Volume 123 | Issue 2 Article 11

December 2020

Content, Context, What's Next? A *Garcetti-Pickering* Analysis for Public Employees in Court

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CONTENT, CONTEXT, WHAT'S NEXT? A GARCETTI-PICKERING ANALYSIS FOR PUBLIC EMPLOYEES IN COURT

I. INTRODUCTION

A government employee is sitting at home when he gets a phone call. On the other end of the line is his co-worker John's attorney, who informs him that John has been badly injured in a worksite accident. The attorney asks the government employee to testify as to John's state both before and after the accident. Rather than being able to simply help his friend, the government employee is instead stuck between a proverbial rock and a hard place. He can testify truthfully and potentially face termination from the career he has worked all his life to build, or he can refuse to testify, saving his career, but sacrificing both his friend and the pursuit of justice in the process.

"Always design a thing by considering it in its next larger context—a chair in a room, a room in a house, a house in an environment, an environment in a city plan,"[1] said Eilel Saarinen, who designed buildings and not laws; but the judiciary must also consider the context when building laws through precedent. This Note explores the importance of context, as well as content, when judges rule on employment discrimination cases stemming from the speech of a public employee.

The federal circuit courts are divided on the question of whether a public employee who is testifying in court is "speaking out on an issue of public concern"[2] for the purposes of First Amendment protections.[3]

To follow the approach of the Third and Fifth Circuits would create an irrebuttable presumption that any truthful testimony—on any matter—could not operate as the basis for disciplinary action unless the government could satisfy the balancing test, balancing the free speech interests of an employee against the interest of the employer in operating efficiently.

Alternatively, to follow the approaches of the Fourth, Seventh, Eighth, and Eleventh Circuits leaves public employees with a motivation to lie under oath to preserve their jobs or to refuse to testify and face potential contempt charges.

This Note argues for a third interpretation, borrowing from both approaches. It argues that courts should operate under a presumption that testimony under oath is on a matter of public concern that can be *rebutted* on a case-by-case basis.

Part II of this Note sets forth the background of employee protections in the public sector as compared to the private sector. Part III lays out the current state of the law and how it sets up the current circuit split. Part IV examines that circuit split. Part V shows the failures of the approaches in these circuits. Part VI provides the proposed alternative approach, a rebuttable presumption. Part VII shows how to rebut the proposed presumption. Part VIII provides the conclusion to this Note. For those readers well-versed in employment law, Parts II and III may be review, but they are likely necessary for the less versed reader.

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[1] Hadley Keller, *AD Remembers the Extraordinary Work of Eilel and Eero Saarinen*, ARCHITECTURAL DIG. (July 31, 2014), https://www.architecturaldigest.com/story/saarinen-father-and-son.

[2] Arvinger v. Mayor of Balt., 862 F.2d 75, 77 (4th Cir. 1988).

[3] Butler v. Bd. of Cnty. Comm'rs, 920 F.3d 651 (10th Cir. 2019); Maggio v. Sipple, 211 F.3d 1346 (11th Cir. 2000); Padilla v. S. Harrison R-II Sch. Dist., 181 F.3d 992 (8th Cir. 1999); Latessa v. N.J. Racing Comm'n, 113 F.3d 1313 (3d Cir. 1997); Wright v. Ill. Dep't of Child. & Fam. Servs., 40 F.3d 1492 (7th Cir. 1994); Johnston v. Harris Cnty. Flood Control Dist., 869 F.2d 1565 (5th Cir. 1989); *Arvinger*, 862 F.2d 75.

II. THE RISE AND FALL OF PUBLIC EMPLOYEE FREE SPEECH PROTECTION

Public employees may only be subject to adverse employment actions when such action will promote government efficiency.[4] Public employment protections go even further than requiring cause, also requiring the government employer give the government employee at least 30 days advanced written notice (unless a crime has been committed) of the adverse action, at least 7 days to answer and provide evidence, a right to representation by an attorney, and a written decision with specific reasons for the adverse employment action.[5] These protections are afforded to all public employees, except for those specifically enumerated by statute.[6] Even if a public employer correctly takes adverse action against its employee—for cause and following all statutory requirements in the process—a public employee still has a right to appeal at a hearing before the Merit Systems Protection Board with counsel from an attorney or representative.[7]

At-will employment exists in direct contrast with these for cause requirements. At-will employment in the private sector is a long-standing tradition in the United States, traceable to a treatise written in 1877 by Horace Wood.[8] While it is now accepted that Wood introduced the concept of at-will employment by misrepresenting authority, he was responsible for nationwide acceptance of the rule.[9] In fact, shortly after the publishing of this treatise, many states quickly adopted the concept of at-will employment in the private sector as the norm.[10] Under at-will employment, an employer may terminate an employee

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4 5 U.S.C.A. § 7513(a) (West 2020).

5 *Id.* § 7513(b).

6 *Id.* § 7511(b). The enumerated positions not provided the protection of this subsection are employees appointed by and with advice of the Senate; who are in a position of confidential, policy-determining, policy-making, or policy-advocating character as determined by the President, Office of Personnel Management, or the president of an agency; who are appointed by the President; who are receiving an annuity from the Civil or Foreign Service Retirement and Disability Fund; who are members of the Foreign Service; who serve within the Central Intelligence Agency or the Government Accountability Office; who serve within the United States Postal Service, the Postal Regulatory Commission, the Panama Canal Commission, the Tennessee Valley Authority, the Federal Bureau of Investigation, an intelligence component of the Department of Defense, or an intelligence department of the military; aliens or non-citizens who serve outside the United States; or who serve within the Veterans Health Administration (with exceptions). *Id.*

7 *Id.* §§ 7513(d), 7701(a).

8 Magnan v. Anaconda Indus., 479 A.2d 781, 793 n.8 (Conn. 1984); *see also*, H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT (1877) [hereinafter WOOD, MASTER AND SERVANT].

9 *See Magnan*, 479 A.2d 781.

10 Martin v. N.Y. Life Ins., 42 N.E. 416, 417 (N.Y. 1895) ("[W]e think the rule is correctly stated by Mr. Wood, and it had been adopted in a number of states."); *In re* Phila. Packing & Provision Co., 4 Pa. D. 57 (Pa. Ct. Com. Pl. 1894) (quoting WOOD, MASTER AND SERVANT, *supra* note 8, § 134) ("[A] general or indefinite hiring is prima facie a hiring at will; and if the servant

at any time, and for any reason, good or bad, or for no reason at all, so long as such firing is not prohibited by law.[11]

A. The Rise: Jurisprudence Leading to Pickering

In 1968, the Supreme Court of the United States rejected the idea that public employees lose First Amendment protections as a condition of employment.[12] This alone shows that public employees are afforded some greater protections than at-will, private-sector employees. In fact, the Court required a balancing test weighing the interest of the employee in speaking on matters of public concern and the interest of the government in promoting efficiency.[13] Mr. Marvin Pickering was a schoolteacher in Illinois who sent a letter to the local newspaper disagreeing with a new proposed tax policy.[14] Were Mr. Pickering a private sector employee, his employer could have simply terminated him as an at-will employee for speech, but with the ruling in *Pickering v. Board of Education*,[15] the Court actually increased the protections afforded to public employees by requiring this balancing test.[16]

This concept of protecting public employees started back in 1952 with a dissent in *Adler v. Board of Education*,[17] in which Justice William O. Douglas wrote that he could not accept public employees losing their civil rights by nature of employment.[18] This dissent was adopted by the Court 15 years later in

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seeks to make it out a yearly hiring, the burden is upon him to establish it by proof."). The Author would like to note that the court in *In re Phila. Packing & Provision Co.* cited to § 134 when the correct section containing this quote is actually § 136. *See also* Greer v. Arlington Mills Mfg. Co., 43 A. 609, 609–10 (Del. Super. Ct. 1899) (adopting at-will employment—as promulgated by Wood—as the default employment status); Harrod v. Wineman, 125 N.W. 812, 813 (Iowa 1910) ("[I]n this country it is held by an overwhelming weight of authority that a contract of indefinite employment may be abandoned at will by either party without incurring any liability to the other for damages. The cases are too numerous to justify citation."); McCollough Iron Co. v. Carpenter, 11 A. 176, 178 (Md. 1887) ("[U]nless there was a mutual understanding, it is only an indefinite hiring."); East Line v. Scott, 10 S.W. 99, 102 (Tex. 1888) ("[W]hen the term of service is left to the discretion of either party, or the term left indefinite, or determinable by either party, that either may put an end to it at will, and so without cause.").

11 Ray v. Wal-Mart Stores, Inc., 359 P.3d 614, 617 (Utah 2015). These legal exceptions to at-will employment include Title VII (barring termination based on race, color, religion, or national origin, 42 U.S.C. § 2000e-2), NLRB section seven (barring termination based on unionization, 29 U.S.C. § 157), and the Americans with Disabilities Act (barring termination based upon disability, 42 U.S.C. § 12112), among others.

12 Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

13 *Id.*

14 *Id.* at 564.

15 391 U.S. 563 (1968).

16 *Id.* at 568.

17 342 U.S. 485 (1952).

18 *Id.* at 508 (Douglas, J., dissenting).

Keyshian v. Board of Regents,[19] when the Court rejected the idea of public employees losing their right of expression by the nature of their employment with the government.[20]

With that in mind, the Court developed a balancing test, balancing "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 the public services it performs through its employees."[21]

B. The Fall: Connick *and* Garcetti

The tides turned in 1983. In *Connick v. Myers*,[22] the Court seemingly limited these protections afforded to public employees, writing that if a public employee's speech is not on a matter of public concern, then "it is unnecessary for us to scrutinize the reasons for her discharge."[23] The Court held that if speech was not on a matter of public concern, the government should "enjoy wide latitude" in employment decisions without intrusion by the judiciary.[24] While employers should be receptive to criticism by their employees, the First Amendment does not require it.[25] Four Justices dissented, with Justice Brennan writing that the decision would result in depriving the public of valuable information related to public officials.[26]

In *Garcetti v. Ceballos*,[27] the Supreme Court of the United States drastically limited the free-speech protections afforded to public employees. The *Garcetti* Court established a test for determining whether public employees' speech is constitutionally protected:

> *Pickering* and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first 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

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19 385 U.S. 589 (1967).

20 *Id.* at 606.

21 *Pickering*, 391 U.S. at 568.

22 461 U.S. 138 (1983).

23 *Id.* at 146.

24 *Id.*

25 *Id.* at 148.

26 *Id.* at 170 (Brennan, J., dissenting).

27 547 U.S. 410 (2006).

> justification for treating the employee differently from any other member of the general public.[28]

C. The Current Circuit Split

The protection provided to public employee speech in *Pickering*, and then limited in both *Connick* and *Garcetti*, establishes the basic state of protections afforded to speech by public employees today. Public employees do have more protection than at-will private sector employees, but they do not enjoy unbridled First Amendment protection whenever they speak.

In *Garcetti*, the Court held that public employees may be afforded constitutional protection if they are speaking on a matter of public concern. This Note focuses on this second prong of the *Garcetti–Pickering* analysis to examine whether or not employee speech delivered under oath constitutes a matter of public concern.

The Fourth, Seventh, Eighth, and Eleventh Circuits have considered this issue by applying a case-by-case analysis of whether a public employee testifying under oath is speaking on a matter of public concern.[29] By contrast, the Third and Fifth Circuits have both held that testimony under oath is a matter of public concern per se.[30]

III. BACKGROUND

A. Garcetti–Pickering *Analysis Prong Two Primer*

Americans first received their constitutional freedom of speech in 1791.[31] As discussed above,[32] while the Supreme Court has decided cases that have certainly developed the field, the current circuit split shows that this area of adjudication is far from complete.

If public employees feel their right to free speech has been violated by their employers, they may bring a suit.[33] In a suit by public employees claiming that their employers violated their First Amendment right to free speech,[34] the

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28 *Id.* at 418 (internal citations omitted).

29 Butler v. Bd. of Cnty. Comm'rs, 920 F.3d 651 (10th Cir. 2019); Maggio v. Sipple, 211 F.3d 1346 (11th Cir. 2000); Padilla v. S. Harrison R-II Sch. Dist., 181 F.3d 992 (8th Cir. 1999); Wright v. Ill. Dep't of Child. & Fam. Servs., 40 F.3d 1492 (7th Cir. 1994); Arvinger v. Mayor of Balt., 862 F.2d 75 (4th Cir. 1988).

30 Latessa v. N.J. Racing Comm'n, 113 F.3d 1313, 1319 (3d Cir. 1997); Johnston v. Harris Cnty. Flood Control, 869 F.2d 1565, 1578 (5th Cir. 1989).

31 U.S. CONST. amend. I.

32 *See supra* Part II.

33 42 U.S.C.A § 1983 (West 2020).

34 U.S. CONST. amend. I.

first prong of the analysis asks whether the employees were speaking as citizens.[35] The second prong of the analysis examines whether the employees were speaking on matters of public concern.[36] In other words, if a public employee is speaking as a citizen on a matter of public concern, his employer may not sanction him without overcoming a balancing test that would justify treating the employees differently than some random member of the community.[37] These two prongs are properly analyzed separately as two distinct questions.[38]

This Note and the circuit split it analyzes are focused on this second prong, whether or not the employee is speaking on a matter of public concern.

This developing area of First Amendment protection for public employees has been properly and conveniently broken down by the Tenth Circuit into a five-part test, asking

> (1) whether the speech was made pursuant to an employee's official duties; (2) whether the speech was on a matter of public concern; (3) whether the government's interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests; (4) whether the protected speech was a motivating factor in the adverse employment action; and (5) whether the defendant would have reached the same employment decision in the absence of the protected conduct.[39]

If the public employee is speaking as a citizen, a determination of law, made by the presiding court, must be made of whether the citizen speech is on a matter of public concern.[40] If a court finds that a public employee is speaking as an employee or on a matter of private concern, it need not move any further to a balancing test under prong three.[41]

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35 Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) ("[I]t cannot be [denied] that the State has interests in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.").

36 *Id.* at 574.

37 Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

38 Jackler v. Byrne, 658 F.3d 225, 235 (2d Cir. 2011) (explaining how the Court broke the "'two inquiries' into separate questions" in *Garcetti*).

39 Butler v. Bd. of Cnty. Comm'rs, 920 F.3d 651, 655 (10th Cir. 2019).

40 Greisen v. Hanken, 925 F.3d 1097, 1109 (9th Cir. 2019) ("Whether speech is on a matter of public concern is a question of law, determined by the court, and reviewed by us de novo.").

41 Connick v. Myers, 461 U.S. 138, 146 (1982).

1. Matters That Are of Public Concern

It is already clear that testifying under oath is speech as a citizen to satisfy the first prong of the *Garcetti–Pickering* analysis.[42] The next question to answer—whether the employee is speaking on a matter of public concern—is to be answered based on "the content, form, and context of a given statement, as revealed by the whole record."[43] This inquiry is a question of law, for the presiding court to determine, and not one of fact.[44] While there is no bright-line rule written by the Court to establish whether a matter is of public concern, Supreme Court cases do provide guidance in the determination. "[T]ypically matters concerning government policies that are of interest to the public at large" are matters of public concern.[45] In addition to these cases, when public employees exercise their right to free speech on a topic unrelated to their public employment, they may enjoy First Amendment protection without justification "far stronger than mere speculation" to validate infringing on the employees' freedom of speech.[46] The Supreme Court has already provided several examples of what qualifies as a matter of public concern in various cases through the years.

When a public employee testifies pursuant to a subpoena about a public corruption scandal, the employee is speaking on a matter of public concern.[47] The Court recognized the importance of the context of subpoenaed testimony.[48] When testimony was given pursuant to a subpoena, the Court first examined this context and then examined the content of the speech.[49]

The Supreme Court has held that a matter raised in private may still be a matter of public concern.[50] *Givhan v. Western Line Consolidated School District*[51] illustrates the opposite situation than that which is at question in this Note—where an employee would be speaking in public about a potentially private matter.

Public employees filing suit to allow them to receive honoraria for speaking engagements are speaking on matters of public concern.[52] The Court

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42 Lane v. Franks, 573 U.S. 228, 238 (2014).

43 *Connick*, 461 U.S. at 147–48.

44 *Id.* at 148 n.7.

45 City of San Diego v. Roe, 543 U.S. 77, 80 (2004).

46 *Id.* (citing United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 465, 475 (1995)).

47 *Lane*, 573 U.S. at 240.

48 *Id.* at 238.

49 *Id.* at 240 (discussing public corruption).

50 Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 415–16 (1979). In *Givhan*, the employee spoke with her supervisor about racially discriminatory hiring practices. *Id.* at 413. The Court found this matter to be of public concern. *Id.* at 417.

51 439 U.S. 410 (1979).

52 United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 466 (1995).

reasoned that because these speeches "were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their government employment," the employees were speaking as citizens on a matter of public concern.[53] The ban in question further "impos[ed] a significant burden on expressive activity."[54]

A public teacher's letter to a newspaper regarding school funding is discussing a matter of public concern.[55] In *Pickering*, the employee's letter amounted to an attack on the school board's handling of budget increase requests, as well as the allocation of the financial resources they receive.[56] The Court found that the interest of employers in limiting their employees' contribution to public debate was not greater than the government's interest in limiting a similar contribution by a non-public employee.[57]

The offensiveness of an employee's speech is not outcome-determinative in an analysis of whether the employee is speaking on a matter of public concern.[58] In *Rankin v. McPherson*,[59] two public employees were speaking in the presence of a third about the attempted assassination of then President Ronald Reagan.[60] One employee said, "if they go for him again, I hope they get him."[61] The Court said that although the employee's comments may have been "inappropriate or controversial" in character, a potential presidential assassination is certainly a matter of public concern.[62]

While the Supreme Court has not established a bright-line rule to determine whether a matter is of public concern, cases have provided guidance from which at least a partial rule can be deduced: if the content, form, and context of a statement relates to a matter of concern to the public at large, then it is on a matter of public concern, regardless of the offensiveness of the speech in question.

2. Matters That Are Not of Public Concern

"When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government

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53 *Id.*

54 *Id.* at 468.

55 Pickering v. Bd. of Educ., 391 U.S. 563, 565 (1968).

56 *Id.* at 566.

57 *Id.* at 573.

58 Rankin v. McPherson, 483 U.S. 378 (1987).

59 438 U.S. 378 (1987).

60 *Id.* at 381.

61 *Id*.

62 *Id.* at 387–88.

officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[63]

A public employee speaking on matters of personal interest is not speaking on a matter of public concern.[64] In *Connick*, the employee, an assistant district attorney, distributed a questionnaire around her office.[65] The employer had told the employee that she was being transferred to a different office against her wishes.[66] In response, the employee created the questionnaire which asked about the "transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns."[67] The district court found that the questionnaire was the reason for her termination.[68] The Court held that the questionnaire was not about a matter of public concern and did not afford her protection under the First Amendment.[69] Sheila Myers was not disclosing the office's failure to perform its duties; she was not disclosing wrongdoing or breach of public trust; and she was not evaluating the performance of her office.[70] Instead, she was "gather[ing] ammunition for another round of controversy with her superiors."[71] The Court did recognize that one question regarding work in political campaigns was on a matter of public concern.[72]

In *City of San Diego v. Roe*,[73] the Court found that a police officer who produced videos of himself stripping in a police uniform and masturbating to be outside the sphere of public concern and found that his termination was constitutionally lawful.[74] The appellate court below had found that the officer should enjoy First Amendment protection because the speech was unrelated to his employment and occurred outside the workplace.[75] The Court disagreed and found that because the officer referenced his law enforcement work on his eBay page where he sold the videos along with police paraphernalia (including uniforms from the department for which he worked), he was speaking as a public

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63 Connick v. Myers, 461 U.S. 138, 146 (1983).

64 *Id.* at 147.

65 *Id.* at 141.

66 *Id.* at 140.

67 *Id.* at 141.

68 *Id.* at 142.

69 *Id.* at 148.

70 *Id.*

71 *Id.*

72 *Id.* at 149. It seems the Court disregarded the nature of this question because the questionnaire as a whole largely concerned private matters.

73 543 U.S. 77 (2004).

74 *Id.* at 84.

75 *Id.* at 81.

employee.[76] The content of one of the videos in particular called the "mission of the employer and the professionalism of its officers into serious disrepute."[77]

The Supreme Court has not established a bright-line rule to determine whether a matter is of public concern, as explained above. Neither has the Supreme Court established a bright-line negative definition stating what is *not* speech on a matter of public concern. Just as cases have provided guidance as to what is speech on a matter of public concern, cases have also provided guidance from which at least a partial rule can be deduced for when speech is *not* a matter of public concern: speech solely on matters of private interest that speak on the mission of the employer without touching upon political, social, or other concern is not speech on a matter of public concern.

IV. THE CURRENT STATE OF THE CIRCUIT SPLIT

As noted above, the circuit courts are divided over whether testimony under oath is a matter of public concern. This part of the Note outlines the two competing readings of "public concern" that the circuits have developed in their effort to answer this question. The first approach is driven by the notion that testimony under oath is so important to the public that testimony is a matter of public concern per se. The second approach is driven by a case-by-case analysis that does not acknowledge the fact that a speaker is testifying as particularly important, instead analyzing testimony under oath as if it were any other form of speech. This Note concludes that both of these approaches ultimately fail to create a successful test for when speech is delivered under oath in the form of testimony.

A. Circuits That Hold That Testimony Under Oath Is a Matter of Public Concern Per Se

Drawing on Supreme Court cases regarding testimony by public employees,[78] two circuits have held that when public employees testify under oath, they are speaking on a matter of public concern per se. The Third and Fifth Circuits ignore the content of speech and solely examine the context when analyzing free speech claims by government employees.

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76 *Id.*

77 *Id.* The video in question portrayed the officer in a police uniform issuing a traffic citation, then revoking it, before stripping and masturbating. *Id.* at 79.

78 Lane v. Franks, 573 U.S. 228 (2014); Garcetti v. Ceballos, 547 U.S. 410 (2006); *Roe*, 543 U.S. 77; United States v. Nat'l Treasury Emps. Union, 513 U.S. 454 (1995); Rankin v. McPherson, 483 U.S. 378 (1987); Connick v. Myers, 461 U.S. 138 (1983); Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410 (1979); Pickering v. Bd. of Educ., 391 U.S. 563 (1968); Wieman v. Updegraff, 344 U.S. 183 (1952).

The Fifth Circuit Court of Appeals decided *Johnston v. Harris County Flood Control District*[79] in 1989, holding that "[w]hen an employee testifies before an official government adjudicatory or fact-finding body he speaks in a context that is inherently of public concern."[80] Carl Johnston was a supervisor with the Harris County Flood Control District, a government employer.[81] Johnston had worked as an employee since 1950 and as a supervisor since 1977.[82] In 1980, a fellow employee filed an equal employment suit against the Harris County Flood Control District.[83] During the hearing, Johnston testified against his employer.[84] Following this testimony, the government employer began a series of retaliatory employment actions, ending in telling Johnston to accept a demotion.[85] When Johnston refused this demotion, he was fired.[86] Although the Harris County Flood Control District pointed to various acts by Johnston to justify his termination, the Fifth Circuit found these to be pretextual and that the employer's true motivation was Johnston's testimony at the equal employment opportunity hearing.[87]

The Fifth Circuit reasoned that allowing the government to retaliate when testimony harms the government would undermine and compromise the judicial process.[88] The court reached a per se rule finding public concern when government employees were testifying to remedy the difficult choice that public employees would face when under oath—either testify truthfully and face termination, or lie under oath and perjure themselves to protect their jobs.[89] The court wrote that the goal of criminal, civil, and grand jury proceedings was to discover the truth, "a goal sufficiently important to render testimony given in these contexts speech of 'public concern.'"[90] To avoid government retaliation against employees, and to promote employee testimony spoken freely and truthfully, the Fifth Circuit Court of Appeals became the first circuit to decide that testimony is a matter of public concern per se, satisfying the second prong of a *Garcetti–Pickering* analysis.[91]

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79 869 F.2d 1565 (5th Cir. 1989).

80 *Id.* at 1578.

81 *Id.* at 1568.

82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.*

86 *Id.*

87 *Id.* at 1571–73.

88 *Id.* at 1578.

89 *Id.*

90 *Id.*

91 *Id.*

Eight years after *Johnston*, the Third Circuit Court of Appeals decided *Latessa v. New Jersey Racing Commission*.[92] The court held that "a public employee's truthful testimony before a government adjudicating or fact-finding body, whether pursuant to a subpoena or not, is a matter of public interest."[93]

Mr. Donato Latessa was employed as a harness horse races judge by the New Jersey Racing Commission, a government employer.[94] Mr. Latessa had been a judge for the New Jersey Racing Commission since 1988 and a judge at the Meadowlands race track since 1992.[95] Mr. Fancesco Zanzucki was an executive director of the New Jersey Racing Commission.[96] A three-judge panel was to impose penalties when rules were broken which could *then* be reviewed by directors, such as Mr. Zanzucki.[97] In 1993, Mr. Zanzucki began breaking this rule by telling Mr. Latessa what penalties to impose before the three-judge panel had decided.[98] In the same year, Mr. Latessa testified before the Office of Administrative Law, detailing this violation by Mr. Zanzucki.[99] The very next day, Mr. Zanzucki sent a memorandum to the chairman of the New Jersey Racing Commission stating that it would no longer employ Mr. Latessa as a judge.[100]

Prior to *Latessa*, the Third Circuit had held that testimony pursuant to a subpoena was a matter of public concern.[101] In *Latessa*, the court extended its ruling to cover voluntary appearances to testify.[102] The Third Circuit emphasized the context of the speech, rather than the content, in deciding that sworn testimony is a matter of public concern per se.[103]

B. Circuits That Hold That Testimony Under Oath Is Examined Under the Second Prong on a Case-By-Case Basis, Like Any Other Speech

At about the same time that the Third and Fifth Circuits were emphasizing the context of speech—testimonial and under oath—four circuits ignored the context and solely examined the content of the speech. The Fourth, Seventh, Eighth, and Eleventh Circuits ignore where speech took place and only examine what was said to decide if a public employee is speaking on a matter of

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92 113 F.3d 1313 (3d Cir. 1997).

93 *Id.* at 1319 (citing Green v. Phila. Hous. Auth., 105 F.3d 882, 887 (3d Cir. 1997)).

94 *Id.* at 1315.

95 *Id.*

96 *Id.*

97 *Id.* at 1316.

98 *Id.*

99 *Id.*

100 *Id.*

101 Pro v. Donatucci, 81 F.3d 1283, 1291 (3d Cir. 1996).

102 *Latessa*, 113 F.3d at 1317.

103 *Id.*

public concern. These case-by-case courts decided several cases largely ignoring the context of the speech.

In 1988, the Fourth Circuit Court of Appeals decided *Arvinger v. Mayor & City Council of Baltimore*.[104] The court first recognized that the Supreme Court analyzed questions of public concern by examining the "content, form, and context" of the speech in question.[105] The Fourth Circuit then held that context of speech cannot be elevated over its content and did not protect the public employee's speech, holding that it was not on a matter of public concern.[106]

Stephen Arvinger was a school police officer in Baltimore, who was arrested when Baltimore City Police discovered marijuana in his van.[107] Mr. Arvinger was traveling with a Ms. Diane Diggs at the time of arrest.[108] An investigation found that the marijuana belonged to Ms. Diggs, who was subsequently fired.[109] Ms. Diggs subsequently filed a sex discrimination suit based on the disparate treatment that she and Mr. Arvinger received.[110] During this suit, Mr. Arvinger was questioned by the Baltimore Community Relations Commission.[111] Mr. Arvinger was fired following this hearing, with his employer claiming that he was lying to the Commission.[112] The district court found that Mr. Arvinger's speech was on a matter of public concern because it was in the course of an official investigation, but the Fourth Circuit disagreed, finding that it was "irrelevant for First Amendment purposes that the statement was made in the course of an official hearing."[113]

In 1994, the Seventh Circuit Court of Appeals decided *Wright v. Illinois Department of Children & Family Services*.[114] The court emphasized the importance of the content of speech and not the context, finding that sworn testimony by an employee does not always constitute protected speech.[115]

Margaret Wright was a social worker for the Illinois Department of Children and Family Services.[116] Ms. Wright and her employer disagreed about

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104 862 F.2d 75 (4th Cir. 1988).

105 *Id.* at 79 (quoting Connick v. Myers, 461 U.S. 138, 147 (1983)).

106 *Id.*

107 *Id.* at 76.

108 *Id.*

109 *Id.* at 77.

110 *Id.*

111 *Id.*

112 *Id.*

113 *Id.* at 79. The Fourth Circuit did not examine whether Mr. Arvinger had lied under oath. Had it done so, this case would be outside the purview of this Note.

114 40 F.3d 1492 (7th Cir. 1994).

115 *Id.* at 1501, 1503.

116 *Id.* at 1494.

and fought over a case involving sexual abuse of a minor.[117] The department removed Ms. Wright from the case and refused to protect the minor as she saw necessary.[118] Ms. Wright then filed a written report with a juvenile judge detailing what she saw as errors and what she believed the judge should do.[119] The judge agreed with Ms. Wright and continued a protection order for the minor.[120] The next conflict between Ms. Wright and her employer occurred when Ms. Wright testified at the trial in the case.[121] Ms. Wright was placed on leave, but subpoenaed to testify while on that leave.[122] Ms. Wright claimed that employment retaliation occurred every time that she testified, and she filed suit against her employer.[123] The court rejected this argument and held that the content of speech is the most important factor.[124]

In 1999, the Eighth Circuit Court of Appeals decided *Padilla v. South Harrison R-II School District*.[125] Despite being compelled to answer questions on cross examination, the court found that the context of compelled testimony did not overcome the content of speech for First Amendment protection.[126]

Padilla was a physical education teacher and high school coach in Missouri.[127] Another local teacher was found guilty of raping and sexually abusing four boys from 1992 to 1993.[128] During this period, a student spoke about sexual fantasies she had of Padilla and told a story about having sex with Padilla.[129] Padilla was eventually suspended when the student's parents made a complaint.[130] Padilla requested a formal hearing and was reinstated after the board found no immoral conduct had occurred.[131] Criminal charges were brought stemming from these accusations, and Padilla testified that he had no problem with extramarital affairs, that he had never had an extramarital affair himself, and that if a minor was out of school or not a student, a sexual relationship could be

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117 *Id.* at 1495.

118 *Id.* at 1497.

119 *Id.*

120 *Id.*

121 *Id.* at 1497–98.

122 *Id.* at 1498.

123 *Id.*

124 *Id.* at 1501.

125 181 F.3d 992 (8th Cir. 1999).

126 *Id.* at 996–97.

127 *Id.* at 994.

128 *Id.*

129 *Id.*

130 *Id.* at 995.

131 *Id.*

appropriate.[132] Padilla was fired, in part based upon his "public statements" in court.[133]

In 2000, the Eleventh Circuit Court of Appeals decided *Maggio v. Sipple*.[134] The Eleventh Circuit held that Ms. Maggio's testimony as a witness in an administrative appeal was not speech on a matter of public concern.[135]

Ms. Maggio sued the State Department of Labor and Employment Security for retaliating against her in violation of her First Amendment rights.[136] When Ms. Maggio's supervisor, Ms. Davis, was charged with insubordination, Ms. Davis filed a grievance.[137] Ms. Maggio testified at this grievance hearing, and Ms. Davis's insubordination charge was overturned.[138] Ms. Maggio also testified at a later hearing regarding Ms. Davis's later termination, which was also overturned.[139] When Ms. Maggio filed suit, the Eleventh Circuit specifically found that the context of an administrative appeal hearing was not public.[140] The Eleventh Circuit also found that the content of Ms. Maggio's testimony did not have the purpose of raising a matter of public concern.[141]

In 2019, the Tenth Circuit Court of Appeals decided *Butler v. Board of County Commissioners of San Miguel County*.[142] The Tenth Circuit expressly rejected a per se rule making sworn testimony a matter of public concern and found no First Amendment violation when a government employee was demoted for truthful testimony at a state court hearing.[143]

Mr. Butler was a government employee for the Colorado Road and Bridge Department.[144] Mr. Butler was demoted when he testified in state court as a character witness.[145] The Tenth Circuit directly rejected a claim that sworn, truthful testimony is a matter of public concern per se.[146] The court was concerned that such a rule ignored the weight of the content of the speech in

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132 *Id.*

133 *Id.* at 996.

134 211 F.3d 1346 (11th Cir. 2000).

135 *Id.* at 1354.

136 *Id.* at 1349.

137 *Id.*

138 *Id.*

139 *Id.*

140 *Id.* at 1352–53.

141 *Id.* at 1353.

142 920 F.3d 651 (10th Cir. 2019).

143 *Id.* at 657.

144 *Id.* at 653.

145 *Id.*

146 *Id.*

question.[147] The Tenth Circuit wrote that giving testimony has consequences, while "salut[ing] the courage of such witnesses" in the face of witness retaliation.[148]

V. FAILURES OF PRIOR APPROACHES

On one side of the circuit split, we have cases that heavily weigh the *context* of the speech in question when determining if a public employee has spoken on a matter of public concern. These circuits find the *context* of truthful, sworn testimony to be so vital to the public that it is automatically a matter of public concern. On the other side of the split, we have courts that emphasize the *content* of speech when answering the same question.

In *Connick*, the Supreme Court made clear that questions of public concern "must be determined by the content, form, *and* context of a given statement."[149] The Supreme Court has not made clear which of these three factors—if any—should be given more weight. However, it is clear that all three must be examined. In the most recent Supreme Court case on this matter, the Court examined context first, but it has yet to establish this as a rule that must be followed.[150] Because the content, form, and context of speech must be analyzed, both a per se rule of public concern when a public employee is testifying as well as a rule that effectively ignores the context of speech are both incorrect approaches.

A. A Per Se Rule Holding Testimony To Be a Matter of Public Concern at All Times Is Overbroad

The greatest failure of the Third and Fifth Circuits is that they ignore the content of employee speech.[151] A rule that finds public employees are speaking on a matter of public concern whenever they testify truthfully fully overlooks what was actually said. That is not to say that these circuits ignored the Supreme Court in reaching their holdings. It may well be that these courts found the context of testimony to be so compelling that it fully outweighed the content of the speech. Nevertheless, even if the Third and Fifth Circuits have not acted contrary to the Supreme Court's decisions, it does not mean that they established the correct rule.

Some legal scholars argue that it is particularly difficult to justify legal decisions in hard cases.[152] These are the cases where the result is more difficult

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147 *Id.* at 653–54.

148 *Id.* at 660.

149 Connick v. Myers, 461 U.S. 138, 147–48 (1983) (emphasis added).

150 *See* Lane v. Franks, 573 U.S. 228 (2014).

151 *See supra* Section IV.A.

152 Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1057 (1975).

to determine based on either statute or—as in the case of speech by public employees—precedent.[153] If hard cases occur when statutes and precedent are murkier, easy cases occur when statutes and precedent are clear. In order to make just legal decisions, the goal should then be to make cases easier to decide. Not only does this further judicial economy[154] but it allows even-handed justice to be dealt out. In the interests of economy and justice, any law promulgated by Congress or ruling handed down by a judge or justice should make hard cases easier. A poorly drafted law or a poorly worded decision can be examined under an easy-case-hard-case analysis. If a ruling makes future hard cases easier, then it is a good ruling. If a ruling makes a future case harder, then it is a bad ruling. Other factors certainly come into consideration, but an easy-case-hard-case analysis should be part of the jurisprudential approach of presiding courts.

Within these per se circuits, hard cases certainly become easier to decide. In effect, hard cases become easy cases. This may be good for judicial economy; however, it can lead to bad results for parties to First Amendment litigation. Even more concerning is when an easy case becomes easy, but the result goes to the wrong side. In a case where an employee is clearly not speaking to a matter of public concern based on the absurd content of his speech, and the result should easily be in favor of the employer, this per se rule indeed makes it an easy decision—a decision for the employee.

Take for example, our hypothetical former government employee, John. John is called as a character witness for his neighbor. John is called to appear in court, gets sworn in, and takes the stand. Neighbor's attorney asks John to describe Neighbor for the jury. John opens with, "Neighbor is a good guy, for a black man." After this racist answer, Neighbor's attorney quickly shifts the subject and gets some good responses from John before ending his direct. On cross, for the sake of impeachment by bias, opposing counsel manages to get John to openly respond with a litany of racist comments and remarks. For the sake of making this case even easier, John at one point uses a racist epithet beginning with the letter "n" to describe Neighbor. When word of this testimony reaches John's government employer, it fires him. John files suit claiming that this termination violates his First Amendment rights. Under the per se rule, John would be correct and be able to force the jury into a balancing test, weighing the interest of the government in promoting the efficiency of the public service against John's free speech interests. After all, John responded truthfully to questions, he just happens to be openly racist. A case that should have been easy to win for the government *employer*, instead becomes easy to win for the government *employee*.

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153 *Id.*

154 Judges aim for efficiency, and if they do not, they should strive to. Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 488 (1980).

This rule's ability to make hard cases easy may be good for some cases; however, it can certainly be problematic. Sometimes hard cases should be hard. These are often cases of great importance that will guide lower courts in the future. If the content of speech is important in a case, that content should rightly be examined to reach a decision. A per se rule should not operate as a cop-out to make these hard cases easy.

Take, for example, Jane, a hypothetical prison guard. Jane is called as a character witness in her friend Sally's sexual assault case. When asked whether Sally has changed since the alleged sexual assault, Jane responds in the affirmative. On cross, when asked why she thinks this has anything to do with an alleged sexual assault, Jane states that she's seen such changes occur before on multiple occasions. Through further questions, Jane reveals that multiple female guards at the prison have been sexually assaulted. Just like John's employer above, Jane's employer terminates her for making it look bad and affecting the operation of the prison. Jane files suit. A court in Jane's case would be left with a hard question. The original purpose of Jane's testimony was simply to assert that her friend seemed to have experienced sexual assault, a private matter. As the questioning continued, did Jane's purpose change? It seems that sexual assault of government employees should be a matter of public concern, but perhaps the employee's purpose or specific situation is important. This is a hard case that could be decided either way, and the content of the speech is certainly worth examining for future cases. However, the per se rule of some circuits makes this hard case easy to decide as the content of Jane's speech would not even be in question. Maybe Jane was speaking on a matter of public concern, and maybe she was not, but at times, justice requires a hard case to be hard to decide.

This per se rule does have certain advantages. For those that believe law should be efficient and who find the law and economics analyses of judicial economy compelling, a per se rule would seem attractive. After all, in a case where the content of an employee's speech would clearly show that they were testifying on a matter of public concern, if the analysis can end even sooner, then judicial economy has been furthered. The federal courts openly promote judicial efficiency, mentioning it no less than four times on the front page of their strategic plan.[155] This is certainly a valid goal; however, it completely eliminates a content analysis in cases where the speech was testimony, and a goal of judicial efficiency cannot outweigh the need to examine content, particularly in hard cases.

No case concerning speech given as testimony is hard to decide under this per se rule. This can be a good thing at times. Where speech is clearly on a matter of public concern based on the content of said speech, this rule does no harm by ending an examination of the second prong of a *Garcetti–Pickering*

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[155] *Strategic Plan for the Federal Judiciary*, U.S. CTS., https://www.uscourts.gov/statistics-reports/strategic-plan-federal-judiciary (last visited Sept. 22, 2020).

analysis at context, as the result is the same. In hard cases where the content is a close call, allowing the context to be a sort of tie breaker also leads to the same result. The problem in these cases is not the result, but the fact that in those cases where an analysis of content could guide lower courts, it is not examined at all.

B. A Simple Case-By-Case Analysis Fails To Account for the Importance of Testimony Under Oath

Where the Third and Fifth Circuits ignore the content of employee speech, the greatest failure of the Fourth, Seventh, Eighth, and Eleventh Circuits is that they ignore the context of employee speech. A rule that so heavily examines the content of a public employee's speech while affording little to no weight to the context is also incorrect. The circuits that use a strict case-by-case approach, even when a public employee is testifying under oath, do not afford proper weight to the context of the employee's speech. In these circuits it seems that the courts found the content of testimony to be so compelling that it fully outweighed the context of the speech in question.

This approach fails to take the context of speech into account at all in practice. In *Connick*, the Supreme Court required the context of speech to be analyzed.[156] However, most circuits employing a case-by-case analysis glossed over the context of the employee's speech. The Tenth Circuit did mention the context of the employee's speech in *Butler*,[157] but it did not fully address it. Judge Carlos F. Lucero's dissent addressed this concern: "My colleagues recognize the form and context of Butler's speech in a judicial proceeding 'weigh in favor of treating it as a matter of public concern,' yet proceed to engage in a myopic analysis of the content alone to declare the speech was not a matter of public concern."[158]

In the other circuits employing this approach the context of an employee's speech was afforded even less weight. The Fourth and Seventh Circuits largely ignored the context of the speech while elevating content over context.[159] The Eighth Circuit seemingly held that context could never overcome content of employee speech.[160] The Eleventh Circuit attempted to distinguish the facts in holding that a private, administrative hearing was not a public context,[161] but the question remains whether that is any less of a public context. A sealed hearing can be vitally important to the public, and the testimony of an

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156 Connick v. Myers, 461 U.S. 138 (1983).

157 Butler v. Bd. of Cnty. Comm'rs, 920 F.3d 651 (10th Cir. 2019).

158 *Id.* at 665 (Lucero, J., dissenting).

159 *See* Wright v. Ill. Dep't of Child. & Fam. Servs., 40 F.3d 1492, 1501, 1503 (7th Cir. 1994); Arvinger v. Mayor of Balt., 862 F.2d 75, 79 (4th Cir. 1988).

160 Padilla v. S. Harrison R-II Sch. Dist., 181 F.3d 992, 996–97 (8th Cir. 1999) (holding that the testimony in this case was *compelled* testimony).

161 Maggio v. Sipple, 211 F.3d 1346, 1354 (11th Cir. 2000).

administrative hearing is still given under oath, raising no less of a concern related to the importance of truthful testimony by government employees.

Truthful testimony is of vital importance to the American justice system. The purpose of the federal rules of evidence is "ascertaining the truth."[162] Witnesses are sworn to truthful testimony,[163] witnesses can be attacked for untruthfulness,[164] and when witnesses testify to outside statements not under oath, the statements are excludable hearsay.[165]

Our justice system goes so far as to criminalize lying under oath.[166] Indeed, "[a]nyone who testifies in court bears an obligation, to the court and society at large, to tell the truth."[167] Further, "[p]erjured testimony is an obvious and flagrant affront to the basic concept[] of judicial proceedings."[168] The context of speech given is vitally important, as is the content. To ignore the context of sworn testimony is to ignore a vitally important tenet of the American justice system.

The circuits utilizing a case-by-case approach also raise issues under an easy-case-hard-case analysis. Hard cases become harder to decide. Cases that should be easy also become harder to decide. This creates serious judicial economy concerns. More cases will go to trial, and more of these tried cases may be appealed.

Ignoring the context of testimony, even if it is only in practice, makes easy cases hard and hard cases harder. Take, for example Joe, a hypothetical government employee in one of these case-by-case circuits. Joe testifies about the hiring practices of his department. Joe testifies that his department hires in a discriminatory manner that excludes women. Joe is testifying in a public context, and Joe is testifying to content of public concern. The courts in these circuits would be forced to do an in-depth analysis to reach the clear conclusion that Joe is testifying on content of public concern. This case becomes harder where content must be analyzed if that analysis could end with a context analysis. The rule in these circuits thereby make easy cases harder.

Without truly taking context into account, cases that are justly hard become even harder. Take the Jane hypothetical explored above. Where the per se rule allows a court to make a decision far too easily, an examination that only concerns content in these circuits, while ignoring context, makes a hard decision for a court even harder. Where the decision could truly go either way, and context

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162 FED. R. EVID. 102.

163 FED. R. EVID. 603.

164 FED. R. EVID. 608(a).

165 FED. R. EVID. 801.

166 18 U.S.C.A. § 1623 (West 2020).

167 Lane v. Franks, 573 U.S. 228, 238 (2014).

168 United States v. Mandujano, 425 U.S. 564, 576 (1976).

could be an effective tie breaker the per se rule is not the best approach. A case-by-case analysis sounds good in practice but results in ignoring context.

VI. IMPLEMENTING A REBUTTABLE PRESUMPTION

Courts should adopt a new test, implementing a rebuttable presumption that public employees are speaking on a matter of public concern when testifying truthfully under oath. The current circuit split cannot stand as practitioners of law must "treat like cases alike."[169] This rebuttable presumption would take the reasoning of circuits on both sides of the split to create an easily implementable rule that in effect constitutes a compromise of both positions. The test would allow proper analysis of both context and content. It would further highlight the importance of truthful testimony by all citizens and by government employees in particular. The presumption would be rebutted if the employer could show that an employee had perjured themselves; this rebuttable presumption would only protect truthful testimony. Such a rebuttable presumption would not contradict any current Supreme Court holdings and would simply add a new step. Finally, this presumption would best fit an easy-case-hard-case analysis.

A rebuttable presumption that a public employee is speaking on a matter of public concern is the best way for courts to analyze both content and context, as the Supreme Court required in *Connick*.[170] The per se rule of some circuits ignores the content of speech when a public employee is testifying. The case-by-case analysis approach of some circuits largely ignores the context of speech in practice by focusing almost entirely on its content. A rebuttable presumption gives proper emphasis to both context and content. In practice, it would give the correct weight to context, so that a government employer—by sufficiently showing that the content of the speech is on such a private matter—could overcome the context of the speech.

The Court has already found subpoenaed testimony to be persuasive when determining if a public employee is speaking on a matter of public concern.[171] A rebuttable presumption would preserve the importance that the American legal system places on truthful testimony. It makes little sense to place a public employee between a rock and a hard place where the rock is unemployment and the hard place is truthful testimony. As the Tenth Circuit noted, testifying can have repercussions.[172]

Witnesses can be intimidated, attacked, or even murdered to silence them in various proceedings. However, our legal system has outlawed such

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169 H. L. A. HART, THE CONCEPT OF LAW 155 (Peter Cane et al. eds., 2d ed. 1961).

170 Connick v. Myers, 461 U.S. 138, 147–48 (1983).

171 *See Lane*, 573 U.S. 228.

172 Butler v. Bd. of Cnty. Comm'rs, 920 F.3d 651, 660 (10th Cir. 2019).

tampering,[173] not used it to justify rules of law. We should not encourage getting witnesses caught between a rock and a hard place when testifying. Ignoring context does just this.

A rebuttable presumption protects the importance of truthful testimony. The Court has even recently noted that "[t]here is considerable value, moreover, in encouraging, rather than inhibiting, speech by public employees."[174] If the purpose of the Federal Rules of Evidence is ascertaining the truth, and those testifying have an obligation to society at large to testify truthfully, then a rebuttable presumption makes the most sense to encourage said truthfulness. Public employees should not fear losing their job when taking the witness stand; they should only be concerned with telling the truth. A straight case-by-case analysis does not afford the context of truthful testimony the weight that it deserves.

Implementing a rebuttable presumption does not contradict the current interpretation of the law promulgated by the Supreme Court; it simply adds one more step. It also seems to be the next logical move in light of the Court's recent decision in *Lane v. Franks*,[175] when the Court used the context of subpoenaed testimony as part of its inquiry.[176] The first step in a freedom of speech claim by a public employee is whether or not he is speaking as a citizen.[177] The second step asks whether he is speaking on a matter of public concern.[178] The Supreme Court has directed lower courts to analyze both the context and the content.[179] The Court has also found that the First Amendment protects public employees providing truthful testimony subject to a subpoena on matters outside the scope of their official duties.[180] This rebuttable presumption would simply add a caveat to the second prong of a *Garcetti–Pickering* analysis. It would also follow from the Court's decision in *Lane*.[181] Public employees should be protected by this proposed presumption whether or not their testimony is pursuant to a subpoena. It should extend automatically when testifying, and the government employer could attempt to rebut the presumption.

Following the easy-case-hard-case analysis engaged in above, a rebuttable presumption would be most effective at allowing courts to reach the correct holding, for the correct reasons, and in an efficient manner. Easy cases would become even easier to decide, for the correct side. Certain hard cases

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173 18 U.S.C.A. § 1512 (West 2020).

174 *Lane*, 573 U.S. at 236.

175 573 U.S. 228 (2014).

176 *See id.*

177 *Butler*, 920 F.3d. at 655.

178 *Id.*

179 Connick v. Myers, 461 U.S. 138, 147–48 (1983).

180 *Lane*, 573 U.S. at 238.

181 *See id.* at 246.

would become easier to decide as well. However, those hard cases that are difficult to decide would not become overly simplistic because such cases should be difficult to decide at times given the nature of the issue. The examples used above in the prior easy-case-hard-case analyses would be decided correctly and as efficiently as possible when utilizing a rebuttable presumption. Finally, the litany of former Supreme Court cases on the topic of speech in the public sector would all be decided the same way, in a more efficient manner.

Under a rebuttable presumption, easy cases would remain easy to solve and may become even easier for the courts. Unlike a per se rule, these easy cases would not be easily decided for the wrong side. Unlike a case-by-case analysis, the context of the speech would not be ignored, but rather examined first, furthering judicial economy in some cases. Take for example the hypothetical used above where John takes the stand and, while testifying, truthfully makes several racist statements. As explained above, if his employer fires him for these statements, John should not be able to recover. However, under a per se rule, John would win out on the second step as he was testifying. Under a rebuttable presumption, John would win as to context, but his employer could quickly produce a transcript of his testimony in court and show that the content of John's speech was on such a private matter—the racist feelings he held towards his neighbor—that his speech would fail to qualify as a matter of public concern. This case would come out correctly and efficiently were the courts to implement a rebuttable presumption.

Under a rebuttable presumption, hard cases would become easier to solve, while not becoming overly simplistic. In the Jane hypothetical above, a hard case to decide, a rebuttable presumption would make it easier on the courts. Starting with a presumption in place, Jane's testimony in court would create a rebuttable presumption that she was speaking to a matter of public concern. The government would be forced to show that the content of her speech was on a private matter to overcome the presumption. While courts could decide this either way still, it would seem more likely that Jane's testimony about sexual assault would qualify as a matter of public concern with a presumption in place. This presumption would further judicial economy in making the case easier to decide. Jane would also be encouraged to testify truthfully, as the American judicial system requires. In this case, not only would a hard case become easier to decide, but tenets of judicial economy and truthfulness in testimony would be furthered. Again, this case would come out correctly and efficiently were the courts to implement a rebuttable presumption.

Finally, in the hypothetical case of Joe, where a government employee testifies about discriminatory government hiring practices, an easy case would become even easier. In the case-by-case-analysis circuits, this case could take up quite a bit of court time as both sides argue over the content of the speech. If a rebuttable presumption were implemented this case would be over quickly. The presumption would be that Joe was speaking to a matter of public concern because he was testifying in court. The government would likely fail to overcome

this presumption with the content of their speech. This case would come out correctly and for the correct side were the courts to implement a rebuttable presumption.

If implemented, this rebuttable presumption would not conflict with former Supreme Court decisions in this area of law. None of the former Supreme Court cases have addressed this issue. However, in each of these cases if the employees had been testifying when they spoke, then the outcomes likely would still be the same.

In *Pickering*,[182] if the teacher had testified about school funding rather than written to a newspaper, the decision would have been even easier with a rebuttable presumption. It would have been presumed that the teacher was speaking on a matter of public concern based on the context, and the government would not have overcome this with a content argument. In *Givhan*,[183] if the employee had been speaking publicly by testifying, rather than speaking in private with a supervisor, the courts would have reached the same decision that they did, more quickly. A rebuttable presumption would have meant that the Court would never have had to analyze the content of the speech but could have stopped when the government could not overcome the presumption by showing the content was sufficiently private in nature. In *Givhan*, the Court would have reached the same decision, but the onus would have been on the government to try to prove that discussion of presidential assassinations was a private matter. In *Rankin*,[184] had he been testifying rather than speaking privately to a fellow employee, the Court could have started with the rebuttable presumption and found that the government had not overcome its burden in order to reach the correct holding even more quickly. The result in *Lane*[185] should not change simply because the testimony was not given pursuant to a subpoena, and the government would have similarly failed to show that the content was on a private matter.

Connick[186] was the first of the cases in this field where the Supreme Court found the employee did not speak on a matter of public concern. The Court could have reached this same result with a rebuttable presumption in place. Had the employee been testifying in *Connick*, the presumption could have been overcome by the government showing that the employee was simply "gather[ing] ammunition for another round of controversy with her superiors,"[187] just as they found in the original case. Had the officer in *Roe*[188] been testifying about the

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

183 Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410 (1979).

184 Rankin v. McPherson, 483 U.S. 378 (1987).

185 *Lane*, 573 U.S. 228.

186 Connick v. Myers, 461 U.S. 138, 148 (1983).

187 *Id.*

188 City of San Diego v. Roe, 543 U.S. 77 (2004).

videos he produced, the government could still overcome the presumption by easily showing that stripping and masturbating on video are not matters of public concern.

Garcetti[189] was decided based on prong one, but had the employee been speaking as a citizen, rather than speaking as an employee, the Court could have more easily decided prong two if a rebuttable presumption existed.

In the cases where the Court did decide that the employee's speech was protected, a rebuttable presumption would further judicial economy. In all of these cases the employee was not testifying. If all other facts were the same, but the employee had been testifying, a rebuttable presumption would allow the court to reach the same decision more quickly—making hard cases easier—thus furthering judicial economy. In the cases where the Court decided that the employee was not speaking on a matter of public concern, a rebuttable presumption would not necessarily change the outcome even if the employee had been testifying. The government could clearly overcome the presumption in *Roe* by showing how private in nature the content of the officer's speech had been. In *Connick*, the government would also have been tasked with rebutting the presumption, and it seems it would be able to do so. A rebuttable presumption would have allowed the Court to properly examine the context of the speech before the government could move forward and show that the employee was speaking on a private grievance.

VII. REBUTTING THE REBUTTABLE PRESUMPTION

"[T]he party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally."[190] If a government employee were to bring suit alleging wrongful discipline or termination due to speech, the employee would have the burden of proof in court. If a rebuttable presumption were implemented to support public employees testifying truthfully under oath, the burden would be upon the government employer to rebut the presumption that the employee was speaking on a matter of public concern, but the ultimate burden of persuasion would still be on the employee.

This would not shift the burden of persuasion onto the government employer to prove that its actions were justified. In fact, the government employer could even concede that its employee was speaking on a matter of public concern by opting not to rebut the presumption and still potentially win a case through the remaining three steps. While this Note only addresses a change in prong two of a *Garcetti–Pickering* analysis, it is important to remember that

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189 Garcetti v. Ceballos, 547 U.S. 410 (2006).

190 FED. R. EVID. 301.

this prong is only the second of five prongs.[191] The Supreme Court has already held that truthful testimony under oath qualifies as citizen speech.[192] Therefore, when government employees testify truthfully under oath, they have already satisfied the first prong of the analysis. If the premise of this Note were to be adopted by any court, the second prong of the *Garcetti–Pickering* analysis would also be satisfied—but subject to rebuttal—by a public employee testifying truthfully under oath. The finder of fact in a case would still have to balance the employer's interest in promoting the efficiency of the workplace against the employee's interest in free speech.[193] The employer would also be protected if the speech was not a motivating factor in the adverse employment action or if the adverse employment action would have been taken even in the absence of the protected speech.[194]

If the government were to opt to try to overcome the rebuttable presumption, it could do so in the same manner parties rebut other presumptions within the justice system. There exists a presumption of sanity in criminal cases[195] that can be rebutted by a defendant with varying levels of evidence necessary to overcome it depending upon the jurisdiction.[196] There also exists a presumption that a person is dead if he has been missing for seven years.[197] Such a presumption can obviously be overcome by producing the missing party to show that he is not dead. Some jurisdictions operate with a presumption of paternity, where a man is presumed to be the father of a woman's child if they are married when the child is born.[198] Minnesota, as an example, requires clear and convincing evidence to overcome this presumption, such as a paternity test.[199] Some jurisdictions operate with a presumption of fraud or undue influence when the dominant party to a fiduciary relationship benefits.[200] The Seventh Circuit applied a clear and convincing standard to overcome this standard as well.[201] A rebuttable presumption of mail delivery also exists when an agency mails documents using a regular mail service.[202]

The presumption in this case could be rebutted by a government showing that the content of the speech is so clearly on a matter of private interest that the

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191 Butler v. Bd. of Cnty. Comm'rs, 920 F.3d 651, 655 (10th Cir. 2019).

192 Lane v. Franks, 573 U.S. 228, 238 (2014).

193 Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

194 *Butler*, 920 F.3d at 655.

195 Clark v. Arizona, 548 U.S. 735, 766 (2006).

196 *Id.* at 767.

197 Davie v. Briggs, 97 U.S. 628, 633 (1878).

198 MINN. STAT. ANN. § 257.55 (West 2020).

199 *Id.*

200 Ball v. Kotter, 723 F.3d 813, 826 (7th Cir. 2013).

201 *Id.* at 827.

202 Nibagwire v. Gonzales, 450 F.3d 153, 156 (4th Cir. 2006).

context of truthful testimony under oath should be overcome. This could be done under either a preponderance of the evidence standard—that mirrors the civil standard of the case in question—or under a clear and convincing evidence standard to even further elevate the importance of truthful testimony by government employees. While either of the above could be appropriate, it is clear that a bursting bubble standard would not be appropriate.[203]

Whichever presumption standard is chosen, the laws, rules, and policies encouraging truthful testimony would be best served by the implementation of a rebuttable presumption that a public employee is speaking on a matter of public concern when testifying truthfully under oath. This presumption would also allow the context and the content to be properly analyzed by courts when they rule on adverse employment actions in the public sector.

VIII. CONCLUSION

In conclusion, a standard rule needs to be implemented to settle this circuit split. The views of the Third and Fifth Circuits are not reconcilable with the views of the Fourth, Seventh, Eighth, and Eleventh Circuits. Each side has taken a strong stance with some solely analyzing context of speech and others analyzing solely the content. A much better solution allows a proper analysis of both, while emphasizing the vital importance of truthful testimony, particularly by government employees. This solution requires implementing a rebuttable presumption that a public employee is speaking on a matter of public concern when testifying truthfully under oath. This presumption allows proper respect to be afforded to the context of truthful testimony. However, it also allows content its day in court, so to speak. Were this rebuttable presumption to be implemented, the government could overcome it with a sufficient showing that the content of the speech was on such a private matter that employee discipline or termination was necessary.

This rebuttable presumption satisfies the easy-case-hard-case analysis put forth by Ronald Dworkin, would further judicial economy, and would allow even-handed application of justice across the nation. It would not require overturning any prior Supreme Court decisions and in fact seems a next logical step from the recent decision in *Lane*. This rebuttable presumption best serves the interests of the courts, the citizens who take the roles of public employees, and the First Amendment.

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[203] FED. R. EVID. 301 advisory committee's note to 1972 amendment; H.R. REP. NO. 93-650, at 7080 (1974). This disfavored bursting bubble theory requires only that the party burdened by a presumption introduce any iota of evidence to burst the bubble of the presumption.

* J.D. Candidate, West Virginia University College of Law, 2021. This author thanks Professor Anne Lofaso and the entire West Virginia Law Review for their assistance.