No. _____

In The

Supreme Court of the United States

ALBERTO T. FERNANDEZ,

Petitioner,

v.

THE SCHOOL BOARD OF
MIAMI-DADE COUNTY, FLORIDA,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. For purposes of First Amendment freedom of speech for public employees, whether *scope of employment* is a threshold question to be resolved before consideration of what speech constitutes an *ordinary job duty*, and if so, whether *scope of employment* is to be determined in accordance with precedent consisting of this Court's decisions in *Garcetti v. Ceballos*,[1] and *Lane v. Franks*,[2] plus Restatement (Third) of Agency, *Scope of Employment* principles and the federal appellate decisions applying these principles in this context, *Anderson v. Valdez*[3] and *CBS Corp. v. F.C.C.*,[4] or whether *scope of employment* should be decided in accordance with a new and different analytical framework propounded by the Eleventh Circuit.

2. Related thereto is the question whether the lower courts have defied this Court's warning in *Garcetti* against undermining the constitutional right to freedom of speech by crediting an overly-broad job description of *leadership* as bringing the employee speech here at issue within the employer's control.

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[1] *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 (2006).

[2] *Lane v. Franks*, 573 U.S. ___, 134 S. Ct. 2369 (2014).

[3] No. 15-40836 at 2 (5th Cir. 2016).

[4] 535 F.3d 167, 189 (3d Cir. 2008).

PARTIES TO THE PROCEEDINGS

Petitioner is Dr. Alberto T. Fernandez; Respondent is the School Board of Miami-Dade County, Florida.

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PETITION FOR A WRIT OF CERTIORARI

Thomas E. Elfers, on behalf of Alberto Fernandez, respectfully petitions this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Eleventh Circuit is reported at *Fernandez v. Sch. Bd. of Miami-Dade Cnty.*, 898 F.3d 1324 (11th Cir. 2018) and is appended herein at App. 1. The Eleventh Circuit's order denying Appellants' petition for rehearing en banc is appended herein at App. 120. The District Court for the Southern District of Florida's opinion is reported at *Fernandez et al. v. Sch. Bd. of Miami-Dade Cnty*., 201 F.Supp.3d 1353 (S.D. Fla. 2016) and is appended herein at App. 23.

JURISDICTION

The Eleventh Circuit entered judgment on August 10, 2018. Petitioner filed a timely petition for rehearing en banc, which the Eleventh Circuit denied on October 24, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. Amend. I.

The relevant Florida statutory provisions, Fla. Stat. §§1002.33 (1) – (4), are reproduced in the appendix. App. 127. The relevant Florida regulations, Fla. Admin. Code R. 6A-6.0787, *Ballot Process for Teacher and Parent Voting for Charter School Conversion Status*, are reproduced in App. 122.

STATEMENT OF THE CASE

In February of 2012 Dr. Alberto Fernandez, a thirty-year veteran of Miami-Dade County Public Schools ("MDCPS"), who had been a principal for fifteen years, and whose performance evaluations throughout this period were given the highest possible rating as either "distinguished or exemplary,"[5] along with Mr. Henny Cristobol, a sixteen-year MDCPS

[5] *Final Order, State of Florida, Department of Education*, DOAH Case No. 13-92 at 4 (November 6, 2014). (App. 105, 109).

veteran, who had been an administrator for ten years, were respectively Principal and Assistant Principal at *Neva King Cooper Special Education Center* ("Neva King") in Miami-Dade County, Florida. Neva King provides educational services for severely intellectually and physically challenged students.

Fernandez and Cristobol were investigated by MDCPS and notified that they were subject to disciplinary measures for fomenting discussion by parents and staff of a possible charter school conversion of Neva King. Converting a Florida public school into public charter school is a lawful process that involves removing the entire school – the students, teachers, administrative staff, non-professional staff, and the school property, plant, and equipment – from the control of the local school board (in this case, from the control of the Respondents) and transferring control to another board, formed for the purpose of operating the school under a charter from the State. It is one method for expanding the role of charter schools in public education under Florida law; the other being the creation of a start-up school as a charter school. *See* Fla. Stat. §§ 1002.33 (1) *et seq.* (App. 127).

Charter schools are intended to improve academic achievement and to increase learning opportunities. Fla. Stat. §§ 1002.33 (2)(b) 1 & 2. They receive operating funds from the Florida Education Finance Program in the same way as other public schools, which means that in the case of a conversion the local public school district will sustain a corresponding loss of revenue, exacerbated in the present case by the weighting

of the allocation for special education students, which is four or five[6] times that of regular students. *See* Fla. Stat. § 1002.33 (17). Special education students converted into charter school students also bring their federal funding with them. *See* 20 U.S.C. § 7221e (a). If Fernandez and Cristobol had succeeded in converting Neva King into a charter public school under the control of an independent board, MDCPS would have lost a large amount of funding. A good deal of that funding is diverted by the School Board into administrative overhead and never reaches Neva King, making the school something of a cash cow.

In order to convert a public school into a public charter school, an application must be presented to a district school board for its approval. *See* Fla. Stat. § 1002.33 (3) (b). Before the application can be submitted, it must be demonstrated that the conversion is supported by "at least 50 percent of the teachers employed at the school and 50 percent of the parents whose children are enrolled at the school." *Id.*[7] The initiation of the vote can occur at the written request of the principal, parents, teachers, the school board, or as

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[6] Florida House of Representatives, *Education Fact Sheet 2010-11*, *Florida Education Finance Program (FEFP)* at 24, available at http://basiceducationfundingcommission.pasenategop.com/wp-content/uploads/sites/68/2014/10/2010-11-Florida-Education-Finance-Program-FEFP.3.pdf.

[7] Obviously, being presented with a petition for conversion supported by a majority of its constituents would place the School Board in a difficult political situation, one which it sought to avoid by squelching the conversion initiative undertaken by Fernandez and Cristobol.

it did in the present case, the school advisory council. Afterwards, the principal must schedule and arrange the balloting. Fla. Admin. Code R. 6A-6.0787 (1). The principal is to ensure that only eligible persons vote and that no one votes more than once. *Id.* at 6A-6.0787(2) (g). Ballots are to be "created and distributed by the school." The principal, in conjunction with the applicant, must select an independent arbitrator to tally the ballots. *Id.* at 6A-6.0787 (3) (a) & (b).

While the foregoing statutes and administrative rules assign certain ministerial duties to principals once a petition is presented, these are not employment duties assigned by the employing school board; they are not part of a principal's ordinary job duties; and they have nothing to do with principals speaking (or refusing to speak) about charter schools or charter school conversion, pro or con. Neither Florida statutes nor School Board policies restrict or limit a principal's personal position or his speech regarding conversion of a public school to a charter school.[8] To the contrary, Fla. Stat. § 1002.33 (4) *specifically prohibits any reprisal by a school board against any employee for involvement, directly or indirectly, in a charter school application*.[9]

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[8] For the significance of employer silence (meaning no institutional attempt to direct or control), *see Dougherty v. Sch. Dist. of Phila*., 772 F.3d 979, 988 (3d Cir. 2014) ("nothing about [the plaintiff's] position compelled or called for him to provide or report this information"). Therefore it was not a job duty.

[9] The same statute protects an employee involved in a "*start up*" charter school, not just a conversion.

In the case at bar, despite the statute, there were reprisals. On May 2, 2012, Dr. Fernandez was involuntarily transferred from Neva King to the *Mail and Stores Distribution Warehouse*, where he was assigned to package crayons and mops and to organize car keys. His confinement lasted thirteen and a half months. Mr. Cristobal was also involuntarily transferred from Neva King, but to the *South Transportation Depot*, where he was assigned to scan documents.

Both employees were investigated by the MDCPS Civil Investigative Unit ("CIU"), and both were issued a gag order by the School Board, prohibiting communications with the Neva King school community. The Board imposed the gag order even after the investigation was completed. The transfer, investigation, and gag order had their intended effect: the charter school conversion initiative, which was supported by a number of teachers and parents of students at Neva King, died with the School Board's retaliatory actions against Fernandez and Cristobol.

On June 30, 2014, after a five-day hearing at the Florida Division of Administrative Hearings ("DOAH") – during which the District argued that initiating a charter school conversion was *not* the job of either Fernandez or Cristobol[10] – the Hearing Officer determined

[10] In the State administrative action: "Converting [Neva King] into a charter conversion school was not a part of [Dr. Fernandez/ Mr. Cristobol's] official duties." *Recommended Order*, DOAH No. 13-1491, Finding of Fact 46 (App. 72); "ethically barred from utilizing any worksite time or resources vis-à-vis the prospective conversion", *Recommended Order*, Finding of Fact 51 (App. 76).

that neither had done anything wrong.[11] He also found that that their exiles were unlawful reprisals by the School Board that violated their right to be free from retaliation under Fla. Stat. §1002.33 (4).[12] However, the Hearing Officer did not award non-economic damages and refused Fernandez and Cristobol reinstatement to their positions at Neva King, handing the School Board a practical victory. (App. 101, 117).

Fernandez and Cristobol then brought a First Amendment action in the United States District Court for the Southern District of Florida, invoking the court's federal question jurisdiction, 28 U.S.C. § 1331. The District Court granted summary judgment for the $School Board,[13] finding that speech in furtherance of

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The hearing officer's findings of fact were adopted by DOAH in its *Final Order, State of Florida, Department of Education*, DOAH Case No. 13-92. at 12. (App. 116). *See also*, *Fernandez v. Sch. Bd. of Miami-Dade Cnty.*, 898 F.3d 1324, 1327-28 (11th Cir. 2018) ("The reports also included several statements from School District officials representing that, in attempting to convert Neva King to a charter school, the Administrators exceeded their official duties.") (App. 6). Petitioners' arguments below to the federal court that the School Board should be judicially estopped from taking the opposite position in this litigation fell on deaf ears.

[11] *Recommended Order*, DOAH No. 13-1492, Findings 43-46, (App. 69-73).

[12] *Recommended Order*, DOAH No. 13-1492, Conclusion of Law II, Unlawful Reprisal (App. 82-83, 99); *Final Order, State of Florida, Department of Education*, DOAH Case No. 13-1492 at 4, 9-10 (November 6, 2014). (App. 117).

[13] *Order* (granting in part and denying in part motion for summary judgment) *Fernandez et al. v. School Board of Miami-Dade County, Fla.*, No. 1:15-cv-21915-DPG (S.D. Fla. January 25, 2016). (App. 23, 40).

charter school conversion exhibited *leadership*[14] on the part of Fernandez and Cristobol, even though it had caused their removal from Neva King and reassignment to menial jobs at remote locations. *Leadership*, which was listed in the principal's job description (though not in that of the assistant principal) was, according to the District Court, a *job duty* that brought the speech in question within the purview of *ordinary job duties* as explicated by this Court's decisions in *Garcetti*[15] and *Lane*.[16] The District Court ruled that Fernandez and Cristobol were therefore not entitled to First Amendment protection.

That ruling was at odds with the testimony of various top MDCPS administrators, including Fernandez' supervisor's superior, at the administrative level. Consistent with the Board's theory of the case against Fernandez and Cristobol before DOAH, its witnesses testified, and the written evidence showed, that the Board contended it was *not* the job of Fernandez and Cristobol to get involved in a charter school conversion application. However, instead of invoking judicial estoppel, the District Court (and later, the Circuit Court) considered the Board's change of position of "*no moment*." *See Order* (granting in part and denying in part motion for summary judgment) *Fernandez et al. v.*

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[14] *Order* (granting in part and denying in part motion for summary judgment) *Fernandez et al. v. School Board of Miami-Dade County, Fla.*, No. 1:15-cv-21915-DPG (S.D. Fla. January 25, 2016). (App. 32-33).

[15] *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 (2006).

[16] *Lane v. Franks*, 573 U.S. ___, 134 S. Ct. 2369 (2014).

School Board of Miami-Dade County, Fla., No. 1:15-cv-21915-DPG (S.D. Fla. January 25, 2016) (emphasis added). (App. 23).

On appeal, the Eleventh Circuit panel affirmed the lower court, citing to the statutory scheme for charter school conversion, but without any consideration of the fact that local school boards lack control over the ministerial processes, and without recognizing the distinction between ministerial actions and the speech of a principal on the merits of conversion. The court made no attempt to square the need for the employer to have "commissioned or created" the speech at issue for the two administrators to lose First Amendment protection, with the Florida statute prohibiting school boards from retaliating against their employees for such speech. *Compare Garcetti*, 547 U.S. at 421-22, 126 S. Ct. 1951 (no First Amendment protection where the employer's control is "over what the employer itself has commissioned or created") *with* Fla. Stat. §1002.33 (4) ("[n]o district school board, or district school board employee who has control over personnel actions, shall take unlawful reprisal against another district school board employee because that employee is either directly or indirectly involved with an application to establish a charter school"). There was also no discussion whether Fernandez's and Cristobol's speech on charter school conversion was amicable or inimical to the interests of the School Board, which stood to lose a school, its students, its staff, and a substantial amount of money if the conversion process was successful. *See*

Fernandez v. Sch. Bd. of Miami-Dade Cnty., 898 F.3d 1324 (11th Cir. 2018). (App. 22).

Instead the Eleventh Circuit opinion relied heavily upon its own precedent of *D'Angelo v. School Board of Polk County, Florida*, 497 F.3d 1203 (11th Cir. 2007) which had a similar fact pattern. Principal D'Angelo had advocated for a charter school conversion and alleged he had been fired for his efforts, despite Florida's statutory "*unlawful reprisal*" provision. Subsequently, his First Amendment suit was dismissed by the federal district court and affirmed by the Eleventh Circuit.

As in the present case, the pivotal issue was whether D'Angelo spoke pursuant to his job duties, which, as in the present case, turned on his "*obligation to provide leadership*."[17] The lower court found that D'Angelo's speech had been "part and parcel of his official duties."[18] However, D'Angelo testified at trial that charter school conversion was not one of his "*assigned duties*."[19] Obviously not; he was fired for attempting to do it. D'Angelo explained he initiated the conversion attempt because he felt he had a "moral obligation."[20] He "in good conscience . . . could not continue the practice of providing an inferior educational opportunity to ESE (special education) students."[21] The court rejected

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[17] *D'Angelo*, 497 F.3d at 1207.

[18] *Id.* at 1208.

[19] *Id.* at 1206.

[20] *Id.* at 1210.

[21] *Id.*

the plaintiff's attempt to distinguish a professional or moral responsibility versus an ordinary job duty. *Id.*

In the case at bar, the Eleventh Circuit held that Fernandez and Cristobol, like D'Angelo, had spearheaded the discussion about applying for a charter school conversion pursuant to "*broad administrative responsibilities*."[22] However, the Eleventh Circuit failed to address: traditional agency criteria regarding scope of employment to determine whether it included speech in furtherance of conversion to a charter school; whether it was the employer's interests that were being served by the speech at issue; and whether the employer had the right to exercise control over the speech at issue.[23] The court appeared unmoved by the irony of an ordinary job duty (ostensibly owed to the School Board) that involved its employees speaking on whether they and other members of the Neva King community would be better served being under the control of some entity *other than* their employer.

Upon petition for rehearing en banc, Fernandez and Cristobol pointed to the panel opinion's departure from the following principles of the common law of agency: 1) If the employee does not intend to provide a service for the employer by his or her actions, then the employee's actions cannot be within the scope of employment; and 2) If the employer is prohibited from attempting to control the employee's speech (in this

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[22] *Fernandez*, 898 F.3d at 1334. (Emphasis added).

[23] Restatement (Third) of Agency, *Scope of Employment*, § 7.07(1) (2006).

case, by the State's charter school anti-retaliation statute), then the employee's speech cannot be within the scope of employment. Fernandez and Cristobol also argued that the Circuit's decision in *D'Angelo* had been abrogated by this Court's decision in *Lane*. On October 24, 2018, the Eleventh Circuit denied the petition for rehearing and rehearing en banc. (App. 120).

SUMMARY OF ARGUMENT

Petitioner asserts that for purposes of First Amendment freedom of speech for public employees, *scope of employment* is a threshold question to be resolved before consideration of *ordinary job duty*, determined in accordance with precedent consisting of Restatement (Third) of Agency, *Scope of Employment* principles and the decisions in *Garcetti v. Ceballos*,[24] *Lane v. Franks*,[25] *Anderson v. Valdez*[26] and *CBS Corp. v. F.C.C.*[27] so as to require that an employee's speech is not protected citizen speech where the employee is acting to further the employer's interests, in accordance with the employer's directives, and under the employer's control. Petitioner further contends that instead of the foregoing, the Eleventh Circuit wrongly used a new and different analytical framework that conflicts with the foregoing precedent.

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[24] *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 (2006).

[25] *Lane v. Franks*, 573 U.S. ___, 134 S. Ct. 2369 (2014).

[26] No. 15-40836 at 2 (5th Cir. 2016).

[27] 535 F.3d 167, 189 (3d Cir. 2008).

Finally, Petitioner argues that the lower court disregarded the presumption in favor of free speech by accepting *leadership* as a job description that covered the speech at issue in this case, contrary to this Court's warning in *Garcetti* to the lower federal courts that they should refuse to allow overly-broad job descriptions to undermine the First Amendment as applied to public employment. A writ of certiorari is therefore warranted. Several years after both *Garcetti* and *Lane*, the Eleventh Circuit continues to struggle with the proper application of these precedents.

In *Garcetti*, Ceballos was a deputy district attorney who reviewed police affidavits submitted in support of search warrant applications.[28] He wrote a memo recommending dismissal of one application, to which his superiors took issue, and claimed he was afterwards subjected to adverse employment action.[29] Ceballos asserted this violated his right to free speech under the First Amendment.

In reviewing the claim, this Court held that when public employees speak in the course of carrying out their "*routine, required employment obligations*,"[30] they speak as employees and not as citizens, and that "the Constitution does not insulate their

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[28] *Garcetti*, 547 at 414.

[29] *Id.* at 415.

[30] *Id.* at 416.

communications from employer discipline.[31] The memo written by Ceballos was employer speech, not citizen speech, because it was created subject to the employer's direction and control. However, this Court issued a warning: "*We reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions*."[32]

Lane involved a director of a college program who discovered that a state representative was receiving a paycheck for a no-show job, and despite being warned by Franks not to do so, terminated her employment.[33] Shortly after that, federal authorities indicted the state representative. At the representative's trial, Lane testified under subpoena, and the representative was convicted.[34] Thereafter, Lane's employment was terminated.[35]

Lane's challenge to the termination on First Amendment grounds failed in the district court, and the Eleventh Circuit affirmed, holding that Lane was acting pursuant to his official duties when he investigated the state representative's employment.[36] This Court reversed. While emphasizing that when employees speak as part of their *ordinary* job duties they are

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[31] *Id.* at 420.

[32] *Id.* at 424.

[33] *Ibid.*

[34] *Ibid.*

[35] *Id.* at 2376.

[36] *Id.* at 2377.

not protected by the First Amendment;[37] the Court held the obligation to speak when subpoenaed is an independent obligation.[38] Therefore, Lane was protected.

Although the outcomes were different for Ceballos and Lane, the analysis used by this Court was the same. Because Ceballos had been given his job assignment to review search warrant applications and supporting affidavits by his employer, the employer could control his work product (the memoranda that Ceballos was required to write regarding these applications) and impose discipline if not satisfied with his written analyses. However, Lane, when testifying pursuant to subpoena, was not performing a job duty assigned to him by his employer, so the employer could not control what he said or impose sanctions if displeased with his testimony.

The nascent two-fold test in the foregoing precedents is whether the employee acted in the employer's interest and under the employer's direction and control. In the *Lane* case, this court emphasized that the speech at issue must be made pursuant to the employee's *ordinary* job duties or responsibilities. However, ordinary job duties or responsibilities cannot exist outside the scope of employment. Therefore Petitioner posits that the first step should be to examine the employment relationship. Actions are outside the scope of employment where an employee acts contrary

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[37] *Id.* at 2378.

[38] *Id.* at 2379.

to the employer's interest or beyond the employer's control.

The same year as the *Garcetti* decision, the following recitation appeared in the Restatement (Third) of Agency:

> An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct *subject to the employer's control. An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.*

Restatement (Third) of Agency, *Scope of Employment*, § 7.07(2) (2006) (emphasis added). In the case at bar, it is the Eleventh Circuit's disregard for these agency principles, implicit in *Garcetti v. Ceballos*,[39] *Lane v. Franks*,[40] and explicit in *Anderson v. Valdez*[41] and *CBS Corp. v. F.C.C.*[42] – the employer's lack of control over the speech at issue and the absence of conduct intended to serve the employer's interest – that warrants review by this Court.

The *Restatement's* "Scope of Employment" test has been cited and applied twice by U.S. circuit courts, the Third and the Fifth, as controlling with respect to freedom of speech issues: *Anderson v. Valdez*, No. 15-40836

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[39] *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 (2006).

[40] *Lane v. Franks*, 573 U.S. ___, 134 S. Ct. 2369 (2014).

[41] No. 15-40836 at 2 (5th Cir. 2016).

[42] 535 F.3d 167, 189 (3d Cir. 2008).

at 2 (5th Cir. 2016) and *CBS Corp. v. F.C.C.*, 535 F.3d 167, 189 (3d Cir. 2008). Beyond freedom of speech actions, the *Restatement* test is ubiquitous, having appeared in various and not a few legal contexts.[43]

Misconstruing or avoiding the instruction provided collectively by *Garcetti*, *Lane*, *Anderson*, *CBS* and the *Restatement (Third) of Agency*, the Eleventh Circuit below has held that a principal's actions are outside the protection of the First Amendment pursuant to "*broad administrative responsibilities*"[44] or where *leadership* has been included in the relevant job

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[43] *See*, *e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 693, 129 S. Ct. 1937 (2009) (Souter, Stevens, Ginsberg, and Breyer, J.J., dissenting) (unconstitutional misconduct by government officials); *Garnett v. Remedi Seniorcare of Va., LLC*, 892 F.3d 140, 144 (4th Cir. 2018) (defamation); *Jones v. Royal Admin. Servs., Inc.*, 887 F.3d 443, 448 (9th Cir. 2017) (Telephone Consumer Protection Act); *Salyers v. Metro. Life Ins. Co.*, 871 F.3d 934, 940 (9th Cir. 2017) (life insurance claim); *Barnes v. United States*, No. 16-5166 at 12 (10th Cir. 2017) (negligence); *Vasquez v. Empress Ambulance Serv., Inc.*, 835 F.3d 267, 273 n.5 (2d Cir. 2016) (retaliation for complaining of sexual harassment); *Javier v. City of Milwaukee*, 670 F.3d 823, 828 (7th Cir. 2012) (excessive force); *Bohnsack v. Varco, L.P.*, 668 F.3d 266, 273 (5th Cir. 2012) (misappropriation of trade secrets); *Lomando v. United States*, 667 F.3d 363, 364 (3d Cir. 2011) (medical malpractice); *Wilder Corp. of Del. v. Drainage*, 658 F.3d 802, 803 (7th Cir. 2011) (noncontractual indemnity); *O'Bryan v. Holy See*, 556 F.3d 361, 382-83, 2009 WL 305342 (6th Cir. 2009) (sexual abuse); *Nationwide Transp. Fin. v. Cass Info. Sys.*, 523 F.3d 1061, 1054 (9th Cir. 2008) (intentional interference with contractual relationship).

[44] *Fernandez v. Sch. Bd. of Miami-Dade Cnty.*, 898 F.3d 1324, 1334 (11th Cir. 2018).

description.[45] The Eleventh Circuit has also propounded a different test for scope of employment, one not analogous to *Garcetti*, *Lane*, *Anderson*, *CBS* or the *Restatement (Third)*, but supported instead solely by Eleventh Circuit precedent.

ARGUMENT

A. The Eleventh Circuit's test for scope of employment conflicts with the Supreme Court's test in *Garcetti v. Ceballos* and *Lane v. Franks*, along with the Third Circuit decision in *CBS Corp. v. F.C.C.*[46] and the Fifth Circuit decision in *Anderson v. Valdez*,[47] as well as the Restatement (Third) of Agency, *Scope of Employment*.[48]

This Court's review is necessary to resolve whether traditional agency principles for determining scope of employment should apply to First Amendment cases involving public employees who have been punished by their employers for speech disapproved by their employers. The majority opinion of this Court in *Lane*[49] focused on whether Lane's testimony was

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[45] *Fernandez*, 898 F.3d at 1328, 1334 (11th Cir. 2018); *Fernandez v. School Board of Miami-Dade County, Florida*, No. 15-cv-21915-Gayles at 7 (S.D. Fla. 2017).

[46] *CBS Corp.*, 535 F.3d 167, 189 (3d Cir. 2008).

[47] *Anderson*, No. 15-40836 at 2 (5th Cir. 2016).

[48] Restatement (Third) of Agency § 7.07(1) (2006). Scope of employment.

[49] *Lane*, 573 U.S. ___, 134 S. Ct. 2369 (2014).

"outside the scope of his *ordinary job responsibilities*"[50] or "outside the scope of his *ordinary job duties*,"[51] as did the concurring opinion of Justices Thomas, Scalia and Alito.[52]

Ordinary job duties and ordinary job responsibilities cannot exist outside the scope of employment. That would be impossible. As to the definition of *ordinary*, the Eleventh Circuit incorrectly stated:

> Fernandez and Cristobol lean heavily on the extensive use of the phrase "ordinary job duties" and argue that "neither Fernandez nor Cristobol, during their many prior years of employment with the District, had ever initiated charter school discussions [before fall 2011]." Their argument misses the mark. In order to determine whether speech is uttered as a private citizen or as a public employee, we ask not whether the speech itself is made ordinarily and regularly. Rather, we inquire whether the speech falls within an ordinary duty. It is entirely consistent with *Lane* to conclude that Fernandez and Cristobol spoke pursuant to their ordinary duties even though they had *never* before attempted a charter conversion.[53]

The Eleventh Circuit's strained interpretation of "ordinary" differs significantly from the Eighth

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[50] *Id.* at 2378.

[51] *Id.*

[52] *Id.* at 2383, 84.

[53] *Fernandez*, 898 F.3d at 1333-34.

Circuit's definition of the same word. The Eighth Circuit has said that consideration must be given to "whether the act is *commonly done* in the course of business." *St. John v. U.S.*, 240 F.3d 671, 676 (8th Cir. 2000). Thus, at the circuit court level two competing definitions of *ordinary job duties* exist. In this case, none of the School Board's principals had commonly initiated a charter school conversion in the course of conducting the School Board's business; not one of the Board's schools had ever been converted. (App. 53). Indeed, as charter school conversion entails removing the school in question from the control of the incumbent school board, this should have led the court to conclude that not only was speech on charter school conversion *not* in the ordinary course of the principals' business *for* the School Board, it was literally *none of the School Board's business*.

Until this case, the Restatement's scope of employment test has been followed by all of the federal circuits whenever a question has arisen as to the existence of an employment relationship.[54] As previously

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[54] *See*, *e.g.*, *Nat'l Labor Relations Bd. v. Hlth. Care 7 Retirement Corp*., 114 S. Ct. 1778 (1994); *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 578 (1994); *Community For Creative v. Reid*, 490 U.S. 730, 740, 109 S. Ct. 2166 (1989); *Atrium of Princeton, LLC v. Nat'l Labor Relations Bd.*, 684 F.3d 1310, 1315 (D.C. Cir. 2012); *Landstar Exp. America v. Federal Maritime Com'n*, 569 F.3d 493, 497 (D.C. Cir. 2009); *Nichols v. Land Transport Corporation*, 223 F.3d 21, 24 (1st Cir. 2000); *McHugh v. University of Vermont*, 966 F.2d 67, 75 (2d Cir. 1992); *Flora v. Cnty. of Luzerne*, 776 F.3d 169, 179-80 (3d Cir. 2015); *Garnett v. Remedi Seniorcare of Va., LLC*, No. 17-1890 at 7 (4th Cir. 2018); *United States v. Hilton*, 701 F.3d 959, 970 (4th Cir.

noted, it has been applied to freedom of speech cases in at least two of the federal circuits.[55]

In the present case, while eschewing any mention of this traditional agency precedent, the Eleventh Circuit derived a unique, five-fold test:

> Our cases have identified, among others, these considerations as relevant in determining whether a public employee spoke pursuant to his official duties: (1) speaking with the objective of advancing official duties; (2) harnessing workplace resources; (3) projecting official authority; (4) heeding official directives; and (5) observing formal workplace hierarchies. See *Abdur-Rahman*, 567 F.3d at 1280,

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2012); *United States v. Am. Commercial Lines, L.L.C.*, 875 F.3d 170, 178 (5th Cir. 2017); *Bohnsack v. Varco, L.P.*, 668 F.3d 262, 273, (5th Cir. 2012); *Anderson v. Valdez*, 845 F.3d 580, 596 (5th Cir. 2016); *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 566 (6th Cir. 2008); *Javier v. City of Milwaukee*, 670 F.3d 823 n.6 (7th Cir. 2012); *St. John v. U.S.*, 240 F.3d 671, 676 (8th Cir. 2000); *Jones v. Royal Admin. Servs., Inc.*, 887 F.3d 443, 448 (9th Cir. 2017); *Mavrix Photographs, LLC v. Livejournal, Inc.*, 873 F.3d 1045, 1054 (9th Cir. 2017; *Knopf v. Williams*, 884 F.3d 939, 952 (10th Cir. 2018); *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir. 1997).

[55] *Anderson*, No. 15-40836 at 2 (5th Cir. 2016). *CBS Corp.*, 535 F.3d 167, 189 (3d Cir. 2008).

1283;[56] *Alves*, 804 F. 3d at 1161,[57] 1154-65; *Moss*, 782 F.3d at 618-20.[58]

Fernandez v. Sch. Bd. of Miami-Dade Cnty., 898 F.3d 1324, 1332 (11th Cir. 2018). Notably, no other circuit has subscribed to this test. Petitioner submits that the Eleventh Circuit's test is wrong, as it is in conflict with the agency principles implicit in this Court's *Garcetti* and *Lane* precedents and explicit in *Anderson v. Valdez*[59] and *CBS Corp. v. F.C.C.*[60]

Although the first criterion of the Eleventh Circuit test – *whether a public employee speaks with the objective of advancing official duties* – may seem to resemble the *Restatement* specification that says – *an employee acts within the scope of employment when intended by the employee to serve any purpose of the employer*[61] – there is an important difference. The Eleventh Circuit criteria is a tautology, i.e., if the purpose of the test is to determine what constitutes "official duties," how can part of the test be whether the speech advances "official duties?" Missing from the Eleventh Circuit's formulation is whether there is a duty to

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[56] *Abdur-Rahman v. Walker*, 567 F.3d 1278, 1283 (11th Cir. 2009).

[57] *Alves v. Board of Regents*, 804 F.3d 1149, 1161 (11th Cir. 2009).

[58] *Moss v. City of Pembroke Pines*, 782 F.3d 613, 618-20 (11th Cir. 2015).

[59] No. 15-40836 at 2 (5th Cir. 2016).

[60] 535 F.3d 167, 189 (3d Cir. 2008).

[61] Restatement (Third) of Agency, *Scope of Employment*, § 7.07(2) (2006).

speak attributable to the employer in the first place, as opposed to an obligation coming from somewhere else, e.g., a subpoena (*Lane*), a personal sense of morality, a professional code of ethics, or a directive from a legislature that is not the public employer. (In this case, under Florida law, the local school board – not the State – is the employer, pursuant to Fla. Stat. § 1012.01(3)). In both *Fernandez* and *D'Angelo*, the Eleventh Circuit rejected efforts to draw a distinction between ordinary job duties and obligations emanating from another source (professional responsibility), contrary to this Court's decision in *Lane*, where it ruled in favor of the employee's First Amendment rights because of this distinction.

Two other items are missing from the Eleventh Circuit's test, but are prominent in the *Restatement* version. One is the *intent* of the employee, i.e., whether the employee intended to serve some interest of the employer.[62] The other is whether there was an *assignment by* the employer.[63]

The intent of Fernandez and Cristobol (as was true for D'Angelo) was not to serve any interest of the employer. In each case it was noted that the plaintiffs intended to serve the best interests of their students, but in these cases that was *not* the same as serving the interests of the employing school boards. Although serving an employer's "customers" *using the resources of the employer* is typically within the interests of the

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[62] *Ibid.*

[63] *Ibid.* (Emphasis added).

employer that was not what was involved in these cases. To the contrary, a desire to "serve the best interests of the students" through a charter school conversion is the antithesis of serving the interests of the employing school board. The conversion process is designed to remove a school, its staff, and its students from the control of the incumbent public school board, and place the school, the staff, and the education of the students (and the concomitant state and federal funding for their education) under the control of some *other* employer. Accordingly, speech to explore conversion of one of the School Board's public schools to a charter school was neither something intended to benefit the School Board, nor something that the School Board had ever assigned. As to the latter point, obviously not, as the School Board went to great lengths and took unlawful measures to stop it.[64]

B. The Supreme Court's test for s*cope of employment* in *Garcetti*, ignored by the court in this case, emphasizes whether the employer's attempt at control was over what the employer itself commissioned or created.

In *Garcetti v. Ceballos* this Court found that Ceballos had been employed to examine search warrant requests and supporting affidavits, and to issue written memoranda regarding their viability. Therefore,

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[64] The remaining four Eleventh Circuit criteria are also not in conformance with *Garcetti* and *Lane*, as they give dispositive weight to factors that this Court has stated are not dispositive. *Garcetti*, 547 U.S. at 420-21; *Lane*, 134 S. Ct at 2379.

adverse employment actions taken against him by his employer, based on the employer's dissatisfaction with those memoranda or the employee's statements in support of his defiance, reflected "*employer control over what the employer itself . . . commissioned or created*."[65] The Court articulated this test to strike a balance between the First Amendment right of public employees and the right of the government as employer to control the work product of its workforce as any other employer. Contrast this with the hearing officer's finding in the present case that the District had committed a "*blatant usurpation* of Dr. Fernandez' control over the voting. . . ." (App. 60) (Emphasis added).

In the present case the employing School Board did not *create or commission* any conversion speech, procedures or initiatives. Conversion is a creature of the legislature, and the legislature commanded that school board employees should participate freely, without fear of retaliation by their employer. The State legislature eliminated the employer's instruments of control, prohibiting school boards from using discipline, discharge, transfer, or any other adverse employment action to punish its employees for their involvement, *directly or indirectly*, in any charter school application. *See* Fla. Stat. § 1002.33 (4).[66]

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[65] 547 U.S. at 422.

[66] Under traditional agency principles, actions are outside the scope of employment where an employee acts outside the employer's control. *See Anderson v. Valdez*, 845 F.3d 580, 596 (5th Cir. 2016). In this case, although ministerial oversight of balloting has been statutorily vested in the principal, it is a legislative duty

C. One of the Restatement's criteria for whether an action is taken within the scope of employment, ignored in this case, is whether it is undertaken for the benefit of the employer.

A significant part of the agency test is whether the employees' actions were undertaken to benefit the employer. "An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve *any purpose of the employer*."[67] An act is not within the scope of employment "*unless the act was done in furtherance of the master's business*." *McHugh v. University of Vermont*, 966 F.2d 67, 75 (2d Cir. 1992) (emphasis added). However, this indicator was not addressed in the Eleventh Circuit's opinion, and it does not appear in the Eleventh Circuit's new alternative test.

In *Fernandez* the School Board's interests were not being served, as demonstrated in the first instance by the districts' ferociously aggressive and unlawful countermeasures. Fernandez and Cristobol testified that they acted primarily in the interest of the students, not the School Board. The Eleventh Circuit found that they "[d]etermined to *improve the school's*

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not an employment duty, and in any event, it was not among the duties at issue. The DOAH hearing officer pointedly said that the District's interference was an "improper usurpation." (App. 60).

[67] Restatement (Third) of Agency, *Scope of Employment*, § 7.07(2) (2006). (Emphasis added).

instructional quality."[68] However, what school? Overlooked was that conversion would effectively create a different school – one not under the control of the School Board. In *D'Angelo*, the Eleventh Circuit similarly went off in this wrong direction: "[H]e [D'Angelo] admitted that it was incumbent upon [him] to investigate Charter and to move towards Charter for the *betterment of the students*."[69] Fernandez and Cristobol (and D'Angelo) were motivated by moral and professional interests separate from, and indeed diametrically opposed to, their employers' interests, to serve a constituency by removing it from control by the employer.

D. The lower court decisions conflict with this Court's admonition in *Garcetti* that overly-broad job descriptions (e.g., "Leadership") should not circumvent the general rule that public employees do not forfeit their constitutional right to free speech when speaking on matters related to or learned in the course of their employment.

Separate from the Eleventh Circuit's five-part test for scope of employment (which does not appear in any other circuit), the Eleventh Circuit also has propounded an additional consideration: where the word *leadership* has been affixed to a job description, and if a particular employee's articulated views can somehow

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[68] *Fernandez*, 898 F.3d at 1326. (Emphasis added).

[69] *D'Angelo*, 497 F.3d at 1206. (Emphasis added).

be characterized as exhibiting leadership, that employee will forfeit his First Amendment protection. This conflicts with the Court's direction in *Garcetti* that a public employer should not try to use overly-broad job descriptions to eliminate First Amendment protections for its employees.

Injecting that intangible noun into various line items is easy to do. For example: "*Every teacher and administrator shall demonstrate leadership towards fostering positive communications with the community*." Facially, this may seem like a good idea, until some controversial issue, such as charter school conversion, or some notorious issue, such as whistle-blowing in connection with artificial-grade-inflation or teacher-assisted-test-cheating on standardized tests, is communicated. At that point, freedom of speech will hang in the balance.

For more than two hundred and fifty years, America has been wont to stick a feather in its cap and call it macaroni.[70] What is proposed in the Eleventh Circuit is to stick *leadership* into job descriptions and call it a job responsibility, or (with even less effort than broadening a job description), to conjure a "*broad*

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[70] During the French and Indian war (1754-1763) British regulars, off-put by the provincialism of rag-tag colonial militia (who probably did put feathers in their caps) composed *Yankee Doodle* to express their contempt – these ignorant yokels wouldn't know the difference. But in one of the world's spunky *in-your-face* reversals the colonials adopted the song as their own and went on to trounce the regulars at Yorktown 18 years later.

administrative responsibility"[71] out of whole cloth that can exist without any job description iteration. But if there is an inclination to proceed in that direction with freedom of speech issues, then the factual circumstances should at least be tested for scope of employment according to agency precedent.

E. The Eleventh Circuit continues to depart from *Garcetti* and broadly interprets that decision to stifle lawful speech that should be protected by the First Amendment.

The Eleventh Circuit's pattern of deviation from *Garcetti* is illustrated by contrasting the majority and dissenting opinions in *Abdur-Rahman v. Walker*, 567 F.3d 1278 (11th Cir. 2009). In *Abdur-Rahman*, the enumerated job duties of certain sewer inspectors included investigating sanitary sewer overflows to determine whether grease was the cause of the overflows. The investigation by the inspectors of two sanitary sewer overflows resulted in further investigation beyond the scope of determining whether grease was the cause; reports that the inspectors contended went beyond their ordinary job duties and for which they were punished. The majority ruled their speech unprotected by the First Amendment, stating that their reports "owe [their] existence," *Garcetti*, 547 U.S. at 421, 126 S. Ct. at 1960, to the two principal job responsibilities of the inspectors: writing fat, oil, and grease ordinances and inspecting sanitary sewer overflows."

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[71] *Fernandez*, 898 F.3d at 1334.

Said the Eleventh Circuit:

> Our precedents require that we reject the distinction the inspectors advocate. *We review* '*the content, form, and context of a given statement*, as revealed by the whole record[,]' *Vila*, 484 F.3d at 1340 (internal quotation marks omitted); *Boyce*, 510 F.3d at 1343, not whether an employee's job mandated the act of speaking, as revealed by facts considered in isolation. We have consistently discredited narrow, rigid descriptions of official duties urged upon us to support an inference that public employees spoke as private citizens. *See D'Angelo*, 497 F.3d at 1210-11; *Vila*, 484 F.3d at 1340; *Battle*, 468 F.3d at 761 & n.6. If we had examined only whether the employees' official responsibilities required them to speak, we would have reached a different result in *D'Angelo*, *Vila* and *Battle*.

Abdur-Rahman v. Walker, 567 F.3d at 1284 (emphasis added).

Indeed, the court *should* have reached a different result in *D'Angelo*, *Vila*,[72] and *Battle*[73] – and in *Abdur-Rahman* – and the case at bar. The Eleventh Circuit has been chronically misapplying the test of whether speech is "on a matter of public concern" from *Connick v. Myers*, 461 U.S 138, 147-148 (1983) (whether speech

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[72] *Vila v. Padron*, 484 F.3d 1334 (11th Cir. 2007).

[73] *Battle v. Bd. of Regents for the State of Ga.*, 468 F.3d 755 (11th Cir. 2006) (per curiam).

is on a matter of public concern turns on the "content, form, and context" of the speech). This is not the proper test articulated by this Court, which, as explained, *supra*, is based on agency principles. This misapplication is most stark in *D'Angelo*.

> In *D'Angelo*, we ruled that a high school principal did not speak as a citizen when he worked, on his own initiative, to convert his high school to charter status and was terminated later. 497 F.3d at 1210-11. The principal "testified at trial that charter conversion was not one of [his] assigned duties, but he admitted that [i]t was incumbent upon [him] to . . . move towards [c]harter . . . [because] his number one duty . . . [wa]s to do whatever [he could] for the kids." *Id.* at 1206 (alteration in original) (internal quotation marks omitted). Like the inspectors in this appeal, the principal in *D'Angelo* attempted to limit the scope of his admission. He described his responsibility to do what he could for his students as "[his] moral obligations as a human being and not his responsibilities as a principal," but we rejected that distinction based on our review of the *content, form, and context of his speech*. *Id.* at 1210.

Abdur-Rahman, 567 F.3d at 1284. (Emphasis added).

However, in the *Lane* case this Court acknowledged that public employment can result in distinct and independently required duties, so that an employee's speech related to their employment may not

be required by some job duty assigned by the employer, and therefore unprotected by the First Amendment, but instead may be the result of some other duty, such as the duty to testify pursuant to a subpoena, and therefore be protected by the First Amendment.

In *D'Angelo*, as in the case at bar, "principal" (and "assistant principal") is both an occupation and a specific job, subject to professional norms as well as specific job obligations. These can be parallel or overlap, but they can also diverge. Where, as in the case at bar (and in *D'Angelo*), a principal believes his obligation to do what is "best for the students" requires speaking about taking those students and their school out from under the control of his employer and setting up the school as a competing educational institution for those students, employer and employee interests clearly diverge, and the employee is not speaking pursuant to some employment obligation, but from a responsibility outside of the control of his employer.

In *Vila*, the Eleventh Circuit examined the "content, form, and context" of reports by a vice president of a community college of illegal and unethical behavior of the president and other employees of the college, and concluded that the vice president made her reports, save one, pursuant to her job duties. *Abdur-Rahman*, 567 F.2d at 1285, *citing*, *Vila*, 484 F.3d at 1336-38, 1340. "We did not examine whether her job required her to make those reports." *Abdur-Rahman*, 567 F.2d at 1285, *citing*, *Vila*, 484 F.3d at 1340. However, the court should have done so, because that should be the crucial inquiry under *Garcetti* and *Lane*.

Otherwise, the worst fears of the dissenters in *Garcetti* have been realized, and what this Court meant as an exception to First Amendment protection will have instead reduced it to a dead letter.

In *Battle*, the court found unprotected a public employee's speech based on her duties in the financial aid office of a public university. *Battle*, 468 F.3d at 757-59. The contract of that employee was not renewed after she expressed concerns to her supervisors about fraudulent practices in the federal work-study program. *Id*. The court emphasized that the speech was based on her duties and rejected the employee's distinction that her employment duties related only to her control and oversight of financial aid information provided by certain students, and not to the discovery of fraud by her supervisor. *Abdur-Rahman*, *citing Battle*, 468 F.3d at 757-59. The court also rejected the argument that the employee had no duty to discover fraud because employees of another agency had that responsibility. *Id.*

> We rejected the attempt of the employee in *Battle* to distinguish *Garcetti* and ignore the content, form, and context of her speech. *In the light of federal guidelines charging all financial aid administrators to report suspected fraud, we concluded that even if the employee had no duty to investigate fraud, she was obligated to report suspected fraud.*

Abdur-Rahman, 567 F.3d at 1285, *citing Battle*, 468 F.3d at 757-59. (Emphasis added).

The Eleventh Circuit's reasoning is a misapplication of *Garcetti* and *Lane*, and sets a dangerous precedent. In *Lane*, the Court emphasized that the rule in *Garcetti* was an *exception* to the broad protection of the First Amendment, as it applied only to *ordinary* job duties, i.e., when the speech at issue was part of a job that routinely requires speaking on the topic at hand on behalf of the public employer (e.g., a spokesperson). This Court denied any intent to remove First Amendment protection from all speech by public employees, particularly when it involves whistle-blowing activity. However, such is the implication of *Battle*. Today, all or virtually all public employer rules, regulations, job descriptions, employee handbooks, etc., include an exhortation that all employees are required to report instances of waste, fraud, and abuse – regardless of how that information comes to them, and regardless whether the employee's ordinary job duties include investigating or writing reports concerning waste, fraud, or abuse. "If you see something, say something," has become something of a mantra in public employment. If the circuit courts are allowed to bootstrap such a general obligation into an "ordinary job duty" for every public employee, then no public employee can ever claim First Amendment protection for speaking out against public corruption. That directly contradicts this Court's intent to limit *Garcetti* to "ordinary" job duties, and the vow that it would not allow "overly-broad" job descriptions to expand *Garcetti* beyond its intended purpose of efficient government operations.

Circuit Judge Barkett, dissenting in *Abdur-Rahman*, correctly noted that the Circuit had deviated from the principle that "the sacrifice of First Amendment rights by public employees in the interest of managerial efficiency is the exception, not the rule." *Abdur-Rahman*, 567 F.2d at 1288.

> I believe the majority opinion misapplies *Garcetti* – which did not overrule the framework for analyzing public employee speech cases set forth in, among others, *Pickering [v. Bd. of Educ., 391 U.S. 563, 574, 88 S. Ct. 1731, 20 L.Ed.2d 811 (1968)]*, *[Connick v.] Myers [461 U.S. 138, 145, 103 S. Ct. 1684, 75 L.Ed.2d 708 (1983)]*, and *Givhan [v. W. Line Consol. Sch. Dist., 439 U.S. 410, 414, 99 S. Ct. 693, 58 L.Ed.2d 619 (1979)]* – to conclude that the employees' speech regarding sanitary sewer overflow ("SSO" or "spill") reporting, posting, and remediation is unprotected by the First Amendment.
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> [T]he record is undisputed that, unlike in *Garcetti*, the employees in this case had no official professional duty to report SSOs to state or federal environmental authorities, to post or remediate SSO sites, or to complain about the failure to do any of these things, but did so anyway out of concern for the health and safety of their community . . . problems.
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> * * *
>
> The majority brushes off these undisputed facts regarding the limited scope of the employees' duties by repeatedly asserting that

because the employees' speech "owe[s] [its] existence to [the employees'] official responsibilities and cannot reasonably be divorced from those responsibilities," the employees' speech is not protected.

* * *

When examined in its proper context, the phrase "owes its existence to" cannot bear the weight the majority accords it. The phrase is found in one passage of the *Garcetti* opinion, as follows:

> The significant point is that [Ceballos'] memo was written pursuant to Ceballos' official duties. Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.

547 U.S. at 421-22, 126 S. Ct. 1951. In other words, speech owes its existence to an employee's professional responsibilities when the employer has "commissioned or created" it. *Id.* And, as the *Garcetti* Court emphasizes throughout the opinion, an employer commissions or creates speech when an employee speaks pursuant to official duties, not when that employee speaks outside of those commissioned duties – that is the "significant point" of the *Garcetti* opinion. *Id.*

Abdur-Rahman, 567 F.2d at 1286-1290 (Barkett, J., dissenting).[74]

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[74] *Abdur-Rahman* is a case that predates the decision of this Court in *Lane*, but the Eleventh Circuit still considers its opinion (and the Circuit cases discussed therein) good law. In *Kirkpatrick v. Geneva Cnty. Bd. of Educ.*, Civil Action No. 1:14cv171-MHT (WO) (M.D. Ala. October 6, 2015), a federal district court within the Eleventh Circuit stated its belief that *Abdur-Rahman* had been partially abrogated by this Court's decision in *Lane*, stating of *Abdur-Rahman*:

> In holding that plaintiffs' speech was unprotected, the Eleventh Circuit focused on language from *Garcetti* indicating that "speech that owes its existence to a public employee's professional responsibilities" constitutes unprotected speech as an employee. *Id*. (internal quotation marks omitted). In her dissent, Judge Barkett took issue with this reading of *Garcetti*, pointing out that, properly understood, that case indicated that "an employer commissions or creates speech when an employee speaks *pursuant to official duties*, not when that employee speaks outside of those commissioned duties." *Id.* at 1289 (Barkett, J., dissenting). Indeed, Judge Barkett's reading of *Garcetti* was vindicated in 2014 in *Lane*. *See Lane*, 134 S. Ct. at 2379 ("The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."); *id*. at 2383 (Thomas, J., concurring) ("The petitioner in this case did not speak 'pursuant to' his ordinary job duties because his responsibilities did not include testifying in court proceedings, and no party has suggested that he was subpoenaed as a representative of his employer.") (citations omitted). *Kirkpatrick*, Slip op. at 16.

Undersigned counsel brought the *Kirkpatrick* case to the Circuit Court's attention. The Eleventh Circuit rejected the notion that *Lane* had abrogated its decision in *Abdur-Rahman* or any of the cases discussed therein. *Fernandez*, 898 F.3d at 1332-33.

This Court should grant the petition for a writ of certiorari in order to bring clarity to the law in the Eleventh Circuit, which has a demonstrated history of misapprehending *Garcetti* and expanding that decision beyond its proper bounds. *See*, *e.g.*, *Alves v. Bd. of Regents of the Univ. Sys. of Ga.*, 804 F.3d 1149 (11th Cir. 2015), where the Eleventh Circuit found that memos prepared by clinicians alleging that their supervisor's leadership and management of a public mental health center adversely impacted client care and jeopardized the reputation of the center was employee speech unprotected by the First Amendment, even though none of the clinic employees behind the memos had oversight responsibilities or a job duty that involved writing such memos.

CONCLUSION

For the above reasons, this Court should issue a writ of certiorari to the Eleventh Circuit Court of Appeals to review that court's decision in this case, and upon review, reverse and remand this case for trial.

Respectfully submitted,

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