

# NOTRE DAME LAW REVIEW ONLINE



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## PRACTITIONER COMMENT

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### COMPLIANCE WITH MOST FAVORED CUSTOMER CLAUSES: GIVING MEANING TO AMBIGUOUS TERMS WHILE AVOIDING FALSE CLAIMS ACT ALLEGATIONS

*Mitchell S. Ettinger & James C. Altman\**

Federal and state contracting authorities more frequently are including Most Favored Customer (MFC) clauses in contracts for procurement of privately manufactured products. These clauses seek to ensure that the contracting authority (typically a federal or state agency) receives at least as favorable pricing as other customers making similar purchases. For example, the government agency may request that the contractor warrant that the prices it charges under the contract will be as favorable as those offered to other parties purchasing similar products of similar quantity under similar terms and conditions. In theory, the request to be treated equally to others making similar purchases is reasonable.

In practice, however, it is challenging to satisfy MFC clauses because they often contain ambiguous comparative terms that make MFC compliance an onerous undertaking. Specifically, in a world of complex products and services, it often is difficult—if not impossible—to identify “similar” products sold pursuant to “similar” terms and conditions. Making compliance even more challenging are those MFC clauses that do not define the subset of purchasers (basis of award customers) who are to be compared for purposes of determining whether a price adjustment is necessary to satisfy the contractor’s MFC obligations. Some MFC clauses are not limited to any subset of purchasers, effectively requiring the

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contractor to search all U.S.-based sales to ensure compliance with the clause.

This Comment will provide examples of MFC clauses, identify the most common problems contractors have in complying with such clauses, and provide recommendations for best practices to achieve compliance with the Clauses and thereby mitigate the potential for liability under the False Claims Act (FCA).<sup>1</sup>

## I. GOVERNMENT ENFORCEMENT OF MFC CLAUSES

MFC clauses routinely appear in federal and state contracts. Such a requirement reduces the burden on the contracting authority when negotiating pricing for the contract by ensuring that the government agency will receive the best pricing offered to other parties purchasing similar products and quantities. Because these clauses appear in contracts across the country, one would expect that there would be wealth of legal precedent arising in the context of breach of contract claims that could be used to derive best practices for compliance with such clauses. Unfortunately, that is not the case. Rather, the Department of Justice and state attorneys general enforce these clauses in the context of FCA cases, where treble damages and penalties are available. For this reason, best practices must be gleaned from the complaints and settlements in those cases.

### A. *The Federal Contracting Regulatory Landscape*

Federal government agencies, such as the General Services Administration (GSA), define the process for the procurement of privately manufactured commercial products.<sup>2</sup> To facilitate this procurement process, the GSA typically negotiates with private companies to execute Multiple Award Schedule (MAS) contracts governing the sale of goods and services.<sup>3</sup> A MAS contract benefits private companies because, once negotiated and executed, the government lists that company's products in a schedule, which is available to all government agencies.<sup>4</sup> The schedule

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<sup>1</sup> 31 U.S.C. §§ 3729–33 (2013). The civil False Claims Act, which Congress enacted during the Civil War era, prohibits the knowing submission of a false claim that is paid in whole or in part from the federal fisc. The statute provides for treble damages and up to \$11,000 penalty for each false claim. In fiscal year 2014, the Department of Justice collected approximately \$6 billion in civil False Claims Act settlements and verdicts. *Id.*; see also Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Justice Department Recovers Nearly \$6 Billion from False Claims Act Cases in Fiscal Year 2014 (Nov. 20, 2014), available at <http://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014>.

<sup>2</sup> See 48 C.F.R. §§ 1.103 (2013); see generally 48 C.F.R. § 1 (2013) (codifying the Federal Acquisition Regulations).

<sup>3</sup> See *id.* § 1.102.

<sup>4</sup> *Id.* § 8.402.

provides a “fair and reasonable” price at which the federal agencies may purchase the listed products or services. A MAS contract thus allows companies direct access to the expansive federal marketplace, where they can sell their products in large volume to clients with substantial buying power.

#### 1. No Requirement to Provide the Federal Government with the Best Price

There are myriad rules and regulations governing the sale of products and services to the federal government. Title 48 of the Code of Federal Regulations (CFR), the Federal Acquisition Regulations (FAR), and various agency supplements, such as the Defense Federal Acquisition Regulation Supplement (DFARS), codify these rules and regulations.<sup>5</sup> The government designs these regulations to ensure it receives a “fair and reasonable” price for the products it purchases.<sup>6</sup> However, no regulation requires that the federal government receive the best price available in the marketplace. Indeed, although the federal regulations create an affirmative obligation for the government contracting officer to seek the “best price” available, there is no federal regulatory requirement that the contractor do so. The regulations provide that “[t]he Government will seek to obtain the offeror’s best price (the best price given to the most favored customer).”<sup>7</sup> Further, “[i]f the best price is not offered to the Government, [the contracting officer] should ask the offeror to identify and explain the reason for any differences.”<sup>8</sup> Consequently, the government contracting officer is not required by regulation to obtain the actual “best price” available in the marketplace; the federal regulations acknowledge the business reality that “conditions of commercial sales vary and there may be legitimate reasons why the best price is not achieved.”<sup>9</sup> Rather, the regulations require contracting officers to understand the disparities between the price offered to the government and the actual “best price” available in the commercial sector.<sup>10</sup> As this Comment will discuss below, interchanges with the contracting officer regarding the contractor’s commercial sales data (such as discounts, rebates and special incentives) often serve as the basis for False Claims Act allegations.

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5 Title 48 of the Code of Federal Regulations codifies both the FAR and DFARS. *See id.* §§ 1.101, 201.104.

6 *Id.* § 15.402.

7 *Id.* § 538.270(a).

8 *Id.* § 538.270(c)(7).

9 *Id.* § 538.270(a).

10 *Id.* § 538.270(c)(7).

## 2. The Price Reduction Clause

Many government contracts contain a Price Reduction Clause (PRC). The federal PRC governs required price adjustments to federal contracts.<sup>11</sup> Through this PRC, the contracting officer establishes a “basis of award” customer as the benchmark by which future discounts to the government will be measured. The basis of award customer can be a class of customers (e.g., educational institutions) or a specified subset of customers.<sup>12</sup> The relationship between the discounts provided to the governmental agency must remain consistent with those offered to the basis of award customer. As the regulations indicate, “[a]ny change in the Contractor’s commercial pricing or discount arrangement applicable to the identified customer (or category of customers)”<sup>13</sup> triggers the PRC. In addition, the contractor has an affirmative duty to notify the government if there is any change in pricing to a basis of award customer that would trigger the PRC.<sup>14</sup> In addition to liability for breach of contract, a failure to comply with PRC obligations may serve as a basis for FCA allegations.<sup>15</sup> MFC clauses are an analogue to the PRC because they too are designed to ensure that government purchases are subject to the same discounting practices as other customers, including those in the commercial sector.

## 3. Most Favored Customer Clauses

There is no federal regulatory requirement for the contracting officer to include a “most favored customer” clause in a GSA contract. Indeed, there is no standardized MFC in the FAR. Perhaps it is for this reason that the MFC clauses surfacing in federal contracts vary broadly. Although the concept may appear simple in form (i.e., giving the government at least the best price offered to other customers making similar purchases), in application, compliance with MFC obligations can prove to be quite challenging. The terms of MFC clauses often are broadly constructed without consideration to the burden placed on the contractor to comply with them. Consider the following examples:

- Contractor warrants that the price(s) are not less favorable than those extended to any other customer (whether government or commercial) for the same or similar articles or services in similar quantities;

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11 *See id.* § 552.238-75.

12 *See id.* § 552.238-75(a).

13 *Id.*

14 *Id.* § 552.238-75(b) (“the Contractor shall report . . . all price reductions”).

15 *See* 31 U.S.C. §§ 3729–33 (2012).

- The Contractor certifies that the prices, warranties, conditions, benefits and terms are at least equal to or more favorable than the prices, warranties, conditions, benefits and terms quoted by the Contractor to any customers for the same or a substantially similar quantity and type of service; or
- The Contractor warrants that prices of materials, equipment and services set forth herein do not exceed those charged by the Contractor to any other customer purchasing the same goods or services under similar conditions and in like or similar quantities.

Broad MFC clauses, like those appearing above, are particularly difficult from a compliance perspective. First, there is no limitation with respect to the basis of award customer, thus requiring compliance efforts to include a survey of sales to all customers. Second, defining the scope of products or services covered as being those that are “similar” renders the clause susceptible to competing interpretations as to what the parties intended. Third, additional ambiguity is injected into the analysis where the clause defines the triggering quantity only as being “similar” to the government’s purchase volume. It is axiomatic that the quantity purchased may affect a seller’s willingness to increase the discount offered. Fourth, what constitutes similar terms and conditions (e.g., warranties and benefits) provides yet another layer of complexity that can differentiate transactions and remove them from the purview of a MFC clause.

### *B. State Regulations*

Many state contracting agencies include MFC clauses in their requests for proposals as a required term for any contract award. Like their federal counterparts, these clauses vary significantly. Some include a basis of award customer that is well defined (e.g., other educational institutions within the state), while others contain no limitation on the basis of award customer. We have seen some clauses that include the “similar” quantity provision and others that are broader (e.g., similar quantity or fewer). Moreover, the state MFC clauses—like those seen in GSA contracts—contain no temporal limitations when defining relevant transactions, leaving to the contractor the burden of determining when the price adjustment period for any given transaction begins and ends. Also like their federal counterparts, state MFC clauses are principally enforced through FCA cases.

As of July 2014, thirty states, including the District of Columbia, had enacted iterations of the Federal False Claims Act.<sup>16</sup> Local municipalities enact false claims statutes, as well.<sup>17</sup> As is the case with the Federal FCA, invoices and certifications of contractual compliance, whether express or implied, may form the basis of an FCA allegation. Florida, for example, requires contractors “at least annually” to submit an affidavit that the contractor is in compliance with contractual MFC clauses.<sup>18</sup>

## II. ENFORCEMENT OF MFC CLAUSES THROUGH FEDERAL AND STATE FCAS

Although there are no reported FCA cases tried to verdict based upon an alleged violation of an MFC Clause, FCA caselaw generally, coupled with complaints filed by the government and relators, provide useful insight to a company formulating its compliance strategy with respect to the MFC clauses. The allegations in the publicly available complaints typically are based on a post hoc evaluation of data relating to commercial sales, and the claim that the government should have been offered the discounts identified during the review. Consider the allegations in the following illustrative, publicly available complaints:

- Ward Diesel Filter Systems “failed to disclose its actual best price . . . Ward submitted false pricing information and falsely disclosed that the prices offered through the GSA were ‘equal to or better’ than the ‘best price’ offered to ‘any’ customer . . . . Ward’s failure to report the pricing changes to the GSA is fraud.”<sup>19</sup>
- “Corning defrauded the government by[] failing to provide the government with price discounts provided to private customers such that private customers received more favorable pricing[.]”<sup>20</sup>
- “EMC did not accurately disclose its business practices and discounts . . . as required by federal law . . . . The defective

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16 See *States with False Claims Acts*, TAXPAYERS AGAINST FRAUD EDUCATION FUND, <http://www.taf.org/states-false-claims-acts> (last visited Dec. 30, 2014).

17 See, e.g., ALLEGHENY COUNTY, PA., FALSE CLAIMS ORDINANCE, ch. 485 (2011).

18 FLA. STAT. § 216.0113(2) (2011).

19 Complaint at ¶¶ 38–40, *United States ex rel. Siska v. Ward Diesel Filter Sys.*, No. 10CV00111 (D.N.H. Mar. 22, 2010).

20 Complaint at 1, *United States ex rel. Jones v. Corning Inc.*, No. 1:10CV01692 (D.D.C. Oct. 5, 2010).

disclosures by EMC led to the government paying significantly higher prices.”<sup>21</sup>

- Oracle “fail[ed] to disclose deep discounts [it] offered to commercial customers when [it] sold software products to federal government agencies through a General Services Administration Multiple Award Schedule.”<sup>22</sup>
- Network Appliance (NetApp) “promis[ed] to adhere to the contract provisions regarding . . . price reduction . . . [but] failed to do so. . . . The defendant, during the course of its contract with GSA, gave commercial customers higher discounts than it gave GSA in contravention of the provisions of [the] contract.”<sup>23</sup>

Although each of these cases involved unique facts and circumstances, their unifying theme is the purported failure to disclose accurate pricing and discounts—either during negotiations for the underlying contract or in the context of post-award pricing of government transactions.

In *Corning*, for instance, the *qui tam* relator alleged that Corning provided more favorable pricing to other customers.<sup>24</sup> The more favorable pricing terms included rebates and free laboratory equipment in exchange for purchasing Corning products, which Corning purportedly used “as a way to secure or reward customers for their business.”<sup>25</sup> For example, the complaint alleged:

[T]he University of Pennsylvania, a private institution, could purchase a particular type of cell plate for \$131.90 under its . . . Contract. Corning’s GSA contract price for the same plates was \$89.97. When the University of Pennsylvania received a ‘buy 1, get 1 free’ deal on these plates, the price was reduced to \$65.95, which is \$24.02, or approximately 27%, below GSA pricing.<sup>26</sup>

The relator alleged that this promotion amounted to a “discount” that negated the government’s status as a most favored customer and subsequently became actionable under the FCA when Corning certified

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21 Complaint in Intervention at ¶¶ 31–32, *United States ex rel. Rille v. EMC Corp.*, No. 1:09-cv-00628 (E.D. Ark. Jun. 6, 2008).

22 Complaint at 1, *United States ex rel. Frascella v. Oracle USA*, 751 F. Supp. 2d 842 (E.D. Va. 2010) (No. 1:07CV00529 LMB/TRJ).

23 Complaint at ¶¶ 26–27, *United States ex rel. Kapuscinski v. Network Appliance Inc.*, No. 06CV00675 (D.D.C. Apr. 13, 2006).

24 Complaint at ¶ 20, *Corning*, No. 1:10CV01692.

25 *Id.* at ¶ 25.

26 *Id.* at ¶ 31.

compliance with the contract. Ultimately, Corning settled the action for \$5.65 million.<sup>27</sup>

Recent settlements make clear that FCA cases, based upon purported deficiencies in pricing practices, are likely to be the continued focus of the federal and state agencies, as well as whistleblowers. In 2009, NetApp agreed to pay \$128 million to settle the allegations that it breached its pricing obligations to the federal government.<sup>28</sup> In 2011, Oracle paid \$199.5 million to resolve allegations that it “knowingly failed to meet its contractual obligations to provide GSA with current, accurate and complete information about its commercial sales practices, including discounts offered to other customers.”<sup>29</sup> Similar allegations in 2012 against hardware company W.W. Grainger resulted in a \$70 million settlement.<sup>30</sup> In August 2014, Hewlett-Packard, a manufacturer of IT and other computer products, paid \$32.5 million to settle allegations that it violated an MFC clause by “failing to comply with pricing terms of [its] contract [with USPS], including a requirement that HP provide prices that were no greater than those offered to HP customers with comparable contracts.”<sup>31</sup>

As designed by Congress, the government may not use the FCA as an enforcement tool for mere perceived breaches of contract.<sup>32</sup> Yet, because the FCA does not require proof of *scienter*,<sup>33</sup> it is difficult for contractors to establish at the motion to dismiss stage that the action alleges a mere

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27 Press Release, Office of Pub. Affairs, U.S. Dep’t of Justice, New York-based Corning Incorporated to Pay US \$5.65 Million to Resolve False Claims Allegations (Mar. 8, 2013), available at <http://www.justice.gov/opa/pr/new-york-based-corning-incorporated-pay-us-565-million-resolve-false-claims-allegations>.

28 Press Release, Office of Pub. Affairs, U.S. Dep’t of Justice, GSA Contractor NetApp Agrees to Pay U.S. \$128 Million to Resolve Contract Fraud Allegations (Apr. 15, 2009), available at <http://www.justice.gov/opa/pr/gsa-contractor-netapp-agrees-pay-us-128-million-resolve-contract-fraud-allegations>.

29 Press Release, Office of Pub. Affairs, U.S. Dep’t of Justice, Oracle Agrees to Pay U.S. \$199.5 Million to Resolve False Claims Act Lawsuit (Oct. 6, 2011), available at <http://www.justice.gov/opa/pr/oracle-agrees-pay-us-1995-million-resolve-false-claims-act-lawsuit>.

30 Press Release, Office of Pub. Affairs, U.S. Dep’t of Justice, Illinois-based Hardware Distributor W.W. Grainger Pays US \$70 Million to Resolve False Claims Act Allegations (Dec. 26, 2012), available at <http://www.justice.gov/opa/pr/illinois-based-hardware-distributor-ww-grainger-pays-us-70-million-resolve-false-claims-act>.

31 Press Release, Office of Pub. Affairs, U.S. Dep’t of Justice, Hewlett-Packard Company Agrees to Pay \$32.5 Million for Alleged Overbilling of the U.S. Postal Service (Aug. 1, 2014), available at <http://www.justice.gov/opa/pr/hewlett-packard-company-agrees-pay-325-million-alleged-overbilling-us-postal-service>.

32 See, e.g., *United States ex rel. Owens v. First Kuwaiti Gen. Trading & Contracting Co.*, 612 F.3d 724, 728 (4th Cir. 2010) (“[The FCA] does not allow a *qui tam* relator to shoehorn what is, in essence, a breach of contract action into a claim that is cognizable under the False Claims Act” (internal quotation marks omitted)).

33 See 1 JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 1.04[B] (4th ed. Supp. 2014).



breach of contract as opposed to a basis upon which FCA liability may be predicated. Indeed, the government and relators frequently contend that a contractor's certification of compliance with the contract, whether express or implied,<sup>34</sup> constitutes a knowing violation of the FCA because it was based upon a willful disregard of or a deliberate indifference to the truth.<sup>35</sup>

A case alleging an FCA violation as a result of the breach of an MFC clause necessarily will force courts to determine the proper interpretation of a contract term and, based on that interpretation, whether there was a knowing violation giving rise to FCA liability. The ambiguous nature of MFC clauses ultimately should inure to the benefit of the contractor, as a number of courts have refused to find FCA liability on the basis of imprecise contract terms.<sup>36</sup>

The decision in *United States v. Data Translation Inc.*,<sup>37</sup> a case involving allegations that the contractor failed to accurately disclose its discount practices, provides a practical approach to disclosure obligations. Data Translation Inc. (DTI) sold computer boards to federal government agencies via a MAS contract at prices negotiated by the GSA. The government brought suit against DTI, alleging it violated the FCA by failing to properly disclose the prices at which it sold the computer boards to other nongovernmental customers. The relevant contract term was as follows:

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34 See, e.g., *Shaw v. AAA Engineering & Drafting, Inc.*, 213 F.3d 519, 531 (10th Cir. 2000) (holding that invoices submitted after false certifications of compliance with a contract were cognizable under the "false implied certification theory" of FCA liability).

35 See BOESE, *supra* note 33, at § 1.04[B] (discussing the lowered intent/knowledge requirements of the federal FCA following its amendment in 1986, and stating that "the government need only show that the defendant . . . acted in deliberate indifference . . . or . . . reckless disregard of the truth of the information").

36 See, e.g., *United States ex rel. Thomas v. Siemens AG*, 991 F. Supp. 2d 540, 568 (E.D. Pa. 2014) (granting defendant's motion for summary judgment in a case alleging that the defendant violated the FCA by failing to disclose discounts given to basis of award customers, because "[w]ithout more than a relator's subjective interpretation of an imprecise contractual provision, a defendant's reasonable interpretation of its legal obligation precludes a finding that the defendant had knowledge of its falsity."); see also *United States v. Basin Elec. Power Coop.*, 248 F.3d 781, 805 (8th Cir. 2001) (holding that the relator had failed to prove an FCA violation where the defendant's "interpretation and performance under the contract was reasonable," thereby eliminating the possibility that the defendant "acted with the requisite knowledge."); *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018, 1020 (7th Cir. 1999) ("[I]mprecise statements or differences in interpretation growing out of a disputed legal question are similarly not false under the FCA . . . [T]he FCA is not an appropriate vehicle for policing technical compliance with administrative regulations."). But see *United States ex rel. Vosika v. Starkey Labs., Inc.*, No. 01-709 (DWF/SRN), 2004 U.S. Dist. LEXIS 18349, at \*10-12 (D. Minn. Sept. 8, 2004) (distinguishing *United States v. Data Translation* and denying the defendant's motion to dismiss).

37 984 F.2d 1256 (1st Cir. 1992).

If, subsequent to the award of any contract resulting from this solicitation, it is found that any price negotiated . . . was increased by any significant amount because the prices, data, and facts were not as stated in the offeror's "Certificate of Established Catalog or Market Price," then the contract price(s) shall be reduced by such amount and the contract shall be modified in writing to reflect such adjustment.<sup>38</sup>

The court characterized the government's 'breach of contract' claim as resting essentially on the proposition that DTI, when it submitting its offer, did not "disclose all the computer board price discounts it gave to its non-governmental customers."<sup>39</sup> Justice Breyer, then a member of the First Circuit, opined that "one must examine the relevant provisions, not necessarily as the GSA intended them, but rather from the perspective of a *reasonable person* in DTI's position."<sup>40</sup> The court emphasized that the contract should be given a practical—as opposed to a literal—interpretation. Justice Breyer observed that "[t]he Government has asked . . . this court to read the contract's 'discount disclosure' language literally, as requiring DTI to reveal *every price discount* it provided *any* of its customers *ever*—a revelation that DTI must concede it did not make."<sup>41</sup> The court held:

No reasonable person, negotiating with [the GSA] could have believed that the Government really wanted the complete and total disclosure for which the language seems to ask. . . . An ordinary business person would not seem likely to interpret the form literally, for, read literally, the form asks a business to shoulder a compliance burden which will often seem inordinately difficult or impossible to carry out.<sup>42</sup>

The court concluded that a policy requiring the broad disclosure the GSA demanded would create an unreasonable and undesirable compliance situation.<sup>43</sup> In attempting to fashion a practical interpretation of the contract clause, the court's explanation focused on *relevant* data. Importantly, the court stated that the contract only required DTI "to disclose *significantly relevant* price discounts that DTI *normally* provided other customers making purchases *roughly comparable* to the agency purchases the Government contemplated would occur under the MAS program."<sup>44</sup>

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38 *Id.* at 1258 (alteration in original) (emphasis in original).

39 *Id.*

40 *Id.* at 1259 (emphasis in original).

41 *Id.* at 1260.

42 *Id.* at 1261.

43 *Id.* at 1262 ("[A] system that lays down a literal rule with which compliance is inordinately difficult, turning nearly everyone into a rule violator, and then permits the agency to pick and choose when and where to enforce the rule, is obviously undesirable").

44 *Id.* at 1263 (emphasis in original).

*Data Translation* supports the contention that MFC contract terms should be interpreted with a practical view toward compliance. The terms of such clauses should be interpreted to ensure commercial viability, fulfilling its purpose of ensuring that the contracting agency is treated fairly in light of other similarly situated purchasers and providing a compliance landscape that is not overly burdensome or expensive to implement.<sup>45</sup>

### III. BEST PRACTICES FOR COMPLYING WITH MFC OBLIGATIONS

#### A. *Define the Basis of Award Customer Narrowly and with Specificity*

When formulating a strategy for complying with MFC obligations, companies need to first analyze their IT systems to understand what data is captured, the form in which it is maintained, and how readily it may be accessed. The answers to these basic questions will inform the negotiating strategy with the contracting agency. For example, one may wish to negotiate the basis of award customer(s) based on how the data is stored in the company's system (e.g., state, local or educational customers). Recognizing the inherent limitations on the ability to access and process sales and pricing data is essential to understanding what the company is able to achieve with respect to MFC compliance. In this regard, limiting the basis of award customer(s) to specific accounts makes compliance with MFC obligations feasible. Whenever possible, identify specific customers (e.g., "entities X, Y and Z") or at least a specific business segment (e.g., educational institutions within the state). Limitations of this kind will enable the company more readily to conduct the necessary comparisons and to establish compliance with the clause.

#### B. *Develop a Written Protocol for Compliance with MFC Clauses*

Recognizing, however, that contracting authorities are not likely to negotiate the scope of their MFC clauses, companies are left to develop a compliance regimen that is practical and will withstand the test of commercial reasonableness. To do so, the contractor must give meaning to most ambiguous of terms, including "similar" or "substantially similar" products or services, quantities, and terms and conditions. To ensure consistency in application and establish the contractor's good faith effort to comply with its MFC obligations, the contractor should (i) develop a

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<sup>45</sup> State caselaw is not well developed as many of the state actions arise in the context of a federal suit. It is reasonable, however, to assume that the state courts will follow the lead of the federal courts that have addressed the same or analogous issues. *See, e.g.*, S.F. Unified Sch. Dist. *ex rel.* Contreras v. Laidlaw Transit Inc., 182 Cal. App. 4th 438, 447 (2010) ("Given the 'very close similarity' of the [California FCA] to the federal False Claims Act . . . 'it is appropriate to turn to federal cases for guidance in interpreting the [California FCA].'" (citations omitted)).

written protocol to be followed by the individuals responsible for compliance with MFC obligations; (ii) train its personnel to that protocol and document completion of the training; (iii) periodically audit compliance with the protocol; and (iv) make appropriate disclosures to the governmental contracting agency at the appropriate time.

When formulating a protocol for compliance with MFC clauses, the contractor must take into account the different clauses within its contracts. In this regard, although it may be possible to develop a single protocol for use with all MFC clauses, the approach must be based on the specific requirements of existing contractual obligations and must be reexamined in the context of future bids for contracts. Although it may be most efficient to develop the compliance protocol on the basis of the broadest MFC clause, that may prove to be too costly. For this reason, the protocol probably should be written on a generic basis with instructions that permit it to be applied to a variety of clauses.

#### 1. Temporal Limitations

The MFC compliance protocol should give definition to the ambiguous terms in the MFC clause. To the extent MFC clauses do not provide for any temporal limitations, the company should adopt a commercially reasonable time frame for comparison of basis of award customer sales. What is commercially reasonable will depend on the volatility of pricing practices in the particular industry—the most volatile the pricing model, the shorter the term of comparison. A solid standard is the current fiscal quarter. In other words, at the end of each quarter, the company could look back to the beginning of the quarter to ensure that the basis of award customers did not receive better pricing on relevant transactions. If no adjustment is necessary, the company should document its analysis, demonstrating its good faith efforts to comply with the MFC clause, and maintain the work product in the contract files. If an adjustment is necessary to comply with the MFC clause, the company should notify the contracting agency that it is entitled to a credit or rebate pursuant to the MFC clause.

#### 2. Give Meaning to Ambiguous Terms

##### 1. Same or similar products

The protocol also must address and give meaning to the inherently ambiguous terms appearing in MFC clauses. In some industries what constitutes the same or similar products may be readily discernable. This is especially true where there is no ability for the consumer to customize the product. Where the product offering includes different options or is susceptible to customization, the protocol should provide a concrete

methodology for isolating potentially relevant sales. It is not possible to provide a one-size fits all approach to this dilemma, but the company should start with the product model and determine what percentage over the list price—due to customization—should be considered within the relevant subset of sales. For example, a model that has a list price for \$100 and options valued at up to \$50 has a ceiling list price of \$150. The company could pick a range of list prices (e.g., +/- 5-7%) for which it would consider purchases of that model to be the “same” or “similar” for purposes of applying the MFC clause. This approach eliminates the need to conduct analysis of what options or customization the purchaser selected. This approach is premised on the principle that the sale of the same model within a specified list price range, although differently equipped, should be discounted similarly. Alternatively, if the company’s IT system facilitates sorting of transactions by model and options, the company could design a more specific protocol that is not price-based.

b. Same or similar quantities

The same approach could be used to define “similar” quantities. Once transactions with “similar products” are identified, it is necessary to identify the subset of those transactions involving the same approximate number of products. Many variables can affect this analysis. If the potentially relevant like-kind transactions involve only the single product at issue, then the analysis is fairly straightforward. The company need only designate a quantity range for inclusion in the analysis (e.g., +/- 5%) (a purchase of 100 units would trigger the same product sales of 95–105 units). Where the potentially like-kind transactions include other products and services, the analysis can (and should) become more complicated. In this regard, the purchase of additional products or services increasing the overall purchase price can affect the overall discount offered to a customer. If the company isolates only one element of the transaction to compare the discount offered on a particular model, it is not truly an apples-to-apples comparison. For this reason, there should be a correlation in aggregate list price between the MFC clause order and the like-kind transaction. This requirement would avoid comparing orders with an aggregate list price valued at \$1,000 with another valued at \$5,000. Again, this can be addressed through a designated relevancy range.

c. Same terms and conditions

Finally, the analysis necessarily must take into account the terms and conditions of the sale. Certain aspects of a transaction (e.g., warranties and credit terms) may affect end pricing. Consider the discounting associated with the purchase of a new car. Dealers often offer 0% financing or, *in the alternative*, cash back of a specified amount. The purchaser is not offered

both; it is a choice because the financing terms affect the final purchase price. Extended payment terms or warranty provisions have associated costs. The MFC review protocol should take into account the specific terms and conditions offered by the company and should eliminate those transactions for which the difference in terms and conditions affects pricing to the customer. This can be accomplished by category (e.g., eliminate all transactions that have extended warranties).

### *C. Train and Audit to the Written Protocol*

Once the company develops and implements a written protocol for compliance with its MFC obligations, it should conduct formal training sessions with the personnel responsible for satisfying those obligations. This could include sales, contracting and compliance personnel. The training session(s) should be documented, including written materials used to present the protocol, attendance sheets and testing, if appropriate. In addition, period updates to the protocol and training may be necessary as the company develops experience and new MFC clauses are added to its contracts.

In addition, the company should audit compliance with the MFC protocol to ensure that it is accurately and consistently applied. The audits should confirm that the required evaluations are being conducted on a timely basis and that adjustments to contract pricing are achieved in accordance with the protocol. Documentation of the audit results is equally important, as it is a further demonstration of the company's good-faith effort to comply with its contractual obligations.

### *D. Notice to the Government of Pricing Adjustments*

Whenever the company determines that a price adjustment is required pursuant to an MFC clause, it should use a standardized letter to inform the customer of the adjustment. The notice should cite the specific provision of the contract and advise that a credit in a specified amount is due to the customer. Although not required, it is prudent to include in the letter the general process followed by the company in arriving at the credit. For example, the notice could advise the customer that the company compared transactions occurring in the same quarter that involved the same model purchased by the customer having a list price within +/- x percent and with an aggregate transaction value within +/- x percent. Those transactions completed under the same or similar terms and conditions (e.g., warranties and financing terms) were compared to the customer's transactions, and it was determined that the customer was entitled to a credit of \$X. Such notice provides transparency with respect to the company's MFC compliance protocol and creates a further hurdle to any subsequent FCA claim premised on noncompliance with the MFC clause. In this regard, the

government knowledge defense prevents the government from claiming fraud related to actions about which the government was aware.<sup>46</sup>

#### CONCLUSION

MFC clauses are becoming more prevalent in federal and state agency contracts. Contracting officers rely on these clauses to ensure that their customers receive favorable pricing, and generally are not amenable to negotiating changes to their standard clauses. Those clauses are broad in scope, often do not identify a basis of award customer, and contain ambiguous terms that require subjective analysis to implement. Given the litigation landscape, where the government has aggressively sought to enforce pricing provisions, including MFC clauses, through FCA actions, companies need to be vigilant in their compliance efforts.

Compliance with MFC clauses should be achieved through a written protocol that identifies the basis of award customer(s), imputes a commercially reasonable temporal limitation where the clause is silent, and provides definitions for the ambiguous terms consistent with the company's IT capabilities. The company should train and audit to its written protocol to ensure it is implemented accurately and effectively. In addition, the company should provide written notice to its customers when it determines a price adjustment is necessary. That notice should reveal the general parameters of the protocol and the amount of the credit due to the customer. Finally, the company should update its protocol to address new requirements created by MFC clauses in future contracts.

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<sup>46</sup> See, e.g., *United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 289 (4th Cir. 2002) ("Today, we join with our sister circuits and hold that the government's knowledge of the facts underlying an allegedly false record or statement can negate the scienter required for an FCA violation.").

QUASI-RIGHTS FOR QUASI-RELIGIOUS  
ORGANIZATIONS: A NEW FRAMEWORK RESOLVING  
THE RELIGIOUS-SECULAR DICHOTOMY AFTER  
*BURWELL V. HOBBY LOBBY*

*Krista M. Pikus\**

INTRODUCTION

With the proliferation of corporate entities, courts must determine what constitutional rights and statutory protection these corporations should enjoy. A major factor in the courts' assessment is where on the religious-secular spectrum the corporation falls. Although it has long been recognized that religious institutions can assert First Amendment free exercise rights, it is not necessarily clear that business corporations qualify as religious organizations warranting such privileges.<sup>1</sup>

On June 30, 2014, the Supreme Court decided the controversial and highly politicized case of *Burwell v. Hobby Lobby Stores, Inc.*<sup>2</sup> The Court held that Department of Health and Human Services (HHS) regulations imposing mandatory insurance coverage of contraceptives violated the Religious Freedom Restoration Act (RFRA) as applied to closely held for-profit corporations, because the mandate substantially burdened these corporations' religious exercise.<sup>3</sup> Many criticized this decision, largely on grounds that Hobby Lobby is not a "religious" organization.<sup>4</sup>

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1 See Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 6–16 (2013).

2 134 S. Ct. 2751 (2014).

3 *Id.* at 2775–79, 2785.

4 See, e.g., Noah Fitzgerald, *Beyond Accommodation: Hobby Lobby as a Challenge to Our Perception of Religious Organizations*, HUFFINGTON POST (Sept. 11, 2014, 5:59 AM),



The Court's analysis never officially declared Hobby Lobby religious or secular, yet it curiously described many of Hobby Lobby's business characteristics as incorporating both religious and secular elements.<sup>5</sup> The absence of a clear declaration whether Hobby Lobby is religious or secular is curious, because in earlier cases the Supreme Court often classified organizations as religious *or* secular before deciding if the organization had religious rights.<sup>6</sup> More importantly, though, the *Hobby Lobby* decision failed to recognize a third option beyond the religious-secular dichotomy: a "quasi-religious" classification. This classification would afford some, but not all, religious rights to organizations that embody religious characteristics while simultaneously maintaining secular aspects. Recognizing this middle-ground classification also suggests a useful amendment to the Affordable Care Act and similar statutes offering religious exemptions: granting quasi-rights to quasi-religious organizations in a way tailored to their particular corporate character.

This Comment aims to break free of the limiting religious-secular dichotomy by proposing a "quasi-religious" classification in order to achieve a more nuanced assignment of corporate religious exercise rights. Part I addresses the current legal standard for classifying organizations as religious and how the *Hobby Lobby* decision engaged that standard. Part II identifies and discusses the problems with the religious-secular dichotomy. Lastly, Part III proposes a new solution to the problem of corporate

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[http://www.huffingtonpost.com/noah-fitzgerel/hobby-lobby-a-challenge-hobby-lobby\\_b\\_5576513.html](http://www.huffingtonpost.com/noah-fitzgerel/hobby-lobby-a-challenge-hobby-lobby_b_5576513.html) ("Americans do not universally consent to the majority opinion's claim that Hobby Lobby constitutes a religious organization entitled to the same accommodations as religious communities like churches or religious non-profit organizations in the *first place*. In other words, this is an issue even more fundamental than an argument about accommodation; instead, it is an argument about whether Hobby Lobby has even the right to approach the table as a religious organization.").

<sup>5</sup> *Hobby Lobby*, 134 S. Ct. at 2766.

<sup>6</sup> See *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 388 (3d Cir. 2013) (characterizing Conestoga as "secular" and using that characterization to justify the conclusion that it cannot engage in the exercise of religion), *rev'd sub nom.*, *Burwell v. Hobby Lobby, Inc.*, 134 S. Ct. 2751 (2014); *Barnes-Wallace v. City of San Diego*, 704 F.3d 1067, 1072 (9th Cir. 2012) (following the stipulated facts, which identified Boy Scouts of America as a religious organization for purposes of resolving an Establishment Clause case); *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226 (3d Cir. 2007) (looking to for-profit status, among many other factors, in considering whether an organization is secular or religious for purposes of Title VII); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 75 (Cal. 2004) (finding that Catholic Charities did not qualify as a religious employer for purposes of the statutory exemption); *cf.* Susan J. Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 HARV. J.L. & PUB. POL'Y 741, 757 n.69 (2005) ("It is difficult to understand how one can come to the conclusion that the Boy Scouts is a religious organization and that Catholic Charities or a Catholic hospital is not.").

religious exercise rights that transcends the limitations of the religious-secular dichotomy and may also bring clarity to the *Hobby Lobby* decision.

### I. CURRENT LEGAL STANDARD FOR CLASSIFYING ORGANIZATIONS AS “RELIGIOUS”

The term “religious” appears in both constitutional and statutory frameworks and applies to organizations and individuals alike. Yet, currently there is no established test for defining a religious organization. Courts sometimes rely on the criteria defining an organization as religious for purposes of Title VII when evaluating the religious nature of an organization in other statutory or constitutional contexts.<sup>7</sup>

Two prominent cases—*LeBoon v. Lancaster Jewish Community Center Association*<sup>8</sup> and *Spencer v. World Vision*<sup>9</sup>—illuminate the several tests available for determining whether an organization is “religious” for purposes of Title VII. In *LeBoon*, Linda LeBoon worked for the Lancaster Jewish Community Center, a nonprofit corporation whose “mission was to enhance and promote Jewish life, identity, and continuity.”<sup>10</sup> The relationship between LeBoon and the executive director of the Center began deteriorating near the spring of 2002. The Center fired LeBoon on August 30, 2002, citing financial difficulties and the ability for other coworkers to assume her responsibilities.<sup>11</sup> LeBoon claimed the Center discriminated against her on the basis of her religion, because she was an Evangelical Christian.<sup>12</sup> The Third Circuit held that the Lancaster Jewish Community Center was a religious organization exempt from compliance with the religious discrimination prohibition provision of Title VII.<sup>13</sup> The court determined that, in analyzing whether a religious organization exemption applies under Title VII, “[a]ll significant religious and secular characteristics must be weighed to determine whether the [employer’s] purpose and character are primarily religious.”<sup>14</sup> The Third Circuit

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<sup>7</sup> See *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1136 (10th Cir. 2013) (discussing the *Hosanna-Tabor* case for its effect on free exercise rights of corporations). In determining whether an organization can be exempt for purposes of the Affordable Care Act, the Third Circuit in *Conestoga Wood* considered cases that dealt with religious exemptions for purposes of Title VII. See *Conestoga Wood*, 724 F.3d at 401 n.16 (Jordan, J., dissenting) (citing *Leboon*, 503 F.3d at 229–30), *rev’d sub nom.*, *Burwell v. Hobby Lobby, Inc.*, 134 S. Ct. 2751 (2014).

<sup>8</sup> 503 F.3d at 217.

<sup>9</sup> 633 F.3d 723 (9th Cir. 2011).

<sup>10</sup> *LeBoon*, 503 F.3d at 221 (internal quotation marks omitted).

<sup>11</sup> *Id.* at 221–22.

<sup>12</sup> *Id.* at 220.

<sup>13</sup> *Id.* at 231.

<sup>14</sup> *Id.* at 226 (quoting *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir. 1988)).

mentioned some factors typically relevant in determining whether an organization is “religious” for purposes of a Title VII exemption:

- (1) whether the entity operates for a profit,
- (2) whether it produces a secular product,
- (3) whether the entity’s articles of incorporation or other pertinent documents state a religious purpose,
- (4) whether it is owned, affiliated with[,] or financially supported by a formally religious entity such as a church or synagogue,
- (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees,
- (6) whether the entity holds itself out to the public as secular or sectarian,
- (7) whether the entity regularly includes prayer or other forms of worship in its activities,
- (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution,<sup>15</sup> and
- (9) whether its membership is made up by coreligionists.<sup>15</sup>

The *LeBoon* court noted, however, that not all the factors may be relevant in every case.<sup>16</sup> Rather, the factors should “be measured with reference to the particular religion.”<sup>17</sup>

In *Spencer v. World Vision, Inc.*,<sup>18</sup> the Ninth Circuit decided against using a checklist like the one in *LeBoon*, though disagreement remained on what standard should govern. In *World Vision*, former employees brought suit against World Vision, Inc., a nonprofit faith-based humanitarian organization, alleging termination on account of their religious beliefs in violation of Title VII.<sup>19</sup> At the time World Vision hired them, the employees “submitted required personal statements describing their ‘relationship with Jesus Christ.’”<sup>20</sup> Further, all the employees “acknowledged their ‘agreement and compliance’ with World Vision’s Statement of Faith, Core Values, and Mission Statement.”<sup>21</sup> In 2006, World Vision discovered the “[e]mployees denied the deity of Jesus Christ and disavowed the doctrine of the Trinity,”<sup>22</sup> and fired them.<sup>23</sup>

The Ninth Circuit agreed that World Vision qualified as a religious organization exempt from Title VII’s prohibition against religious discrimination, but the judges divided on their reasoning for reaching that

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15 *Id.* (citing *Killinger v. Samford Univ.*, 113 F.3d 196 (11th Cir. 1997)); *EEOC v. Kamehameha Sch./Bishop Estate*, 990 F.2d 458 (9th Cir. 1993); *Townley*, 859 F.2d at 618–19; *EEOC v. Miss. Coll.*, 626 F.2d 477 (5th Cir. 1980)).

16 *Id.* at 227.

17 *Id.*

18 633 F.3d at 723.

19 *Id.* at 725.

20 *Id.*

21 *Id.*

22 *Id.* (footnote omitted) (citations omitted).

23 *Id.*

result.<sup>24</sup> All three judges on the panel “agree[d] that a multifactor test does not work well because it is inherently too indeterminate and subjective.”<sup>25</sup> Judge O’Scannlain’s concurrence argued that “where the religious or nonreligious nature of a particular activity or purpose is in dispute,” the analysis should not rely exclusively on *LeBoon*’s “constitutionally questionable inquiries.”<sup>26</sup> Rather, Judge O’Scannlain proposed an alternative evaluation based on a simpler, three factor test: whether it is “(1) is organized for a self-identified religious purpose (as evidenced by Articles of Incorporation or similar foundational documents), (2) engaged in activity consistent with, and in furtherance of, those religious purposes, and (3) holds itself out to the public as religious.”<sup>27</sup> In contrast, Judge Berzon stated that “Congress used the terms ‘religious corporation, association . . . or society’ as they were commonly understood: to describe a church or other group organized for worship, religious study, or the dissemination of religious doctrine.”<sup>28</sup> Consequently, only those organizations meeting this common understanding should qualify for the exemption.<sup>29</sup> Judge Kleinfeld criticized Judge O’Scannlain’s test for being “too inclusive,”<sup>30</sup> and Judge Berzon’s formulation for being “too exclusive.”<sup>31</sup> Instead, he recommended a modification of Judge O’Scannlain’s three-factor test: an entity is “religious” if (1) “organized for a religious purpose,” (2) “engaged primarily in carrying out that religious purpose,” (3) “holds itself out to the public as an entity for carrying out that religious purpose,” and (4) “does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.”<sup>32</sup>

Despite the several tests available for classifying an organization as “religious” at the time *Burwell v. Hobby Lobby* came before the Supreme Court, and the opportunity to settle debate among the circuits as to the correct formulation, the Court avoided the task of classifying Hobby Lobby along the religious-secular spectrum.<sup>33</sup> The Court did, however, describe many religious aspects of the Hobby Lobby corporation.<sup>34</sup> For instance,

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24 *Id.* at 724 (per curiam); *id.* at 741 (Kleinfeld, J., concurring). The opinion contains a per curiam decision, two concurrences, and one dissent. *Id.*

25 *Id.* at 741 (Kleinfeld, J., concurring).

26 *Id.* at 734 (O’Scannlain, J., concurring).

27 *Id.* (footnote omitted) (citing *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1343 (D.C. Cir. 2002); *Universidad Cent. de Bayamon v. NLRB*, 793 F.2d 383, 399–400, 403 (1st Cir. 1985) (en banc) (Breyer, J.)).

28 *Id.* at 753 (Berzon, J., dissenting).

29 *Id.*

30 *Id.* at 742 (Kleinfeld, J., concurring).

31 *Id.*

32 *Id.* at 748.

33 *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759–85 (2014).

34 *Id.* at 2766.

the Court noted Hobby Lobby's statement of purpose, which commits the owners to "[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles."<sup>35</sup> The Court also noted that Hobby Lobby closes on Sundays in accordance with these principles, even though the company loses millions of dollars annually as a result.<sup>36</sup> Furthermore, Hobby Lobby refuses to engage in business transactions that promote the use of alcohol, because to do so would violate the corporation's principles of faith.<sup>37</sup> The fact that the Court took time to highlight the organization's statement of purpose and practices in furtherance of that purpose likely signals that these are factors relevant to determining whether an entity is "religious"—but the Court neither set forth a definitive test nor officially characterized Hobby Lobby as "religious." Failure to complete this analysis<sup>38</sup> leaves lower courts without a workable framework for assessing the religious claims of entities that are not closely held corporations. Furthermore, in the absence of a clear classification of the corporation as a "religious" entity, many criticize the Court's decision arguing that Hobby Lobby is not definitively a religious organization.<sup>39</sup>

## II. RELIGIOUS-SECULAR DICHOTOMY

Currently, no federal statute recognizes quasi-religious organizations for exemption purposes. Although courts look at all the relevant secular and religious elements in characterizing an organization,<sup>40</sup> the ultimate

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 2767–75.

<sup>39</sup> See, e.g., Fitzgerald, *supra* note 4; Jamie Raskin, *The Gospel of Citizens United: In Hobby Lobby, Corporations Pray for the Right to Deny Workers Contraception*, PEOPLE FOR THE AMERICAN WAY, <http://www.pfaw.org/media-center/publications/gospel-citizens-united-hobby-lobby-corporations-pray-right-deny-workers-co> ("The astounding nature of the decision becomes clear when we focus on the fact that Hobby Lobby is a regular business corporation, secular in its operations and devoted to profit-making purposes. It is neither a church nor a religious organization.") (last visited Dec. 27, 2014); cf. Amelia Thomson-DeVeaux, *The Spirit and the Law*, THE AMERICAN PROSPECT, <http://prospect.org/article/little-known-force-behind-hobby-lobby-contraception-case> ("It's one thing to argue that a Catholic college's daily operations are imbued with a religious ethos. It's another to contend that a corporation, competing in a secular marketplace, is so fundamentally guided by its owners' faith that it should enjoy religious-liberty rights.") (last visited Dec. 27, 2014).

<sup>40</sup> See *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226 (3d Cir. 2007) ("[A]ll significant religious and secular characteristics must be weighed to determine whether the [employer's] purpose and character are primarily religious." (internal quotation marks omitted)).

judicial classification is secular *or* religious.<sup>41</sup> Maintaining this religious-secular dichotomy can be quite difficult when an organization embraces both religious and secular elements.<sup>42</sup> The requirement that religious and secular characterizations be mutually exclusive may lead to contradictory outcomes.<sup>43</sup> If this approach continues, then many organizations will likely face unfair treatment before the courts.

The assumption that what is religious is distinct from what is secular is commonplace in our legal and cultural discourse.<sup>44</sup> Nevertheless, this assumption is increasingly difficult to maintain in a world where the influence and involvement of religion often surfaces in the public sphere and political discourse.<sup>45</sup> Some argue the religious-secular distinction has become blurred in American culture, thus rendering the religious-secular dichotomy no longer useful.<sup>46</sup> The inept nature of the divide perhaps signals a need to revisit the way in which we classify organizations in a legal context.

Requiring the court to determine whether a corporation is religious or secular before ascertaining whether it is afforded constitutional rights or statutory protection may be a burdensome process that generates inconsistent results. Some scholars even argue that the uncertain vitality of the religious-secular dichotomy warrants disregarding this portion of the analysis and instead allowing all corporations to assert free exercise rights.<sup>47</sup>

There remains, however, an important distinction between constitutional religious rights and statutory protections. The constitutional religious rights derive from the First Amendment, while statutory protections derive from Congress. Statutory protections often provide enforcement mechanisms for preservation of constitutional rights, or additional safeguards to ensure or advance religious freedom.<sup>48</sup> Even if all

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41 *Id.*

42 For a discussion of the disparities and inconsistencies with states attempting to define religion, see Susan J. Stabile, *supra* note 6.

43 See, e.g., *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 388 (3d Cir. 2013), *rev'd sub nom.*, *Burwell v. Hobby Lobby, Inc.*, 134 S. Ct. 2751 (2014); *Barnes-Wallace v. City of San Diego*, 704 F.3d 1067, 1072 (9th Cir. 2012); *LeBoon*, 503 F.3d at 226; *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 75 (Cal. 2004).

44 See Sheila Greeve Davaney, *The Religious-Secular Divide: The U.S. Case*, 76 SOC. RES. 1327, 1327 (2009).

45 *Id.* at 1327–28.

46 *Id.* at 1331 (“[W]e need to ask if our now more nuanced views of the secular and the religious have outlived their usefulness or whether they can be rehabilitated to provide significant work for the present.”).

47 See Colombo, *supra* note 1, at 16–24; *accord id.* at 1.

48 Compare U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”), with Religious

corporations can assert First Amendment free exercise rights,<sup>49</sup> it does not automatically follow that they should be granted every statutory protection.<sup>50</sup> Although religious rights in the Constitution are distinct from religious protections afforded by statutes, courts have understandably viewed the interpretative question of corporate religious exercise as one uniformly answered. For instance, in *Conestoga Wood*, the Third Circuit explained that its “conclusion that a for-profit, secular corporation cannot assert a claim under the Free Exercise Clause necessitates the conclusion that a for-profit, secular corporation cannot engage in the exercise of religion. Since *Conestoga* cannot exercise religion, it cannot assert a RFRA claim.”<sup>51</sup> While principles overlap in the constitutional and statutory contexts, it is important to keep in mind that what religion or free exercise means under the Constitution may differ from its meaning in a statute.

### III. TRANSCENDING THE DICHOTOMY OF RELIGIOUS AND SECULAR ORGANIZATIONS

#### A. *The Need for and Benefit of a Quasi-Religious Framework*

Quasi-religious organizations bring benefit to society, and should enjoy constitutional and statutory protections commensurate with their religious nature.<sup>52</sup> Certain organizations already make substantial

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Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 3, 107 Stat. 1488, 1489 (1993) (codified at 42 U.S.C. § 2000bb-1(a)-(c) (2012)) (“Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.”).

<sup>49</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (failing to answer whether for-profit corporations may engage in religious exercise under the First Amendment).

<sup>50</sup> See Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Moneymakers?*, 21 GEO. MASON L. REV. 59, 114 (2013) (borrowing distinctions from Title VII or the Internal Revenue Code about differences in treatment for nonprofit or for-profit entities, if any distinction even exists, “is particularly problematic” in light of RFRA’s broad language).

<sup>51</sup> *Conestoga Wood Specialties Corp. v. Sec’y of the U.S. Dep’t of Health & Human Servs.*, 724 F.3d 377, 388 (3d Cir. 2013) *rev’d sub nom.*, *Burwell v. Hobby Lobby, Inc.*, 134 S. Ct. 2751 (2014).

<sup>52</sup> See CARL H. ESBECK ET AL., *THE FREEDOM OF FAITH-BASED ORGANIZATIONS TO STAFF ON A RELIGIOUS BASIS* 92 (2004) (“It is not possible for a religious organization of a particular faith to retain the characteristics and tenets of that faith, if it is forbidden to take religion into account in its employment decisions.”); JAMES W. SKILLEN, *RECHARGING THE AMERICAN EXPERIMENT* 101 (1994) (“[T]he only way to assure a civic/legal unity that does not hang illegitimately on the coattails of an unjust ecclesiastical, ideological, or racial establishment is to make sure that every citizen enjoys full religious freedom in all spheres of life.”).

sacrifices in accordance with their religious beliefs. For example, Hobby Lobby chooses to close its operation on Sundays, in an effort to honor the Sabbath.<sup>53</sup> Failure to recognize the semi-religious nature of some organizations, and to reward them accordingly with constitutional and statutory protections, could cause the organizations to lose the ability or willingness to stay in business, thereby thwarting economic growth and limiting providers of important services.<sup>54</sup> Furthermore, if such organizations shut down, the government may be forced to bear the economic burden of unsatisfied needs in the community,<sup>55</sup> such as programs to assist the elderly, homeless, and orphaned.

“Quasi-rights” for quasi-religious organizations would mean that the quasi-religious organizations would not qualify for *all* rights or benefits that fully religious organizations enjoy, such as tax exemption<sup>56</sup> or permission to hire on a religious basis.<sup>57</sup> Rather, they would qualify for those rights that logically and meaningfully connect to the religious convictions of their organization. Under the current religious-secular dichotomy, there is no ability to tailor the protections a “religious” organization receives, creating some concern that organizations may enjoy a range of benefits they do not deserve.<sup>58</sup> A quasi-rights framework alleviates that concern by restricting religious protections to those logically and meaningfully connected to the corporation’s religious characteristics.

A “logical and meaningful connection” test also encourages consistency between an organization’s words and actions. Requiring a colorable connection between an organization’s religious mission and the exemption they wish to claim would encourage corporations to demonstrate through their business practices adherence to their mission statements.

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53 See *Hobby Lobby*, 134 S. Ct. at 2766.

54 See ESBECK ET AL., *supra* note 50, at 92; see also Matthew W. Clark, Note, *The Gospel According to the State: An Analysis of Massachusetts Adoption Laws and the Closing of Catholic Charities Adoption Services*, 41 SUFFOLK U. L. REV. 871, 894–97 (2008) (discussing the closing of Catholic Charities in Massachusetts as a result of its adoption laws and arguing that, as a result, Massachusetts has lost its most successful adoption agencies). For a discussion of the scope of religious liberty the Privileges and Immunities Clause of the Fourteenth Amendment intended to embrace, see generally Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994).

55 See JAMES FREELAND ET AL., FUNDAMENTALS OF FEDERAL INCOME TAXATION 744 (Clark et al. eds., 17th ed. 2013) (“Congress encourages contributions to charitable organizations by providing taxpayers with this deduction. This relieves some of the economic responsibilities that would otherwise fall on the federal government if not met by private funding.”).

56 See 26 U.S.C. § 501(c)(3) (2012).

57 See 42 U.S.C. § 2000e-1(a).

58 See Rienzi, *supra* note 50, at 112–13.



This would transform mission statements from mere “window dressing”<sup>59</sup> to guides of action. In essence, this is a litmus test seeking demonstrated commitment to professed beliefs. For instance, Hobby Lobby’s Sunday closing practice would provide evidence of the exercise of its religious mission.<sup>60</sup> The validity of its religious practice is not the question presented; rather, at issue is whether the corporate practice conforms to the organization’s professed religious beliefs.<sup>61</sup>

The concept of a “quasi-religious” organization is not entirely new; at least one court already employed this designation. In *Youle v. Edgar*,<sup>62</sup> the Appellate Court of Illinois held that the state requirement that a driver participate in Alcoholics Anonymous as a condition of reinstatement of his driving privileges did not violate his constitutional rights, even though Alcoholics Anonymous could be considered a quasi-religious organization.<sup>63</sup> The organization’s twelve-step program includes a belief and faith in God and has strong religious undertones.<sup>64</sup>

In utilizing this framework, it is important to note that an organization denied religious status under one statute should not be foreclosed such status for other statutory or constitutional purposes.<sup>65</sup> Courts often mistakenly treat the foreclosure of religious status under one statute as appropriate grounds for denial of religious status under a different statute.<sup>66</sup> The purpose of the “quasi-religious rights” framework is to allow the courts flexibility to recognize religious rights and protections where appropriate. When an organization is “quasi-religious” instead of fully religious, it will likely not qualify for *all* statutory religious exemptions. For instance, if the Supreme Court classified Hobby Lobby as a quasi-religious organization, its sincere religious beliefs and business practices arising from those beliefs should be protected as religious exercises, even when the larger part of its

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59 Donna T. Chen & Ann E. Mills, *Addressing Ethical Commitments When Professionals Partner with Organizations*, 39 MCGEORGE L. REV. 719, 722 (2008).

60 See *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1122 (10th Cir. 2013).

61 *Id.* at 1137 (recognizing Hobby Lobby’s “explicit Christian mission”).

62 526 N.E.2d 894 (Ill. App. 1988).

63 *Id.* at 899.

64 See Michael G. Honeyman, Jr., Note, *Alcoholics Anonymous as a Condition of Drunk Driving Probation: When Does It Amount to Establishment of Religion?*, 97 COLUM. L. REV. 437, 442 (1997).

65 See Rienzi, *supra* note 50, at 64 (“The better course is to protect religious exercise wherever it occurs regardless of identity, ownership structure, or tax status of the party engaged in the exercise. In truth, this is the only course permitted under the Free Exercise Clause and federal religious freedom laws.”).

66 See *Conestoga Wood Specialties Corp. v. Sec’y of the U.S. Dep’t of Health & Human Servs.*, 724 F.3d 377, 388 (3d Cir. 2013) (“Our conclusion that a for-profit, secular corporation cannot assert a claim under the Free Exercise Clause necessitates the conclusion that a for-profit, secular corporation cannot engage in the exercise of religion.”), *rev’d sub nom.*, *Burwell v. Hobby Lobby, Inc.*, 134 S. Ct. 2751 (2014).

“secular” endeavors are subject to regulation. Therefore, even though Hobby Lobby may assert a religious exemption for the contraception mandate, it will not necessarily be able to hire on a religious basis per Title VII, or enjoy tax exemption as a religious organization.

*B. Nonprofit Status Should Not Be a Dispositive Factor in the Quasi-Religious Characterization*

An often-decisive factor in courts’ classification of an organization as religious or secular is whether the organization is a nonprofit entity.<sup>67</sup> A policy that identifies profitmaking as incompatible with religion is a controversial value judgment that lies with Congress, not the courts.<sup>68</sup> Additionally, that policy ignores the ethical conflicts ever-present in business practice—“profit” is never obtained free of value judgments and temptations. As white-collar crimes are on the rise,<sup>69</sup> corporate commitments to ethical practices should be acknowledged as indispensable aspects of the business endeavor. These corporate commitments to ethical practices will subsequently result in benefits to stockholders, as well as society in general.<sup>70</sup> A corporation’s adherence to moral or ethical principles plays a role in the organization’s public reputation and goodwill, perhaps even affecting its status in the stock market. For instance, the FTSE KLD Catholic Values 400 Index evaluates large corporations’ adherence to moral and ethical principles, presenting information to

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67 See *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 226 (3d Cir. 2007) (looking to for-profit status among many other factors in considering whether an organization is religious for purposes of Title VII exemption). In *Hobby Lobby Stores, Inc. v. Sebelius*, the court responded negatively to the government’s citation of *Hosanna-Tabor* as evidence that religious organizations must be nonprofit entities—the Tenth Circuit explained that “*Hosanna-Tabor* was not deciding for-profit corporations’ Free Exercise rights, and it does not follow that the Congress which enacted RFRA would have understood the First Amendment to contain such a bright-line rule.” 723 F.3d 1114, 1136 (10th Cir. 2013).

68 Cf., e.g., *Matthew 25:14–30* (describing, in the parable of the talents, a master becoming angry with a servant to whom money was entrusted after the servant did not invest the money while the master was away).

69 See Mary Kreiner Ramirez, *Criminal Affirmance: Going Beyond the Deterrence Paradigm to Examine the Social Meaning of Declining Prosecution of Elite Crime*, 45 CONN. L. REV. 865, 865 (2013) (arguing that the lack of prosecutions in the wake of recent financial scandals has created “perverse incentives” for “even more lawlessness”).

70 Cf. Richard W. Garnett, *The Righteousness in Hobby Lobby’s Cause*, L.A. TIMES, Dec. 5, 2013, <http://www.latimes.com/opinion/commentary/la-oe-garnett-obamacare-contraception-surpreme-cou-20131205,0,2899.story#ixzz2mcEverlh> (“At a time when we talk a lot about corporate responsibility and worry about the feeble influence of ethics and values on Wall Street decision-making, it would be strange if the law were to welcome sermonizing from Starbucks on the government shutdown but tell the Greens and Hobby Lobby to focus strictly on the bottom line.”).

Catholic investors who seek equity in corporations that align with the Church's teachings.<sup>71</sup>

A corporation's for-profit status should not preclude it from enjoying rights of religious exercise. Although courts often elevate nonprofit status, giving it vital consideration toward an organization's religious standing for statutory religious exemptions<sup>72</sup>—that approach inexplicably makes tax exemption a stand-in for religious character. It is an arbitrary boundary.<sup>73</sup> Although for-profit status may be a valuable element in considering whether an organization is religious, quasi-religious, or secular, it should not be dispositive.<sup>74</sup>

### CONCLUSION

This Comment proposed that quasi-religious organizations should be recognized and afforded quasi-religious rights where there is a logical and meaningful connection to those rights, as demonstrated by the character of the organization. Doing so would help to resolve the dichotomy between religious and secular corporations without unduly favoring religion or secularism.<sup>75</sup> This framework is increasingly more necessary in American culture given the overlap of religious and secular aspects in many organizations. The *Hobby Lobby* decision failed to officially classify the organization's religious status, allowing confusion in this area of the law to fester. Recognizing a middle ground of "quasi-religious" status could help to avoid or eliminate contradictory classifications, resulting in the safeguarding of genuine religious beliefs where appropriate.

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71 See generally *MSCI USA Catholic Values Index*, MSCI RESEARCH (July 2010), [http://www.msci.com/resources/products/indexes/thematic/esg/MSCI\\_USA\\_Catholic\\_Values\\_Index\\_Methodology\\_Jul10.pdf](http://www.msci.com/resources/products/indexes/thematic/esg/MSCI_USA_Catholic_Values_Index_Methodology_Jul10.pdf).

72 See *supra* Part I.

73 *Spencer v. World Vision, Inc.*, 633 F.3d 723, 745–46 (9th Cir. 2011) (Kleinfeld, J., concurring) ("There is not much congruence between nonprofit status and the free exercise of religion. . . . Nonprofit status affects corporate governance, not eleemosynary activities.").

74 See Rienzi, *supra* note 50, at 111 (arguing that making money does not preclude for-profit businesses from engaging in protected religious exercise).

75 See *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994) ("Government should not prefer one religion to another, or religion to irreligion."); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.").

## RECENT CASES

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### MCCUTCHEON V. FEDERAL ELECTION COMMISSION

#### *Supreme Court Holds Aggregate Limits on Campaign Contributions Unconstitutional*

*Stephen M. DeGenaro\**

#### INTRODUCTION

Campaign finance law “is a matter of First Amendment concern.”<sup>1</sup> Political speech has long enjoyed coveted status as a category of speech most fundamental to the U.S. system of governance, thus warranting robust protection.<sup>2</sup> A person choosing to spend money in connection with a candidate or ballot initiative implicates protections of the First Amendment because such actions are a form of both political expression and

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\* Juris Doctor, Notre Dame Law School, Class of 2014; Bachelor of Arts, Georgetown University, Class of 2011. I would like to thank Professor Randy J. Kozel for providing invaluable background knowledge and assistance on a paper from which this Case Comment developed. I would also like to thank the staff of the *Notre Dame Law Review* for their top-notch editing in preparing this Case Comment for publication. All errors are my own.

1 *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring).

2 *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (“The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.” (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931) (internal quotation marks omitted)); *id.* at 270 (discussing the fact that the First Amendment reflects a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”).

association.<sup>3</sup> Campaign finance regulation is demarcated based upon the form that the political expression or association takes.<sup>4</sup> Restrictions on expenditures—money *spent* by the donor or speaker to express support for the candidate or issue—fail to satisfy strict scrutiny.<sup>5</sup> Restrictions on contributions—money *given* by the donor or speaker directly to the candidate or issue—will be upheld by a court when “the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms.”<sup>6</sup> For purposes of establishing a sufficiently important interest, the government may seek to eliminate actual or apparent corruption in politics, but may neither seek to eliminate the amount of money spent in elections nor increase the influence of groups.<sup>7</sup>

*McCutcheon v. Federal Election Commission* involved a challenge to limits imposed on the amount a donor may contribute during a single election cycle.<sup>8</sup> In *McCutcheon*, the Court was presented with the question of whether the aggregate limits placed on contributions to candidate and

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3 *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (per curiam). Expressional freedoms under the First Amendment are so robust as to extend equal protection to unpopular as well as popular speech. *See, e.g., United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012) (declaring unconstitutional a federal law criminalizing the act of lying about receipt of military decorations); *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969) (per curiam) (striking down a state statute that criminalized mere advocacy for violence to affect political change, rather than “incitement to lawless action,” thereby upholding the right of members of the KKK to hold a rally where the rally falls short of “incitement”). The Supreme Court has recognized associational freedoms within the realm of political speech both generally, *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (“It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.”), and specifically, *see Kusper v. Pontikes*, 414 U.S. 51, 56–57 (1973) (“There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of orderly group activity protected by the First and Fourteenth Amendments.” (internal quotation marks omitted)).

4 *Buckley*, 424 U.S. at 12–13.

5 *Id.* at 58–59; *see also Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (“The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.”).

6 *Buckley*, 424 U.S. at 25.

7 *See Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2825–27 (2011).

8 *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014). The Federal Election Commission is an independent administrative agency tasked with administering and enforcing the laws that govern federal elections. *See About the FEC*, FEC, <http://www.fec.gov/about.shtml> (last visited Dec. 27, 2014). For a general discussion about the binding nature of various administrative agency actions, *see* Stephen M. DeGenaro, Note, *Why Should We Care About An Agency’s Special Insight?*, 89 NOTRE DAME L. REV. 909 (2013).

noncandidate committees either lacked a cognizable constitutional interest or were unconstitutionally too low.<sup>9</sup> In a five to four decision, the Supreme Court held that the aggregate limits on campaign contributions burden substantial First Amendment rights without furthering a permissible government interest.<sup>10</sup>

## I. HISTORY

The Federal Election Commission Act (FECA), as amended by the Bipartisan Campaign Reform Act (BCRA),<sup>11</sup> has two different types of contribution limitations.<sup>12</sup> Base limits restrict the amount of money a donor may contribute to any single candidate or committee.<sup>13</sup> Aggregate limits restrict the amount of money a donor may contribute to all candidates or committees during a single election cycle.<sup>14</sup> Any single contribution may violate the base limits, aggregate limits, or both, depending on how much money the donor has already contributed during an election cycle. For example, during the 2013–2014 election cycle, FECA’s base limits permitted an individual to contribute up to \$2600 per election to any particular candidate, while FECA’s aggregate limits permitted contributions up to \$48,600 to federal candidates.<sup>15</sup> A donor attempting to give \$3000 to a congressional candidate after having already contributed \$48,000 to other federal candidates would violate both the base and aggregate limits. If the donor instead chose to limit his contribution to the \$2600 amount permitted under the base limits, the donor would still violate the aggregate limits because the contributions exceed the \$48,600 limit. This would be true even for smaller contributions, because any amount donated to the candidate over \$600 would exceed the aggregate limits for the 2013–2014 election cycle.

Shawn McCutcheon is an Alabama resident who sought to make a series of contributions to various federal candidates for office during the 2011–2012 election cycle. In total, McCutcheon lawfully contributed \$33,088 to sixteen different federal candidates and \$27,328 to numerous noncandidate political committees.<sup>16</sup> McCutcheon wished to contribute \$1776 to twelve additional candidates, but FECA’s aggregate limits

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9 *McCutcheon v. FEC*, 893 F. Supp. 2d 133, 137 (D.D.C. 2012).

10 *McCutcheon*, 134 S. Ct. at 1462.

11 52 U.S.C.A. § 30101 (West 2014).

12 *See id.* §§ 30116(a)(1), 30116(a)(3).

13 § 30116(a)(1).

14 § 30116(a)(3).

15 Senate General Election Expenditure Limits for the 2013–2014 Election Cycle, 78 Fed. Reg. 8532 (Feb. 6, 2013).

16 *McCutcheon v. FEC*, 134 S. Ct. 1434, 1443 (2014).

prevented him from doing so.<sup>17</sup> McCutcheon, along with the Republican National Committee (RNC), brought a First Amendment challenge in federal court in 2012, seeking an injunction against the enforcement of the aggregate limits.<sup>18</sup> McCutcheon and the RNC argued that the challenged aggregate limits were “unsupported by any cognizable government interest . . . at any level of review” and were unconstitutionally low.<sup>19</sup>

A three-judge district court panel denied McCutcheon and the RNC’s motion for a preliminary injunction and granted the Federal Election Commission’s motion to dismiss.<sup>20</sup> The district court rejected McCutcheon’s argument that strict scrutiny ought to be applied to the aggregate limitations based on First Amendment precedent.<sup>21</sup> The district court found that the government’s sufficiently important interest in preventing corruption or the appearance of corruption is furthered by limits that prevent the circumvention of contribution limits. The district court first observed that the government’s interest in preventing corruption was limited to quid pro quo corruption—direct contributions to political candidates in exchange for political favors<sup>22</sup>—and that mere influence or access to a candidate or officeholder did not rise to the level of corruption.<sup>23</sup> To that end, however, the district court found that the aggregate limits helped prevent the evasion of the base limits—the latter of which unquestionably implicate the government’s anticorruption interest.<sup>24</sup> In support of this conclusion, the district court mentioned that, without the aggregate limits, a donor would be able to:

give half-a-million dollars in a single check to a joint fundraising committee comprising a party’s presidential candidate, the party’s national party committee, and most of the party’s state party

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17 *Id.* During the 2013–2014 election cycle, McCutcheon told the Court “he again wishe[d]t to contribute at least \$60,000 to various candidates and \$75,000 to noncandidate political committees.” *Id.*

18 *Id.*

19 *McCutcheon v. FEC*, 893 F. Supp. 2d 133, 137 (D.D.C. 2012) (alteration in original) (internal quotation marks omitted).

20 *Id.* at 142.

21 *Id.* at 138.

22 *Id.* at 139 (“The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.” (quoting *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985))).

23 *Id.* (citing *Citizens United v. FEC*, 558 U.S. 310, 359 (2010)). In *Citizens United*, the Supreme Court explained that influence or access to a candidate is not corruption without more because “[i]t is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.” 558 U.S. at 359 (quoting *McConnell v. FEC*, 540 U.S. 93, 297 (2003)).

24 *McCutcheon*, 893 F. Supp. 2d at 140.

committees. After the fundraiser, the committees are required to divvy the contributions to ensure that no committee receives more than its permitted share, but because party committees may transfer unlimited amounts of money to other party committees of the same party, the half-a-million-dollar contribution might nevertheless find its way to a single committee's coffers. That committee, in turn, might use the money for coordinated expenditures, which have no significant functional difference from the party's direct candidate contributions. The candidate who knows the coordinated expenditure funding derives from that single large check at the joint fundraising event will know precisely where to lay the wreath of gratitude.<sup>25</sup>

Moreover, the district court rejected McCutcheon's argument that the limits were not closely drawn to furthering the anticircumvention interest.<sup>26</sup> McCutcheon argued that the limits were unconstitutionally low because, for example, if he had wanted to support a candidate in all 468 federal races in 2006, the aggregate limits then in effect would have restricted McCutcheon's contributions to \$85.29 per candidate—an amount far below a limit held unconstitutionally low in *Randall v. Sorrell*.<sup>27</sup> The district court found this argument unpersuasive because, even conceding the fact that McCutcheon would be so limited, he “remain[ed] able to volunteer, join political associations, and engage in independent expenditures” as means of expressing his political beliefs.<sup>28</sup>

Following the district court's decision, McCutcheon and the RNC appealed directly to the Supreme Court.<sup>29</sup>

## II. ANALYSIS

Chief Justice Roberts announced the judgment in *McCutcheon* in an opinion joined by Justices Scalia, Kennedy, and Alito.<sup>30</sup> The Supreme Court first rejected the invitation to revisit *Buckley* because of its limited utility in analyzing the constitutionality of FECA's aggregate limits.<sup>31</sup> *Buckley* itself only dedicated three sentences to aggregate limits because

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<sup>25</sup> *Id.* (citations omitted) (internal quotation marks omitted). Although the Court acknowledged that gratitude is not itself corruption, the parties involved could implicitly agree to the above hypothetical as a means of masking quid pro quo corruption. *Id.*

<sup>26</sup> *Id.* at 141.

<sup>27</sup> *Id.* at 141 n.5 (citing *Randall v. Sorrell*, 548 U.S. 230, 239 (2006)).

<sup>28</sup> *Id.* at 142.

<sup>29</sup> *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014); 28 U.S.C. § 1253 (2012) (“Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.”).

<sup>30</sup> *McCutcheon*, 134 S. Ct. at 1436.

<sup>31</sup> *Id.* at 1445.



they “ha[d] not been separately addressed at length by the parties.”<sup>32</sup> In contrast, the *McCutcheon* Court had been directly confronted with the constitutionality of aggregate limits.<sup>33</sup> The Court noted that subsequent legislative developments since *Buckley* warranted full review of the aggregate limits’ constitutionality.<sup>34</sup> Base limits on contributions made to political committees were enacted in 1976 “in part to prevent circumvention of the very limitations on contributions that this Court upheld in *Buckley*.”<sup>35</sup> As further evidence of subsequent legislative developments, Chief Justice Roberts noted that “[t]he 1976 Amendments also added an antiproliferation rule prohibiting donors from creating or controlling multiple affiliated political committees[]”<sup>36</sup> that could be used to “direct funds in excess of the individual base limits.”<sup>37</sup> The Federal Election Commission has also enacted earmarking regulations that prevent a donor from making contributions to political committees supporting a candidate for whom the donor has reached the base contribution limits “if the individual knows that ‘a substantial portion [of his contribution] will be contributed to, or expended on behalf of,’ that candidate.”<sup>38</sup> Finally, the Court noted that *Buckley* did not involve an overbreadth challenge to the aggregate limits.<sup>39</sup> Each of these considerations led the Court to conclude that *Buckley* should not control the outcome of this case.<sup>40</sup>

The Court, however, disagreed with *Buckley* that aggregate limits only pose a “quite modest restraint” on political speech.<sup>41</sup> At the current aggregate limits, a donor could not support ten candidates up to the full amount permitted under the base limits; moreover, after the donor reached the aggregate limit, he or she was prevented from further supporting additional candidates through contributions of even one dollar.<sup>42</sup> The aggregate limits thus worked substantial harm upon a would-be speaker from engaging in protected First Amendment activity well within the base

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32 *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 38 (1976)) (alteration in original).

33 *Id.*

34 *Id.* at 1446.

35 *Id.* (quoting *Cal. Med. Ass’n v. FEC*, 453 U.S. 182, 197–198 (1981) (plurality opinion)).

36 *Id.*

37 *Id.* at 1447.

38 *Id.* (quoting 11 C.F.R. § 110.1(h)(2) (2014)) (alteration in original).

39 *Id.* The doctrine of overbreadth states generally that if the statute under which the speaker is prosecuted “sweeps in” too much protected speech that should not be covered, then the statute is unconstitutional. *Gooding v. Wilson*, 405 U.S. 518, 530–31 (1972). The concern motivating the doctrine is that “persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.” *Id.* at 521.

40 *McCutcheon*, 134 S. Ct. at 1447.

41 *Id.* at 1448 (quoting *Buckley v. Valeo*, 424 U.S. 1, 38 (1976)).

42 *Id.*

limits Congress found to prevent corruption or the appearance of corruption.<sup>43</sup>

Moreover, the Court found unpersuasive the government's arguments that the aggregate limits furthered its interest in preventing corruption.<sup>44</sup> The aggregate limits did not further the goal of preventing corruption per se because once a donor reached the limits, the law prevented him from contributing even one additional dollar.<sup>45</sup> This, the Court stated, is contrary to Congress's conclusion that all contributions at or below the base limit do not pose a "cognizable risk of corruption."<sup>46</sup> The government was also unable to justify the aggregate limit as necessary for preventing circumvention of the base limits.<sup>47</sup> Post-*Buckley* campaign finance legislation prohibited each hypothetical scenario involving a donor circumventing the base limits.<sup>48</sup> For instance, earmarking and antiproliferation laws prevent the hypothetical donor channeling donations to a candidate through various political action committees (PACs).<sup>49</sup> Attempts to donate to unaffiliated PACs would dilute the corrupting influence of the donation because the donor's contribution would be pooled with other contributions and often times dispersed to candidates other than the intended target.<sup>50</sup> Furthermore, it is unlikely that a donor would make a large number of contributions to different PACs in order to funnel a small amount of money to one candidate when the donor is free to make an unlimited amount of expenditures on behalf of the same candidate without worrying the money would go to some other recipient.<sup>51</sup>

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43 *Id.* The Court said that "[i]t is no answer to say that the individual can simply contribute less money to more people" to avoid the constitutional problem posed by the aggregate limits because "[t]o require one person to contribute at lower levels than others because he wants to support more candidates or causes is to impose a special burden on broader participation in the democratic process." *Id.* at 1449.

44 *Id.* at 1450. The Court also reaffirmed the principle that the government may only permissibly regulate actual or apparent quid pro quo corruption: "As *Buckley* explained, Congress may permissibly seek to rein in 'large contributions [that] are given to secure a political *quid pro quo* from current and potential office holders.'" *Id.* (quoting *Buckley*, 424 U.S. at 26 (alteration in original)). In contrast, "[s]pending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such *quid pro quo* corruption." *Id.*

45 *Id.* at 1452.

46 *Id.*

47 *Id.* at 1453.

48 *Id.* at 1452–53.

49 *Id.* at 1453; *see also supra* note 36 and accompanying text.

50 *Id.* at 1453.

51 *Id.* at 1454 ("On a more basic level, it is hard to believe that a rational actor would engage in such machinations. . . . [A] dedicated donor spent \$500,000 . . . to add just \$26,000 to [a hypothetical candidate] Smith's campaign coffers. That same donor . . . could have spent his entire \$500,000 advocating for Smith, without the risk that his selected PACs would choose not to give to Smith . . . ." (citation omitted)).

The Court also found that the government failed to show proper fit between the aggregate limits and the furthered interest.<sup>52</sup> The aggregate limits would only work as an anticircumvention measure if it could be shown that large amounts were being made and then subsequently recontributed to the actual intended recipient; yet, the Court found that experience suggests “recipients have scant interest in regifting donations they receive.”<sup>53</sup> In any event, Congress had a choice of many alternative means to further the anticircumvention interest without “‘unnecessary abridgment’ of First Amendment rights.”<sup>54</sup> For instance, Congress could have increased restrictions on transfers among candidates and PACs<sup>55</sup> or strengthened earmarking regulations.<sup>56</sup> Finally, the Court noted that disclosure requirements “deter actual corruption”<sup>57</sup> and “arm[] the voting public with information”<sup>58</sup> without imposing a “ceiling on speech” in the same way that aggregate limits do.<sup>59</sup>

Justice Thomas provided the fifth vote to declare the aggregate limits unconstitutional, but wrote separately to voice his belief that *Buckley* should be overruled.<sup>60</sup> Justice Thomas found the bifurcation between political expenditures and contributions “tenuous” because both “‘generate essential political speech’ by fostering discussion of public issues and candidate qualifications.”<sup>61</sup> For instance, *Buckley*’s rationale for allowing restrictions on contributions—that contributions only serve to generally express support without communicating the underlying basis of the

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52 *Id.* at 1456.

53 *Id.* at 1457. As an example, the Court observed that “the NRSC [National Republican Senatorial Committee] and DSCC [Democratic Senatorial Campaign Committee] spent just 7% of their total funds on contributions to candidates and the NRCC [National Republican Congressional Committee] and DCCC [Democratic Congressional Campaign Committee] spent just 3%.” *Id.*

54 *Id.* at 1458 (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)).

55 *Id.* at 1458–59. “One possible option for restricting transfers would be to require contributions above the current aggregate limits to be deposited into segregated, nontransferable accounts and spent only by their recipients.” *Id.* at 1458.

56 *Id.* at 1459 (“Congress might also consider a modified version of the aggregate limits, such as one that prohibits donors who have contributed the current maximum sums from further contributing to political committees that have indicated they will support candidates to whom the donor has already contributed.”).

57 *Id.* (quoting *Buckley*, 424 U.S. at 67).

58 *Id.* at 1460.

59 *Id.* at 1459.

60 *Id.* at 1462 (Thomas, J., concurring) (“I adhere to the view that this Court’s decision in *Buckley v. Valeo* denigrates core First Amendment speech and should be overruled.” (citation omitted)).

61 *Id.* (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 412 (2000) (Thomas, J., dissenting)).

support<sup>62</sup>—cannot be squared with the fact that the Supreme Court “has never required a speaker to explain the reasons for his position in order to obtain full First Amendment protection.”<sup>63</sup> Justice Thomas also found unpersuasive the argument that “[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution,”<sup>64</sup> because contributions assist a candidate to increase the dissemination of his or her message.<sup>65</sup> Finally, Justice Thomas said that the plurality opinion itself rejected the last remaining rationale for allowing restrictions on contributions: contribution restrictions leave open alternative channels for expression.<sup>66</sup> In light of the plurality’s rejection of the last remaining rationale for restricting contributions, Justice Thomas concluded “*Buckley* is a rule without a rationale.”<sup>67</sup>

Justice Breyer penned a dissenting opinion, which Justices Ginsburg, Sotomayor, and Kagan joined.<sup>68</sup> The dissent argued that the plurality opinion defined corruption “too narrowly” because the plurality ignored the important First Amendment interests that the government has in regulating money in politics.<sup>69</sup> In the eyes of the dissent, “the First Amendment advances not only the individual’s right to engage in political speech, but also the public’s interest in preserving a democratic order in which collective speech *matters*.”<sup>70</sup> Corruption, then, is any action that “derails the essential speech-to-government-action tie” between the general public will and its representatives, not the “limited definition of ‘corruption’” that involves direct exchange of money for political favors.<sup>71</sup> By safeguarding the electoral process, campaign finance law ensures that the government remains responsive to the larger public, rather than a select few individuals.<sup>72</sup>

According to the dissent, the Supreme Court’s jurisprudence confirms this broader understanding of corruption.<sup>73</sup> For example, the Supreme Court upheld a ban on direct contributions by corporations in *Federal Election Commission v. Beaumont* as a means of preventing individuals who own or work at a corporation from using the corporate form to

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62 *Buckley*, 424 U.S. at 2.

63 *McCutcheon*, 134 S. Ct. at 1463.

64 *Buckley*, 424 U.S. at 21.

65 *McCutcheon*, 134 S. Ct. at 1463.

66 *Id.* at 1464; *see supra* notes 44–45 and accompanying text.

67 *Id.*

68 *Id.* at 1465 (Breyer, J., dissenting).

69 *Id.* at 1466.

70 *Id.* at 1467 (emphasis omitted).

71 *Id.* at 1468; *accord id.* at 1467.

72 *Id.* at 1468.

73 *See id.*

circumvent individual base contribution limits.<sup>74</sup> *Beaumont* characterized the government's interest as preventing "not only . . . *quid pro quo* agreements, but also . . . undue influence on an officeholder's judgment."<sup>75</sup> Similarly, "undue influence" was considered an acceptable government interest in limiting coordinated campaign expenditures among candidates and political parties,<sup>76</sup> state law contribution limits,<sup>77</sup> and soft money contributions.<sup>78</sup> Thus, to the dissent, the plurality wrongly goes further down the path that *Citizens United* started when it confines its definition of corruption to actual or apparent *quid pro quo* corruption.<sup>79</sup>

The dissent also took issue with the plurality's contention that aggregate limits were no longer needed to further an anticircumvention interest.<sup>80</sup> To demonstrate the necessity of the limits, Justice Breyer listed three hypotheticals, which he argued reflected gaps in campaign finance law that can only be closed by aggregate limits.<sup>81</sup> In the first, a donor legally contributes \$1.2 million to a Joint Party Committee soliciting funds for all federal and state political committees where the donor would otherwise be capped at contributing \$74,600.<sup>82</sup> In the second, a donor legally contributes a total of \$3.6 million to all of a party's candidates for the House or Senate during a single election cycle, with the understanding that over \$2.3 million of that total could be funneled to a single candidate.<sup>83</sup> In the third, party members could create 200 PACs, which would then in turn solicit \$10,000 donations each from a single donor and contribute it to a single candidate.<sup>84</sup> Each hypothetical created the opportunity for the donor to curry strong favor with the party of his or her choice and, according to the dissent, invited the chance of *quid pro quo* favors from the appreciative recipients that other existing checks could not guard against.<sup>85</sup>

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74 See *FEC v. Beaumont*, 539 U.S. 146, 155–56 (2003).

75 *Id.* at 156 (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001)) (citation omitted).

76 *Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 441.

77 *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 388–89 (2000).

78 *McConnell v. FEC*, 540 U.S. 93, 144 (2003), *overruled by* *Citizens United v. FEC*, 558 U.S. 310 (2010). "Soft money" is a term used to describe funds that went to political parties for purposes other than directly helping a candidate; such activities include "voter registration, 'get out the vote' drives, and advertising that d[oes] not expressly advocate a federal candidate's election or defeat." *McCutcheon*, 134 S. Ct. at 1469 (citing *McConnell*, 540 U.S. at 122–24).

79 *McCutcheon*, 134 S. Ct. at 1470–71.

80 *Id.* at 1471–72.

81 *Id.* at 1472–75.

82 *Id.* at 1472; *accord id.* 1472–73.

83 *Id.* at 1473–74.

84 *Id.* at 1474–75.

85 *Id.* at 1475–78.

Finally, the dissent criticized the portion of the plurality that pertained to the fit of the aggregate limits.<sup>86</sup> While the plurality suggested that the government could take any number of different steps other than aggregate limits to further its anticircumvention interest without restricting as much protected speech, the dissent observes that the plurality could not show how each alternative “could effectively replace aggregate contribution limits.”<sup>87</sup> Moreover, each alternative had been “similarly available at the time of *Buckley*” when the Court upheld the constitutionality of the aggregate limits in 1976, and yet the plurality made no attempt to demonstrate how the same limits had become “poorly tailored” in *McCutcheon*.<sup>88</sup>

### CONCLUSION

In the wake of *McCutcheon*, proponents of campaign finance reform have decried *McCutcheon* as the latest example of the Supreme Court rolling back necessary restrictions on campaign spending and gradually chipping away at *Buckley v. Valeo*.<sup>89</sup> This latter concern seems unlikely at this juncture for two reasons.

First, *McCutcheon* is not as hostile towards *Buckley* as some initially feared. Justice Thomas appears to be the only member of the Supreme Court ready to overturn *Buckley*; the four justices in dissent certainly would uphold a constitutional challenge to base contribution limits, and the plurality is still willing to accept that base contributions do in fact serve as a necessary measure for preventing actual or apparent corruption. In fact, the plurality opinion assumed the constitutionality of the base contributions in order to highlight throughout its opinion the problems with aggregate limits.<sup>90</sup> *McCutcheon* also never stated the applicable scrutiny to be applied to aggregate contributions because the plurality found that the

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<sup>86</sup> *Id.* at 1479.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> See, e.g., David Schultz, *Amend the Constitution to Restore the Democracy the Roberts Court Killed*, THE HILL (Aug. 29, 2014, 6:01 AM), <http://thehill.com/blogs/congress-blog/economy-budget/216168-amend-the-constitution-to-restore-the-democracy-the> (“The Supreme Court under Chief Justice Roberts continued to hack away at efforts such as McCain-Feingold to limit the power of money in politics. *Citizens United* and *McCutcheon* are only the most recent examples of how the Court is letting money and privilege entrench itself, preventing the political system from functioning.”).

<sup>90</sup> E.g., *McCutcheon*, 134 S. Ct. at 1448 (plurality opinion) (“To put it in the simplest terms, the aggregate limits prohibit an individual from fully contributing to the primary and general election campaigns of ten or more candidates, even if all contributions fall within the base limits Congress views as adequate to protect against corruption.”); *id.* at 1452 (noting that “Congress’s selection of a \$5,200 base limit indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption.”).

aggregate limits could not even satisfy the lower, “closely drawn” standard applied to contribution limits.<sup>91</sup> Significantly, *McCutcheon* did not explicitly state, nor implicitly suggest, that base contributions ought to be analyzed under strict scrutiny—which would make it more challenging for the government to justify restrictions on base contributions. *McCutcheon* still leaves room for the government to utilize base contributions to combat actual or apparent quid pro quo corruption. Whatever effects *McCutcheon* may have on the Supreme Court’s campaign finance jurisprudence going forward,<sup>92</sup> providing the means to overrule *Buckley* does not appear to be one of them.

Second, *McCutcheon* left undisturbed—indeed, it even spoke favorably of—components of campaign finance law pertaining to disclosure.<sup>93</sup> This portion of the majority’s opinion is by no means an academic exercise. It is true that, depending on one’s perspective, money is either the most powerful form of political speech or is an extraordinarily powerful tool for enabling effective political speech.<sup>94</sup> Yet, money is not the be-all, end-all form of speech that critics of *Citizens United* suggest it is. American politics is rife with examples of high-profile elections in which other, more cost-effective forms of speech trumped well-financed speech.<sup>95</sup> To put it simply, “dollars do not vote.”<sup>96</sup> Under a First

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91 *Id.* at 1446 (“Because we find a substantial mismatch between the Government’s stated objective and the means selected to achieve it, the aggregate limits fail even under the ‘closely drawn’ test. We therefore need not parse the differences between the two standards in this case.”).

92 It remains to be seen to what extent *McCutcheon* limits the ability of state laws that impose similar aggregate limits on campaign contributions. Federal courts have imposed preliminary injunctions against enforcement of state aggregate limits in both Wisconsin and Minnesota. See *CRG Network v. Barland*, No. 14-C-719, 2014 WL 4391193, at \*1 (E.D. Wis. Sept. 5, 2014); *Seaton v. Wiener*, No. 14-1016 (DWF/JSM), 2014 WL 2081898, at \*1 (D. Minn. May 19, 2014). It is likely that other state aggregate limits will be found similarly preempted by *McCutcheon*—including state courts following the Supreme Court’s decision. For an examination of how state courts perform preemption analysis, see Stephen M. DeGenaro, *Obstacle Preemption: Federal Purpose in State Courts*, 29 NOTRE DAME J.L. ETHICS & PUB. POL’Y ONLINE (forthcoming 2015).

93 *McCutcheon*, 134 S. Ct. at 1459–60 (“Disclosure requirements burden speech, but—unlike the aggregate limits—they do not impose a ceiling on speech. For that reason, disclosure often represents a less restrictive alternative to flat bans on certain types or quantities of speech. With modern technology, disclosure now offers a particularly effective means of arming the voting public with information.” (citations omitted)).

94 EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES* 445 (4th ed. 2011) (“Most effective speech—publishing a newspaper, buying a newspaper ad . . . printing and distributing leaflets, and the like—requires spending money. . . . Restrictions on spending money to speak thus diminish people’s ability to speak effectively.”).

95 In the week leading up to the 2012 Presidential Election, Governor Romney’s campaign ran a targeted advertisement in Ohio related to the alleged closing of a Jeep plant in Ohio. The *Washington Post* published an article shortly thereafter discrediting the

Amendment regime where the best ideas emerge when speech enjoys robust protection,<sup>97</sup> being able to critically evaluate the message and its speaker will always provide a check against even the most pervasive and well-funded message. As long as the First Amendment continues to uphold reasonable regulations requiring disclosure of campaign contributions, candidates and voters will be armed with facts they can argue show why they believe there is too much money in politics. Nothing but their own desire to spread the message will limit the scope of their speech.

This latter point is crucial. If one imagines a counterfactual scenario in which *McCutcheon* upheld the aggregate limits, an unknown number of people would be prohibited from participating as fully in the political process as they otherwise might wish. Moreover, although some people do not find large contributions to be a virtue of modern politics, others do, and they may wish to participate robustly in that manner. So, in this respect, *McCutcheon* is more protective of political speech than the counterfactual scenario because all speakers can participate to the fullest extent they desire. Rejecting aggregate limits ultimately affords greater protection to

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advertisement for deceptively portraying the facts surrounding the plant. See Glenn Kessler, *4 Pinocchios for Mitt Romney's Misleading Ad on Chrysler and China*, WASH. POST (Oct. 30, 2012, 6:02 AM), [http://www.washingtonpost.com/blogs/fact-checker/post/4-pinocchios-for-mitt-romneys-misleading-ad-on-chrysler-and-china/2012/10/29/2a153a04-21d7-11e2-ac85-e669876c6a24\\_blog.html](http://www.washingtonpost.com/blogs/fact-checker/post/4-pinocchios-for-mitt-romneys-misleading-ad-on-chrysler-and-china/2012/10/29/2a153a04-21d7-11e2-ac85-e669876c6a24_blog.html). Although the author is not privy to specific numbers, it is far more likely that the Romney campaign spent more money on its media buy in the quintessential presidential election swing state than the total amount of money: (i) paid by the *Washington Post* for the salary of the staff to investigate and write the article, and (ii) time spent by numerous Ohio residents who read the article and shared it by email or social media. As a resident of Ohio, the author can confirm that the *Washington Post* article fact-checking the Romney ad was just as pervasive as the television buy made by the campaign. From a purely financial perspective, the speech associated with discrediting the Romney ad proved far more cost-effective than the ad itself—and given the fact that President Obama carried Ohio during the 2012 election, it may have been more effective from a tactical perspective for supporters of President Obama to share the *Washington Post* article.

More recently, House Majority Leader Eric Cantor lost his seat to David Brat in Virginia's Seventh District, despite outspending Brat by a ratio of more than 25 to 1. See Jon Greenberg, *Rare Feat: Cantor Spent more at Steakhouses than Opponent Did on Campaign*, POLITIFACT (June 11, 2014, 4:49 PM), <http://www.politifact.com/punditfact/statements/2014/jun/11/chuck-todd/rare-feat-cantor-spent-more-steakhouses-opponent-d/>. Brat's success is largely attributed to a strong message that portrayed Cantor as a Washington insider who did not spend enough time in his district. See *How Did Virginia Underdog David Brat Beat DC Political Player Eric Cantor?*, FOX NEWS (June 11, 2014), <http://www.foxnews.com/politics/2014/06/11/how-did-virginia-underdog-david-brat-beat-dc-political-player-eric-cantor/>.

<sup>96</sup> See *How Did Virginia*, *supra* note 96.

<sup>97</sup> See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”).



citizens wishing to engage in collective self-governance—the very ideal the dissent seeks to protect through the imposition of aggregate limits. When speech is afforded maximum protection, the processes of collective self-governance, such as counter-speech and other forms of vigorous public debate, are safeguarded against government evaluation. The People, not the judiciary, are then empowered to govern themselves by making evaluative decisions about the worth of any type of speech.<sup>98</sup>

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98 STEPHEN G. BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 15 (2005) (“The concept of active liberty . . . refers to a sharing of a nation’s sovereign authority among its people.”).

## LANE V. FRANKS

### *Supreme Court Rules on First Amendment Speech Protections for Government Employees*

*Katie Jo Baumgardner\**

The role that the First Amendment plays in the public workplace is one of particular importance. Given that almost twenty-two million Americans work for the local, state, and federal governments, the constitutional protections afforded to public employees is of particular interest to public employers and employees, and the audiences who might learn from employees' speech.<sup>1</sup> Unlike the constitutional protections granted to private citizen speech, the Supreme Court's First Amendment public employee speech jurisprudence provides public employees with a constrained and "limited set of First Amendment freedoms."<sup>2</sup> Although the law grants public employees some First Amendment protection, "their speech is afforded a lower degree of constitutional protection as compared with the speech of private citizens."<sup>3</sup> Notably, these free speech rights most often become more controversial when an employee faces discipline because of his or her speech.<sup>4</sup>

On June 19, 2014, the U.S. Supreme Court expanded the scope of public employee free speech with its decision in *Lane v. Franks*.<sup>5</sup> The Court granted certiorari in order "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

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1 U.S. CENSUS BUREAU, 2013 ANNUAL SURVEY OF PUBLIC EMPLOYMENT & PAYROLL, CATEGORIES OF EMPLOYEES AT THE FEDERAL, STATE, AND LOCAL LEVELS (2014) (reporting that local, state, and federal governments employ 21,831,255 people), available at [http://factfinder.census.gov/rest/dnldController/deliver?\\_ts=437686905107](http://factfinder.census.gov/rest/dnldController/deliver?_ts=437686905107).

2 W. Bradley Wendel, *Dedication to Professor Ray Forrester: Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305, 313 (2001).

3 *Id.* at 344.

4 See David L. Hudson Jr., *Balancing Act: Public Employees and Free Speech*, 3 FIRST REPORTS 1, 4 (2002).

5 134 S. Ct. 2369 (2014).

testimony outside the course of their ordinary job responsibilities.”<sup>6</sup> The unanimous *Lane* decision, which affirmed in part and reversed in part an opinion by the Eleventh Circuit, held that the First Amendment protects a public employee from retaliatory employer discipline where the employee testifies at trial, pursuant to a subpoena, and when such testimony is not required by his or her duties as an employee. However, the Court also ruled that the public employer in *Lane* could not be held liable in his individual capacity for damages because he enjoyed qualified immunity from suit.<sup>7</sup> *Lane* adds its voice to the preexisting *Pickering v. Board of Education*<sup>8</sup> and *Garcetti v. Ceballos*<sup>9</sup> frameworks of public employee speech. *Lane* is important because it further clarifies the Court’s public employee speech doctrine, while also providing more definite limits to *Garcetti* by asking whether the speech “is itself ordinarily within the scope of an employee’s duties, not whether it merely concerns those duties.”<sup>10</sup>

But while *Lane* clarifies that a public employee cannot be terminated for providing “truthful sworn testimony, compelled by subpoena, outside the course of his ordinary job responsibilities,”<sup>11</sup> the question of how far that protection will extend remains open. The *Lane* Court explicitly declined to address “whether truthful sworn testimony would constitute citizen speech under *Garcetti* when given as part of a public employee’s ordinary job duties.”<sup>12</sup> Thus, *Lane* would not cover situations involving a police officer or crime scene technician who may testify in the course of their ordinary job duties.<sup>13</sup> While *Lane*’s application of the *Pickering* framework gives guidance to public employers when weighing the First Amendment interests of employees subpoenaed to testify outside the scope of their ordinary job duties with the interests of the government as an employer, *Lane* also leaves unanswered significant public employee speech questions for public employees that may find themselves testifying as a part of their ordinary job responsibilities.

## I. THE MAJORITY OPINION

The plaintiff in *Lane* was Edward Lane, the former Director of the Community Intensive Training for Youth (hereinafter CITY) program at Central Alabama Community College (CACC); Lane was hired in 2006,

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6 *Id.* at 2377.

7 *Id.* at 2383.

8 391 U.S. 563 (1968).

9 547 U.S. 410 (2006).

10 134 S. Ct. at 2379.

11 *Id.* at 2378.

12 *Id.* at 2378 n.4.

13 *Id.* at 2384 (Thomas, J., concurring). The concurrence offers these examples as employees whose speech rights remain unsettled under *Lane*.

during a time when CITY faced “significant financial difficulties.”<sup>14</sup> As part of his duties as Director, Lane conducted an extensive audit of the CITY program’s expenses.<sup>15</sup> During the course of his audit, he discovered a woman on the payroll—Alabama State Representative Suzanne Schmitz—had not been reporting for work at the CITY office.<sup>16</sup> Lane informed Steve Franks, then-President of CACC, about Schmitz’s failure to report. In response, Franks warned Lane that terminating Schmitz’s employment at CITY could have negative consequences.<sup>17</sup> Lane terminated Schmitz’s employment and shortly thereafter the Federal Bureau of Investigation (FBI) initiated an investigation into Schmitz’s employment with CITY.<sup>18</sup>

The FBI’s investigation led to Schmitz’s indictment on federal charges of mail fraud and theft in connection with a program in receipt of federal funds.<sup>19</sup> In the case against her, Lane testified, under subpoena, before a federal grand jury about the events surrounding Schmitz’s termination and his reasons for firing her.<sup>20</sup> Lane testified both in Schmitz’s August 2008 trial and her retrial six months later.<sup>21</sup> Upon retrial, the jury convicted Schmitz, sentenced her to thirty months’ imprisonment, and ordered her to pay more than \$177,000 in restitution.<sup>22</sup>

In January 2009, President Franks terminated Lane and twenty-eight other CITY employees in an alleged effort to address budget problems.<sup>23</sup> Franks rescinded all but two termination decisions a few days later, but did not rescind Lane’s termination.<sup>24</sup> Franks claimed he did not rescind Lane’s termination due to ambiguity in Lane’s employee status.<sup>25</sup> Lane

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14 *Id.* at 2375.

15 *Id.*

16 *Id.*

17 “CACC’s president and its attorney . . . warned [Lane] that firing Schmitz could have negative repercussions for him and CACC.” *Id.* After her termination, “Schmitz told another CITY employee . . . that she intended to ‘get Lane back’” and threatened to fire him if he requested money from the state legislature. *Id.* (quoting *Lane v. Cent. Ala. Cmty. Coll.*, No. CV-11-BE-0883-M, 2012 WL 5289412, at \*1 (N.D. Ala. Oct. 18, 2012)).

18 *Id.*

19 *Id.*

20 *Id.*

21 During Schmitz’s first trial, the jury failed to reach a verdict. Schmitz was then tried again six months later and convicted. *Id.*

22 *Id.*

23 *Id.* at 2376.

24 *Id.*

25 *See id.* Lane recommended to Franks that, in order to address the CITY program’s budget shortfalls, he should consider layoffs. This led Franks to terminate twenty-nine probationary CITY employees, including Lane. *Id.*

Shortly thereafter, Franks rescinded all but 2 of the 29 terminations—those of Lane and one other employee—because of an “ambiguity in [those other

subsequently filed suit against Franks in both his individual and official capacities, alleging Franks “violated the First Amendment by firing him in retaliation for testifying against Schmitz.”<sup>26</sup>

The U.S. District Court for the Northern District of Alabama granted Franks’ motion for summary judgment, finding he was entitled to qualified immunity.<sup>27</sup> In reaching its decision, the district court relied on *Garcetti v. Ceballos*,<sup>28</sup> “which held that ‘when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes.’”<sup>29</sup> The district court’s decision noted that, although there were “genuine issues of material fact” concerning Franks’ “true” motivation for terminating Lane’s employment, “a reasonable government official in [] Franks’ position would not have had reason to believe that the Constitution protected Mr. Lane’s testimony.”<sup>30</sup>

The Eleventh Circuit affirmed the lower court, relying “extensively” on *Garcetti*.<sup>31</sup> The Eleventh Circuit concluded that Lane’s speech fell into a category of employee speech outside the protection of the First Amendment because it came into “existence [because of] the employee’s professional responsibilities.”<sup>32</sup> However, the Eleventh Circuit determined that “‘even if . . . a constitutional violation of Lane’s First Amendment rights occurred in these circumstances, Franks would be entitled to qualified immunity in his personal capacity’ because the right at issue had not been clearly established.”<sup>33</sup>

In an opinion authored by Justice Sotomayor, the Supreme Court reversed in part and affirmed in part the opinion of the Eleventh Circuit. The Court began by concisely framing the legal issue raised in *Lane*: “whether the First Amendment protects a public employee who provided truthful sworn testimony, compelled by subpoena, outside the course of his

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employees’] probationary service.” Franks claims that he “did not rescind Lane’s termination . . . because he believed that Lane was in a fundamentally different category than the other employees: he was the director of the entire CITY program, and not simply an employee [who could be fired at will].”

*Id.* (first and second alterations in original) (citations omitted).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (citing *Lane v. Cent. Ala. Cmty. Coll.*, 2012 WL 5289412, at \*12 (N.D. Ala. Oct. 18, 2012)).

<sup>28</sup> 547 U.S. 410 (2006).

<sup>29</sup> *Lane*, 134 S. Ct. at 2376 (quoting *Garcetti*, 547 U.S. at 421).

<sup>30</sup> *Lane*, 2012 WL 5289412, at \*6, \*12.

<sup>31</sup> *Lane*, 134 S. Ct. at 2376.

<sup>32</sup> *Lane v. Cent. Ala. Cmty. Coll.*, 523 F. App’x 709, 711 (11th Cir. 2013) (regarding Franks’ official capacity, the court in its decision did “not resolve, however, the claims against Burrow—initially brought against Franks when he served as president of CACC—in her official capacity.”). The Court remanded the case to the Eleventh Circuit for further proceedings.

<sup>33</sup> *Lane*, 134 S. Ct. at 2377 (quoting *Lane*, 523 F. App’x at 711 n. 2).

ordinary job responsibilities.”<sup>34</sup> In holding that the First Amendment did indeed protect such speech, the Court began with the basic premise that “speech by citizens on matters of public concern lies at the heart of the First Amendment.”<sup>35</sup>

Although the government has unique interests as an employer, individuals “do not renounce their citizenship” when they take up an employment position with the government.<sup>36</sup> The Court recognized the inherent tension between the interests of the employee as a citizen and the interest of the state as an employer. While government employees have interests in protecting their constitutional rights to free speech, government employers have legitimate interests in promoting efficiency and integrity, and maintaining discipline within the workplace.<sup>37</sup> The Court characterizes this tension as a struggle to determine “whether the government had ‘an adequate justification for treating the employee differently from any other member of the public’ based on the government’s needs as an employer.”<sup>38</sup> In an attempt to determine which interests “tip[ped] the balance,”<sup>39</sup> the Court turned to its precedent in *Pickering v. Board of Education*, which involved a teacher’s letter to a newspaper about a school budget.<sup>40</sup> In *Pickering*, the Court found the teacher’s speech to be on a matter of public concern.<sup>41</sup> It also held that the publication of the letter did not impede or interfere with the teacher’s performance or the school’s operation, and so could not supply grounds for dismissal.<sup>42</sup> The Court acknowledged that the government’s interest in controlling its workplace must be properly balanced against an employee’s interest “as a citizen, in commenting upon matters of public concern.”<sup>43</sup> But it concluded that “[h]ere, the employer’s side of the *Pickering* scale [was] entirely empty” because Franks and CACC could not demonstrate any government interest that tipped the balance in their favor.<sup>44</sup>

The *Lane* Court then turned to the framework established in *Garcetti* in order to distinguish between employee speech and citizen speech.

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34 *Id.* at 2378.

35 *Id.* at 2377.

36 *Id.*

37 *Id.* at 2381 (“[G]overnment employers have legitimate ‘interests in the effective and efficient fulfillment of their responsibilities to the public’, including ‘promot[ing] efficiency and integrity in the discharge of official duties,’ and ‘maintain[ing] proper discipline in public service.’” (quoting *Connick v. Myers*, 461 U.S. 138 (1983)).

38 *Id.* at 2377 (quoting *Garcetti*, 547 U. S. at 418).

39 *Id.*

40 *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

41 *Id.* at 571.

42 *Id.* at 572–74.

43 *Id.* at 568.

44 *Lane*, 134 S. Ct. at 2377.

*Garcetti* articulated a two-step inquiry to determine whether a public employee's speech is entitled to First Amendment protection:

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 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.<sup>45</sup>

*Garcetti* involved an internal memorandum prepared by a prosecutor, which the Court held the First Amendment did not protect because it was prepared as part of the prosecutor's ordinary job duties.<sup>46</sup> Importantly, the Court differentiated between citizen speech—which may trigger constitutional protection—and unprotected statements made by public employees pursuant to their official duties. Per *Garcetti*, the Constitution does not insulate these types of public employee communications from employer discipline because it is not speech made as a citizen for First Amendment purposes.

Addressing the facts before it, the *Lane* Court first examined whether Lane's testimony constituted speech as a private citizen on a matter of public concern. The decisive question in *Garcetti* turns on whether the speech at issue is ordinarily "within the scope of an employee's duties."<sup>47</sup> Speech that is ordinarily within the scope of an employee's duties constitutes employee speech and remains outside the protections of the First Amendment. The Court easily found Lane's speech to be speech as a private citizen because

sworn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth. When the person testifying is a public employee, he may bear separate obligations to his employer—for example, an obligation not to show up to court dressed in an unprofessional manner. But any such obligations as an employee are distinct and independent from the obligation, as a citizen, to speak the truth. That independent obligation renders sworn testimony speech as a citizen and sets it apart from speech made purely in the capacity of an employee.<sup>48</sup>

The Court distinguished between *Garcetti*'s internal memorandum and *Lane*'s sworn testimony by noting that, unlike *Garcetti*'s internal memorandum, *Lane*'s testimony about the facts surrounding Schmitz's

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45 *Lane*, 134 S. Ct. at 2378 (quoting *Garcetti*, 547 U.S. at 418 (citations omitted)).

46 *Garcetti*, 547 U.S. at 424.

47 *Id.*

48 *Lane*, 134 S. Ct. at 2379 (citation omitted).

termination was compelled by subpoena and was not distinctly “ordinarily within the scope of an employee’s duties.”<sup>49</sup> The fact that Lane’s testimony concerned information acquired through his employment and that it involved his employment duties did not “transform” his testimony into employment speech.<sup>50</sup> The Court then rebuked the Eleventh Circuit for failing to distinguish Lane’s speech from that in *Garcetti*, causing the Eleventh Circuit to read “*Garcetti* far too broadly.”<sup>51</sup> The Court’s strong language served to emphasize both the importance of First Amendment protection for sworn testimony as citizen speech, as well as the Court’s defined—and somewhat limited—scope of *Garcetti*.

The Court also drew attention to the importance of affording protection to public employee speech in the case of “a public corruption scandal.”<sup>52</sup> Citing its recent decision in *Snyder v. Phelps*, the Court noted that speech of public concern “can ‘be fairly considered as relating to any matter of political, social, or other concern to the community,’ or when it ‘is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.’”<sup>53</sup> Given that Lane provided compelled testimony in a case against a state representative involving corruption of a public program, misuse of state funds,<sup>54</sup> extensive press coverage<sup>55</sup> and resulting in substantial restitution,<sup>56</sup> the Court found that Lane’s speech “obviously” involved a matter of significant public concern.<sup>57</sup>

However, the Court stopped short of granting categorical First Amendment protection for a public employee’s sworn testimony as a citizen on a matter of public concern.<sup>58</sup> Instead, the Court applied the *Pickering* balancing test.<sup>59</sup> Under *Pickering*, even if an employee speaks as a citizen on a matter of public concern, the Court must still determine whether the interest of the employee or government should prevail in cases where the government seeks to curtail its employees’ speech. This determination “depends on a careful balance ‘between the interests of the [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

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49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.* at 2380.

53 *Id.* (citing *Snyder v. Phelps*, 131 S. Ct. 1207, 1211 (2011)).

54 *Id.*

55 *Id.* at 2375.

56 *Id.*

57 *Id.* at 2380.

58 *Id.*

59 *Id.* at 2377.



the public services it performs through its employees.”<sup>60</sup> Here, the Court looked to whether the government took action based on its legitimate interests as an employer,<sup>61</sup> and found that the government failed to show adequate justification for Franks’ retaliatory termination of Lane. Remarking that “the employer’s side of the Pickering scale [was] entirely empty,” the Court held Lane’s speech was entitled to First Amendment protection.<sup>62</sup>

On the question of qualified immunity, the *Lane* Court agreed with the lower courts that then-President Franks enjoyed qualified immunity from suit, and therefore dismissed the claims against him in his individual capacity for damages.<sup>63</sup> Citing *Ashcroft v. al-Kidd*, the Court reaffirmed the principle that “qualified immunity ‘gives government officials breathing room to make reasonable but mistaken judgments about open legal questions.’”<sup>64</sup> The Court began by identifying the relevant question for qualified immunity in this case: “Could Franks reasonably have believed, at the time he fired Lane, that a government employer could fire an employee on account of testimony the employee gave, under oath and outside the scope of his ordinary job responsibilities?”<sup>65</sup> The Court ruled that, although Lane’s speech fell within the protection of the First Amendment, the unsettled precedent within the Courts of Appeal at the time that Franks terminated Lane’s employment required a grant of qualified immunity. The Court reiterated that the pertinent analytical inquiry was: whether “Franks [could] reasonably have believed, at the time he fired Lane, that a government employer could fire an employee on account of testimony the employee gave, under oath and outside the scope of his ordinary job responsibilities.”<sup>66</sup> In determining whether qualified immunity was appropriate, the Court analyzed the state of the law in the Eleventh Circuit at the time Franks made his termination decision. Because of discrepancies in Eleventh Circuit caselaw<sup>67</sup> and that of the other

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60 *Id.* at 2377 (quoting *Pickering v. Bd. of Ed.*, 391 U.S. 563, 568 (1968)).

61 Such as “promot[ing] efficiency and integrity in the discharge of official duties, and maintain[ing] proper discipline in public service.” *Id.* at 2381 (quoting *Connick v. Myers*, 461 U.S. 138, 150–51 (1983)) (alteration in original) (internal quotations omitted).

62 *Id.* at 2381.

63 *Id.*

64 *Id.* (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011)).

65 *Id.*

66 *Id.* at 2382.

67 *Id.* Highlighting the various Eleventh Circuit precedents at issue, the Court noted: *Morris*, *Martinez*, and *Tindal* represent the landscape of Eleventh Circuit precedent the parties rely on for qualified immunity purposes. If *Martinez* and *Tindal* were controlling in the Eleventh Circuit in 2009, we would agree with Lane that Franks could not reasonably have believed that it was lawful to fire Lane in retaliation for his testimony. But both cases must be read together with *Morris*, which reasoned—in declining to afford First Amendment protection—that

courts of appeals, the question of whether Franks could terminate Lane's employment based on his testimony "was not beyond debate at the time Franks acted."<sup>68</sup> Thus, the claims against Franks in his individual capacity must be dismissed.<sup>69</sup>

## II. JUSTICE THOMAS'S CONCURRENCE

Justice Thomas penned a two-paragraph concurring opinion, which Justices Scalia and Alito joined, in order to stress the limited application of the Court's decision. He noted that *Lane* provided "no occasion to address the quite different question whether a public employee speaks 'as a citizen' when he testifies in the course of his ordinary job responsibilities."<sup>70</sup> The concurring opinion asserted that *Lane* "requires little more than a straightforward application of *Garcetti*"<sup>71</sup>: Lane testified in a manner that was neither pursuant to job duties, nor done to fulfill a work responsibility, which means he spoke "as a citizen" and was entitled to constitutional protection.<sup>72</sup>

Justice Thomas also drew attention to the majority's failure to address the level of First Amendment protection, if any, afforded public employees who give testimony as part of their ordinary job duties.<sup>73</sup> The *Lane* majority noted that "Lane's ordinary job responsibilities did not include testifying in court proceedings . . . We accordingly need not address in this case whether truthful sworn testimony would constitute citizen speech under *Garcetti* when given as part of a public employee's ordinary job duties, and express no opinion on the matter today."<sup>74</sup> While the concurring opinion refrained from clarifying the scope of *Lane*'s First Amendment protection, by explicitly distinguishing Lane's testimony from that of a police officer or crime scene technician—employees who may find themselves testifying in the course of their ordinary job duties—

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the plaintiff's decision to testify was motivated solely by his desire to comply with a subpoena.

*Id.* (citing *Morris v. Crow*, 142 F. 3d 1379 (1998) (per curiam); *Martinez v. Opa-Locka*, 971 F. 2d 708 (1992) (per curiam); *Tindal v. Montgomery Cty. Comm'n*, 32 F. 3d 1535 (1994)).

<sup>68</sup> *Id.* at 2374. It is worth noting that the Court placed weight on the fact that the Third and Seventh Circuit precedents were "in direct conflict with Eleventh Circuit precedent." *Id.* This direct conflict undermined Lane's argument that the Third and Seventh Circuit precedents should have put Franks on notice that firing Lane was unconstitutional.

<sup>69</sup> *Id.* at 2383.

<sup>70</sup> *Id.* at 2384 (Thomas, J., concurring).

<sup>71</sup> *Id.* at 2383.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 2384; *accord id.* at 2378 n.4 (majority opinion).

<sup>74</sup> *Id.* at 2378 n.4. (majority opinion).

Justice Thomas highlighted the open question that remains for the Court's future consideration.<sup>75</sup>

### III. ANALYSIS

At this point, it is worth considering whether there is any meaningful difference between Lane's testimony and that provided by police officers and crime scene technicians. Should the *Lane* rule apply to employees who testify as part of their ordinary job duties? One might imagine a scenario where a police officer is subpoenaed and testifies—in the course of his ordinary job responsibilities—and is later terminated. Such a case could fall squarely under *Garcetti* because the employee's testimony can be viewed as parallel to the prosecutor's internal memorandum. Under *Garcetti*, "[t]he fact that [an employee's] duties sometimes required him to speak or write does not mean that his supervisors were prohibited from evaluating his performance."<sup>76</sup> Moreover, when police officers or crime scene technicians testify, their testimony "is itself ordinarily within the scope of [their] duties, not...merely concern[ing] those duties."<sup>77</sup> *Lane* acknowledges *Garcetti*'s emphasis on the "government's needs as an employer."<sup>78</sup> Taking away the government employer's ability to terminate an employee for actions taken in the course of their ordinary job duties would certainly infringe on the government's ability to effectively hire and fire. Thus, a court could conclude that the officer's testimony was not protected.

However, the *Lane* Court made clear that providing "[s]worn testimony in judicial proceedings is a quintessential example of speech as a citizen."<sup>79</sup> Although *Garcetti* held that when a public employee speaks pursuant to his official duties he is not speaking as a citizen, the fact that someone is a police officer or crime scene technician in no way diminishes his or her "obligation, to the court and society at large, to tell the truth. That obligation is distinct and independent from any separate obligations a testifying public employee might have to his employer."<sup>80</sup>

Even if a court was unwilling to find the officer's speech to be "speech as a citizen," there are sufficient reasons to apply *Lane*'s protection to sworn testimony by employees who testify in the course of their ordinary job duties. First, extending *Lane* to provide First Amendment protection for public employees who testify as part of their ordinary job duties meaningfully protects sworn testimony. Furthermore, the fact that an

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75 *Id.* at 2384 (Thomas, J., concurring).

76 *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006).

77 *Lane*, 134 S. Ct. at 2381 (majority opinion).

78 *Id.*

79 *Id.* at 2379.

80 *Id.*

officer testifies to “fulfill a work responsibility” is not significantly distinguishable from the compelled sworn testimony in *Lane*. An officer’s obligation to be truthful remains, and the government employer’s interest in hiring and firing does not outweigh the need for officers to offer truthful sworn testimony without fear of repercussion.<sup>81</sup> Finally, the idea that a police officer could be terminated for providing truthful sworn testimony is somewhat troubling because testifying is often a “critical part of . . . employment duties.”<sup>82</sup> There remains something deeply unsettling about the notion that police officers or crime scene technicians are essentially required to testify—as a critical part of their job—but could be terminated for their truthful sworn testimony.

### CONCLUSION

*Lane* is notable for two distinct reasons: (1) it helps clarify the distinction between citizen speech and employee speech in situations involving subpoenaed testimony, and (2) it provides defined limits to the scope of *Garcetti*. In further outlining the First Amendment protections afforded public employees, the case both affirms the free speech rights of those employees and provides guidance to public employers in weighing the First Amendment interests of their employees against their own interests.

Yet, while *Lane* provides guidance to public employers, employees should take care to note the caveats built into *Lane* opinion, particularly with respect to the type of testimony at issue. The Court emphasized that in the facts before it “[t]here [was] no evidence . . . that Lane’s testimony at Schmitz’ trials was false or erroneous or that Lane unnecessarily disclosed any sensitive, confidential, or privileged information while testifying.”<sup>83</sup> This language leaves open the possibility that if an employee gave testimony that “unnecessarily disclosed any sensitive, confidential, or privileged information,” a government employer could be justified in terminating that employee, based on its legitimate needs as an employer. At the same time, however, if sworn testimony is a “quintessential example of speech as a citizen” and a witness “bears an obligation . . . to tell the truth,” an employer may find it difficult to argue that information given under compelled testimony was unnecessarily disclosed. It would appear that, although not all sworn testimony falls under the protection of the First Amendment, under *Lane* all “truthful subpoenaed testimony outside the course of their ordinary job responsibilities”<sup>84</sup> would enjoy protection. Thus, public employers should be extremely careful when considering

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81 *Id.* at 2384 (Thomas, J., concurring) (quoting *Garcetti*, 547 U.S. at 421).

82 *Id.*

83 *Id.* at 2381 (majority opinion).

84 *Id.* at 2377.

termination on the basis of “unnecessary disclosure” in subpoenaed testimony because *Lane* illustrates the difficulty that accompanies a public employer’s duty to properly balance the First Amendment interests of employees and the interests of the government as an employer.

*Lane* also reaffirms the premise that government employers whose actions are not precluded by clear legal precedent enjoy qualified immunity because qualified immunity exists for those government officials charged with making employment decisions when there are discrepancies in the law. Although *Lane* leaves open whether the First Amendment protects the speech of government employees called to testify as part of their employment obligations, the case nonetheless bolsters the strength of the qualified immunity standard that insulates government actors to the point that the standard seems “increasingly impenetrable.”<sup>85</sup> Ultimately, the defense of qualified immunity, as outlined in *Lane*, remains for government officials unless they have violated a clearly established constitutional right.

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85 Ruthann Robson, *Opinion Analysis: First Amendment Clearly Protects Public Employee’s Subpoenaed Testimony—But Not Sufficiently Clearly to Overcome Qualified Immunity*, SCOTUSBLOG (June 19, 2014, 3:11 PM), <http://www.scotusblog.com/2014/06/opinion-analysis-first-amendment-clearly-protects-public-employees-subpoenaed-testimony-but-not-sufficiently-clearly-to-overcome-qualified-immunity/>.