No. 20-384

In The
Supreme Court of the United States

PENNY NICHOLS CORN; TWYLA JENNINGS,
Petitioners,
v.
MISSISSIPPI DEPARTMENT OF PUBLIC SAFETY; ALBERT SANTA CRUZ, Individually and in his official capacity as former Commissioner of the Mississippi Department of Public Safety; MARSHALL FISHER, In his official capacity as Commissioner of the Mississippi Department of Public Safety,
Respondents.

On Petition For Writ of Certiorari
To the United States Court Of Appeals
For The Fifth Circuit

BRIEF OF STEPHEN SHEPPARD AND MICHAEL HOEFLICH, AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici curiae are scholars working at the intersections of constitutional law, legal history, jurisprudence, and legal ethics. Michael H. Hoeflich (Haverford College B.A., M.A.; Cambridge M.A (hon.), Ph.D.; Yale J.D.) taught at the University of Illinois, and was dean of Syracuse and Kansas. His works include two volumes of Justice Scalia's opinions, a critical edition of Justice Holmes's Black Book, and Sources of the History of the American Law of Lawyering. Stephen M. Sheppard (Southern Miss. BA; Columbia J.D., Cert Int'l L., LL.M.; Oxford M.Litt.; Columbia J.S.D.) taught at Arkansas and is dean emeritus of St. Mary's. His works include American Law in a Global Context (with George Fletcher), the W-K Bouvier Law Dictionary, and I Do Solemnly Swear: The Moral Obligations of Legal Officials. Amici present this brief as individuals; institutional roles are noted for identification.

Amici share a scholarly and personal commitment to the practical realization of justice in the substance and applications of the law. For decades, this commitment has animated their law teaching, their legal and interdisciplinary scholarship, and their service to the bench, the bar, and the public. This case raises fundamental issues related to that scholarship, teaching, and service. The scope of public servants' rights, and the Constitutional limits on their supervisors are essential to the Rule of Law in the United States. Each of these issues touches our work and our commitments to justice.

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[1]Pursuant to Rule 37.6, amici curiae affirm that no counsel for a party authored this brief in whole or in part and that no person other than the amici has made any monetary contributions intended to fund the preparation or submission of this brief. The parties both gave blanket consent to the filing of amicus briefs prior to a ruling on the petition. Copies of their letters of consent are on file with the Clerk's Office.

SUMMARY OF THE ARGUMENT

Amici curiae seek to alert the Court to three dangerous conditions. First, there is so little coherence among the circuits over the scope of public servant free speech that this right is not reliably enforceable anywhere in the U.S. Second, lower courts increasingly ignore this Court's supervisory efforts to end this discord among the circuits. Third, decades of eroding public servants' rights to free speech and due process have led the federal courts routinely to punish state public servants who do their work lawfully and routinely to protect state officers who commit federal and state crimes.

The divisions among the lower courts arose after Justice Kennedy's analysis in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), divided the speech of public servants between speech as a government employee and speech as a private citizen. The Court sought to heal this division in *Lane* v. *Franks*, 573 U.S. 228 (2014), which demonstrated the *Garcetti* analysis was not a death knell for a public servant's free speech claims.

Lower courts do not all employ the Court's recent instructions, nor emulate the example in *Lane*. Instead, they parse *Garcetti's* employee touchstones in new and conflicting ways. Some ignore the guidance in *Lane* altogether. Thus, the confusion.

This case arises from a dismissed complaint brought by state public servants who were fired without notice, hearing, or reasons; in circumstances that demonstrate they were punished for speech required by federal law. The Fifth Circuit ruled their truthful speech disclosing corruption in the Mississippi Highway Patrol was unprotected employee speech. The court's analysis made no attempt to comport with *Lane*.

This case is the perfect vehicle for the Court not only to clarify the threshold issues of a public servant's Constitutional protections for speech but also to articulate related issues inextricable from an action enforcing those protections: the right to competently perform lawful work without unlawful interference and the lack of immunity for supervisor interference that exceeds the Constitutional limits of their office.

The Constitution requires clear, fair, and reliable standards to balance the rights and duties of public servants and to restrain public servants in supervisory roles from unconstitutional misconduct. Other than personal staff, no politician, appointee, or bureaucrat holds a license to demand the loyalty of a public servant over the public servant's duty of truthful, competent and lawful performance of that person's duties.

The case here indicates whatever protections the free speech clause affords a public servant, they still lack sufficient clarity either for a public servant to rely on them or for a supervisor to respect them. Instead, the courts give the benefit of every doubt to the supervisor, whose qualified immunity thrives in such doctrinal mud and deprives relief to the public servant who acts with courage to support the law and do justice.

This case comes to the Court when the role of the public servant is under unusually great political pressure. The Court could here clarify the First Amendment rights of public servants while tending to the source and scope of the liberty and property interests a public servant has in expert service to the country, which may retrospectively end the abuse of qualified immunity by corrupt supervisors. This clarity and inquiry is essential to the survival of the Rule of Law in the American legal system.

ARGUMENT

I. This Court Should Grant Certiorari to Reassert a National Standard of Protected Speech by Public Servants

"Statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors." *Pickering* v. *Board of Education,* 391 US 563, 574 (1968).

Pickering held a public employee's "exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." *Id.* at 574. Fifteen years later, this broadly drawn conception of the rights of the public servant was given a tighter framework. In *Connick v, Myers*, 461 U.S. 138 (1983), Justice White, speaking for the Court, described a balance of employee and departmental interests in a manner that would take on a life of its own:

> "We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Connick, 461 U.S. at 147.

The significance of distinguishing the public-servant-as-citizen from the public-servant-as-employee emerged after two decades of gestation in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). Justice Kennedy amplified this distinction into a two-stage test:

> *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. See *id.*, at 568. 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. See *Connick*, *supra*, at 147. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. See *Pickering*, 391 U.S., at 568.

Garcetti, *supra*, at 418. From that moment, new cracks among the circuits began to form, becoming splits and moving toward fault lines.

Thus, eight years later, in *Lane* v. *Franks*, 573 U.S. 228 (2014), this Court sought to restore consistency to these cases. Justice Sotomayor, speaking for a bench unanimous in its judgment, continued the division of a public servant's speech between the unprotected speech of an employee and the protected speech of a citizen. Yet she emphasized that public servants may have protected speech interests that are clearly related to their jobs, for instance, in speaking against public corruption. See *id,* at 241.

That consistency remains elusive.

A. The Circuits' Manifold Splits Reflect Differing Analyses of at Least Six Distinct Variables in Every Case

The Petition for Certiorari accurately depicts extraordinary, multivalent splits among the federal circuits on the Constitutional issue at the heart of this case. It conveys the depth of confusion across the country over what speech by a public servant

is entitled to First Amendment protection. Pet. for Cert. 7-17. Yet the chaotic nature of these splits, indeed their fractures and chasms, is difficult to grasp at a single sitting.

There is great variety in the tests the lower courts use to divide speech as citizen from speech as employee. These tests usually ask six questions, though there are more. The courts usually answer each question in the light of its facts, leaving language for later cases that seems to require the facts that passed the earlier test, thus raising the curve for later cases. The result is disparities among and even within circuits as to what can be the right answer to any one of these six questions:

1. How unrelated must be the forum of the public servant's speech to the public servant's workplace, for the speech to be speech of a citizen? Compare *Mertins* v. *City of Mount Clemens*, 817 Fed.Appx. 126 (CA6 2020) (Greater protection for external speech, which is an indicia of citizen speech) with *Walker* v. *Smith*, 801 Fed.Appx. 265 (CA5 2020) (Protection for external speech is lost if the speech is authorized by supervisor, even if retaliation followed).

2. How unrelated must be the subject of the public servant's speech to the public servant's duties of office, for the speech to be speech of a citizen? Compare *Bohler* v. *City of Fairview*, 2020 WL 5758016 (CA6 2020) (Speech to a supervisor was that of an employee, where the speech directly related to the public servant's job responsibilities) with *Conte* v. *Bergeson*, 764 Fed.Appx. 25 (CA2 2019) (Speech to a body outside the place of employment was that of an employee, because the speech was pursuant to responsibilities of the profession).

3. How unrelated must be the speech to the ordinary conditions of employment, such as pay, benefits, or working conditions, for the speech to be speech of a citizen? Compare *Alves* v. *Board of Regents of the University System of Georgia*, 804 F.3d 1149 (CA10 2015) (speech on topics of usual employee grievances unprotected) with *Nagel* v. *Marron*, 663 F.3d 100 (CA2 2011) (wrong motive for speech can turn speech reporting a crime into employee speech).

4. How significant must be the public interest in the speech, for the speech to be speech of a citizen? Compare *Joritz* v. *Gray-Little*, 822 Fed.Appx. 731 (CA10 2020) (Teacher's speech against students' discriminatory teacher evaluations was unprotected because its focus was their effect on the teacher's odds of tenure) with *Dougherty* v. *School District of Philadelphia*, 772 F.3d 979 (CA3 2014) (Public significance of alleged corrupt contracts can reach the highest rung of protected speech).

5. How extraordinary to the employee's daily duties must be the duty that compels the employee's speech, for the speech to be speech the speech of a citizen? Compare *Ulrey* v. *Reichhart*, 941 F.3d 255 (CA7 2019) (speech is not protected unless its context is comparable to sworn testimony) with *Barrow* v. *City of Hillview, Kentucky*, 775 Fed.Appx. 801(CA6 2019) (speech may be in a variety of settings and be protected)

6. How compelling must be an independent duty to engage in the speech, for the speech to be the speech of a citizen? Compare *Marra* v. *Township of Harrison*, 913 F.Supp. 2d 100 (USCD NJ 2012) (speech compelled by law, subpoena, or oath is as a citizen) with this case, *Corn* v. *Mississippi Dept. Public Safety*, 954 F.3d 268 (CA5

2020) (that silence would be a federal crime does not alter employee nature of speech).

All six tests support the binary test of whether the speech is of a citizen or employee: as examined in the lower courts, if the speech is that of an employee, *under any single test*, the speech is unprotected. This test must be satisfied before balancing the public servant's interests against the department's interests.

An additional source of confusion arose because the threshold inquiry "requires determining whether the employee spoke as a citizen on a matter of public concern." *Garcetti*, 547 U.S., at 418. That is, the question must be answered "yes" or "no." *Id.* If the answer is yes, the courts then inquire "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Id.*

The amici believe that practically all of the speech by the public servants at issue in the cases reported since *Lane* is that of a citizen on a matter of public concern, at least to some degree, and that of an employee to some degree If that is so, then the logical effect of retaining this binary inquiry as a threshold test is to eviscerate the rights recognized in *Pickering*.

Confronted with — but not acknowledging — this logical effect, the lower courts evolved more and more subsidiary inquiries that either slip past this effect or mask it sufficiently to continue to utter soothing words of judicial respect for the public servant's rights, which this Court has persistently recognized for 62 years.

Whether our observations about the logical effect of the binary test are correct or not, the public servant must still pass each one of the six tests (and more in some circuits) before ever inquiring if the supervisor's actions are justified.

Yet each of these tests contains a variable that is made nearly indeterminate by the range of values assigned to it by different federal courts. Any court that weighs the evidence (or, as in this 12(b)(6) dismissal, the well pled facts before it) may pick one or another of myriad authorities for that one test and so adjust the requirement until the quantum of evidence required rises too high to be met in that case.

If protection of a public servant's speech continues to depend on this threshold inquiry of whether the public servant is speaking as a citizen, then it is essential that this test not be answerable with either only "yes" or a "no." Answers to the threshold test must be measures of degree: more or less, not all or nothing. Otherwise, the trains will continue to wreck in the lower courts.

Respectfully, the amici ask that the Court should grant the Writ of Certiorari because of the need to clarify the threshold inquiries in *Pickering* cases, which extends and focuses Petitioner's Question Two.

B. The Circuits Have Increasingly Avoided this Court's Instructions in *Lane* and Followed *Garcetti*, Which Provoked the Split *Lane* was to Resolve

The public servants at every level of government in the United States deserve more than just clarity in their rights. They deserve fair standards with fixed goal posts. In this case, the Fifth Circuit – like many lower courts – appears to have rejected the new

goal posts and moved out the old ones. The opinion below did not even mention *Lane*.

To most lawyers confronting a *Pickering* issue, *Lane v. Franks* would be the precedent of choice. The Court resolved *Lane* in 2014, eight years after *Garcetti,*

Age alone would suggest *Lane* provide the controlling analysis for current cases, to the diminished influence of *Garcetti* and its predecessors. To the extent a later decision of the Supreme Court is inconsistent with one of its own precedents, the earlier case "should be deemed neither controlling nor instructive on the issue." *Bond v. United States*, 564 U.S. 211, 220 (2011)(Kennedy, J.).

Moreover, the result in *Lane* was unanimous, in contrast to *Garcetti's* 5-4 fracture, which yielded three separate dissents. Writing for the *Lane* Court, Justice Sotomayor's opinion expressly sought to "resolve discord among the Courts of Appeals as to whether public employees may be fired—or suffer other adverse employment consequences—for providing truthful subpoenaed testimony outside the course of their ordinary job responsibilities." *Lane*, 573 U.S. at 235. The analysis maintained the balance between departmental and employee interests, affirmed the constitutional rights of employees, and diminished the lower court confusion by the employee's employment in this case. *Id.*, at 238. Though the fact that Edward Lane was testifying under oath was enough to cast the speech as that of a citizen, it was not the only means of showing his duty to speak then was independent of his duties to his job. *Id.* Nor did the mere fact that the public servant learned the content of the speech on the job preclude a finding of citizen speech, either under *Lane* or according to *Garcetti*.

> "It bears emphasis that our precedents dating back to *Pickering* have recognized that speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment.

Lane, 573 U.S. at 240.

Thus, in studying the Fifth Circuit opinion below in this case, in the context of other lower court decisions, the amici were perplexed to discover two trends running counter to all of these indications:

1. The lower federal courts persist in anchoring their analysis in *Garcetti*.

2. They do so to the increasing neglect of this Court's analysis in *Lane*.

One amicus extracted all of the public-servant free speech opinions issued by the lower federal courts and recorded in Westlaw's CTA and DCT databases since the year after *Garcetti*.[2] The amicus then comparing citations to authority in each opinion to compile annual ratios of citation for *Garcetti* and for *Lane*. The results are presented in the table on the next page:

[2]The amici recognize a margin of error in examining patterns only of citations and their omissions, rather than through multivalent case-to-case analysis. The value of such citation studies, however, has grown widely accepted since their development. See J. Merryman, Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970, 50 S. Cal. L. Rev. 381 (1977). The tools of such analysis have grown both more accepted and more sophisticated. See, e.g., the encouragement of Judge Richard Posner in An Economic Analysis of the Use of Citations in the Law, 2 Am. L. & Econ. Rev. 381 (2000), and the comparative methodology in F. Cross, et al., Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance, 2010 Ill. L. Rev. 489. Further, our more thorough comparison of precedent reliance was too lengthy to report here but strongly suggests the use or absence of one of these citations is an appropriate surrogate datum for the influence of that precedent's analysis in the *ratio* expressed in the later case.

Annual Citation Ratios of Garcetti and Lane in Lower Federal Courts, 2007-2020[3]

Year	Public Servant Free Speech Cases in CTA or DCT	Opinions citing *Garcetti*	Ratio of opinions citing *Garcetti* to cases that year	Opinions citing *Lane*	Ratio of opinions citing *Lane* to cases that year
2007	344	344	100%	--	--
2008	328	328	100%	--	--
2009	295	295	100%	--	--
2010	276	276	100%	--	--
2011	288	288	100%	--	--
2012	269	269	100%	--	--
2013	244	244	100%	--	--
2014	281	249	89%	75	27%
2015	286	243	85%	132	46%
2016	264	238	90%	238	90%
2017	272	216	79%	216	79%
2018	237	197	83%	122	51%
2019	246	212	86%	117	48%
2020	187	168	90%	57	30%

From 2007 to 2014, the pattern is a baseline that demonstrates the expected prevalence of *Garcetti* as a controlling precedent. From 2014 to 2016, the patterns fit the predictable shift of reliance toward a new controlling precedent. Reliance on *Lane* increases at a roughly inverse rate to the decline of reliance on its predecessor.

In 2017, however, these patterns begin to shift in an unanticipated way. The lower federal courts seem to revert. The opinions rely less on *Lane* than they did the year before, and they place greater reliance on *Garcetti* than the year before.

[3]Data for 2020 was collected through August 15, 2020. The data for 2020 is therefore not fully comparable to early years, as it likely reflects only 70% of the cases to be decided that year. Yet the ratio of citations within those cases is comparable to the ratios in prior years.

This pattern continued through 2018 and 2019 and into this year. Thus far, in 2020, the lower courts are three times *less* likely to base their analysis on *Lane* than on *Garcetti*, the precedent *Lane* was intended to clarify.

The diminished reliance on the later case and the increasing reliance on the earlier case in such a fact-intensive analysis as a *Pickering* issue are troubling signs. Certainly, this widespread practice in the lower courts runs counter to Justice Stevens's admonition that, "It is this Court's responsibility to say what the law means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." *Rivers* v. *Roadway Exp., Inc*., 511 U.S. 298, 312 (1994)(Stevens, J.)(referring to a statutory interpretation).

C. The Lack of a National Standard Is Illustrated in this Case, in Which the Fifth Circuit Upheld State Punishment for Compliance with Federal Law.

The public servants' acts in this case are clearly within the scope of *Pickering's* protections for the state public servants, not least because their actions were essential to protect the public as well as the government of the United States.

The public servants in this case were models for the public service contemplated in *Lane*, when Justice Sotomayer concluded the Court's analysis of whether the speech in that case was of a citizen or employee this way:

> It would be antithetical to our jurisprudence to conclude that the very kind of speech necessary to prosecute corruption by public officials — speech by public employees regarding information learned through their employment — may never form the basis for a First Amendment retaliation claim.

> Such a rule would place public employees who witness corruption in an impossible position, torn between the obligation to testify truthfully and the desire to avoid retaliation and keep their jobs.

Lane, 573 U.S. at 240-241. Yet not only were these public servants denied their claim, the manner in which that denial occurred is no longer unusual.

II. This Case Is the Perfect Vehicle to Resolve Interrelated Ambiguities in the Liberties of State Public Servants and the Duties of their Supervisors To Uphold the Law, particularly Federal Law.

A. This Complaint Has Straightforward Facts

The case below is before this Court with stark facts that illustrate the dangers of a tree-by-tree analysis that can obscure the constitutional forest. In this case, two senior public servants performed the precise jobs they were hired to perform, to audit activities of the Mississippi Highway Patrol for fraud and to report those results to the state and to the federal governments. They discovered the fraud. Having done so, if they had not reported the fraud, they would have failed to perform their allotted work. More, failing to do so would have enabled continuation of a fraud on the U.S. Treasury, which would amount to a felony under federal law.[4] See Petition 2-4.

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[4]Misprision of felony:

> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

18 U.S.C. § 4.

B. The Issues in this Petition Seek to Frame a Clear Standard for the Scope of Free Speech by Public Servants as well as the Constitutional Limits on Public Supervisors' Authority to Punish Public Servants for the Lawful, Truthful, Performance of their Duties.

1. There is a Constitutional Imperative to Articulate a Clear First Amendment Standard To Protect the Lawful, Speech of Public Servants from Punishment by Corrupt Supervisors.

If this Court were not to review the opinion below – and by extension to leave undisturbed the many similar opinions of lower courts since *Lane v. Franks* – then the *Corn* decision will stand as a denial of the protections of free speech in the United States to nearly all citizens who labor to serve the public in municipal, state, or federal government. In matters of speech, they are reduced to vassals of their political bosses. This is not hyperbole.

Early this year, another Petitioner petitioned for the Court's review of a quite similar case, *Waronker* v. *Hempstead Union Free School District*, 788 Fed.Appx .788 (CA2 2019)(unpublished). Dr. Waronker petitioned this Court to heal the rifts among the circuits and in the process to overturn the dismissal of an action to enjoin a retaliatory firing by a public school district in New York. Instead, the district court and the Second Circuit found no free speech protections for the public school superintendent's speech. He had warned his school board, community, and law enforcement of the legal and ethical implications of the board's dismissal of investigators the superintendent hard hired to investigate fraud, mismanagement, and corruption. *Id.* at 791. The defendants and the courts implicitly found Dr. Waronker's speech to be of clear public significance. Yet, because the lower court found each episode of speech to be that of an employee, the

Second Circuit determined that Dr. Waronker could not " plausibly allege that he spoke as a private citizen on a matter of public concern." *Id* at 793. And so, his speech became fair game for retaliation by his bosses, as a matter of the First Amendment.

The *Waronker* court at least considered the effect of *Lane*'s analysis on Dr. Waronker's claims, applying *Lane* after concluding its analysis under *Garcetti*. The panel read *Lane* to allow a public servant to utter speech as a citizen only if the public servant is under a legal duty or similar compulsion to tell the truth that is "distinct and independent" from any obligation that a public employee might owe an employer. *Id.*

This Court denied Dr. Waronker's petition. *Id.*, cert. den'd, __ U.S. ___, 140 S.Ct. 2669 (Mem) (April 20, 2020).[5] Thus, Dr. Waronker, like the Petitioners in this case, found no protection under the First Amendment for speech voluntarily and courageously offered from a public servant's genuine sense of duty to the law and the public he served.

Both of these panels of the United States Court of Appeals ruled, after *Lane*, that compelled speech is more protected by the First Amendment than voluntary speech. Per these cases, the First Amendment values no speech of any magnitude of public significance, if that speech is motivated by a public servant's ethical, moral, and patriotic commitments to serve justice and the public through the law.

These are but two examples in the last year, of federal courts' persistent rulings that public officials who are engaged in – or covering up – corruption, fraud and mismanagement may fire truthful and courageous public servants who try to stop them.

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[5]The amici are grateful to counsel of record for Dr. Waronker. Dean Erwin Chemerinsky's clear, short, and powerful Petition in that matter was an inspiration for core arguments of this amicus brief.

If this Court does not grant certiorari in this matter, it will twice this year endorse a ruling that is repugnant to very purposes of Due Process, corrosive to the Rule of Law, and contrary to its own supervisory purposes in deciding *Lane v. Franks*.

The Unites States is in a challenging time for the values of good government. *See, e. g.*, Executive Order on Creating Schedule F In The Excepted Service, Exec. Order 13957, 85 FR 67631 (Oct. 21, 2020); Erich Wagner, 'Stunning' Executive Order Would Politicize Civil Service, Gov't Exec. (October 22, 2020).

If the protections of the civil service are diminished as now planned, a large portion of the federal public servants with a statutory protection for their work will be stripped of it, leaving them in the same condition as Ms. Corn, Ms. Jennings, and Dr. Waronker, with no protections but the Constitution.

In such conditions, citizens in public employment may find that they are not just chilled in speech resulting from their government work, there are no Constitutional rights to speech or to liberty by which they may exercise their professional skills and judgment in a manner contrary to their supervisor's preferences. As matters stand, there is no right for a public servant to base a decision on that person's careful analysis of neutrally gathered evidence, on fair and neutral interpretations of the law, on science, on military necessity, on neutral cost/benefits, or on sound public policy to perform their jobs, without fear of losing them.

This is what happened in this case and in *Waronker*, The boss of a state's police force and the members of a local school board sought to punish a public servant who

reported evidence of fraud and corruption in their agencies. They sought to cover up allegations that might involve them in a criminal investigation.

These public officials fired truthful, honest public servants, though the officials knew or should have known they were themselves committing criminal acts by aiding the perpetrators of the corruption. Regardless, they sought to silence the reporters of fraud in their state agencies and to do so with impunity. The United States courts have, so far, fulfilled their corrupt hopes. There have been no repercussions.

Given the disturbing state of the case law in the lower courts, there is no reason to delay further the Court's management of this issue. This issue is ripe to the point of rot. This case present a timely and needed opportunity to clarify the precedents from *Pickering* forward.

2. *Corn* and its Sibling Cases Are a Practical Threat to Federalism, Judicial Review, and the Rule of Law and Deride Oaths of Office

The *Corn* decision extirpates the constitutional protections *Pickering* recognized for public servants at the very moment the public servant and the public most need them: when the citizen-public servant is at the height of the citizen's expertise and authority but under stress to lie and to falsely perform the public's work.

This result, which is hardly rare, renders the oath of office of every state employee empty of meaning. There is little institutional benefit in requiring every public servant take a solemn oath to "obey," and "faithfully support," or "protect and defend" the laws and Constitutions of state and nation. See 5 U.S. Code § 3331 (oath required of all

employees in the federal civil and uniform service). Regardless of their own oaths,[6] state leaders who are elected or appointed to rule over such public servants can deprive them of their jobs, their security, and their family's food if they choose do so. To empty these solemn commitments to the law of their meaning is to threaten the trustworthiness and the persistence of the Law itself. See S. Sheppard, I Do Solemnly Swear: The Moral Obligations of Legal Officials 1-3, 264-66 (2013).

The pernicious effects of this and similar opinions on individual public servants should not obscure their independent dangers. These cases create a vacuum of federal oversight of state officials, not only leaving state public servants unprotected but also shielding state officers who do violate federal laws (and even demand others do so) from detection. That result defies the Constitution's commitment to federalism by state officers required in the Oath of Office Clause, which admonishes, "all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution." U.S. Const., Art. VI, cl. 3.

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[6]The Mississippi Constitution requires:

> All officers elected or appointed to any office in this State, except judges and members of the Legislature, shall, before entering upon the discharge of the duties thereof, take and subscribe the following oath: "I, _____, do solemnly swear (or affirm) that *I will faithfully support* the Constitution of the United States and the Constitution of the State of Mississippi, and *obey the laws thereof*; that I am not disqualified from holding the office of _____; that I will faithfully discharge the duties of the office upon which I am about to enter. So help me God."

Miss. Const. Art. 14, § 268 (emphasis added).

Respectfully, amici ask that the Court should grant the Writ of Certioriari to restore the Constitutional protection of free speech for public servants.

C. This Case Requires Clearer Limits on Supervisor Authority and Immunity, Demonstrates a Liberty Interest in the Performance of Public Service as a Matter of Due Process of Law and by a Citizen's Privileges or Immunities as Originally Understood under the Fourteenth Amendment.

> Our ancestors' ancestors had known the tyranny of the kings and the rule of man and it was, in my view, in order to insure against such actions that the Founders wrote into our own Magna Carta the fundamental principle of the rule of law, as expressed in the historically meaningful phrase "due process of law."

In re Winship, 397 U.S. 358, 384 (1970) (Black, J., dissenting).

Every public servant's powers to act are conferred by or derived from the laws, and so the scope of a public servant's authority cannot exceed the limits on the exercise of that power in the Constitution. Thus, the Due Process Clause of the Fifth Amendment prohibits a public servant from taking an interest in life, liberty, or property "without due process of law." This prohibition expressly applies to holders of federal authority.

Due Process prohibits the abuse of individual rights by state officials as well. Due Process constrains state officials from taking interests in life, liberty, or property through its incorporation into the meaning of the Fifth Amendment. And, as originally conceived, the Fourteenth Amendment's protection of the citizen's privileges or immunities likewise prohibited state officials from taking such interests without due process of law, owing to that clause's derivation from the first eight amendments. See *Adamson* v. *California*, 332 U.S. 46, 68-123 (1947) (Black, J., dissenting); *McDonald* v. *Chicago*, 561 U.S. 742, 808 (2010)(Thomas, J., concurring); *Timbs* v. *Indiana*, ___ U.S.

___, 139 S.Ct. 682, 691 (Gorsuch, J., concurring) (2019). Either way, a state public official can have no lawful authority that exceeds the limits of the due process of law.

The reason offered by the Petitioners to grant cert. in this case questions whether a state public servant owes a duty to the law alone or owes a duty of loyalty to supervisors, appointed directors or elected officials. It raises the converse question as well, can state-employed and empowered supervisors demand loyalty to themselves rather than to the Constitution or or to the people? See Petition p. 4.

The petitioners' plea for certiorari offers the Court a needed moment to consider not only whether a public servant who is harmed by a superior may seek the protection of the Courts but also why the superior should have any refuge there.

Were this Court to grant certiorari for the Petitioners and then to remand this matter for further consideration, for instance according to the Court's current standards for *Pickering* issues, the Petitioners may amend their pleadings, with leave of the court to frame their case on any appropriate legal foundation. Fed. R. Civ. Pro. 15.

The Court is much too familiar with the countless thousands of misdeeds by state and federal officers who evaded not only any legal consequences of their actions but even judicial review, under the Court's doctrine of qualified immunity. When, as in this case, the power of one official is being bent to the will of another, the moment has come to limit the authority of a public officer not to the clear limits of another person's rights, but to a reasonable understanding of the limits of that person's office.

The Court announced *Pickering* not so many years ago that we are deaf to its

subtlety that important statements by a public servant must be protected "despite the fact that the statements are directed at their nominal superiors." *Pickering*, *supra*, at, 574 (1968). The superiors were nominal because the true superiors of the public servant are the law and the people whom the law protects. No "nominal" superior could imagine firing an employee for doing the work she was hired to do. Yet a boss whose sense of superiority is much more than nominal can do so with alacrity and gusto. It is time to limit qualified immunity to only such acts as are clearly lawful and clearly within the reasonable scope of the office held by the person claiming immunity.

Any doubts as to the law or the scope of office should not accrue to the benefit of state-funded bullies and crooks. Doubts should be resolved in favor of judicial review and in favor of the restoration of justice denied at the hands of public officers. In this case, the men who fired these women knew it was wrong, and knew it was illegal. They just thought they could get away with it.

The United States Supreme Court should not prove them right.

Respectfully, the amici ask that the Court should grant the Writ of Certiorari to reconsider doctrines interrelated with public servants efforts to protect themselves from free speech retaliation.

CONCLUSION

As friends of the Court, the amici have sought to demonstrate the scope and significance of the fractures among the circuits revealed by this case. Further, the amici have offered at least some reasons for these fractures, resulting from details in sixty

years of case law as well as some potential remedies for those fractures that could be pursued should this Court grant the Petition.

In closing, it is important to the interest for which we offered these insights to summarize the stakes to the Constitutional order, to justice and to the Rule of Law that underlie these cases. In the case below, the federal courts found the Constitution to offer no protection to public servants who were fired for truthful speech that uncovered fraud and corruptions. Rather, court doctrines limited the public servant's constitutional rights and protected the men who used the power of state office to punish their subordinates for their own criminal negligence and political embarrassment.

That result and others like it mock the notion that a public servant retains the slightest constitutional rights. It threatens constitutional governance, the Rule of Law, keystone to the principles of ordered liberty at the heart of the Due Process of Law.

For these reasons, the amici pray that this Honorable Court will grant the Petition of Penny Corn and Twyla Jennings and issue a Writ of Certiorari in this matter.

Respectfully submitted,

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