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 *AMICUS CURIAE* NATIONAL WHISTLEBLOWER CENTER IN SUPPORT OF THE PETITIONER

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STATEMENT OF INTEREST

Founded in 1988, the National Whistleblower Center (NWC)[1] is a nonprofit, non-partisan, tax-exempt, charitable, and educational organization dedicated to the protection of employees who report misconduct in the workplace. *See* www.whistleblowers.org.

As part of its core mission, the NWC regularly monitors major legal developments in whistleblower law and files "Friend of the Court" briefs in federal and state courts and administrative agencies. Since 1990, the Center has participated before this Court as *amicus curiae* in cases that directly impact the rights of whistleblowers, including, *English v. General Electric*, 496 U.S. 72 (1990); *Haddle v. Garrison*, 525 U.S. 121 (1999); *Vermont Agency of Nat. Resources v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000); *Beck v. Prupis*, 529 U.S. 494 (2000); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Doe v. Chao*, 540 U.S. 614 (2004); *FAA v. Cooper*, 566 U.S. ___, 132 S.Ct. 1441 (2012); and *Lawson v. FRM, LLC*, 571 U.S. ___ (March 4, 2014).

Persons assisted by the NWC, including employees who work for state and local government

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[1] Pursuant to Rule 37.6, the NWC states that counsel of record for all parties gave consent to the filing of this brief. No monetary contributions were accepted for the preparation or submission of this *amicus curiae* brief, and the NWC's counsel authored this brief in its entirety.

entities, have a direct interest in the outcome of this case. The ability of employees to testify before federal Grand Juries and in criminal proceedings, free from intimidation, is of paramount importance to whistleblowers, who are often witnesses in such proceedings. Furthermore, whistleblowers are often called to testify in other court proceedings regarding their allegations of fraud or misconduct. Likewise, in order for whistleblowers to defend themselves in court from illegal retaliation, witnesses who are called on their behalf to testify, and who work for state or local governments, must be fully protected from any retaliation.

SUMMARY OF THE ARGUMENT

A public employee cannot be subjected to retaliation on the basis of testimony before a federal Grand Jury or testimony in a criminal proceeding pending in federal court. The First Amendment protects public employee speech on matters of "public concern" and "limits the ability of a public employer to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Garcetti v. Ceballos*, 547 U.S. 410, 418-19 (2006).

Evidence in federal criminal proceedings is unquestionably a matter of "public concern." Criminal laws are enacted by the elected representatives of the People to reflect standards of conduct, the

abridgment of which is, by their very nature, a subject of "public concern."

The duty and right to testify in criminal proceedings has also long been recognized as a duty and right of citizenship: "It is the duty and the right . . . of every citizen, to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States." *In re Quarles*, 158 U.S. 532, 535 (1895). The right to give relevant and admissible evidence in court proceedings is not simply a private right of the witness, but arises from the "necessity of the government itself," which demands that all such testimony be "free" from "adverse influence." *Id.*, p. 536.

In the context of a citizen's right to testify when called before a Grand Jury, over 125 years ago this Court held that: "The avenue to the grand jury should always be free and unobstructed." *Vogel v. Gruaz*, 110 U.S. 311, 315 (1884). The right to testify in criminal proceedings was viewed as part of the right and "duty of every citizen of the United States to communicate to his government any information which he has of the commission of an offense against its laws." *Id.*, p. 316.

When a "citizen enters government service," the pre-existing duty to "communicate to his government" information about potential crimes, including providing testimony about those crimes, is not negated or abridged. The right and duty is intrinsic

in citizenship itself and the fact that the citizen also holds a government job is immaterial to that right.

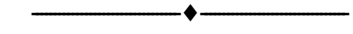
As this Court correctly held in *Garcetti*: "The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). Every citizen enjoys the liberty to provide testimony about potential crimes in the courts of the United States. *Vogel v. Gruaz*, 110 U.S. 311, 316 (1884), *citing Dawkins v. Rokeby*, L.R. 8 Q.B. 255, 265 (1873).

Speech related to providing information to the government (including prosecutors, judges, and jurors performing their government-related and sponsored civic duty) does not "owe its existence to a public employee's professional responsibilities." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). Any person who has evidence of criminal wrongdoing (or evidence that a person charged with a crime may be innocent) has a right and duty to provide that evidence to the appropriate government and judicial authorities, irrespective of any employment relationship whatsoever. To interfere with that right violates the fundamental public policy that underlies the U.S. Constitution and is criminal unto itself. 18 U.S.C. § 1514(e).

In *Garcetti*, the speech at issue was radically distinct from the speech at issue in this case. The speech in *Garcetti* was not made because the employee was exercising his rights as a "citizen," but instead

was simply part of the employee's "daily professional activities" for which he was paid to perform as a civil servant. *Garcetti*, 547 U.S. at 422. Testifying before a Grand Jury or in a federal criminal proceeding is not part of a typical public employee's "daily professional activities." *Id.* A citizen's right to testify in federal criminal proceedings is not tethered or connected to his or her government job. The right to testify is a right inherent in citizenship and exists regardless of any government position the citizen so happens to occupy.

Under the *Garcetti* precedent, Mr. Lane's testimony before a federal Grand Jury and in a related criminal proceeding constitutes protected speech under the United States Constitution.



ARGUMENT

UNDER *GARCETTI*, PETITIONER EDWARD LANE'S TESTIMONY BEFORE A FEDERAL GRAND JURY AND DURING A FEDERAL CRIMINAL PROCEEDING CONSTITUTED PROTECTED SPEECH UNDER THE UNITED STATES CONSTITUTION

In order for the speech of a government employee to be protected under the United States Constitution, it must satisfy the following "two inquiries": (1) whether the speech is of a matter of "public concern"; and (2) whether the "relevant government entity" has an "adequate justification for treating the

employee differently from any other member of the general public." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). Additionally, a Court must inquire whether or not the speech was part of the employees "daily professional duties" or performed as part of the "tasks he was paid to perform." *Id.*, at 421.

As set forth below, Edward Lane's speech before a federal Grand Jury, and during a federal criminal trial, was a matter of public concern. His Grand Jury and in-court testimony was not part of his "daily professional duties." His employer had no justification for treating him any differently from any other citizen who testified in the criminal proceedings.

Moreover, citizens are not paid for their testimony in federal criminal proceedings. In point of fact, any connection between pay and testimony could give rise to witness tampering and/or an obstruction of justice. Consequently, Mr. Lane's speech in the criminal proceedings was fully protected under the U.S. Constitution.

I. Mr. Lane's Speech was of Public Concern and Protected as a Fundamental Right of Citizenship

Mr. Lane gave testimony in two federal criminal proceedings. The first was testimony in a Grand Jury proceeding. Thus, pursuant to federal Grand Jury procedure, the federal prosecutor would have called Mr. Lane as a witness before the Grand Jury. Presumably, the prosecutor concluded that Mr. Lane had

evidence relevant to the violation of a federal law. Testimony about actual or potential violations of law is a matter of public concern. *Garcetti*, 547 U.S. at 417-18 ("the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern").

As this Court has long held, it is a fundamental right of "every citizen to communicate to his government any information which he has of the commission of an offense against its laws." *Vogel v. Gruaz*, 110 U.S. 311, 316 (1884). This right and duty of citizenship includes the right of citizens to testify in courts of law. In *Vogel*, the Supreme Court specifically cited to the case of *Dawkins v. Rokeby*, L.R. 8 Q.B. 255 (1873), as precedent for this right. In *Dawkins*, the Court of Queen's Bench explained the importance of protecting testimony from any improper influences:

> . . . there is the further overwhelming reason that witnesses are protected from actions for what they may have stated in evidence in a court of justice; otherwise, everybody in the witness-box would speak in fear of litigation; *and no man who is called to give evidence would be safe from some troublesome action being brought against him*.

Dawkins, L.R. 8 Q.B. at 265 (emphasis added).

Testimony in court is speech that is a matter of public concern and that unquestionably owes its existence to the duty of citizenship. *Accord*, *In re Quarles*, 158 U.S. 532, 535-36 (1895) ("It is the duty

and right . . . of every citizen, to assist in prosecuting . . . any breach of the peace."). This duty of citizenship is not a duty that arises as a term or condition of employment.

II. No Government Entity Can Justify Treating an Employee differently from a Citizen when the Employee Performs his Civic Duty to Testify in Federal Criminal Proceedings

The second inquiry this Court must undertake to determine whether Mr. Lane's testimony in two criminal proceedings was constitutionally protected focuses on the Respondent's "justification" for "treating the employee differently from any other member of the general public." *Garcetti*, 547 U.S. at 418. No such justification exists.

It is well established that a person's right to provide "information" to the "proper authority of any misconduct, frauds or misdemeanors committed by any person in the service of" the "states" is part of the fundamental law of the United States, and is inherent in the U.S. Constitution. Resolution of July 30, 1778, Vol. XI *Journals of the Continental Congress* 732 (Washington: Government Printing Office, 1908); *In re Quarles*, 158 U.S. at 535-36 ("It is the duty and right . . . of every citizen, to assist in prosecuting . . . any breach of the peace."); *Vogel*, 110 U.S. at 316 (1884), *citing Dawkins*, L.R. 8 Q.B. at 265 (1873).

The right to testify in such proceedings is a "freedom" inherent in citizenship for which no public

employer can reasonably set "limitations." *Garcetti,* 547 U.S. at 418. It is a "freedom" inherent in "citizenship" and any attempt by a public employer to assert "control" over its employees' "words and actions" when testifying in a federal criminal proceeding would be highly inappropriate and most likely would constitute a criminal obstruction of justice. The "words" spoken by a witness to a Grand Jury or before a federal court in a criminal proceeding are controlled by the oath the witness swears, not by any sense of loyalty or duty to a public employer.

Even more significant is the "leverage" issue identified by this Court in *Garcetti*. *Id*., at 419. It is well understood that a public employer can leverage employment opportunities in order to lawfully control the work-related activities of an employee. However, this power to leverage employee speech is limited by the U.S. Constitution: "The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Id.*

Nowhere are the "liberties" "enjoyed" by public employees in their "capacities as private citizens" more implicated than in the liberty and freedom of any person to freely, truthfully, and completely testify in a criminal proceeding. Such testimony is essential in order to ensure that the guilty are convicted and held accountable for their crimes and that the innocent are freed. It would be shocking to permit a public employer to "leverage the employment relationship"

in order to influence, "incidentally or intentionally," the truthful testimony of a citizen who happens to also be a public employee. *Garcetti*, 547 U.S. at 419.

III. Mr. Lane's Testimony before the Grand Jury and in a Federal Criminal Proceeding was Not Part of his "Daily Professional Activities"

A citizen's testimony before a federal grand jury, or at a federal criminal trial, is *not* part of an employee's job duties. It arises from the duty every citizen owes his country and the freedom every citizen maintains to inform the appropriate authorities of crimes committed against the People. As this Court has long recognized, this freedom is part of the fundamental structure of the Constitution itself. *In re Quarles*, 158 U.S. at 535-36.

This case bears no resemblance to the facts at issue in *Garcetti*. The plaintiff in the *Garcetti* case, Mr. Richard Ceballos, engaged in "speech" inside his workplace office, not in a court. *Garcetti*, 547 U.S. at 420. While Ceballos "spoke" to his supervisor, Mr. Lane "spoke" to prosecutors, judges, lawyers, and jurors who, obviously, were not in Mr. Lane's chain of command. He also spoke to members of the public who, under the U.S. Constitution, have a right to attend criminal trials.

Furthermore, Mr. Ceballos' speech "owe[d] its existence" to the fact that Mr. Ceballos was performing his "professional responsibilities" at work. *Id.*, at

421. Mr. Ceballos' speech was made as part of his "duties" to "advise his supervisor about how to best proceed" with a work-related duty. *Id.* By contrast, Mr. Lane's testimony owed its existence to his willingness to perform a *civic* duty. Mr. Lane was not advising his "supervisor" about how better to perform his job. Rather, he was testifying in a court about the crimes committed by his supervisors and providing evidence that could result in his supervisors going to prison for mail fraud and fraud in the expenditure of federal funds.

As this Court pointed out in *Garcetti*, Mr. Ceballos "did not act as a citizen when he went about conducting his daily professional activities." 547 U.S. at 422. However, Mr. Lane did act as a citizen when he upheld one of the most important duties of citizenship and testified in two criminal proceedings. *In re Quarles*, 158 U.S. at 535 ("It is the duty . . . of every citizen, to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States."). That the accused happened to be Mr. Lane's supervisors does not convert Mr. Lane's duty of citizenship to testify truthfully before a Grand Jury and criminal court into a part of his daily job duties.

CONCLUSION

Under this Court's precedent in *Garcetti*, Mr. Lane's testimony in two federal criminal proceedings was fully protected under the Constitution of the United States and its First Amendment.

Respectfully submitted,

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