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Oral Argument Preview: Employee Speech at the Supreme Court and the Amicus Brief of Law Professors

By Ruthann Robson

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As we explained when certiorari was granted in ***Lane v. Franks,*** the case involves a public employee's First Amendment rights in the context of retaliation and raising questions about the interpretation of *Garcetti v. Ceballos*. My preview of Monday's oral argument is at SCOTUSBlog here.

The Brief of Law Professors as Amici Curiae in Support of the Petitioner, the employee Edward Lane, available on ssrn, advances two basic arguments.

 The first argument is essentially that the Eleventh Circuit's opinion was a clearly erroneous expansion of *Garcetti* to include Lane's subpoened testimony in a criminal trial. Here's an especially trenchant paragraph:

But the *Garcetti* Court took great pains to distinguish Mr. Ceballos from Mr. Pickering [in *Pickering v. Board of Education*(1968)], who spoke *about what he observed and learned at his workplace* and identified himself *as a teacher* in doing so, and Ms. Givhan [in *Givhan v. Western Line Consolidated School District*(1979)], who spoke to her own supervisors *about what she observed at her workplace* and did so *while at work*. Neither of these employees could have prevailed if any speech they would not have made *but for* their employment were excluded from the First Amendment's protections. The sole fact distinguishing Mr. Ceballos from these other two defendants was that neither Mr. Pickering nor Ms. Givhan was *required by their employment contracts* to engage in the speech for which they were punished. Petitioner was not required by his job duties to testify in court, so his speech is as protected as Ms. Givhan's and Mr. Pickering's.

(emphasis in original). There are similar arguments in the merits briefs, but advancing this doctrinal clarity in the law professors' brief is not misplaced, given that the Eleventh Circuit's summary opinion had so little specific analysis.

Perhaps more common to an amicus brief are the policy arguments raised here regarding the importance of protecting testimony by public employees from retaliation by their government employers. The brief's "judicial integrity" argument seeks to draw an interesting parallel, arguing it is

crucial that public employees be able to speak freely and truthfully about government malfeasance so that the judicial process is not distorted. Distortion of the litigation process occurs when public employees do not feel free to testify in various legal proceedings for fear of losing their jobs. This

Court expressed analogous concerns in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), where the Court struck down as violative of the First Amendment a federally imposed restriction prohibit- ing Legal Services Corporation ("LSC")-funded attorneys, as a condition of the receipt of federal funds, from challenging the legality or constitutionality of existing welfare laws. . . . No less than in *Velazquez*, "[t]he restriction imposed by the [lack of protection for public employee testimonial speech] threatens severe impairment of the judicial function." Id. at 546.

The brief argues in favor of a bright line rule that testimony is "citizen speech" and thus protected by the First Amendment. Whether the line should be so bright might be a topic at oral argument given the arguments in the other briefs.

The named authors of the law professors brief, ConLawProfs Paul Secunda, Scott Bauries, and Sheldon Nahmod, and the signatories, provide a terrific model of "engaged scholarship" and advocacy, and all in approximately 25 pages.

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