

No.

IN THE
Supreme Court of the United States

COLLEEN M. BRADLEY, PETITIONER,

v.

WEST CHESTER UNIVERSITY OF THE PENNSYLVANIA
STATE SYSTEM OF HIGHER EDUCATION; MARK MIXNER;
LAWRENCE A. DOWDY; DR. GREGORY R. WEISENSTEIN;
DR. MARK G. PAVLOVICH; PENNSYLVANIA STATE
SYSTEM OF HIGHER EDUCATION; AND LOIS M. JOHNSON,
CHARLIE WILSON, AS EXECUTOR OF THE ESTATE OF
DEBRA WILSON

*PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

1. Is petitioner's speech exposing her public employer's false, illegal and corrupt accounting practices, conduct unrelated to her ordinary job duties or her job description, protected as First Amendment citizen speech under *Lane v. Franks*, 573 U.S. ____; 134 S. Ct. 2369 (2014) and *Garcetti v. Ceballos*, 547 U.S. 410 (2006)?

2. Has the conflict among the analyses employed by the courts of appeals to determine whether a public employee spoke as a citizen or as an employee on a matter of public concern become so pronounced that it impermissibly chills valuable speech identifying government corruption by whistleblowers like petitioner, invoking this Court's power to further clarify the analysis for future decisionmaking?

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OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Third Circuit in *Colleen M. Bradley v. West Chester University et al.*, C.A. No. 17-1588, decided January 26, 2018, and reported at 880 F.3d 643 (3rd Cir. 2018), affirming the District Court's grant of summary judgment in respondent Mark Mixner's favor and the dismissal of the complaint against the other respondents because of Eleventh Amendment immunity, is set forth in the Appendix hereto (App.1-32).

The published Memorandum of Decision of the United States District Court for the Eastern District of Pennsylvania in *Colleen M. Bradley v. West Chester University et al.*, Civil Action No. 15-2681, decided March 3, 2017, and reported at 226 F. Supp. 3d 435 (E.D. Pa. 2017), granting respondent Mark Mixner's summary judgment motion, is set forth in the Appendix hereto (App. 33-63).

The unpublished Memorandum of Decision of the United States District Court for the Eastern District of Pennsylvania in *Colleen M. Bradley v. West Chester University et al.*, Civil Action No. 15-2681, decided December 9, 2015, and reported at 2015 WL 8468563 (E.D. Pa. 2015), granting respondents' motion to dismiss because of their immunity from suit under the Eleventh Amendment, is set forth in the Appendix hereto (App. 64-76).

The unpublished order of the United States Court of Appeals for the Third Circuit in *Colleen M. Bradley v. West Chester University et al.*, C.A. No. 17-1588, filed on February 28, 2018, denying petitioner's timely filed petition for panel rehearing or for

rehearing *en banc*, is set forth in the Appendix hereto(App. 77-78).

JURISDICTION

The decision of the Third Circuit Court of Appeals affirming the District Court's grant of summary judgment in respondent Mark Mixner's favor was entered on January 26, 2018; and its order denying petitioner's timely filed petition for panel rehearing or for rehearing *en banc* was filed on February 28, 2018 (App. 1-32;77-78).

This petition for writ of certiorari is filed within ninety (90) days of the date the court of appeals denied petitioner's timely filed petition for panel rehearing or for rehearing *en banc*. 28 U.S.C. § 2101(c). Supreme Court Rule 13.3. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment I:

Congress shall make no law...abridging the freedom speech...;...or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

28 U.S.C. Section 1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. Section 1343(a)(3) & (4):

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

...

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Civil Rights Act—42 U.S.C. § 1983:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

43 P.S. § 1423 (Pennsylvania Whistleblower Law):

Protection of employees

(a) Persons not to be discharged.--No employer may discharge, threaten or otherwise discriminate or retaliate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because the employee or a person acting on behalf of the employee makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste by a public body or an instance of waste by any other employer as defined in this act.

(b) Discrimination prohibited.--No employer may discharge, threaten or otherwise discriminate or retaliate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because the employee is requested by an appropriate authority to participate in an investigation, hearing or inquiry held by an appropriate authority or in a court action.

(c) Disclosure prohibition.--An appropriate authority to which a violation of this act was reported may not disclose the identity of a whistleblower without the whistleblower's consent unless disclosure is unavoidable in the investigation of the alleged violation.

STATEMENT

By 2011, petitioner Colleen M. Bradley (“petitioner”), holding a Master’s degree in Finance, had over twenty years of experience in budgeting and finance. She had served for eleven years as CFO of a private boarding school, held a controller position at a company subsidiary in Delmarva, and had been a CFO of a Delaware bank. In November of 2011, respondent West Chester University (“respondent” or “WCU”), the largest university of fourteen composing respondent Pennsylvania State System of Higher Education (“respondent” or “PASSHE”), hired petitioner to serve as its Director of Budget and Financial Planning.

PASSHE was created by the Commonwealth of Pennsylvania pursuant to Act 188 of 1982, 24 P.S. §§ 2-1001A *et seq.*, under which WCU together with thirteen other institutions of higher learning became constituent members. Its purpose was to “provide high quality education at the lowest possible cost to the students.” *Id.* at § 2-2003A(a). WCU’s enrollment during the 2016 fall semester exceeded 17,000 students. Under the regime set out by Act 188, each constituent university of PASSHE like WCU is required to submit an annual budget report or a so-called “BUD Report” to the Office of the Chancellor for PASSHE containing revenue, expenditure and supporting data for the prior fiscal year, current fiscal year and the request fiscal year. Before forwarding its BUD Report to PASSHE’s Board of Governors (“BOG”), WCU’s Council of Trustees is required under Act 188 to review and approve it.

PASSHE then compiles these member university submissions in summary form and issues an

annual BUD Report which determines the amount of appropriations which each university receives from the Commonwealth of Pennsylvania. For the fiscal year ending June 30, 2016, for example, the Commonwealth appropriated \$449.1 million for PASSHE and \$52.5 million for WCU, respectively; and these appropriations represented just 22.2% and 18.7%, respectively, of the total revenues PASSHE and WCU received for this fiscal period.

As Director of Budget and Financial Planning, petitioner reported to respondent Mark Mixner (“respondent” or “Mixner”), WCU’s Vice President of Finance and Administration. While she took a significant pay cut to accept this position at WCU, her four children could attend WCU tuition-free; the benefits associated with the position were very good; she would be groomed to succeed Mixner who was planning to retire in a few years; and she planned to serve in that position until her own retirement.

Throughout petitioner’s tenure, Mixner consistently gave her highly favorable performance evaluations, confirming the fact that she was exceeding or substantially exceeding expectations in all categories. In his last performance evaluation of petitioner on September 26, 2014, Mixner rated her “highly effective” in four of five performance objectives for the year; noted that she had an “[e]xcellent background in finance and accounting;” and despite “significant challenges and changes of direction from [WCU’s] Administrative Budget Committee (ABC), [she] continued to develop and refine processes to meet the needs of the ABC and the University.”

While petitioner was consistently exceeding WCU’s expectations with her job performance, early on in her tenure she became concerned about the content

and accuracy of the BUD Reports WCU was submitting under Act 188 to secure appropriations from the Commonwealth. Specifically, in September of 2012, after preparing a draft BUD Report containing hundreds of line items, petitioner was directed by respondent Lois M. Johnson, PASSHE's Assistant Vice Chancellor ("respondent" or "Johnson") to arbitrarily increase the "Transfer to Plant" line item by millions of dollars so that a multimillion projected *surplus* of approximately \$18 million would become a projected *deficit* of \$2-3 million.

Petitioner immediately voiced her concerns about this false accounting with Mixner, then with PASSHE's Johnson, and then with WCU's Administrative Budget Committee ("ABC"), the body responsible for WCU budget oversight, both verbally and in writing. She reiterated her concerns about creating false deficits at a meeting of the ABC on September 20, 2012. Some members of the ABC shared her concerns and indicated that they should be addressed; Mixner also promised to address the issue directly with Johnson.

In his discussion with Johnson, Mixner reported that Johnson stated that if petitioner was "foolish enough not to follow our directions regarding the transfer to plant [line item], that's [her] business, but [she] would be sending a message to [PASSHE's] board of governors that [WCU doesn't] need the funding [it] is receiving." At no time during this meeting did Mixner or Johnson discuss WCU's actual needs or any other reason to justify creating this false projected deficit. At the next ABC meeting on September 27, 2012, Mixner told the ABC members that he himself had made the adjustment to the Transfer to Plant line item as requested by PASSHE to show an expected

deficit of \$2.3 million on WCU's BUD Report which he then submitted to PASSHE in petitioner's name. Notably, with this BUD Report and with the ones for 2013 and 2014, the WCU's Council of Trustees never reviewed and approved it as required under Act 188.

Petitioner objected in writing to this practice, delivering her Memorandum to each member of the ABC on September 27, 2012. No written response from PASSHE or WCU was forthcoming but Mixner verbally criticized petitioner for damaging her credibility with ABC members. In the aftermath of this ABC meeting in September of 2012, retaliation against petitioner began. Her relationship with Mixner became more strained and he would not support her objections publicly; while she usually facilitated the ABC meetings, Mixner now assumed this role and never returned that function to petitioner; and contrary to her job description, she was now excluded from meetings and strategic discussions which would have fostered more truthful reporting of WCU's financial data.

Despite suffering from shingles and other stress-related symptoms which forced her to take a medical leave under FMLA, petitioner persevered in her job based in part on Mixner's assurances that her ongoing concerns about the budget process would eventually be addressed. He thanked her in an e-mail about the September 2013 BUD Report which again falsely projected another deficit, "for hanging in there....Obviously, that strategy [of projecting false deficits] is not something that can be continued in perpetuity, but it should be adequate for the BUD Report."

With the 2014 BUD Report cycle, petitioner found an ally for her budget concerns in WCU Vice

President of Finance, Bernadette Hinkle, CPA. She e-mailed both Mixner and petitioner in August of 2014 that she was “uneasy and uncomfortable” with the school reporting projected false deficits. She agreed that petitioner had been placed in a “difficult position” and that “[p]rofessionally speaking,” WCU was not being transparent in its budget reports either to its Council of Trustees or to PASSHE.

The upshot of this false accounting by respondents is that for over three years, WCU presented false breakeven or near-breakeven budgets in its BUD Reports to the Commonwealth. As a result of this false and misleading budget information, WCU received more than \$146 million in taxpayer-funded appropriations when during the same time (2012-2014) its general and education fund net assets increased by \$56.6 million or over 100%. Moreover, WCU was using some of this excess revenue from overstating its actual anticipated expenditures to advocate for state legislation which would allow it to secede from PASSHE and achieve quasi-private status as a university.

When respondents failed to address their ongoing process of providing the Commonwealth with false and misleading BUD Reports in order to receive inflated appropriations, petitioner presented her concerns to WCU’s Enrollment Management Committee (“EMC”) at its meeting on October 29, 2014. *Notably, EMC members were not responsible for the budgeting process but instead held positions of leadership and influence outside the inner circle of respondents.* The meeting was held to review enrollment numbers for budgetary projections that would be presented the next day with a large group of

WCU “Opinion Leaders” consisting of several faculty leaders.

Contrary to Mixner’s written direction, petitioner presented to EMC her own version of WCU’s budget, one which did *not* include the falsely inflated expenditures, one which “present[ed] the reality” of accurate accounting, and one which starkly exposed the misrepresentations in Mixner’s own version of the budget which showed projected deficits. That is, notwithstanding a projected increase in enrollment, Mixner’s version projected an \$15 million deficit in a year where there was an actual *surplus* of \$11 million. EMC members agreed with petitioner about this false reporting and that Mixner’s budget should not be presented the next day to the Opinion Leaders. Mixner agreed to discuss the matter with WCU’s President but ultimately he decided to present to the Opinion Leaders the next day his own version of WCU’s budget showing an \$15 million deficit.

Petitioner met with Mixner on November 4, 2014, told him that she remained unwilling to issue false BUD reports and asked him to consider deploying her talents in another capacity where she would not be required to do so. She gave Mixner no ultimatum but rather expressed her need to maintain her income to support her family. On November 18, 2014, less than three weeks after presenting to EMC members the actual BUD Report which exposed to those leaders outside of respondents’ inner circle the misrepresentations contained in Mixner’s budget, petitioner met with Mixner and a Human Resources vice president. Mixner told her that she was not the right “cultural fit” and that her employment with WCU would involuntarily terminate on June 30, 2015.

Mixner thereupon delivered to petitioner a termination letter which recited several alleged performance issues which justified his decision, i.e., that she had problem-solving deficiencies and communication issues; failed to understand big-picture concepts; and that WCU needed “a different type of leadership.” All of these reasons were contradicted by the three very positive written performance evaluations Mixner gave petitioner earlier in her tenure, even one just weeks earlier.

On May 14, 2015, petitioner brought this civil action in the federal district court for the Eastern District of Pennsylvania against respondents WCU, PASSHE, Mixner, Johnson and several administrative officials (“respondents”) alleging that they acted under color of state law and violated her rights when they terminated her employment on November 18, 2014 (App. 37;64-65). Founding jurisdiction on 28 U.S.C. §§ 1331, 1343 & 1367, she alleged *inter alia* that her termination was carried out in order to retaliate for exercising her First Amendment right to speak as a citizen on matters of public concern in violation of 42 U.S.C. § 1983; that it violated the Pennsylvania Whistleblower Law,⁴³ P.S. § 1421 *et seq.*; and that respondents negligently as well as intentionally inflicted emotional distress upon her (App. 37;64).

Respondents moved to dismiss under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and for failure to state a claim under Rule 12(b)(6) (*Id.*). On December 9, 2015, the district court, Baylson, J., citing the Eleventh Amendment, granted the motion to dismiss on sovereign immunity grounds with prejudice as to petitioner’s § 1983 claims against respondent state institutions and the individual respondents named in their official capacities (App. 70-73). However, this

dismissal was without prejudice to petitioner amending her complaint to allege her § 1983 claims against any individual respondents acting in their individual capacities (App. 73). Moreover, the district judge declined to rule on any of petitioner's state law claims, allowing petitioner to assert these claims in an amended complaint (App. 74;76).

Petitioner amended her complaint to assert the same claims against WCU, PASSHE and the individual respondents in their individual capacities(App. 37). As the result of another motion to dismiss by respondents, the district judge dismissed all petitioner's claims except her § 1983 retaliation claim against Mixner in his individual capacity as well as two state law claims against him for emotional distress (App. 37-38). Petitioner's state law claims under the Whistleblower Law and for emotional distress against all other respondents could be refiled in state court (*Id.*). Mixner then moved for summary judgment under Rule 56 on the basis of his qualified immunity from suit and petitioner thereafter withdrew her two claims for emotional distress, leaving only her § 1983 retaliation claim against him for resolution (App. 38;39).

On March 3, 2017, Judge Baylson issued his decision granting Mixner's summary judgment motion and dismissing petitioner's complaint with prejudice (App. 33-63). Relying on *Lane v. Franks*, 573 U.S.____; 134 S. Ct. 2369 (2014), the motion judge determined that petitioner spoke as a citizen rather than as a public employee in raising her concerns about WCU's false accounting practices before the ABC in 2012, in her Memorandum to ABC members, and before the EMC on October 29, 2014 (App. 42-48). There was *no* part of her job description which included asserting charges that the accounting practices WCU employed were

themselves fraudulent, unethical or even illegal (App. 47-48). As he explained, as a practical matter, “[t]here is a difference between recommending changes to improve or streamline an existing policy and upending a policy with accusations that it is in itself fraudulent” (App. 48).

Judge Baylson further concluded that it was self-evident that petitioner spoke on a matter of public concern; and petitioner’s interest in exposing possible instances of public corruption outweighed respondents’ interests as her employer in running an efficient and functional workplace (App. 48-53). That is, in view of the strong interest petitioner had in shedding light on instances of public corruption, her actions, while detrimental to her relationship with Mixner, “were not so disruptive as to give him an independent justification for deciding not to reappoint her” (App. 53). In addition, a jury could find that petitioner’s exposition of WCU’s actual budget before EMC members on October 29, 2014, could have stirred tensions between her and Mixner such that he was driven to terminate her two weeks later (App. 53-57).

Accordingly, on this record whether Mixner violated petitioner’s First Amendment rights was a jury question (App. 57). However, addressing Mixner’s qualified immunity defense, the district judge concluded that a reasonable person in Mixner’s position would not have known that his decision to terminate petitioner because of her speech constituted retaliation because the law establishing her right was not clearly established at the time (App. 57-62). As the district judge ruled, there was no authoritative law from this Court or the Third Circuit holding that speech which occurs internally in the workplace but outside the chain of command----like petitioner’s speech here----was the

protected speech of a citizen rather than that of an employee (App. 59-62). Because Mixner was entitled to qualified immunity on petitioner's § 1983 retaliation claim, her complaint was dismissed (App. 62).

Petitioner appealed this decision as well as the district court's earlier dismissal of her complaint against WCU and PASSHE on Eleventh Amendment grounds. On January 26, 2018, the court of appeals unanimously affirmed both rulings (App. 1-32). As for petitioner's claim of retaliatory discharge based on her speech, it concluded that when petitioner spoke to EMC members on October 29, 2014----the only speech on which petitioner relied for purpose of her appeal---her speech at that meeting "was made pursuant to her official duties and was therefore not protected by the First Amendment" (App.11-12;26). According to the court, petitioner's job description indicated that she was expected to "[r]eview and recommend, as requested, changes to the University['s] budget allocation processes;" and this was exactly what she was doing when she presented her alternate BUD Report to EMC members (App. 12).

In other words, the court wrote, she spoke "because that is part of what [s]he...was employed to do," in a "mode and manner [that] were possible only as an ordinary corollary to h[er] position" (App. 12;26 quoting *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) and *De Ritis v. McGarrigle*, 861 F.3d 444, 454 (3rd Cir. 2017), respectively). That the district judge saw her speech as upending WCU's established accounting policy with accusations that it was itself fraudulent, unethical and illegal, that it was outside of her job description and therefore that it was protected speech as a citizen was wrong because petitioner was paid to critically evaluate WCU's budgeting process, i.e.,

scrutinizing and analyzing the numbers which appeared in the budget was part of her job; and this is what she was doing at the EMC meeting on October 29, 2014 (App. 12-13). Nor was she speaking “outside her chain of command” since she was responding in her official capacity to a direct question by a member of the EMC (App. 13).

Holding that petitioner was therefore speaking pursuant to her official duties as a public employee at that meeting rather than as a citizen, the court of appeals concluded that she had failed to state a First Amendment claim (*Id.*). In view of this disposition, it did not reach the question of Mixner’s qualified immunity (App. 27).

On February 28, 2018, the court of appeals denied petitioner’s timely filed petition for rehearing or for rehearing *en banc* (App. 77-78).

REASONS FOR GRANTING THE PETITION

Petitioner’s Speech Exposing Her Public Employer’s False, Illegal And Corrupt Accounting Practices, Conduct Unrelated To Her Ordinary Job Duties Or Her Job Description, Is Protected As First Amendment Citizen Speech Under *Lane v. Franks*, 573 U.S.____; 134 S. Ct. 2369 (2014) and *Garcetti v. Ceballos*, 547 U.S. 410 (2006)

Introduction.

After *Lane v. Franks*, 573 U.S.____; 134 S. Ct. 2369 (2014) and *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the crucial test now for determining whether a public employee’s speech is protected under the First

Amendment as citizen speech is the “practical” inquiry “of whether the speech at issue is itself *ordinarily* within the scope of an employee’s duties, not whether it merely concerns those duties.” *Lane*, 573 at ____; 134 S. Ct. at 2379 (emphasis supplied). *Garcetti*, 547 U.S. at 424-425. In making this “practical” assessment, the *Garcetti* Court cautioned that “[f]ormal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee’s written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee’s professional duties for First Amendment purposes.” *Garcetti*, *supra*. The *Lane* Court further cautioned that “the mere fact that a citizen’s speech concerns information acquired by virtue of his public employment does not transform that speech into employee----rather than citizen----speech.” *Lane*, *supra*.

With these standards in mind, petitioner opposed Mixner’s summary judgment motion by adducing Mixner’s own sworn deposition testimony as WCU’s Vice President of Finance and Administration, the person to whom petitioner reported and the one person best informed about her actual----not formal----duties as WCU’s Director of Budget and Financial Planning. He testified without contradiction that reporting willful misrepresentations of WCU’s financial information to PASSHE and, in turn, the Commonwealth, so that WCU could obtain more taxpayer-funded appropriations than it would receive otherwise was *not* part of her job description and it was *not* part of her ordinary job duties as Director of Budget and Financial Planning. He also admitted that it was *not* part of her ordinary job duties to investigate

or report on this scheme by WCU of creating false projected deficits.

In addition, Mixner testified that it was *not* part of petitioner's ordinary job duties to report to WCU's senior leaders like members of the EMC, persons who were not responsible for WCU's budgeting process and who were outside her chain of command, about WCU's unethical and unlawful practice of deliberately creating false deficits in order to obtain taxpayer-funded appropriations. Finally, Mixner testified that it "wasn't within [petitioner's] normal [job] duties" to submit her version of WCU's budget to EMC members.

In contrast to this undisputed testimony by Mixner demonstrating the actual dimensions of petitioner's ordinary job duties as Director of Budget and Financial Planning, *none* of which encompassed the speech petitioner engaged in before the EMC on October 29, 2014, Mixner adduced *no* evidence on this summary judgment record to show that the EMC or its members possessed any authority over WCU's budget, were part of petitioner's chain of command, or had responsibility for her supervision. If anything, the record showed that the EMC and its members were concerned only with the budget as it related to their own enrollment expectations, their only area of interest; and that Mixner wanted *his* own BUD Report showing false deficits---not petitioner's true BUD Report showing an actual surplus---presented to the EMC meeting because he had decided as WCU's Vice President of Finance and Administration to present his fraudulent version of the budget to WCU's Opinion Leaders the next day.

Given this summary judgment record, both the district court and the court of appeals were bound: (1) to draw all reasonable inferences from these materials

against Mixner as the moving party and *in favor* of petitioner as the non-moving party; and (2) to resolve all credibility questions *in favor* of petitioner, the non-moving party, because their role is only to determine whether there is a genuine issue of material fact for trial. *Beard v. Banks*, 548 U.S. 521, 529-530;534 (2006). *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151 (2000). *Anderson v. Liberty Lobby*, 477 U.S. 242, 249-255 (1986). As *Reeves* holds, neither court could make credibility determinations because this is a function of a jury, *not* a judge. *Id.* citing *Anderson*, 477 U.S. at 255.

The Court reinforced these fundamental summary judgment principles in *Tolan v. Cotton*, 572 U.S. ____; 134 S.Ct. 1861 (2014) (*per curiam*). In reversing the dismissal of a civil rights action brought against a police officer for using excessive force, it held that by crediting the evidence of the party seeking summary judgment while failing to properly acknowledge key evidence offered by the party opposing that motion, the court of appeals “neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party,” i.e., the plaintiff. *Id.* at ____; 134 S.Ct. at 1868.

Contrary to these summary judgment principles, *Garcetti*’s explicit caution not to rely on an employee’s formal job description, *Lane*’s holding that protected citizen speech takes place when it is outside a public employee’s ordinary job duties, and Mixner’s uncontradicted admissions that petitioner’s speech to the EMC was *not* part of her job description or within her ordinary job duties, the court of appeals concluded that petitioner’s speech was not protected by the First Amendment (App. 11-12). As it ruled, her speech to the

EMC members on October 29, 2014, “was made pursuant to her official duties...because [her] job description indicated that she was expected to “[r]eview and recommend, as requested, changes to the University[‘]s budget allocation processes;” and this was exactly what she was doing when she presented her alternate BUD Report to EMC members (App. 12).

This reasoning contravenes, if not ignores, this Court’s established jurisprudence for determining the protected status of a public employee’s speech under the First Amendment; it is at odds with the summary judgment record, especially Mixner’s own admissions that petitioner’s speech was *not* within her job description or her ordinary job duties; and it impermissibly chills and devalues petitioner’s speech as a whistleblower exposing public corruption.

Contrary to the court of appeals’ attenuated analysis, petitioner was not just presenting “her alternate budget” to the EMC members or simply disagreeing with her superior Mixner about how to analyze or scrutinize a budget (App. 12). She was exposing through her speech that Mixner’s version of the budget was itself fraudulent and illegal, public corruption by WCU of the highest order. The district judge had it right in his “practical” assessment of petitioner’s job duties under *Lane* and *Garcetti*, i.e., as Mixner repeatedly admitted in his deposition testimony, there was *no* part of her job description or her ordinary job duties which included asserting charges that the accounting practices WCU employed were *themselves* fraudulent, unethical or even illegal (App. 47-48). As the district court explained, as a practical matter, “[t]here is a difference between recommending changes to improve or streamline an existing policy and upending a policy with accusations

that it is in itself fraudulent” (App. 48). Accordingly, it was a jury question on this record whether Mixner violated petitioner’s First Amendment rights by terminating her soon after engaging in this speech to the EMC members.

The court of appeals’ condonation of petitioner’s termination in these circumstances sends a message to millions of taxpayers in Pennsylvania and to thousands of putative whistleblowers nationwide that illegal, unethical behavior in the public workplace will be tolerated, even in public corruption cases where the importance of employee speech rooting out such misconduct is especially self-evident. *Lane v. Franks*, 573 U.S. at ___; 134 S. Ct. at 2380 (2014). *Garcetti*, 547 U.S. at 425. *Lane*’s recognition of the independent duty of a citizen to testify provides renewed impetus for this Court to find petitioner’s speech protected here because not doing so devalues the societal value her whistleblowing activity possesses by causing public employees, the members of society most likely to be well informed on the subject of public corruption, to self-censor. If public employees, fearing retaliation, decide not to speak on such matters, “the community would be deprived of informed opinions on important public issues” like public corruption and malfeasance. *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004).

This Court should grant certiorari to address this question of great importance, both nationally and in Pennsylvania, and provide petitioner and every whistleblower like her the protection they deserve under the First Amendment when they speak as citizens rather than as public employees in order to expose public corruption. This Court should also grant the writ in order to clarify the evolving rationale of both *Lane* and *Garcetti* in defining the dimensions of

protected speech for public employees henceforth and to resolve for future decisionmaking the incoherence which has developed among the courts of appeals in interpreting these two decisions.

Discussion.

The First Amendment “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Connick v. Myers*, 461 U.S. 138, 145 (1983) quoting *Roth v. United States*, 354 U.S. 476, 484 (1957). Speech “concerning public affairs is more than self-expression; it is the essence of self-government.” *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Thus the Court has repeatedly reaffirmed that speech on public issues occupies the “highest rung of the hierarchy of First Amendment values.” *Connick, supra*, quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) and *Carey v. Brown*, 447 U.S. 455, 467 (1980).

One of the central purposes of the First Amendment’s guarantee of freedom of expression is to protect and promote the dissemination of information on the basis of which members of our society may make reasoned decisions about their government. *Mills v. Alabama*, 384 U.S. 214, 218-219 (1966). *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-270 (1964). Unconstrained speech about the manner in which government performs its duties is an essential element of the public discourse necessary to informed self-government and this includes “discussions of candidates, structures and forms of government, *the manner in which government is operated or should be operated* and all such matters relating to political processes.” *Mills, supra* (emphasis supplied).

But the constitutionally protected right to speak out on governmental affairs would be meaningless if it did not extend to statements which express criticism of governmental officials or which seek to expose government wrongdoing or misconduct. *Connick*, 461 U.S. at 162 (Brennan, J., dissenting) citing *New York Times Co. v. Sullivan*, *supra*. As Mr. Justice Kennedy observed in writing for a plurality of the Court in *Garcetti*, 547 U.S. at 425, “[e]xposing governmental inefficiency and misconduct is a matter of considerable significance” and public employers should, “as a matter of good judgment,” be “receptive to constructive criticism offered by their employees.” *Id.* quoting *Connick*, 461 U.S. at 149. Moreover, “[t]he importance of public employee speech is especially evident...[when the subject is] public corruption....” *Lane*, 573 U.S. at ___; 134 S. Ct. at 2380.

The *Garcetti* Court further observed:

The dictates of sound judgment are reinforced by the powerful network of legislative enactments----such as whistle-blower protection laws and labor codes----available to those who expose wrongdoing....These imperatives, as well as obligations arising from any other applicable constitutional provisions and mandates of the criminal and civil laws, protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions.

547 U.S. at 425-426. See, e.g., Pennsylvania Whistleblower Law, 43 P.S. § 1423 (a) (“No employer may discharge, threaten or otherwise discriminate or retaliate against an employee [who]...makes a good

faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste by a public body....”).

Reflecting these values which seek to protect public employees who are discriminated against, discharged or otherwise disciplined for exercising their First Amendment right to speak and communicate as private citizens about misconduct, corruption or other mismanagement by their government employers, the Court has developed a sequential test for inferior federal courts to employ when determining whether an employee’s claim for retaliatory discharge or discipline has merit, i.e., whether a public employee’s speech is entitled to protection.

As refined and distilled by this Court’s decisions in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), *Connick*, 461 U.S. at 140;146-147;150; *Garcetti*, 547 U.S. at 417-418, and *Lane*, 573 U.S. at ____; 134 S. Ct. at 2378-2379, the inquiry now for determining whether petitioner was engaging in protected activity when she communicated with EMC members about WCU’s fraudulent practice of artificially inflating its deficits in order to obtain more taxpayer-funded appropriations than it would otherwise receive is a two-step analysis. The first step requires determining whether the employee spoke as a citizen on a matter of public concern. *Lane*, 573 U.S. at ____; 134 S. Ct. at 2378 citing *Garcetti*, 547 U.S. at 547 U.S. at 418. If the answer is no, the employee has no First Amendment claim based on her employer’s reaction to her speech.

But if the answer is yes, then the possibility of a First Amendment claim arises and invokes a second-step inquiry into whether the relevant governmental entity had adequate justification for treating the employee differently from any other member of the

general public. *Id.* This inquiry, in turn, entails the balancing framework set out in *Pickering, supra*, for analyzing whether the employee's interests or the government's interest should prevail in cases where the government seeks to curtail the employee's speech. *Lane*, 573 U.S. at ____; 134 S. Ct. at 2377. In *Pickering*, the Court, after holding in the first step that a teacher's letter to the editor of a local newspaper about a school budget constituted speech on a matter of public concern, in the second step balanced the employee's interest in this speech against the government's interest in efficiency and absence of disruption, holding that the publication of the letter did not "imped[e] the teacher's proper performance of his daily duties in the classroom" or "interfer[e] with the regular operation of the schools generally." *Id.* at 571-573. The teacher's speech was therefore protected under the First Amendment and could not serve as the basis for his dismissal. *Id.* at 574.

In describing the analysis involved with the first step of the inquiry, the *Garcetti* Court held that "when public employees make statements *pursuant to their official duties*, the employees are *not* speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Lane*, 573 U.S. at ____; 134 S. Ct. at 2378, quoting *Garcetti*, 547 U.S. at 421 (emphasis supplied). Employing that analysis, the Court in *Garcetti* found that an internal memorandum prepared by a prosecutor as part of his ordinary job responsibilities was not employee speech protected by the First Amendment. 547 U.S. at 424. Thus after *Garcetti*, employee speech made "pursuant to" his or her official duties was unprotected under the First Amendment.

In *Lane*, the Court revisited the elements of *Garcetti*'s first-step analysis. It held that an employee's truthful sworn testimony, compelled by subpoena, about his investigation of a co-worker was protected speech under the First Amendment because even though that testimony concerned information he had learned in the course of his public employment, testifying in court proceedings about it was outside the scope of his ordinary job responsibilities.⁵⁷³ U.S. at ____ & n. 4; 134 S. Ct. at 2378 & n.4. Justice Sotomayer, writing for a unanimous Court, rejected the court of appeals' reasoning that because the employee learned about the subject of his testimony in the course of his employment, *Garcetti* required that his testimony be treated as speech of an employee rather than that of a citizen. *Id.* at ____; 134 S. Ct. at 2379.

As the Court observed, the court of appeals "read *Garcetti* far too broadly" and "the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee----rather than citizen----speech." *Id.* Moreover, it set forth a new iteration of *Garcetti*'s "pursuant to" test for determining whether an employee's speech is protected under the First Amendment: "The critical question...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.* (emphasis supplied) . Because testifying in court proceedings was not ordinarily within the scope of this employee's duties, he spoke as a citizen rather than as an employee on a matter of public concern, i.e., public corruption. *Id.* at ____; 134 S. Ct. at 2380. The Court then employed the second-step inquiry under *Pickering* to find that no government interest

tipped the balance in its favor so as deny First Amendment protection. *Id.* at ____; 134 S. Ct. at 2381.

In determining whether a public employee speaks as a citizen or as an employee, i.e., under *Lane's* iteration, whether the speech itself is ordinarily within the scope of the employee's duties, *Garcetti* teaches that the proper inquiry must be a "practical" one which cannot rely on merely formal job descriptions which can bear little resemblance to the duties actually performed. 547 U.S. at 424-425. According to Justice Souter's dissenting opinion in *Garcetti*, however, this "practical" inquiry will necessarily become fact-intensive and unpredictable, inciting litigation "to decide which stated duties were actual and which were merely formal." *Id.* at 431 & n. 2; 436.

Justice Souter's prediction has proven true. Some courts have construed an employee's work duties very broadly so that his speech will almost always be unprotected, see *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1198-1199; 1203-1205 (10th Cir. 2007); *Piggee v. Carl Sanburg Coll.*, 464 F.3d 667, 670 (7th Cir. 2006), while other courts interpret employment duties very narrowly so that the speech is more likely to be protected as citizen speech. See *Charles v. Grief*, 522 F.3d 508, 516 (5th Cir. 2008). Some courts of appeals have disagreements among their own judges about how to employ *Garcetti's* "practical" test to determine the scope of an employee's job duties. See *Dahlia v. Rodriguez*, 736 F.3d 1060 (9th Cir. 2013) (*en banc*), *cert. denied*, 573 U.S. ____; 134 S. Ct. 1283 (2014), *passim* (noting the factbound nature of the practical inquiry required by *Garcetti*, the possible factors relevant to the inquiry and the disparate fact-intensive approaches taken by members of the same *en banc* panel); *Weintraub v. Board of Educ. of City of New*

York, 593 F.3d 196, 202-204; 206-208 (2nd Cir. 2010) (majority and Calabresi, J., dissenting, disagreeing on the scope and meaning of *Garcetti*'s practical inquiry).

Several other courts have noted the confusion and incoherence about implementing *Garcetti*'s inquiry either by itself or in light of the Court's later decision in *Lane*. See *Mayhew v. Town of Smyrna*, 856 F.3d 456, 462-464 (6th Cir. 2017) ("Determining whether an employee speaks as a private citizen or as a public employee can be challenging."); *Flora v. Cnty. of Luzerne*, 776 F.3d 169, 179 & n.11 (3rd Cir. 2015) (whether *Lane* modified or merely clarified *Garcetti* left undecided); *Ross v. Breslin*, 693 F.3d 300, 306 (2nd Cir. 2012) (*Garcetti*'s inquiry not susceptible to a "brightline" rule); *Mercado-Berrios v. Cancel-Alegria*, 611 F.2d 18, 27 (1st Cir. 2010) (noting the uncertainty and conflict in the lower courts about *Garcetti*'s inquiry).

The uncertainty about how *Garcetti*'s "practical" inquiry into an employee's job duties has been affected by *Lane* is compounded by the fact that this sometimes fact-intensive first-step inquiry is inconsistent with the Court's earlier pronouncement in *Connick* that "[t]he inquiry into the protected status of speech is one of law, not fact." 461 U.S. at 148 n.7. This implies that there is no room for the kind of factfinding a jury would perform in resolving the fact questions underpinning the inquiry of whether the speech itself is ordinarily within the scope of the employee's duties. But as Justice Souter made clear in *Garcetti*, these inquiries are more often than not factbound and become issues not purely of law but ones of mixed fact and law. 547 U.S. at 431 & n.2; 436. Questions of mixed fact and law are usually ones for juries to decide, not judges. *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 554 (1997);

Dimick v. Schiedt, 293 U.S. 474, 486 (1935) (court determines law and jury determines facts).

This incoherence between *Connick's* unequivocal statement that courts should resolve the question of First Amendment protection purely as a matter of law and the fact-intensive inquiry now required by *Garcetti* and *Lane*----invoking a jury to decide disputed questions of fact----has caused a split among the Circuits as to whether the inquiry into the protected status of a public employee's speech remains one purely of law to be decided by a judge or whether instead *Garcetti* and *Lane* have transformed the question into a mixed question of fact and law to be decided by a jury.

The D.C. (*Wilburn v. Robinson*, 480 F.3d 1140, 1149 (2007)), the Fifth (*Charles v. Grief*, 522 F.3d at 513 n.17), the Sixth (*Mayhew v. Town of Smyrna*, 856 F.3d at 462-464) and the Tenth (*Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d at 1204-1205) Circuits have all described the inquiry as one of law to be decided by judges. On the other hand, the Seventh (*Davis v. Cook County*, 534 F.3d 650, 653 (2008)), the Eighth (*Casey v. City of Cabool*, 12 F.3d 799, 803 (1993)) and the Ninth (*Dahlia v. Rodriguez*, 735 F.3d at 1072-1073) Circuits have described the inquiry as one of mixed fact and law whereby judges "must reserve judgment on [whether the speech was within the ordinary scope of the employee's duties] until *after* the fact-finding process" of the jury. *Dahlia*, 735 F.3d at 1072 quoting *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1131 (9th Cir. 2008) (emphasis supplied).

The Third Circuit appears to align itself with the second group of Circuits. Specifically, "the scope and content of a plaintiff's job responsibilities is a question

of fact [for the fact finder] but the ultimate constitutional significance of those facts is a question of law.” *Flora v. Cnty. of Luzerne*, 776 F.3d at 175. Accord, *Dougherty v. Sch. Dist. of Phila.*, 772 F.3d 979, 987-988 (3rd Cir. 2014) quoting *Foraker v. Chaffinch*, 501 F.3d 231, 240 (3rd Cir. 2007). In other words, if there is no genuine dispute of material fact as to the scope of a plaintiff’s job duties, a court may determine as a matter of law whether the speech at issue fell into the ordinary scope of those duties. *Id.*

But the court of appeals here refused to hew to this precedent within its own Circuit for resolving the disputed fact issue of whether under *Lane* petitioner’s ordinary job duties encompassed her speech which called into question the very legality of WCU’s accounting practices of creating false deficits for purposes of receiving inflated taxpayer-funded appropriations. In the face of Mixner’s undisputed deposition testimony on this summary judgment record that petitioner’s job description and ordinary job duties did *not* include this kind of speech, it is inexplicable how the court could rule as a matter of law that her speech was made pursuant to her official duties as WCU’s Director of Budget and Financial Planning.

Mixner’s own testimony created a jury question whether he violated petitioner’s First Amendment rights by terminating her soon after engaging in this speech to the EMC members. The court of appeals’ ruling otherwise runs afoul of this Court’s precedent in *Garcetti* and *Lane* as well as its own Third Circuit precedent. It unfairly diminishes the role juries can play in deciding the validity of an employee’s First Amendment claim and denies a public employee like petitioner a jury trial on those disputed fact issues

necessary to resolve the question of whether the speech itself is ordinarily within the scope of her duties.

The result further highlights the incoherence and disarray existing among the Circuits and within the Third Circuit itself about the proper method of performing the first-step inquiry under both *Lane* and *Garcetti*, invoking this Court's power to clarify further the analysis for future decisionmaking. Creating a reliable standard for this first-step analysis will provide more certainty for whistleblowers that exposing government mismanagement and corruption will not result in unlawful retaliation, reducing the chill to First Amendment conduct which the decision of the court of appeals creates. Relying upon an inexplicable, unpredictable test, the result here makes it too easy for public employers to escape liability for punishing protected speech.

Petitioner's whistleblowing about public corruption is First Amendment speech in its most valuable form, occupying the "highest rung of the hierarchy of First Amendment values," *Connick*, 461 U.S. at 145; *Pickering*, 391 U.S. at 571-572, and it deserves the highest protection. "Were [employees] not able to speak on these matters, the community would be deprived of informed opinions on important public issues." *City of San Diego v. Roe*, *supra*. This important question therefore needs to be resolved by the Court.

CONCLUSION

For all the reasons identified herein, a writ of certiorari should issue to review and vacate the judgment of the court of appeals and remand the matter to the district court for trial on petitioner's § 1983 claim against Mixner; to clarify the standard under

Garcetti and *Lane* for determining when a public employee like petitioner speaks as a citizen on a matter of public concern; to resolve the split of authority among the Circuits whether the inquiry into the protected status of an employee's speech under the First Amendment is purely one of law or whether it is one of mixed fact and law; or provide petitioner such other relief as is fair and just in the circumstances.

Respectfully submitted,

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