No. 13-483

In the Supreme Court of the United States

EDWARD LANE,

Petitioner,

v.

STEVE FRANKS, ET AL.,

Respondents.

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

BRIEF FOR GOVERNMENT ACCOUNTABILITY PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF FOR GOVERNMENT ACCOUNTABILITY PROJECT AS *AMICUS CURIUM* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIUM*

The Government Accountability Project (GAP) is a nonprofit, nonpartisan public interest organization specializing in legal advocacy on behalf of whistleblowers. GAP addresses all forms of whistleblowing, but most of its work relates to whistleblowing efforts that expose betrayals of the public trust.[1]

GAP defines a "whistleblower" as an employee, agent, or consultant who discloses information that he or she reasonably believes is evidence of illegality, gross waste or fraud, mismanagement, abuse of power, general wrongdoing, or a substantial and specific danger to public health and safety. Although whistleblowers often provide information to journalists, government officials, or others who can influence and rectify the wrongdoing, they also frequently testify under oath before courts or legislative bodies.

GAP's extensive experience—assisting more than 5,000 whistleblowers since 1979—has allowed it to assess the frequency of retaliation against truthful whistleblowers and the means used to retaliate. These include professional demotions, pretextual terminations (as occurred in this case), loss of duties, or-

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

ders to submit to psychological testing, isolation, retaliatory investigations, and criminal prosecutions.

GAP's attorneys have testified regularly before Congress on the effectiveness (and ineffectiveness) of existing statutory protections, filed numerous *amicus curiae* briefs on constitutional and statutory issues relevant to whistleblowers, coauthored the model whistleblower protection laws to implement the Inter-American Convention Against Corruption, and led legislative campaigns for a broad range of relevant federal laws, including the Whistleblower Protection Act (WPA) of 1989, Pub. L. No. 101-12, 103 Stat. 16; the subsequent 1994 amendments to that Act; and the Whistleblower Protection Enhancement Act (WPEA), Pub. L. No 112-199, 126 Stat. 1465 (2012). GAP also has led legislative campaigns to enact the whistleblower provisions in the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A, and the numerous corporate whistleblower statutes enacted in the wake of that law.

Based on its extensive experience in this area, GAP believes strongly that the absence of a remedy under 42 U.S.C. § 1983 for government whistleblowers who suffer retaliation for testifying truthfully will subject these individuals to the Hobson's choice of testifying truthfully and suffering retaliation—including loss of their jobs; or attempting to avoid testifying (and risking contempt sanctions); or shading their testimony to please their supervisors and thereby avoid retaliation. That will make government employees much less willing to come forward and offer to testify regarding wrongdoing.

The First Amendment does not require that result. To the contrary, the First Amendment's protections for government employees, as construed in

Garcetti v. *Ceballos*, 547 U.S. 410 (2006), encompass truthful testimony under oath. Testifying truthfully is a duty of all citizens, not an obligation tied to government employment. And eligibility for First Amendment protection will make government employees more willing to reveal wrongdoing—preserving a critical source of information for detecting and punishing those who misuse government power.

SUMMARY OF ARGUMENT

Truthful sworn testimony by government employees plays a critical role in uncovering official misconduct and holding wrongdoers accountable. Because whistleblowing employees are "insiders," they are uniquely situated to identify malfeasance and gather comprehensive evidence. Thus, testimony by government employees has proven to be essential in a variety of contexts, particularly cases of government corruption.

These whistleblowers frequently face threats of retaliation from supervisors seeking to conceal their own wrongdoing or the crimes of others. Employees who testify about official wrongdoing often encounter demotion, suspension, and even dismissal.

The inevitable result is that many who see something say nothing. Studies confirm the intuition that misconduct often goes unreported because witnesses are afraid of the consequences of telling the truth. Robust protections for whistleblowers are essential to ameliorating this problem.

Unfortunately, existing state whistleblower-protection laws are a patchwork. A significant number of States have not adopted a general whistleblower protection law. Other statutes contain exclu-

sions—like Alabama's here—for particular categories of employees or do not include sworn testimony within the class of protected conduct.

The First Amendment can and does fill that gap.

Sworn testimony by a government employee plainly qualifies as speech by a citizen on a matter of public concern, and therefore is eligible for First Amendment protection under this Court's decision in *Garcetti* v. *Ceballos*, 547 U.S. 410 (2006).

"The duty to testify has long been recognized as a basic obligation that every citizen owes his Government." *United States* v. *Calandra*, 414 U.S. 338, 345 (1974). Sworn testimony therefore just as plainly constitutes speech by the government employee as a citizen, not in his or her official capacity.

And the fact that a government tribunal is receiving sworn testimony on a topic, and will exercise its authority in rendering a decision, necessarily means that the testimony relates to a matter of public concern. *Garcetti*'s threshold standard is satisfied.

Finally, there is no basis for distinguishing sworn testimony presented pursuant to subpoena from sworn testimony resulting from a government employee's voluntary appearance. In both situations, the testimony constitutes speech by the employee as a citizen on a matter of public concern.

Recognizing that reality poses little risk of "constitutionaliz[ing] the employee grievance," *Connick* v. *Myers*, 461 U.S. 138, 154 (1983), or "commit[ting] state and federal courts to a new, permanent, and intrusive role" in adjudicating employment disputes, *Garcetti*, 547 U.S. at 423. Holding sworn testimony eligible for First Amendment protection will affect

the important, but limited category of cases in which the government employee actually provided sworn testimony. The presence, or absence, of that essential, and objective, factual context will be easy to determine at the pleading stage.

Moreover, a determination that truthful sworn testimony is *eligible* for First Amendment protection does not mean that the employee will prevail in every case—even if he or she is able to establish retaliation. The employer would still have the opportunity to show that the retaliatory actions were justified under the *Pickering* balancing test.

Finally, while government employers are entitled to "sufficient discretion to manage their operations" and therefore "have heightened interests in controlling speech made by an employee in his or her professional capacity," *Garcetti*, 547 U.S. at 422, they have no legitimate interest in depriving a government tribunal of relevant evidence by preventing government employees from providing truthful sworn testimony.

Eligibility for First Amendment protection will merely provide much-needed protections against interference with the ability of government tribunals to obtain all relevant truthful evidence, ensuring "that the paths which lead to the ascertainment of truth * * * be left as free and unobstructed as possible." *Briscoe* v. *LaHue*, 460 U.S. 325, 333 (1983) (quoting *Calkins* v. *Sumner*, 13 Wis. 193, 197 (1860)).

ARGUMENT

I. Protecting Public Employees Against Retaliation For Truthful Sworn Testimony Is Essential To Uncovering Government Wrongdoing.

Government employees are the most important source of information about government wrongdoing. But these employees fear—justifiably—that they will suffer retaliation from their superiors if they testify regarding improprieties. Comprehensive protection against retaliation is therefore critical to uncovering and prosecuting these breaches of the public trust. But state laws fall far short of providing the protection necessary to assure employees that they will be protected—as this case illustrates.

A. Public Employees' Testimony Frequently Addresses Matters Of Great Public Importance.

There is a "strong national interest in protecting good faith whistleblowing." S. Rep. No. 112-155, at 6 (2012). Public employees who provide truthful testimony to public bodies often reveal significant "governmental inefficiency and misconduct." *Garcetti* v. *Ceballos*, 547 U.S. 410, 425 (2006).

For example, shortly after the attacks of September 11, 2001, FBI agent Coleen Rowley provided Congress with a detailed account of the FBI's failures prior to 9/11, contributing to a major reorganization of the intelligence community. Amanda Ripley & Maggie Sieger, *The Special Agent*, Time, Dec. 22, 2002, http://perma.cc/8XMV-UFK8. Among those failures, she disclosed that her superiors had failed to "take seriously the case of Zacarias Moussaoui,"

the would-be twentieth hijacker involved in the terrorist attacks. *Ibid.*

Following her testimony before Congress, Rowley was "stung by a nasty backlash within the FBI," including a suggestion that she might be subject to potential criminal charges. Ripley & Sieger, *supra.* See also R. Jeffrey Smith, *Justice IG Supports FBI Whistle-Blower*, Wash. Post, July 30, 2004, at A17 (discussing Rowley and noting that, in a contemporaneous retaliation suit against the FBI, DOJ's inspector general concluded that whistleblowing was "at least a contributing factor" in the firing of the individual, who was "at least the third FBI whistle-blower to accuse the bureau of retaliation or interference since 2001").

Members of Congress expressed concern over potential retaliation. See, *e.g.*, *Oversight Hearing on Counterterrorism: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 17 (2002) (statement of Sen. Leahy, Chairman, S. Comm. on the Judiciary) (asking FBI Director Mueller, "Can you personally assure this Committee, unequivocally, there will be no retaliation of any kind against [Coleen Rowley]?").

Another federal employee, Peter Buxtun, who served as an epidemiologist with the Public Health Service, discovered the Tuskegee syphilis experiments—in which the government deceived hundreds of African-American men into believing that they were receiving treatment for syphilis, when in fact the researchers were intentionally letting the syphilis develop untreated in order to study the effects of the disease. Susan M. Reverby, *Examining Tuskegee: The Infamous Syphilis Study and Its Legacy* 73-85 (2009).

Buxtun's superiors told him that if he continued to investigate the experiments, he would likely be fired. *Quality of Health Care: Human Experimentation: Hearings Before the Subcomm. on Health of the H. Comm. on Labor & Pub. Welfare*, 93d Cong. 3:1223-28 (1973) (statement of Peter Buxtun). He nevertheless testified about his findings before Congress, *ibid.*, which put a stop to the experiments.

A. Ernest Fitzgerald—a federal employee at the Department of Defense—exposed massive cost-overruns of nearly $2 billion in the development of the C-5A cargo plane. *Nixon* v. *Fitzgerald*, 457 U.S. 731, 734 (1982). Despite significant pressure from his superiors to keep silent, he agreed to testify in Senate hearings on the subject. Roberta Ann Johnson, *Whistleblowing: When It Works—and Why* 92-93 (2003). Following Fitzgerald's testimony, President Nixon told his aides to "get rid of" him. Eric B. Kempen & Andrew P. Bakaj, *Marshalling Whistleblower Protection*, J. Pub. Inquiry, Spring/Summer 2009, at 6.

Fitzgerald faced numerous retaliatory actions by his employers, including the loss of many of his duties, which were replaced by trivial projects. Eventually he was fired. It took years of litigation for Fitzgerald to regain his prior position with the Department of Defense. Johnson, *supra*, at 93.

These examples of high-profile federal employee whistleblowers are not at all unique. Whistleblowers' testimony frequently provides critical information regarding government malfeasance at the state and local level.

Bribes and other forms of public corruption pose a significant threat to government at all levels. In-

deed, the Department of Justice has obtained over 20,000 convictions for crimes involving public corruption in just the last two decades. U.S. Dep't of Justice, Pub. Integrity Section, *Report to Congress on the Activities and Operations of the Public Integrity Section for 2012*, at 26 (2013), http://perma.cc/BP9V-2L42.

Testimony of public employees is crucial to uncovering and prosecuting these offenses. "[C]orruption is a hidden activity," which makes investigation "extremely difficult." Indira Carr & David Lewis, *Combating Corruption Through Employment Law and Whistleblower Protection*, 39 Indus. L.J. 52, 56 (2010). As the federal Office of Special Counsel has recognized, whistleblowing by government employees "play[s] a critical role in keeping our government honest, efficient and accountable." *Know Your Rights When Reporting Wrongs*, Office of Special Counsel, http://perma.cc/3KUE-CBZW.

Employees can spot instances of corruption long before outside investigators; expose gaps, inaccuracies, and falsehoods in an organization's cover story; and point investigators to relevant documents and other evidence. See generally Pamela H. Bucy, *Information as a Commodity in the Regulatory World*, 39 Hous. L. Rev. 905, 940-948 (2002) (discussing the importance of insider information in uncovering wrongdoing). Without public employees who are willing to come forward and testify, many of these cases would never be brought at all and those that could be brought would be far harder to prosecute.

A paradigmatic example is provided by police officer Frank Serpico, who exposed widespread corruption within the New York City Police Department in the late 1960s. Serpico reported evidence of police of-

ficers taking bribes from criminals amounting to millions of dollars, but saw his reports ignored or concealed.

Serpico subsequently testified before the Knapp Commission, which was created to investigate his reports, as well as in individual trials involving instances of corruption. See Corey Kilgannon, *Serpico on Serpico*, N.Y. Times, Jan. 22, 2010, http://perma.cc/UF8T-QZ45.

There are many similar examples of public employees providing critical testimony in anti-corruption cases:

- The testimony of Kim Raney, a local police chief, was crucial to demonstrating that a Bell, California official had knowingly authorized inflated salaries for high-level employees. Miriam Hernandez, *Bell Corruption Trial: Angela Spaccia Testifies on High Salaries*, KABC-TV Los Angeles (Nov. 8, 2013), http://perma.cc/QGD8-2FMV. Another police officer, who reported the corruption in the first place, was forced into retirement in retaliation for his actions. Jeff Gottlieb, *Sergeant Who Reported Bell Corruption Wins Whistle-Blower Settlement*, L.A. Times, Aug. 4, 2012, http://perma.cc/H6VY-W8HY.
- Several public employees provided critical testimony in the trial of former New Orleans Mayor Ray Nagin on bribery charges. Juliet Linderman, *In Ray Nagin Trial, 31 Witnesses in 6 Days of Testimony*, Times-Picayune (New Orleans), Feb. 8, 2014, http://perma.cc/MVY8-RQLL. These employees were uniquely positioned to testify regarding Nagin's ex-

ercise of his official powers in exchange for monetary payoffs.

- In yet another case, public employees testified regarding former Congressman William Jefferson's exchange of "official acts" for bribes. Bruce Alpert, *William Jefferson's Activities Cast as "Official Acts" by Witnesses in Corruption Trial*, Times-Picayune (New Orleans), June 26, 2009, http://perma.cc/9S3A-PSK8. His trial featured the testimony of a dozen government officials that prosecutors claimed he attempted to influence. *Rooting Out Corruption: A Look Back at the Jefferson Case*, Fed. Bureau of Investigation (Apr. 9, 2013), http://perma.cc/BG3J-SYHW.
- The prosecution of Linda Schrenko, a Georgia state official who siphoned federal educational funds to pay for a political campaign, demonstrates how public employees are best-situated to illustrate the mechanics of corrupt schemes. Grant Rowe, a director of accounting, was able to testify regarding the means used to launder the stolen funds through a series of companies owned by a third party. Doug Gross, *Former Georgia School Chief Accused of Stealing $600,000*, San Diego Union-Tribune, May 1, 2006, http://perma.cc/VCG2-AD48.

Without public employees' testimony, these cases and many others would be difficult if not impossible to prosecute.[2] Indeed, the case before the Court con-

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[2] For other examples of how public employee testimony can expose corruption, see Jenna Pizzi, *Fate of Trenton Mayor Tony Mack Will Soon Be in the Hands of the Jury*, Times

firms the point: petitioner's testimony regarding a public official who received a paycheck for doing nothing stemmed from information gained in an audit that petitioner personally conducted. Pet. App. 2a.

B. Protections Against Retaliation Are Critical To Obtaining Truthful Testimony From Government Employees.

Government officials frequently seek to conceal wrongdoing by using threats of retaliation to coerce employees into refusing to testify or even committing perjury. Testifying employees can be fired, suspended, demoted, stripped of benefits, denied a necessary security clearance, or subjected to negative personnel reports.

Moreover, retaliation need not be obvious. A supervisor can disguise his or her true aims by seeking to reorganize a department; claiming that technolog-

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(Trenton, N.J.), Feb. 2, 2014, http://perma.cc/Q3HU-5A82 (bribery); *IRS Agent: Kilpatrick Lived Beyond His Means*, Detroit News, Jan. 25, 2013, at A5 (bribery and kickbacks); Bill Silverfarb, *7-Eleven: Is It Legal?*, San Mateo Daily J., Jan. 14, 2013 (abuse of city building permit process); Steve Schultze, *Key Witness Testifies: County Official Says Thomas' Use of Vague Language Was Meant to Disguise a Bribe*, Milwaukee J. Sentinel, Aug. 23, 2012, at 1 (solicitation of bribes); *Threats Feared in LPD Dispute*, Daily Advertiser (Lafayette, La.), May 25, 2012 (police department corruption); *Corruption Trial Continues for DeWeese*, Greene County Messenger, Feb. 3, 2012 (using political staff for campaign work); *The Prosecution's Case*, Plain Dealer (Cleveland), Feb. 17, 2012, at A1 (racketeering); Bob Warren, *Mandeville Selects Stiebing Successor*, Times-Picayune (New Orleans), Sept. 29, 2011, at B (abuse of city credit cards); Lance Griffin, *Judge Lewis Testifies at Bingo Corruption Trial*, Dothan Eagle (Dothan, Ala.), June 22, 2011 (vote-buying).

ical advances have made the whistleblower's job outdated; or creating a hostile work environment that forces the employee to resign. See Bruce D. Fisher, *The Whistleblower Protection Act of 1989: A False Hope for Whistleblowers*, 43 Rutgers L. Rev. 355, 363-369 (1991).

The reality of retaliation is well-known to government employees. A 2010 survey by the Merit Systems Protection Board found that over one-third of employees who reported misconduct faced reprisal or threat of reprisal by their employer. U.S. Merit Sys. Prot. Bd., *Blowing the Whistle: Barriers to Federal Employees Making Disclosures* 10-11 (2011), http://tinyurl.com/nnj7pwr; see also *Lawson* v. *FMR LLC*, No. 12-3, 2014 WL 813701, at *4 (U.S. Mar. 4, 2014) (discussing the "corporate code of silence" and retaliation that discouraged employees of Enron and its contractors from coming forward with evidence of fraud).

The particular situation presented here—retaliation for truthful testimony—is not rare. To the contrary, it occurs all too frequently.[3]

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[3] Following are just a few examples of cases in which a private-sector employee alleged that he or she had suffered retaliation for providing or intending to provide truthful sworn testimony regarding his or her employer: *Bishop* v. *Fed. Intermediate Credit Bank of Wichita*, 908 F.2d 658 (10th Cir. 1990); *Wiskotoni* v. *Mich. Nat'l Bank-West*, 716 F.2d 378 (6th Cir. 1983); *Fitzgerald* v. *Salsbury Chem., Inc.*, 613 N.W.2d 275 (Iowa 2000); *Page* v. *Columbia Natural Res., Inc.*, 480 S.E.2d 817 (W.Va. 1996); *Gantt* v. *Sentry Ins.*, 824 P.2d 680 (Cal. 1992); *Ressler* v. *Humane Soc. of Grand Forks*, 480 N.W.2d 429, 433 (N.D. 1992); *Ludwick* v. *This Minute of Carolina, Inc.*, 337 S.E.2d 213 (S.C. 1985); *Willard* v. *Golden Gallon-TN, LLC*, 154 S.W.3d 571 (Tenn. Ct. App. 2004); *Wil-*

There are numerous examples of retaliation against government employees who testify truthfully. The mayor of Bayou La Batre, Alabama was recently convicted on charges of corruption and witness tampering. He attempted to ruin the career of a police investigator who cooperated with the FBI by reporting an illicit land deal involving the mayor and the mayor's daughter. Brendan Kirby, *Jury Convicts Bayou La Batre Mayor Stan Wright of Four Federal Crimes*, Alabama Media (Mar. 1, 2013, 5:22 PM), http://perma.cc/JL7E-NYAU. The mayor's trial itself featured the testimony of numerous current and former city police officers, which was critical to proving that he had engaged in retaliation. *Ibid.*

Threats of retaliation by government supervisors are a feature of numerous cases in the lower courts. In *Karl* v. *City of Mountlake Terrace*, 678 F.3d 1062 (9th Cir. 2012), the plaintiff was allegedly fired for testifying in a deposition pursuant to a subpoena in a Section 1983 case. After she testified, one of the defendants "was overheard commenting that Karl's testimony 'really hurt' the City, that she could not be trusted anymore, and that the Police Department would have to find a way to 'get rid of her.'" *Id.* at 1066.

In *Fairley* v. *Andrews*, 578 F.3d 518 (7th Cir. 2009), the plaintiffs, prison guards, were subjected to death threats after stating that they would be willing to testify in a suit alleging brutal treatment of prisoners by other guards. One defendant said "[i]f [plaintiff] goes into court on this [case] . . . and tells the truth, he will f[**]k everyone involved. . . . We

liams v. *Hillhaven Corp.,* 370 S.E.2d 423 (N.C. Ct. App. 1988); and *Polycast Tech. Corp.* v. *Uniroyal, Inc.*, 87 Civ. 3297 (CSH), 1992 WL 123185 (S.D.N.Y. May 28, 1992).

always knew he was a weak link and when a weak link can f[**]k everyone in the chain, then we have to bury the weak link." *Id.* at 521.[4]

Employees know that they may be subject to significant adverse consequences if they make the courageous decision to provide their testimony. They are left with a difficult choice: (1) testify, and potentially lose their job; (2) refuse to testify, and risk contempt of court; or (3) testify falsely, and face criminal sanctions for perjury.

Protection against retaliation mitigates these fears and encourages employees to come forward. The Merit Systems Protection Board study found that nearly two-thirds of the 40,000 surveyed employees indicated that protections from reprisal would be an "important" consideration in deciding whether to report corruption or other government misconduct. U.S. Merit Sys. Prot. Bd., *supra*, at 16-17; see also Myron Peretz Glazer & Penina Migdal Glazer, *The Whistleblowers: Exposing Corruption in Government and Industry* 250-251 (1989) (discussing examples of whistleblowers and arguing that protection against reprisal is key to encouraging whistleblowers to come forward).

Several other studies confirm that the willingness of employees to come forward is correlated with legal protection against retaliation. See Edward L. Glaeser & Raven E. Saks, *Corruption in America*, 90

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[4] For other examples, see *Chrzanowski* v. *Bianchi*, 725 F.3d 734 (7th Cir. 2013); *Clairmont* v. *Sound Mental Health*, 632 F.3d 1091 (9th Cir. 2011); *Jackler* v. *Byrne*, 658 F.3d 225 (2d Cir. 2011); *Matrisciano* v. *Randle*, 569 F.3d 723 (7th Cir. 2009); *Reilly* v. *City of Atl. City*, 532 F.3d 216 (3d Cir. 2008); *Green* v. *Barrett*, 226 F. App'x 883, 884 (11th Cir. 2007).

J. Pub. Econ. 1053, 1065 (2006) (finding a correlation between the strength of public integrity laws, including whistleblower protections, and levels of corruption); Rajeev K. Goel & Michael A. Nelson, *Effectiveness of Whistleblower Laws in Combating Corruption* 14 (Bank of Finland Inst. for Economies in Transition, 2013), http://perma.cc/34L3-LESN (finding a correlation between public awareness of whistleblower protections and detection of corruption). The availability of legal protection against retaliation is thus a significant factor in whether employees decide to blow the whistle.[5]

C. Existing Statutes Do Not Protect Whistleblowers Against Retaliation For Truthful Sworn Testimony.

Statutes prohibiting retaliation against government employees do not provide comprehensive protection against retaliation for truthful sworn testimony. Cf. *Lawson* v. *FMR LLC*, 2014 WL 813701, at *4 (explaining that Enron was able to engage in retaliation against employee whistleblowers based on a gap in then-existing law).

On the state level, protections vary widely with respect to the categories of government employees

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[5] Addressing the risk of retaliation is particularly important because of the other factors that may deter a whistleblower from coming forward. After speaking out, employees are frequently subjected to ostracism and may have trouble maintaining their professional reputation. Whistleblowers frequently also suffer from a range of physical and psychological maladies stemming from their decision to come forward and the resulting retaliation. Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 Cal. L. Rev. 433, 486-487 (2009).

covered, the employee activity that can constitute protected "whistleblowing," and other requirements. Pub. Emps. for Envtl. Responsibility, *State Whistleblower Laws—Overview*, http://perma.cc/N8LW-URG2. As a result, many state employees are left without any protection. See *Garcetti*, 547 U.S. at 441 (Souter, J., dissenting) ("[I]ndividuals doing the same sorts of governmental jobs and saying the same sorts of things addressed to civic concerns will get different protection depending on the local, state, or federal jurisdictions that happened to employ them.").

Here, for example, the court below concluded that Alabama's statute did not apply because of the express exemption of state university employees and because testimony in federal court was not a protected activity. *Lane* v. *Cent. Ala. Cmty. Coll.*, CV-11-BE-0883, 2012 WL 5873351, at *2 (N.D. Ala. Nov. 20, 2012). Other state laws have similar exclusions. *E.g.*, S.D. Codified Laws § 3-6D-22 (2014) (protecting reporting only "through the chain of command of the employee's department or to the attorney general's office"); Wash. Rev. Code § 42.40.020(2) (2014) (covering state but not municipal employees).[6]

Indeed, recent studies have found that a significant number of States have no general whistleblower statute at all. See *State Whistleblower Laws*, Nat'l Conf. of State Legislatures (Nov. 2010), http://perma.cc/AQL2-X37D; see also *State Whistleblower Statutes*, Nat'l Whistleblowers Ctr., http://perma.cc/B35Y-JQUF (identifying States with only "piecemeal" whistleblower protections).

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[6] These state laws mirror the federal statute, which also contains exemptions. See 5 U.S.C. § 2302(a)(2)(C)(ii)(I) & (II).

Even when statutory protections apply, the statutory remedy may be subject to procedural standards that render it inadequate. Thus, "[f]rom 1999 to 2005, only two out of thirty whistleblower claims prevailed before the [federal] Merit Systems Protection Board * * *." See Jamie Sasser, Comment, *Silenced Citizens: The Post*-Garcetti *Landscape for Public Sector Employees Working in National Security*, 41 U. Rich. L. Rev. 759, 790 (2007).

In sum, to the extent statutory protections for whistleblowers exist at the state and local level—and in many places they do not—they frequently will not provide protection against the type of government employee whistleblowing at issue here: truthful sworn testimony.

II. Public Employees' Sworn Testimony Satisfies The *Garcetti* Standard.

"When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences." *Garcetti*, 547 U.S. at 423. If, on the other hand, the employee is engages in the speech as part of his official duties or speaks on a matter of private concern, there is no First Amendment protection. *Ibid*. Truthful sworn testimony—whether the government employees appears as a result of a subpoena or testifies voluntarily—plainly qualifies as speech as a citizen on a matter of public concern.

First, this Court has long characterized giving truthful sworn testimony as an obligation one bears *as a citizen*. See, *e.g.*, *United States* v. *Calandra*, 414 U.S. 338, 345 (1974) ("The duty to testify has long been recognized as a basic obligation that every citi-

zen owes his Government"); *Piemonte* v. *United States*, 367 U.S. 556, 559 n.2 (1961) ("Every citizen of course owes to his society the duty of giving testimony to aid in the enforcement of the law."); see also *United States* v. *Nixon*, 418 U.S. 683, 709 (1974) (the "very integrity of the judicial system and public confidence in the [judicial] system" depends on truthful testimony and the production of evidence).

"When a public employee gives testimony pursuant to a subpoena, fulfilling the 'general obligation of [every] citizen to appear before a grand jury or at trial,' he speaks 'as a citizen' for First Amendment purposes." *Chrzanowski* v. *Bianchi*, 725 F.3d 734, 741 (7th Cir. 2013). Here, for example, petitioner testified in the criminal proceedings as a citizen and did not purport to be speaking for his employer. Pet. App. 2a-3a.

Second, truthful testimony in a judicial or legislative proceeding, by definition, involves a matter of public concern. The fact that a government proceeding has been convened to take testimony regarding the matter—and that the tribunal's decision will involve the exercise of government power—demonstrates that the proper resolution is a matter of public concern. Testimony under oath plainly qualifies as a category of expression in which the "interests at stake extend beyond the individual speaker" to encompass broader "societal interests." *Garcetti*, 547 U.S. at 419-420.

Nothing in this analysis differs if the government employee testifies voluntarily, as opposed to appearing pursuant to a subpoena. In both situations the employee is fulfilling his or her duty as a citizen to provide relevant evidence to a government tribunal. And in both situations the fact that the government

tribunal is taking testimony on a matter, and ultimately will render a determination, means that the testimony necessarily relates to a matter of public concern. Indeed, it would be a peculiar rule that held voluntary testimony ineligible for First Amendment protection and thereby created a significant incentive *against* voluntary testimony by government employees relevant to matters being heard by government tribunals.

Respondent suggests (Opp. 4) that sworn testimony in any way relating to the employee's official duties is per se excluded from First Amendment protection. But this Court in *Garcetti* rejected that approach, recognizing that "[t]he First Amendment protects some expressions related to the speaker's job." 547 U.S. at 421.[7] Whether "an employee's official responsibilities provided the initial impetus to appear in court is immaterial to his/her independent obligation as a citizen to testify truthfully." *Reilly* v. *City of Atlantic City*, 532 F. 3d 216, 231 (3d Cir. 2008).

Finally, eligibility for First Amendment protection is particularly appropriate with respect to sworn testimony because, as this Court has long recognized, "'the dictates of public policy * * * require[] that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible.'" *Briscoe* v. *LaHue*, 460 U.S. 325, 333 (1983) (quoting *Calkins* v. *Sumner*, 13 Wis. 193, 197 (1860)); see also *United States* v. *Havens*, 446 U.S. 620, 626 (1980)

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[7] The employee speech at issue in *Garcetti* was far removed from the sworn testimony context—a "work product" memorandum prepared as part of the employee's duties as a prosecutor. 547 U.S. at 422.

("There is no gainsaying that arriving at the truth is a fundamental goal of our legal system.").

The Court recently invoked this principle in unanimously holding that complaining witnesses are absolutely immune from suit for their testimony before grand juries. *Rehberg* v. *Paulk*, 132 S. Ct. 1497 (2012). It observed that "[w]itnesses might be reluctant to come forward to testify, and even if a witness took the stand, the witness might be inclined to shade his testimony * * * for fear of subsequent liability." *Id.* at 1505 (quotation marks omitted).

Similar dangers of self-censorship and distortion attend the prospect of discipline by a government employer. As this Court has explained, "the threat of dismissal from public employment," like the threat of "damage awards," is "a potent means of inhibiting speech." *Pickering* v. *Board of Ed.*, 391 U.S. 563, 574 (1968). And government employees' testimony can be especially valuable, carrying significant costs to the truth-seeking process if it is "repressed" by the threat of retaliation by a government employer seeking to prevent truthful testimony. *Garcetti*, 547 U.S. at 419-420.

III. Holding That Truthful Testimony Satisfies The *Garcetti* Standard Will Not "Constitutionalize The Employee Grievance."

Determining that public employees' truthful sworn testimony is eligible for First Amendment protection would affect an important—but also limited and easily identifiable—category of cases. It therefore presents no danger of "'constitutionaliz[ing] the employee grievance.'" *Garcetti*, 547 U.S. at 420 (quoting *Connick* v. *Myers*, 461 U.S. 138, 154 (1983)).

An employee seeking to assert a claim would have to allege facts establishing that he or she actually testified under oath and that plausibly demonstrate that the retaliatory action was related to that testimony. See *Bell Atl. Corp.* v. *Twombly*, 550 U.S 544, 557 (2007) (requiring allegations at the pleading stage to "plausibly suggest[]" the viability of a claim).

Whether the employee testified under oath is a readily-verifiable objective fact. If not alleged in the complaint, dismissal would rapidly follow. If the complaint falsely alleged that the plaintiff gave sworn testimony, a defendant could quickly move for summary judgment supported by an affidavit.

Similarly, the employee would have to allege facts supporting a connection between the testimony and the retaliatory action. Again, complaints that failed to satisfy the *Twombly* standard would be subject to dismissal.

As a result, holding that truthful testimony is eligible for First Amendment protection would not "commit state and federal courts to a new, permanent, and intrusive role" in monitoring employers. *Garcetti*, 547 U.S. at 423. Indeed, we have identified just thirty reported decisions in the six years following *Garcetti* addressing the issue of retaliation for sworn testimony.[8]

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[8] See, *e.g.*, *Karl* v. *City of Mountlake Terrace*, 678 F.3d 1062 (9th Cir. 2012); *Clairmont* v. *Sound Mental Health*, 632 F.3d 1091 (9th Cir. 2011); *Huppert* v. *City of Pittsburg*, 574 F.3d 696 (9th Cir. 2009), *overruled by Dahlia* v. *Rodriguez*, 735 F.3d 1060 (9th Cir. 2013); *Fairley* v. *Andrews*, 578 F.3d 518, 524 (7th Cir. 2009); *Matrisciano* v. *Randle*, 569 F.3d 723 (7th Cir. 2009); *Reilly* v. *City of Atl. City*, 532 F.3d 216 (3d Cir. 2008); *Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007); *Green* v. *Barrett*, 226 F.

While government employers are entitled to "sufficient discretion to manage their operations" and therefore "have heightened interests in controlling speech made by an employee in his or her professional capacity," *Garcetti*, 547 U.S. at 422, they have no legitimate interest in preventing government em-

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App'x 883 (11th Cir. 2007); *Carr* v. *City of Camden*, 2012 WL 4051884 (D.N.J. 2012); *Hayburn* v. *City of Phila.*, 2012 WL 3238344 (E.D. Pa. 2012); *Chrzanowski* v. *Bianchi*, 2012 WL 2680800 (N.D. Ill. 2012); *Frisenda* v. *Inc. Vill. of Malverne*, 775 F. Supp. 2d 486 (E.D.N.Y. 2011); *Minten* v. *Weber*, 832 F. Supp. 2d 1007 (N.D. Iowa 2011); *Moore* v. *Money*, No. 2:11-CV-122, 2011 WL 5966957 (S.D. Ohio Nov. 29, 2011); *Ramirez* v. *Cnty. of Marin*, No. C 10-02899, 2011 WL 5080145 (N.D. Cal. Oct. 25, 2011); *Proper* v. *Sch. Bd. of Calhoun Cnty. Fla.*, No. 5:10-cv-287-RS-EMT, 2011 WL 3608678 (N.D. Fla. Aug. 12, 2011); *Serianni* v. *City of Venice, Fla.*, No. 8:10-cv-2249-T-33TBM, 2011 WL 2533692 (M.D. Fla. June 27, 2011); *Matthews* v. *Lynch*, No. 3:07-cv-739 (WWE), 2011 WL 1363783 (D. Conn. Apr. 11, 2011), aff'd, 483 Fed. Appx. 624 (2d Cir. 2012); *Whitfield* v. *Chartiers Valley Sch. Dist.*, 707 F. Supp. 2d 561 (W.D. Pa. 2010); *Vaticano* v. *Twp. of Edison*, No. 09-01751 (SDW)(MCA), 2010 WL 4628296 (D.N.J. Nov. 5, 2010); *Reid* v. *City of Atlanta*, No. 1:08-cv-01846-JOF, 2010 WL 1138456 (N.D. Ga. Mar. 22, 2010); *Kerstetter* v. *Pa. Dep't of Corrs. SCI- Coal Twp.*, No. 4:08-CV-1984, 2010 WL 936457 (M.D. Pa. Mar. 12, 2010); *Mullins* v. *City of New York*, 634 F. Supp. 2d 373 (S.D.N.Y. 2009), aff'd, 626 F.3d 47 (2d Cir. 2010); *Foster* v. *Thompson*, No. 05-CV-305-TCK-FHM, 2008 WL 4682264 (N.D. Okla. Oct. 21, 2008); *Davis* v. *City of E. Orange*, No. 05-3720, 2008 WL 4328218 (D.N.J. Sept. 17, 2008); *Evans* v. *Hous. Auth. of City of Benicia*, No. 2:07-CV-0391, 2008 WL 4177729 (E.D. Cal. Sept. 8, 2008); *Hook* v. *Regents of Univ. of Cal.*, 576 F. Supp. 2d 1223 (D.N.M. 2008), aff'd, 394 F. App'x 522 (10th Cir. 2010); *Novak* v. *Bd. of Educ. of Fayetteville-Manlius Cent. Sch. Dist.*, No. 505-CV-199, 2007 WL 804679 (N.D.N.Y. Mar. 14, 2007); *Johnson* v. *LaPeer Cnty.*, No. 04-74659, 2006 WL 2925292 (E.D. Mich. Oct. 11, 2006).

ployees from providing truthful sworn testimony. As the Seventh Circuit recently concluded, "if the defendants here had some legitimate managerial interest in dissuading [the plaintiff] from testifying truthfully pursuant to a subpoena, we cannot imagine what it might be." *Chrzanowski*, 725 F.3d at 742.

When it comes to claims of interference with a government employee's sworn testimony, moreover, it is natural for the judiciary to have a role. *Fairley*, 578 F.3d at 525 ("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, nor can it prevent them from testifying against it." (internal citation omitted) (Easterbrook, J.)). The content of sworn testimony stems from the witness's obligations as a citizen to "tell the truth, the whole truth, and nothing but the truth"—not from the witness's obligations to his or her government employer.

Finally, a determination that truthful sworn testimony is *eligible* for First Amendment protection does not mean that the employee will prevail in every case—even if he or she is able to establish retaliation. The employer would still have the opportunity to show that the retaliatory actions were justified under the *Pickering* balancing test. 391 U.S. at 568. That standard provides additional protections for any employer who can demonstrate a legitimate reason for taking action against an employee who offers truthful testimony.

Ruling in favor of petitioner in this case simply means that claims of retaliation for truthful sworn testimony will not be rejected categorically, and instead may proceed to the balancing stage. That approach properly reconciles the important interests

implicated by this question—the government employer's interest in managing its employees, the employee's interest in fulfilling his or her obligation to speak truthfully when called to testify under oath, and society's interest in obtaining all relevant evidence.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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