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LANE V. FRANKS

Supreme Court Rules on First Amendment Speech Protections for Government Employees

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The role that the First Amendment plays in the public workplace is one of particular importance. Given that almost twenty-two million Americans work for the local, state, and federal governments, the constitutional protections afforded to public employees is of particular interest to public employers and employees, and the audiences who might learn from employees' speech.[1] Unlike the constitutional protections granted to private citizen speech, the Supreme Court's First Amendment public employee speech jurisprudence provides public employees with a constrained and "limited set of First Amendment freedoms."[2] Although the law grants public employees some First Amendment protection, "their speech is afforded a lower degree of constitutional protection as compared with the speech of private citizens."[3] Notably, these free speech rights most often become more controversial when an employee faces discipline because of his or her speech.[4]

On June 19, 2014, the U.S. Supreme Court expanded the scope of public employee free speech with its decision in *Lane v. Franks*.[5] The Court granted certiorari in order "to resolve discord among the Courts of Appeals as to whether public employees may be fired—or suffer other adverse employment consequences—for providing truthful subpoenaed

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1 U.S. CENSUS BUREAU, 2013 ANNUAL SURVEY OF PUBLIC EMPLOYMENT & PAYROLL, CATEGORIES OF EMPLOYEES AT THE FEDERAL, STATE, AND LOCAL LEVELS (2014) (reporting that local, state, and federal governments employ 21,831,255 people), *available at* http://factfinder.census.gov/rest/dnldController/deliver?_ts=437686905107.

2 W. Bradley Wendel, *Dedication to Professor Ray Forrester: Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305, 313 (2001).

3 *Id.* at 344.

4 *See* David L. Hudson Jr., *Balancing Act: Public Employees and Free Speech*, 3 FIRST REPORTS 1, 4 (2002).

5 134 S. Ct. 2369 (2014).

testimony outside the course of their ordinary job responsibilities."[6] The unanimous *Lane* decision, which affirmed in part and reversed in part an opinion by the Eleventh Circuit, held that the First Amendment protects a public employee from retaliatory employer discipline where the employee testifies at trial, pursuant to a subpoena, and when such testimony is not required by his or her duties as an employee. However, the Court also ruled that the public employer in *Lane* could not be held liable in his individual capacity for damages because he enjoyed qualified immunity from suit.[7] *Lane* adds its voice to the preexisting *Pickering v. Board of Education*[8] and *Garcetti v. Ceballos*[9] frameworks of public employee speech. *Lane* is important because it further clarifies the Court's public employee speech doctrine, while also providing more definite limits to *Garcetti* by asking whether the speech "is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."[10]

But while *Lane* clarifies that a public employee cannot be terminated for providing "truthful sworn testimony, compelled by subpoena, outside the course of his ordinary job responsibilities,"[11] the question of how far that protection will extend remains open. The *Lane* Court explicitly declined to address "whether truthful sworn testimony would constitute citizen speech under *Garcetti* when given as part of a public employee's ordinary job duties."[12] Thus, *Lane* would not cover situations involving a police officer or crime scene technician who may testify in the course of their ordinary job duties.[13] While *Lane*'s application of the *Pickering* framework gives guidance to public employers when weighing the First Amendment interests of employees subpoenaed to testify outside the scope of their ordinary job duties with the interests of the government as an employer, *Lane* also leaves unanswered significant public employee speech questions for public employees that may find themselves testifying as a part of their ordinary job responsibilities.

I. THE MAJORITY OPINION

The plaintiff in *Lane* was Edward Lane, the former Director of the Community Intensive Training for Youth (hereinafter CITY) program at Central Alabama Community College (CACC); Lane was hired in 2006,

6 *Id.* at 2377.
7 *Id.* at 2383.
8 391 U.S. 563 (1968).
9 547 U.S. 410 (2006).
10 134 S. Ct. at 2379.
11 *Id.* at 2378.
12 *Id.* at 2378 n.4.
13 *Id.* at 2384 (Thomas, J., concurring). The concurrence offers these examples as employees whose speech rights remain unsettled under *Lane*.

during a time when CITY faced "significant financial difficulties."[14] As part of his duties as Director, Lane conducted an extensive audit of the CITY program's expenses.[15] During the course of his audit, he discovered a woman on the payroll—Alabama State Representative Suzanne Schmitz—had not been reporting for work at the CITY office.[16] Lane informed Steve Franks, then-President of CACC, about Schmitz's failure to report. In response, Franks warned Lane that terminating Schmitz's employment at CITY could have negative consequences.[17] Lane terminated Schmitz's employment and shortly thereafter the Federal Bureau of Investigation (FBI) initiated an investigation into Schmitz's employment with CITY.[18]

The FBI's investigation led to Schmitz's indictment on federal charges of mail fraud and theft in connection with a program in receipt of federal funds.[19] In the case against her, Lane testified, under subpoena, before a federal grand jury about the events surrounding Schmitz's termination and his reasons for firing her.[20] Lane testified both in Schmitz's August 2008 trial and her retrial six months later.[21] Upon retrial, the jury convicted Schmitz, sentenced her to thirty months' imprisonment, and ordered her to pay more than $177,000 in restitution.[22]

In January 2009, President Franks terminated Lane and twenty-eight other CITY employees in an alleged effort to address budget problems.[23] Franks rescinded all but two termination decisions a few days later, but did not rescind Lane's termination.[24] Franks claimed he did not rescind Lane's termination due to ambiguity in Lane's employee status.[25] Lane

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14 *Id.* at 2375.

15 *Id.*

16 *Id.*

17 "CACC's president and its attorney . . . warned [Lane] that firing Schmitz could have negative repercussions for him and CACC." *Id.* After her termination, "Schmitz told another CITY employee . . . that she intended to 'get Lane back'" and threatened to fire him if he requested money from the state legislature. *Id.* (quoting Lane v. Cent. Ala. Cmty. Coll., No. CV–11–BE–0883–M, 2012 WL 5289412, at *1 (N.D. Ala. Oct. 18, 2012)).

18 *Id.*

19 *Id.*

20 *Id.*

21 During Schmitz's first trial, the jury failed to reach a verdict. Schmitz was then tried again six months later and convicted. *Id.*

22 *Id.*

23 *Id.* at 2376.

24 *Id.*

25 *See id.* Lane recommended to Franks that, in order to address the CITY program's budget shortfalls, he should consider layoffs. This led Franks to terminate twenty-nine probationary CITY employees, including Lane. *Id.*

> Shortly thereafter, Franks rescinded all but 2 of the 29 terminations—those of Lane and one other employee—because of an "ambiguity in [those other

subsequently filed suit against Franks in both his individual and official capacities, alleging Franks "violated the First Amendment by firing him in retaliation for testifying against Schmitz."[26]

The U.S. District Court for the Northern District of Alabama granted Franks' motion for summary judgment, finding he was entitled to qualified immunity.[27] In reaching its decision, the district court relied on *Garcetti v. Ceballos*,[28] "which held that 'when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes.'"[29] The district court's decision noted that, although there were "genuine issues of material fact" concerning Franks' "true" motivation for terminating Lane's employment, "a reasonable government official in [] Franks' position would not have had reason to believe that the Constitution protected Mr. Lane's testimony."[30]

The Eleventh Circuit affirmed the lower court, relying "extensively" on *Garcetti*.[31] The Eleventh Circuit concluded that Lane's speech fell into a category of employee speech outside the protection of the First Amendment because it came into "existence [because of] the employee's professional responsibilities."[32] However, the Eleventh Circuit determined that "'even if . . . a constitutional violation of Lane's First Amendment rights occurred in these circumstances, Franks would be entitled to qualified immunity in his personal capacity' because the right at issue had not been clearly established."[33]

In an opinion authored by Justice Sotomayor, the Supreme Court reversed in part and affirmed in part the opinion of the Eleventh Circuit. The Court began by concisely framing the legal issue raised in *Lane*: "whether the First Amendment protects a public employee who provided truthful sworn testimony, compelled by subpoena, outside the course of his

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> employees'] probationary service." Franks claims that he "did not rescind Lane's termination . . . because he believed that Lane was in a fundamentally different category than the other employees: he was the director of the entire CITY program, and not simply an employee [who could be fired at will]."

Id. (first and second alterations in original) (citations omitted).

26 *Id.*

27 *Id.* (citing Lane v. Cent. Ala. Cmty. Coll., 2012 WL 5289412, at *12 (N.D. Ala. Oct. 18, 2012)).

28 547 U.S. 410 (2006).

29 *Lane*, 134 S. Ct. at 2376 (quoting *Garcetti*, 547 U.S. at 421).

30 *Lane*, 2012 WL 5289412, at *6, *12.

31 *Lane*, 134 S. Ct. at 2376.

32 Lane v. Cent. Ala. Cmty. Coll., 523 F. App'x 709, 711 (11th Cir. 2013) (regarding Franks' official capacity, the court in its decision did "not resolve, however, the claims against Burrow—initially brought against Franks when he served as president of CACC—in her official capacity."). The Court remanded the case to the Eleventh Circuit for further proceedings.

33 *Lane*, 134 S. Ct. at 2377 (quoting *Lane*, 523 F. App'x at 711 n. 2).

ordinary job responsibilities."[34] In holding that the First Amendment did indeed protect such speech, the Court began with the basic premise that "speech by citizens on matters of public concern lies at the heart of the First Amendment."[35]

Although the government has unique interests as an employer, individuals "do not renounce their citizenship" when they take up an employment position with the government.[36] The Court recognized the inherent tension between the interests of the employee as a citizen and the interest of the state as an employer. While government employees have interests in protecting their constitutional rights to free speech, government employers have legitimate interests in promoting efficiency and integrity, and maintaining discipline within the workplace.[37] The Court characterizes this tension as a struggle to determine "whether the government had 'an adequate justification for treating the employee differently from any other member of the public' based on the government's needs as an employer."[38] In an attempt to determine which interests "tip[ped] the balance,"[39] the Court turned to its precedent in *Pickering v. Board of Education*, which involved a teacher's letter to a newspaper about a school budget.[40] In *Pickering*, the Court found the teacher's speech to be on a matter of public concern.[41] It also held that the publication of the letter did not impede or interfere with the teacher's performance or the school's operation, and so could not supply grounds for dismissal.[42] The Court acknowledged that the government's interest in controlling its workplace must be properly balanced against an employee's interest "as a citizen, in commenting upon matters of public concern."[43] But it concluded that "[h]ere, the employer's side of the *Pickering* scale [was] entirely empty" because Franks and CACC could not demonstrate any government interest that tipped the balance in their favor.[44]

The *Lane* Court then turned to the framework established in *Garcetti* in order to distinguish between employee speech and citizen speech.

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34 *Id.* at 2378.

35 *Id.* at 2377.

36 *Id.*

37 *Id.* at 2381 ("[G]overnment employers have legitimate 'interests in the effective and efficient fulfillment of their responsibilities to the public', including 'promot[ing] efficiency and integrity in the discharge of official duties,' and 'maintain[ing] proper discipline in public service.'" (quoting Connick v. Myers, 461 U.S. 138 (1983)).

38 *Id.* at 2377 (quoting *Garcetti*, 547 U. S. at 418).

39 *Id.*

40 Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

41 *Id.* at 571.

42 *Id.* at 572–74.

43 *Id.* at 568.

44 *Lane*, 134 S. Ct. at 2377.

Garcetti articulated a two-step inquiry to determine whether a public employee's speech is entitled to First Amendment protection:

> The first [step] requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.[45]

Garcetti involved an internal memorandum prepared by a prosecutor, which the Court held the First Amendment did not protect because it was prepared as part of the prosecutor's ordinary job duties.[46] Importantly, the Court differentiated between citizen speech—which may trigger constitutional protection—and unprotected statements made by public employees pursuant to their official duties. Per *Garcetti*, the Constitution does not insulate these types of public employee communications from employer discipline because it is not speech made as a citizen for First Amendment purposes.

Addressing the facts before it, the *Lane* Court first examined whether Lane's testimony constituted speech as a private citizen on a matter of public concern. The decisive question in *Garcetti* turns on whether the speech at issue is ordinarily "within the scope of an employee's duties."[47] Speech that is ordinarily within the scope of an employee's duties constitutes employee speech and remains outside the protections of the First Amendment. The Court easily found Lane's speech to be speech as a private citizen because

> sworn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth. When the person testifying is a public employee, he may bear separate obligations to his employer—for example, an obligation not to show up to court dressed in an unprofessional manner. But any such obligations as an employee are distinct and independent from the obligation, as a citizen, to speak the truth. That independent obligation renders sworn testimony speech as a citizen and sets it apart from speech made purely in the capacity of an employee.[48]

The Court distinguished between *Garcetti*'s internal memorandum and *Lane*'s sworn testimony by noting that, unlike *Garcetti*'s internal memorandum, Lane's testimony about the facts surrounding Schmitz's

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45 *Lane,* 134 S. Ct. at 2378 (quoting *Garcetti*, 547 U.S. at 418 (citations omitted)).

46 *Garcetti*, 547 U.S. at 424.

47 *Id.*

48 *Lane*, 134 S. Ct. at 2379 (citation omitted).

termination was compelled by subpoena and was not distinctly "ordinarily within the scope of an employee's duties."[49] The fact that Lane's testimony concerned information acquired through his employment and that it involved his employment duties did not "transform" his testimony into employment speech.[50] The Court then rebuked the Eleventh Circuit for failing to distinguish Lane's speech from that in *Garcetti*, causing the Eleventh Circuit to read "*Garcetti* far too broadly."[51] The Court's strong language served to emphasize both the importance of First Amendment protection for sworn testimony as citizen speech, as well as the Court's defined—and somewhat limited—scope of *Garcetti*.

The Court also drew attention to the importance of affording protection to public employee speech in the case of "a public corruption scandal."[52] Citing its recent decision in *Snyder v. Phelps*, the Court noted that speech of public concern "can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'"[53] Given that Lane provided compelled testimony in a case against a state representative involving corruption of a public program, misuse of state funds,[54] extensive press coverage[55] and resulting in substantial restitution,[56] the Court found that Lane's speech "obviously" involved a matter of significant public concern.[57]

However, the Court stopped short of granting categorical First Amendment protection for a public employee's sworn testimony as a citizen on a matter of public concern.[58] Instead, the Court applied the *Pickering* balancing test.[59] Under *Pickering*, even if an employee speaks as a citizen on a matter of public concern, the Court must still determine whether the interest of the employee or government should prevail in cases where the government seeks to curtail its employees' speech. This determination "depends on a careful balance 'between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of

49 *Id.*
50 *Id.*
51 *Id.*
52 *Id.* at 2380.
53 *Id.* (citing Snyder v. Phelps, 131 S. Ct. 1207, 1211 (2011)).
54 *Id.*
55 *Id.* at 2375.
56 *Id.*
57 *Id.* at 2380.
58 *Id.*
59 *Id.* at 2377.

the public services it performs through its employees.'"[60] Here, the Court looked to whether the government took action based on its legitimate interests as an employer,[61] and found that the government failed to show adequate justification for Franks' retaliatory termination of Lane. Remarking that "the employer's side of the Pickering scale [was] entirely empty," the Court held Lane's speech was entitled to First Amendment protection.[62]

On the question of qualified immunity, the *Lane* Court agreed with the lower courts that then-President Franks enjoyed qualified immunity from suit, and therefore dismissed the claims against him in his individual capacity for damages.[63] Citing *Ashcroft v. al-Kidd*, the Court reaffirmed the principle that "qualified immunity 'gives government officials breathing room to make reasonable but mistaken judgments about open legal questions.'"[64] The Court began by identifying the relevant question for qualified immunity in this case: "Could Franks reasonably have believed, at the time he fired Lane, that a government employer could fire an employee on account of testimony the employee gave, under oath and outside the scope of his ordinary job responsibilities?"[65] The Court ruled that, although Lane's speech fell within the protection of the First Amendment, the unsettled precedent within the Courts of Appeal at the time that Franks terminated Lane's employment required a grant of qualified immunity. The Court reiterated that the pertinent analytical inquiry was: whether "Franks [could] reasonably have believed, at the time he fired Lane, that a government employer could fire an employee on account of testimony the employee gave, under oath and outside the scope of his ordinary job responsibilities."[66] In determining whether qualified immunity was appropriate, the Court analyzed the state of the law in the Eleventh Circuit at the time Franks made his termination decision. Because of discrepancies in Eleventh Circuit caselaw[67] and that of the other

60 *Id.* at 2377 (quoting Pickering v. Bd. of Ed., 391 U.S. 563, 568 (1968)).

61 Such as "promot[ing] efficiency and integrity in the discharge of official duties, and maintain[ing] proper discipline in public service." *Id.* at 2381 (quoting Connick v. Myers, 461 U.S. 138, 150–51 (1983)) (alteration in original) (internal quotations omitted).

62 *Id.* at 2381.

63 *Id.*

64 *Id.* (quoting Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2085 (2011)).

65 *Id.*

66 *Id.* at 2382.

67 *Id.* Highlighting the various Eleventh Circuit precedents at issue, the Court noted:

> *Morris, Martinez,* and *Tindal* represent the landscape of Eleventh Circuit precedent the parties rely on for qualified immunity purposes. If *Martinez* and *Tindal* were controlling in the Eleventh Circuit in 2009, we would agree with Lane that Franks could not reasonably have believed that it was lawful to fire Lane in retaliation for his testimony. But both cases must be read together with *Morris*, which reasoned—in declining to afford First Amendment protection—that

courts of appeals, the question of whether Franks could terminate Lane's employment based on his testimony "was not beyond debate at the time Franks acted."[68] Thus, the claims against Franks in his individual capacity must be dismissed.[69]

II. JUSTICE THOMAS'S CONCURRENCE

Justice Thomas penned a two-paragraph concurring opinion, which Justices Scalia and Alito joined, in order to stress the limited application of the Court's decision. He noted that *Lane* provided "no occasion to address the quite different question whether a public employee speaks 'as a citizen' when he testifies in the course of his ordinary job responsibilities."[70] The concurring opinion asserted that *Lane* "requires little more than a straightforward application of *Garcetti*"[71]: Lane testified in a manner that was neither pursuant to job duties, nor done to fulfill a work responsibility, which means he spoke "as a citizen" and was entitled to constitutional protection.[72]

Justice Thomas also drew attention to the majority's failure to address the level of First Amendment protection, if any, afforded public employees who give testimony as part of their ordinary job duties.[73] The *Lane* majority noted that "Lane's ordinary job responsibilities did not include testifying in court proceedings . . . We accordingly need not address in this case whether truthful sworn testimony would constitute citizen speech under *Garcetti* when given as part of a public employee's ordinary job duties, and express no opinion on the matter today."[74] While the concurring opinion refrained from clarifying the scope of *Lane*'s First Amendment protection, by explicitly distinguishing Lane's testimony from that of a police officer or crime scene technician—employees who may find themselves testifying in the course of their ordinary job duties—

> the plaintiff's decision to testify was motivated solely by his desire to comply with a subpoena.

Id. (citing Morris v. Crow, 142 F. 3d 1379 (1998) (per curiam); Martinez v. Opa-Locka, 971 F. 2d 708 (1992) (per curiam); Tindal v. Montgomery Cty. Comm'n, 32 F. 3d 1535 (1994)).

68 *Id.* at 2374. It is worth noting that the Court placed weight on the fact that the Third and Seventh Circuit precedents were "in direct conflict with Eleventh Circuit precedent." *Id.* This direct conflict undermined Lane's argument that the Third and Seventh Circuit precedents should have put Franks on notice that firing Lane was unconstitutional.

69 *Id.* at 2383.

70 *Id.* at 2384 (Thomas, J., concurring).

71 *Id.* at 2383.

72 *Id.*

73 *Id.* at 2384; *accord id.* at 2378 n.4 (majority opinion).

74 *Id.* at 2378 n.4. (majority opinion).

Justice Thomas highlighted the open question that remains for the Court's future consideration.[75]

III. ANALYSIS

At this point, it is worth considering whether there is any meaningful difference between Lane's testimony and that provided by police officers and crime scene technicians. Should the *Lane* rule apply to employees who testify as part of their ordinary job duties? One might imagine a scenario where a police officer is subpoenaed and testifies—in the course of his ordinary job responsibilities—and is later terminated. Such a case could fall squarely under *Garcetti* because the employee's testimony can be viewed as parallel to the prosecutor's internal memorandum. Under *Garcetti*, "[t]he fact that [an employee's] duties sometimes required him to speak or write does not mean that his supervisors were prohibited from evaluating his performance."[76] Moreover, when police officers or crime scene technicians testify, their testimony "is itself ordinarily within the scope of [their] duties, not…merely concern[ing] those duties."[77] *Lane* acknowledges *Garcetti*'s emphasis on the "government's needs as an employer."[78] Taking away the government employer's ability to terminate an employee for actions taken in the course of their ordinary job duties would certainly infringe on the government's ability to effectively hire and fire. Thus, a court could conclude that the officer's testimony was not protected.

However, the *Lane* Court made clear that providing "[s]worn testimony in judicial proceedings is a quintessential example of speech as a citizen."[79] Although *Garcetti* held that when a public employee speaks pursuant to his official duties he is not speaking as a citizen, the fact that someone is a police officer or crime scene technician in no way diminishes his or her "obligation, to the court and society at large, to tell the truth. That obligation is distinct and independent from any separate obligations a testifying public employee might have to his employer."[80]

Even if a court was unwilling to find the officer's speech to be "speech as a citizen," there are sufficient reasons to apply *Lane*'s protection to sworn testimony by employees who testify in the course of their ordinary job duties. First, extending *Lane* to provide First Amendment protection for public employees who testify as part of their ordinary job duties meaningfully protects sworn testimony. Furthermore, the fact that an

75 *Id.* at 2384 (Thomas, J., concurring).
76 Garcetti v. Ceballos, 547 U.S. 410, 424 (2006).
77 *Lane*, 134 S. Ct. at 2381 (majority opinion).
78 *Id.*
79 *Id.* at 2379.
80 *Id.*

officer testifies to "fulfill a work responsibility" is not significantly distinguishable from the compelled sworn testimony in *Lane*. An officer's obligation to be truthful remains, and the government employer's interest in hiring and firing does not outweigh the need for officers to offer truthful sworn testimony without fear of repercussion.[81] Finally, the idea that a police officer could be terminated for providing truthful sworn testimony is somewhat troubling because testifying is often a "critical part of . . . employment duties."[82] There remains something deeply unsettling about the notion that police officers or crime scene technicians are essentially required to testify—as a critical part of their job—but could be terminated for their truthful sworn testimony.

CONCLUSION

Lane is notable for two distinct reasons: (1) it helps clarify the distinction between citizen speech and employee speech in situations involving subpoenaed testimony, and (2) it provides defined limits to the scope of *Garcetti*. In further outlining the First Amendment protections afforded public employees, the case both affirms the free speech rights of those employees and provides guidance to public employers in weighing the First Amendment interests of their employees against their own interests.

Yet, while *Lane* provides guidance to public employers, employees should take care to note the caveats built into *Lane* opinion, particularly with respect to the type of testimony at issue. The Court emphasized that in the facts before it "[t]here [was] no evidence . . . that Lane's testimony at Schmitz' trials was false or erroneous or that Lane unnecessarily disclosed any sensitive, confidential, or privileged information while testifying."[83] This language leaves open the possibility that if an employee gave testimony that "unnecessarily disclosed any sensitive, confidential, or privileged information," a government employer could be justified in terminating that employee, based on its legitimate needs as an employer. At the same time, however, if sworn testimony is a "quintessential example of speech as a citizen" and a witness "bears an obligation . . . to tell the truth," an employer may find it difficult to argue that information given under compelled testimony was unnecessarily disclosed. It would appear that, although not all sworn testimony falls under the protection of the First Amendment, under *Lane* all "truthful subpoenaed testimony outside the course of their ordinary job responsibilities"[84] would enjoy protection. Thus, public employers should be extremely careful when considering

81 *Id.* at 2384 (Thomas, J., concurring) (quoting *Garcetti*, 547 U.S. at 421).

82 *Id.*

83 *Id.* at 2381 (majority opinion).

84 *Id.* at 2377.

termination on the basis of "unnecessary disclosure" in subpoenaed testimony because *Lane* illustrates the difficulty that accompanies a public employer's duty to properly balance the First Amendment interests of employees and the interests of the government as an employer.

Lane also reaffirms the premise that government employers whose actions are not precluded by clear legal precedent enjoy qualified immunity because qualified immunity exists for those government officials charged with making employment decisions when there are discrepancies in the law. Although *Lane* leaves open whether the First Amendment protects the speech of government employees called to testify as part of their employment obligations, the case nonetheless bolsters the strength of the qualified immunity standard that insulates government actors to the point that the standard seems "increasingly impenetrable."[85] Ultimately, the defense of qualified immunity, as outlined in *Lane*, remains for government officials unless they have violated a clearly established constitutional right.

85 Ruthann Robson, *Opinion Analysis: First Amendment Clearly Protects Public Employee's Subpoenaed Testimony—But Not Sufficiently Clearly to Overcome Qualified Immunity*, SCOTUSBLOG (June 19, 2014, 3:11 PM), http://www.scotusblog.com/2014/06/opinion-analysis-first-amendment-clearly-protects-public-employees-subpoenaed-testimony-but-not-sufficiently-clearly-to-overcome-qualified-immunity/.