused to protect the speech of a librarian at The Ohio State University. The librarian participated in a voluntary committee charged with selecting a book that all freshmen would read together. *Savage v. Gee*, 665 F.3d 732, 738 (6th Cir. 2012). Despite the fact that he discussed a matter of public concern that involved both teaching and scholarship, the Sixth Circuit labeled his speech only "loosely" related to "academic scholarship," and, therefore, unprotected. *Id.* at 739.

The Seventh Circuit denied First Amendment protection to a professor at the University of

Wisconsin—Milwaukee who asserted that the university retaliated against him for complaining about the university's use of grant money. *Renken v. Gregory*, 541 F.3d 769, 770 (7th Cir. 2008). Renken's job duties included "teaching, research, and service to the University," all things arguably exempted from *Garcetti*'s holding. *Id*. at 773. Despite that, the court ruled that his complaint about the use of grant money for *research* was not entitled to First Amendment protection. *Id*. at 774.

Courts have even ruled that professors deserve no First Amendment protection when they advise students, *Gorum v. Sessoms*, 561 F.3d 179, 186 (3d Cir. 2009), participate in faculty meetings, *Sadid v. Vailas*, 936 F. Supp. 2d 1207, 1225-26 (D. Idaho 2013), or speak up on departmental hiring decisions, *Isenalumhe v. McDuffie*, 697 F. Supp. 2d 367, 378-79 (E.D.N.Y. 2010). But these are job duties where faculty should have First Amendment protection because it affects their ability to conduct scholarship and teaching and contribute to the marketplace of ideas free of government restraint.

The point is that *Garcetti*'s holding is being interpreted too broadly by many lower courts. Employers are able to devise job descriptions as broad as they want. As a result, employees are left with little ability to speak up, even on matters of public concern. And courts are blindly applying *Garcetti*, even when the results curtail the ability of someone to perform some of the most important public tasks in our Republic—testifying truthfully in court and teaching in public universities.

III. THE FIRST AMENDMENT SHOULD PROTECT PUBLIC EMPLOYEES WHO SPEAK ON MATTERS OF PUBLIC CONCERN, UNLESS THE GOVERNMENT CAN DEMONSTRATE A COMPELLING INTEREST FOR LIMITING THEIR SPEECH.

This Court should clarify that *Garcetti* was aimed at addressing the ability of public employers to make sure their employees do not thwart an employer's objective. *See Garcetti*, 547 U.S. at 422-23 (recognizing employers have need to "ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission"). The Constitution places a high value on freedom of speech; thus, the general rule should be that a public employee may speak freely on a matter of public concern, unless the employer shows that doing so disrupts implementation of the employer's business operations. *See Weintraub*, 593 F.3d at 207 (Calabresi, J., dissenting) ("By contrast, when an employee's speech is not part of the implementation of the employer's business operations, the employer does not depend on 'substantive consistency and clarity,' in that speech. Instead, employers may well benefit from a narrowly defined exception to First Amendment protection") (quoting *Garcetti*, 547 U.S. at 422); *Abdur-Rahman*, 567 F.3d at 1287 (Barkett, J., dissenting) ("the sacrifice of First Amendment rights by public employees in the interest of managerial efficiency is the exception, not the rule"). This would return public employee speech jurisprudence to the workable *Pickering* balancing test.

The currently undefined job duties test, however, is untenable. It gives employers a get-out-of-jail-free card: unless employees can provide a compelling reason for protecting their speech, employers may take any adverse employment action and not fear accountability under the First Amendment because they can define the employee's speech as part of his job duties. *See Weintraub*, 593 F.3d at 205 (noting the current job duties test is too broad). Public employees deserve more protection; after all, they do not forfeit their First Amendment rights when they accept public employment. *Garcetti*, 547 U.S. at 417.

CONCLUSION

The Court should take the opportunity to rein in *Garcetti*'s broad job duties test and clarify that public employees retain First Amendment rights to speak on matters of public concern, unless they disrupt implementation of public employers' business operations. Without clarity from this Court, decisions like the one below will continue to distort First Amendment jurisprudence.

Respectfully submitted,

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