Reframing *Garcetti*: How a Context-Heavy Analysis Protects Witnesses from Government Retaliation

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I. INTRODUCTION

A woman takes the witness stand in a divorce proceeding. She works as a secretary in a government agency and testifies about the character of one of the higher-ups, a man named Bob. She doesn't work for Bob directly and only encounters him infrequently in the workplace. After she gives testimony about Bob, she is fired. In an email explaining the decision, her boss writes that she was terminated because of her testimony. He says that she was otherwise an extraordinary employee, that he didn't think this would affect her performance in any way, but that Bob was adamant she be fired for helping his ex-wife. There is no assertion she lied or said anything damaging to the agency while testifying.[1] Does this retaliatory act by the government employer violate the First Amendment rights of the employee?

This essay will describe how circuits are currently split on whether testimony given by public employees is *per se* a matter of public concern and then examine which analytical approach best promotes First Amendment values. This essay adds to current scholarly literature by arguing that the Supreme Court in *Garcetti v. Ceballos* endorses a context-heavy analysis in circumstances where context is particularly relevant to determining whether the individual is speaking as a public employee or as a citizen. When applied to public employee testimony, this context-heavy approach correctly recognizes

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[1] This hypothetical is loosely based on *Pro v. Donatucci*, 81 F.3d 1283 (3d Cir. 1996).

the historical importance of allowing free and unpressured testimony, incentivizes truthful testimony from public employees, and protects public employees who provide testimony that does not significantly harm the government employer's ability to operate efficiently.

Part II briefly explains Supreme Court doctrine surrounding First Amendment claims by public employees prior to *Garcetti*. Part III describes the circuit court split on how to analyze whether a public employee's testimony is a matter of public concern. Part IV argues that *Garcetti* provides for a context-heavy analysis in certain circumstances where context is particularly relevant to determining whether an individual is speaking as a public employee or as a citizen. Part V asserts that providing sworn testimony is one of those unique circumstances warranting a context-heavy public concern analysis due to the traditional belief that individuals providing testimony serve a necessary public role. Part VI concludes.

II. THE EVOLUTION OF PUBLIC CONCERN FIRST AMENDMENT ANALYSIS

Before the mid-twentieth century, government employment was viewed as a luxury, where "public employee[s] had no right to object to conditions placed upon [their] terms of employment."[2] As Justice Holmes wrote in *Mclauliffe v. City of New Bedford*, a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[3] The speech of public employees was viewed as one large amalgam, their individual rights not distinguished by whether they were speaking as a citizen or as a public employee.[4] Retaliation for speaking in a way the government employer disapproved was constitutionally permissible, even if the employee was speaking as a citizen.[5]

In *Pickering v. Board of Education*, the Court repudiated this approach and proposed a new framework that attempted to determine whether the public employee was speaking as a public employee or as a citizen.[6] As stated by the Court, the test provides: "The problem in any case is to arrive at a balance between the interests of the [public employee], *as a citizen*, in commenting upon matters of public concern and the interest of the State, *as an employer*, in promoting the efficiency of the public services it performs through its

[2] Connick v. Myers, 461 U.S. 138, 143 (1983) (describing the history of public employee First Amendment analysis); *see also* Mclauliffe v. City of New Bedford, 155 Mass. 216, 220 (1892) ("[T]he servant [almost always] agree[s] to suspend his constitutional rights of free speech . . . by the implied terms of his contract.").

[3] *Mclauliffe*, 155 Mass. at 220.

[4] The Supreme Court initially adopted Justice Holmes's view of public employees' First Amendment rights—or lack thereof. *See* Adler v. Bd. of Educ. of City of New York, 342 U.S. 485, 492 (1952) ("It is . . . clear that [public employees] have no right to work for the State in the school system on their own terms.").

[5] *See id.*

[6] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

employees."[7] In *Pickering*, a teacher wrote a letter complaining about the school board's allocation of funding and was fired.[8] The Court ultimately held the dismissal impermissible, as the subject of Pickering's speech was "a matter of legitimate public concern" upon which "free and open debate is vital to informed decision-making by the electorate."[9]

Pickering should be viewed as an attempt by the Court to separate the previous amalgamation of citizen and public employee speech in order to preserve the rights of the public employee when speaking as a citizen. In creating the balancing test, the Court repeatedly referred to public concern and citizenship in the same breath; for example, the Court stated that it had "unequivocally rejected" the premise that public employees "may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy *as citizens* to comment on matters of public interest."[10] The balancing test also emphasizes the role of the speaker as "*a citizen* . . . commenting upon matters of public concern."[11] The proximity of citizen and public interest is no accident. Rather, the Court's examination of whether speech is a "matter of public concern" in *Pickering* is best seen not as an end in and of itself but rather as the means of deeming which role a public employee speech falls under: speech *qua* citizen or speech *qua* employee.

In *Snyder v. Phelps*, the Court further tied the concepts of public concern and citizenship together by embracing a definition of "public concern" that incorporated traditional philosophical conceptions of citizenship in Western democracy.[12] The Court stated that "[s]peech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community.'"[13] This description of public concern is nearly impossible to untether from the traditional Western concept of a citizen as an individual who "take[s] part in the life of their community, reserving a not insignificant part of their energies for the fulfillment of shared duties and goals . . . actively participat[ing] in deliberations concerning common matters."[14] In his book *Active Liberty*, Justice Breyer described this traditional conception of a citizen, writing:

> [When Jefferson] spoke of the rights of the citizen as "a participator in the government of affairs," when Adams, his rival, added that all citizens have a "positive passion for the public good," and when the Founders referred to "public liberty" . . . [t]hey had invoked an idea of freedom as old as antiquity, the freedom of the individual citizen to participate in the

[7] *Id.* (emphasis added).
[8] *Id.* at 566–67.
[9] *Id.* at 571–72.
[10] *Id.* at 568 (emphasis added).
[11] *Id.* (emphasis added).
[12] Snyder v. Phelps, 562 U.S. 443 (2011).
[13] *Id.* at 453 (quoting Connick v. Myers, 461 U.S. 138, 146 (1983)).
[14] DANA RICHARD VILLA, SOCRATIC CITIZENSHIP ix (2001). This traditional conception of the Western citizen was advocated for by Aristotle, Machiavelli, and Rousseau. *Id.*

> government and thereby to share with others the right to make or to control the nation's public acts.[15]

It is this traditional philosophical conception of an individual acting as a citizen that *Pickering* must be attempting to distinguish from an individual acting as a government employee. The alternative formalistic conception would be non-sensical, as whether an individual is a legal citizen has no bearing on the core First Amendment value of promoting public discourse and has never been considered as relevant to the Court's public concern analysis.[16] The public concern test therefore should not be a separate, discrete analysis from citizenship as some legal scholars assert.[17] The two concepts are inseparable. If an individual is speaking on a matter of public concern, then they are speaking as a citizen. And if an individual is speaking as a citizen, then they are speaking on a matter of public concern.

In *Connick v. Myers*, the Court laid down further substantive guidelines to determine if a public employee's speech is on a matter of public concern: "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement."[18] If the speech is on a matter of public concern, then the public interest is balanced against the government's managerial interest in effective and efficient fulfillment of its responsibilities.[19] Again, the Court in *Connick* emphasized that the ultimate purpose of the public concern test was to determine if a public employee was speaking as a citizen or as a public employee: "[W]hen 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 . . . . "[20]

The Court in *Connick* did not describe how much weight to give each factor of content, form, and context, but rather wrote that due to the variety of factual situations it was not "appropriate [n]or feasible to lay down a general standard."[21] This ambiguity has caused disagreement between various circuits on how much weight they can give to certain factors and whether one factor may be dispositive. The following section will consider one circumstance where

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[15] STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING A DEMOCRATIC CONSTITUTION 3 (2008).

[16] The Supreme Court has held that identity discrimination is impermissible under the First Amendment, which would likely apply to non-citizens. *See* Michael Kagan, *Do Immigrants Have Freedom of Speech?*, 6 CAL. L. REV. CIR. 84, 96 (2015).

[17] Many of these formulations have arisen following *Garcetti. See, e.g.*, Lemay Diaz, *Truthful Testimony as the "Quintessential Example of Speech as a Citizen": Why* Lane v. Franks *Lays the Groundwork for Protecting Public Employee Truthful Testimony*, 46 SETON HALL L. REV. 565, 585 (2016).

[18] Connick, v. Myers, 461 U.S. 138, 147–48 (1983).

[19] *Id.* at 150–51.

[20] *Id.* at 147 (emphasis added).

[21] *Id.* at 154.

the circuits are currently split: whether context can be an overriding consideration in situations where public employees are retaliated against by their employer after testifying.

III. THE CONTENT-HEAVY AND CONTEXT-HEAVY ANALYTICAL DIVIDE

Circuits are split on whether testimony from public employees constitutes a *per se* matter of public concern. There are two diverging jurisprudential approaches taken by the circuits when addressing this question. The first approach is what I'll call a context-heavy approach, which emphasizes context in the public concern analysis. The second is what I'll call a content-heavy approach, which emphasizes content in the public concern analysis. The circuits which follow this latter approach do not claim to be giving more weight to content, but rather describe their approach as being even-handed with the *Connick* factors.[22] However, in being even-handed with the factors and not adapting the weight given to the particular factual circumstance they are being applied, those circuits give too much weight to content and ignore the ultimate goal of the public concern analysis: to distinguish speech *qua* citizen from speech *qua* employee.

The first context-heavy approach, adopted by the Fifth and Third circuits, holds that an employee's testimony, regardless of the content, is a matter of public concern.[23] In *Johnston v. Harris County Flood Control District*, the Fifth Circuit wrote that "when an employee testifies before an official adjudicatory or fact-finding body he speaks in a context that is inherently of public concern."[24] The court's rationale for this was largely focused on judicial integrity:

> If employers were free to retaliate against employees who provide truthful, but damaging, testimony about their employers, they would force the employees to make a difficult choice. Employees either could testify truthfully and lose their jobs or could lie to the tribunal and protect their job security . . . . Those unwell or unable to risk unemployment would scuttle our efforts to arrive at the truth.[25]

Another case from the Fifth Circuit more explicitly supports its holding by invoking the judicial interest affected. In *Reeves v. Claiborne County Board of*

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[22] *See* Butler v. Bd. of Cty. Comm'rs for San Miguel Cty., 920 F.3d 651, 663 (10th Cir. 2019) ("[W]e consider on a case-by-case basis the content, form, and context of a government employee's testimony at issue in a given case in order to determine whether it involves a matter of public concern."); Wright v. Illinois Dep't of Children & Family Servs., 40 F.3d 1492, 1505 (7th Cir. 1994) ("[O]ur cases have rejected a blanket rule according absolute First Amendment protection to communications made in the course of a lawsuit.").

[23] Johnston v. Harris Cty. Flood Control Dist., 869 F.2d 1565, 1578 (5th Cir. 1989); Pro v. Donatucci, 81 F.3d 1283, 1290 (3d Cir. 1996).

[24] *Johnston*, 869 F.2d at 1578.

[25] *Id.*

Education, the Fifth Circuit explained: If the government were free to retaliate against truthful testimony, "the judicial interest in attempting to resolve disputes by arriving at the truth would be in jeopardy . . . Yet, these values, along with the first amendment values, would not be served if the fear of retaliation and reprisal effectively muzzled witnesses testifying in open court."[26]

It is without question that the judicial interest in promoting truthful testimony is of value, but that interest is not the focus of the public concern inquiry. The public concern inquiry is concerned with determining if "speech . . . can be fairly considered as relating to any matter of political, social, or other concern to the community."[27] The Third and Fifth Circuits correctly recognize that the interest in obtaining truthful testimony is *a* concern to the community, but what they don't recognize is that providing free and unpressured testimony is a concern of the community regardless of the judicial interest in obtaining the truth. By neglecting to explore the traditions, history, and cultural importance of witness testimony, this narrow approach has opened itself up to additional criticism from other circuits. Not only do other circuits contend that the Supreme Court analysis does not allow for weighing one factor above others, the narrowness of the judicial integrity rationale has allowed other circuits to argue that this does not address the ultimate concern of the *Pickering* analysis: to determine whether the speech relates to a matter of concern to the community (and is therefore *qua* citizen).

This alternative content-heavy approach, taken up most recently by the Tenth Circuit, contends that the Supreme Court public concern analysis does not allow for context or form to be an overriding factor over content when determining if a public employee's speech is a matter of public concern.[28] Courts which have taken this approach have condemned the context-heavy approach taken by the Third and Fifth Circuit as incorrectly applying the three factors laid down in *Connick.*[29] As the Tenth Circuit wrote in *Butler v. Board of County Commissioners*, a rule treating sworn testimony as *per se* "a matter of public concern . . . contradicts the Supreme Court mandate, set forth in *Connick* . . . that we decide whether the speech is on a matter of public concern on a case-by-case basis, considering content, form, and context of the speech in a given case."[30] The Court then criticized the judicial integrity rationale the Fifth Circuit used to support their holding: "There are a number of other ways that courts protect the integrity of their truth-seeking function, including subpoena and contempt powers, cross-examination, and criminal sanctions for perjury, without expanding the essential task of *Garcetti/Pickering.*"[31]

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[26] Reeves v. Claiborne Cty. Bd. of Educ., 828 F.2d 1096, 1100–01 (5th Cir. 1987) (citation omitted).

[27] Snyder v. Phelps, 562 U.S. 443, 453 (2011) (citation omitted).

[28] *See* Butler v. Bd. of Cty. Comm'rs for San Miguel Cty., 920 F.3d 651, 660 (10th Cir. 2019).

[29] *Id.*

[30] *Id.*

[31] *Id.*

However, in taking what they describe as an even-handed approach, these circuits elevate content above context and form by ignoring the possibility that certain situations demand weighing context and form above content. For example, in the particular context of an employee making statements pursuant to the duties of their employment, content could very well be inconsequential. If an auditor for the IRS is constantly harping about how taxes shouldn't exist while performing an audit, then perhaps that individual should not be considered as speaking *qua* citizen on a matter of public concern even though the content of lowering taxes strongly weighs in favor of finding it to be of public concern. The next two sections will describe how (1) the Supreme Court has in fact held that context should be elevated above content when the employee is speaking pursuant to their official duties and (2) context should similarly be elevated above content when the employee is speaking in the form of sworn testimony.

IV. *GARCETTI* DEVELOPING A CONTEXT-HEAVY ANALYSIS

In *Garcetti v. Ceballos*, a deputy district attorney (Ceballos) was tasked with reviewing an affidavit for factual inaccuracies.[32] When Ceballos presented his findings to his superiors in a memorandum and at a meeting, he was sharply criticized for his handling of the case.[33] He then was reassigned, transferred, and denied a promotion.[34]

The Supreme Court held that Ceballos had no First Amendment claim.[35] The majority determined that the content of the memo was unimportant, writing that "the memo concerned the subject matter of Ceballos' employment, but this . . . is nondispositive."[36] Rather, what the Court found dispositive was that "Ceballos' . . . expressions were made pursuant to his duties as a calendar deputy."[37] The Court reasoned that where employee speech is "made pursuant to official duties," these restrictions do "not infringe any liberties the employee might have enjoyed as a private citizen."[38] Because Ceballos made his statements pursuant to his official duties, he was not speaking as a citizen and did not get First Amendment protection.[39]

Some circuits and scholars have interpreted *Garcetti* as providing an additional step in the *Pickering* test: initially asking whether the speech was made pursuant to his or her official duties before proceeding to the typical *Pickering* analysis.[40] One issue with this additional step is that the Court has never explicitly adopted a three-step inquiry. In *Garcetti*, the Court wrote:

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[32] Garcetti v. Ceballos, 547 U.S. 410, 413–14 (2006).
[33] *Id.*
[34] *Id.* at 415.
[35] *Id.* at 421.
[36] *Id.*
[37] *Id.*
[38] *Garcetti*, 547 U.S. at 421–22.
[39] *Id.*
[40] *See, e.g.*, Diaz, *supra* note 17, at 572; *see also infra* Part IV.

> The first [step] requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then . . . the question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.[41]

The Court in *Lane v. Franks* reaffirmed that the analysis was a two-step inquiry and gave further insight on the *Garcetti* holding, writing that "[i]n describing the first step in [the two-step inquiry], *Garcetti* distinguished between employee speech and citizen speech."[42] *Garcetti* should be viewed not as establishing a new step, but rather as clarifying the ultimate purpose of the public concern analysis: distinguishing if the speech is *qua* citizen or *qua* public employee.

The second issue with adding an additional step is conceptual. Consider a hypothetical where a court holds that an employee's speech was indeed pursuant to his or her official duties, but instead of stopping its analysis, the court proceeds to determine if it was a matter of public concern. Let's also say that in this case the content strongly weighs in favor of finding the speech to be of public concern. Context will certainly weigh in favor of the speech not being a matter of public concern because the speech took place pursuant to the employee's official job duties.

Applying the three-step approach creates two troubling possibilities. The first would occur if the *Connick* factors were weighted in the type of content-heavy approach performed by the Tenth Circuit.[43] In this situation, there would likely be a finding that the speech was of public concern due to its content. But because the speech was said pursuant to the employee's official duties, the speech wouldn't get First Amendment protection under the additional step derived from *Garcetti*. This holding would be quite odd. In both inquiries, the context of the speech is the same: pursuant to official duties. In both inquiries, the ultimate objective is the same: to determine if the individual is speaking *qua* citizen. Yet, following this approach yields a result where context is dispositive in one inquiry and inconsequential in the other.

The second possibility is that a context-heavy analysis is performed. In this situation, the public concern analysis would yield the same result as the first step: because the speech was made pursuant to the employee's official duties, regardless of the content, the speech would not be on a matter of public concern. But under this approach, the first step is entirely superfluous. If context is dispositive in the public concern analysis when individuals are found to be speaking pursuant to their official duties, then there is no reason to even have the first step.

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[41] *Garcetti*, 547 U.S. at 418.
[42] Lane v. Franks, 573 U.S. 228, 237 (2014).
[43] *See supra* note 28 and accompanying text.

When applying the *Connick* factors, courts should instead ask whether one factor is particularly relevant to determining if the speech is *qua* citizen or *qua* public employee. For example, where individuals speak pursuant to their official duties, then that context is particularly relevant to whether they are speaking *qua* public employee and should be weighted more heavily, as *Garcetti* holds. This interpretation not only follows the court's traditional two-step test, but has the benefit of recognizing that the ideas of citizenship and public concern heavily overlap. This analysis also lends itself to broad, nuanced applicability rather than being narrowly focused. For example, the next section will explore why an individual speaking in the context of being a sworn witness should *per se* be speaking as a citizen on a matter of public concern.

V. PUBLIC EMPLOYEE TESTIMONY AND CONTEXT-HEAVY ANALYSIS

The Supreme Court has long recognized that citizens not only have a right to provide testimony, but a duty.[44] In 1895, the Court wrote that "every citizen" has the affirmative duty to assist in prosecuting, securing punishment for breach of the peace, and to act as part of the posse comitatus in upholding the laws.[45] These duties are rooted in the English common law.[46] As early as 1562, statutes were established compelling witnesses to appear and testify.[47] In 1612, Lord Francis Bacon described providing sworn testimony as an affirmative duty, saying that "all subjects, without distinction of degrees, owe to the King tribute and service, not only of their deed and hand, but of their knowledge and discovery."[48]

Various circuits have held that because of the citizen's duty to provide testimony, public employee testimony will never be "pursuant to their job duties." The Seventh Circuit, in *Chrzanowski v. Bianchi*, held that "when a public employee gives testimony pursuant to a subpoena, fulfilling the 'general obligation of [every] citizen to appear before a grand jury or at trial,' he speaks 'as a citizen' for First Amendment purposes."[49] The Third Circuit, in *Reilly v. City of Atlantic City*, similarly held that "[w]hen a government employee testifies truthfully, s/he is not 'simply performing his or her job duties,' rather, the employee is acting as a citizen and is bound by the dictates of the court and the rules of evidence."[50] Both circuits interpreted *Garcetti* as if it established a discrete step separate from the public concern analysis. Declaring that the testimony constituted citizen speech, the Third and Seventh Circuit found that

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[44] *In re* Quarles, 158 U.S. 532, 535–36 (1895).

[45] *Id.* at 535.

[46] Blair v. United States, 250 U.S. 273, 279–80 (1919).

[47] *Id.* at 279.

[48] *Id.* at 279–280 (quoting 2 How. St. Tr. 769, 778).

[49] Chrzanowski v. Bianchi, 725 F.3d 734, 741 (7th Cir. 2013) (quoting Branzburg v. Hayes, 408 U.S. 665, 686 (1972)).

[50] Reilly v. City of Atl. City, 532 F.3d 216, 231 (3d Cir. 2008) (citation omitted) (quoting Garcetti v. Ceballos, 547 U.S. 410, 423 (2006)).

sworn testimony was not foreclosed from First Amendment protection by *Garcetti*, but held open the question of whether the speech was of public concern.[51]

Circuits have largely been confused about how citizenship factors into the public concern analysis. Even with a *per se* rule that sworn testimony constitutes citizen speech, the Seventh Circuit has followed the content-heavy public concern analysis. In *Wright v. Illinois Department of Children & Family Services*, the Seventh Circuit wrote that it "share[d] [the] concern for the integrity of the judicial process, [but] [its] cases have rejected a blanket rule" finding that an "employee who testifies before an official government adjudicatory or fact-finding body speaks in a context that is inherently of public concern."[52]

This analysis is confused because to speak as a citizen is to speak as an individual who has a duty to the general public, and therefore when the duty is unfulfilled it is the general public who suffers. The Supreme Court has recognized that the particular duty of a citizen to provide testimony is not a private duty, such as a fiduciary duty or a contractual duty, but a duty which is a "necessary contribution of the individual to the welfare of the public."[53] Compelling written and oral testimony is "essential to the very existence and constitution of the court of common law, [as the court] could not possibly proceed with due effect without them."[54] The affirmative duty of citizens to provide sworn testimony to the public also explains the potential consequences for failing to meet that duty. For example, "the extraordinary power to jail those who refuse to cooperate with grand juries is rooted in the 'longstanding principle that the public . . . has a right to every man's evidence.'"[55] There are exceptions to this general duty of the citizen to provide testimony. Most notably, the constitutional exemption under the Fifth Amendment, declaring that no person shall be compelled, in any criminal case, to be a witness against himself.[56] But the Court has said these exceptions only exist in the most exceptional of circumstances.[57]

If a public employee is fulfilling a duty as a citizen when testifying, and this is a duty owed not to a private party but to the public, then providing for free and unobstructed testimony would be a concern for every citizen. This interest exists regardless of the content of the testimony. A public employee providing sworn testimony is either fulfilling a duty to the public by providing truthful

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[51] *See Chrzanowski*, 725 F.3d at 741; *Reilly*, 532 F.3d at 231.

[52] Wright v. Illinois Dep't of Children & Family Servs., 40 F.3d 1492, 1505 (7th Cir. 1994).

[53] Blair v. United States, 250 U.S. 273, 281 (1919).

[54] Wilson v. United States, 221 U.S. 361, 372 (1911) (quoting Amey v. Long, 9 East, 484).

[55] *Chrzanowski*, 725 F.3d at 742 (quoting Branzburg v. Hayes, 408 U.S. 665, 688 (1972)).

[56] *See* Brown v. Walker, 161 U.S. 591, 629 (1896).

[57] *See* Blair, 250 U.S. at 281.

testimony or failing to meet that duty by providing false testimony. Where a duty is necessary to the welfare of the public, fulfilling the duty by providing truthful testimony maintains the welfare of the public. Failing to meet the duty by providing false testimony hurts the welfare of the public. In either case, the precise content of the testimony is irrelevant. It is the context of the public employee giving sworn testimony which makes it a matter of public concern.

Concerns over false testimony or testimony particularly damaging to the employer can be dealt with when balancing the government employer's interest with the individual's interest.[58] In those circumstances where false testimony is provided, the individual's interest in commenting on a matter of public concern could be quite small, and the government employer's managerial interest might be quite large. Similarly, if an employee says something that might be substantially damaging to efficient government operation, then even if the speaker had a strong personal interest, retaliation by the employer may be constitutionally permissible.

However, in situations such as a secretary providing testimony in a divorce proceeding, where the sworn testimony is not damaging to government operations, weighing context as dispositive in the public concern analysis allows for important First Amendment protection. Rather than stopping the inquiry during the public concern analysis, the context-heavy approach allows a court to proceed to balance the individual's interest against the government's interest. In the hypothetical, the secretary has an interest in commenting, since she is fulfilling a duty to the public by providing testimony, whereas any harm to the government's managerial efficiency is minimal. By providing this protection, the context-heavy analysis incentivizes truthful testimony by the secretary, stops unwarranted retaliation by the government, and correctly recognizes that the secretary fulfills a duty to the public at large when giving sworn testimony.

VI. CONCLUSION

Rather than blindly weighing factors when conducting the public concern analysis, courts should instead weigh the *Connick* factors focusing on how relevant they are to the ultimate purpose driving the public concern analysis: to determine whether the individual is speaking as a citizen or as a government employee. Where public employees speak pursuant to their official duties, context is dispositive, as *Garcetti* holds. Similarly, where public employees are giving sworn testimony, context should be dispositive, because it is the context of giving sworn testimony which creates their duty as citizens to the public. This weighted analysis not only faithfully follows the Court's two-step approach, but will allow for a more nuanced, case-specific analysis in the future.

[58] *See supra* Part I (describing the balancing test).