No. 13-483

IN THE

Supreme Court of the United States

EDWARD LANE,

Petitioner,

v.

STEVE FRANKS,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR THE PETITIONER

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Respondent's brief in opposition makes three critical concessions. First, respondent does not dispute that the courts of appeals squarely disagree whether the First Amendment protects subpoenaed testimony by public employees, and whether that rule is clearly established. Indeed, respondent makes no attempt to distinguish the precedents of the Third, Seventh, and Ninth Circuits, all of which would have held that petitioner's speech was protected, and that qualified immunity did not bar his claim for damages. Second, respondent does not dispute that the questions presented are important. This case not only implicates freedom of speech and the integrity of the judicial process, it also has tremendous practical significance: sworn testimony by public employees is a powerful tool in the fight against corruption, and the threat of retaliation undermines that tool by deterring employees from speaking. Third, respondent does not dispute that under this Court's precedents, subpoenaed testimony is inherently an obligation of citizenship, and not one incident to public employment. When, as here, such speech relates to a matter of public concern, it earns the First Amendment's robust protections for citizen speech.

In light of these concessions, this Court should grant certiorari. The contentions in the brief in opposition do not suggest a different result.

I. The Acknowledged Circuit Conflict Warrants This Court's Review.

Respondent does not dispute that the decision below conflicts with decisions in at least three circuits. In fact, the Eleventh Circuit itself acknowledged the

disagreement. *See* Pet. App. 7a n.3. Nevertheless, respondent argues that the Court should not resolve the conflict for two reasons. First, he argues that the decision below was correct because the lower courts held that petitioner's speech was part of his official duties, so it is not protected under *Garcetti v. Ceballos*, 547 U.S. 410 (2006). *See* BIO 4-5. Second, he downplays the significance of the conflict, arguing that "only four" circuits have decided this issue, and the conflict is "just six years old." *Id*. 5. Neither argument justifies denying certiorari.

1. Respondent's first argument—that the decision below is consistent with *Garcetti*—assumes the answer to the first question presented. The lower courts concluded that when an employee's sworn testimony *describes* events that occurred during the course of his duties, the testimony itself *becomes* part of the employee's official duties—even if the employee was compelled to testify by a federal subpoena, and even if his job does not ordinarily require him to testify. *See* Pet. App. 7a, 29a.

In arguing (BIO 4) that the decision below is consistent with *Garcetti*, respondent seems to assume that the lower courts' conclusions must be accepted as true. In fact, they must not. Whether petitioner's subpoenaed testimony can be characterized as part of his official duties is not an assumed premise of the first question presented, but the heart of the question itself. Moreover, in the Eleventh Circuit, "[w]hether the subject speech was made by the public employee speaking as a citizen or as part of the employee's job responsibilities is a question of law for the court to

decide," and therefore subject to *de novo* review. Pet. App. 6a. And this case was decided at summary judgment, review of which is always *de novo*, with inferences drawn in petitioner's favor.[1] So no deference to the lower courts' holdings is warranted.

Respondent also erroneously suggests (BIO 5) that the court of appeals merely misapplied *Garcetti*. Actually, the court held as a matter of law that whether an employee testifies pursuant to a subpoena is irrelevant to the First Amendment inquiry. *See* Pet. App. 6a-7a; *see also Morris v. Crow*, 142 F.3d 1379, 1382 (11th Cir. 1998). In so doing, it acknowledged that other circuits apply a different legal rule, and would have reached a different result. Pet. App. 7a n.3. Thus, the Eleventh Circuit's error was not an isolated misapplication of the correct standard, but instead the conscious application of an entirely different standard to facts that are indistinguishable (or *a fortiori*) from contrary cases in other circuits.

2. Respondent's attempts to minimize the circuit split also fail. First, this Court's intervention is necessary because positions on both sides of the split are entrenched. On one side, the Seventh Circuit announced its rule in *Fairley v. Fermaint*, 482 F.3d

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[1] Respondent also does not dispute that the propriety of deciding the case at summary judgment is itself the subject of a circuit conflict. As the petition explained, four circuits treat this matter as a question of law, while four circuits regard it as a mixed question of fact and law, such that if the parties dispute it, summary judgment is inappropriate. Pet. 11-12 n.2.

897, 902-03 (7th Cir. 2007), and has consistently applied it, *see Chrzanowski v. Bianchi*, 725 F.3d 734, 741-42 (7th Cir. 2013); *Morales v. Jones*, 494 F.3d 590, 598 (7th Cir. 2007). The Ninth Circuit has similarly held employee testimony protected, including in a recent *en banc* decision. *See Dahlia v. Rodriguez*, --- F.3d ----, No. 10-55978, 2013 WL 4437594 (9th Cir. Aug. 21, 2013) (en banc); *Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1069-72 (9th Cir. 2012); *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1105-06 (9th Cir. 2011).

On the other side of the split, the Eleventh Circuit's position is also fixed. Its rule dates to *Morris v. Crow*, 142 F.3d 1379 (11th Cir. 1998), which the court has never questioned—despite this Court's intervening decision in *Garcetti*, and despite the acknowledged circuit split. Thus, in *Green v. Barrett*, 226 F. App'x 883, 887 (11th Cir. 2007), the court applied *Morris* to reject the employee's argument that the First Amendment protects testimonial speech. The court then denied the employee's petition for rehearing *en banc*. Here, the Eleventh Circuit again applied *Morris*, deeming it "the law in this Circuit on the question of public employee speech per a subpoena in the context of judicial proceedings," notwithstanding its recognition that "other circuits seem to have decided this issue differently." Pet. App. 7a n.3. There is accordingly no reasonable prospect the Eleventh Circuit will reverse itself, and respondent does not contend otherwise.

Second, this issue arises with remarkable frequency. In addition to the circuits identified in the

petition, the D.C. Circuit has suggested that subpoenaed testimony is protected, although voluntary testimony may not be. *See Bowie v. Maddox*, 653 F.3d 45, 47 n.1 (D.C. Cir. 2011). A survey of federal cases yields more than twenty illustrative examples of First Amendment retaliation claims involving testimony.[2]

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[2] *See, e.g.*, *Caruso v. N.Y.C.*, --- F. Supp.2d ----, No. 06-cv-59997(RA), 2013 WL 5382206, at *15-18 (S.D.N.Y. Sept. 26, 2013); *Walker v. Town of Hennessey*, --- F. Supp. 2d ----, No. 11-cv-1364-HE, 2013 WL 3058085, at *8 (W.D. Okla. June 17, 2013); *Seifert v. Unified Gov't of Wyandotte Cnty/Kan. City*, No. 11-2327-JTM, 2013 WL 2631632, at *8-9 (D. Kan. June 12, 2013); *Klein v. Cnty. of Bucks*, No. 12-4809, 2013 WL 1310877, at *6 (E.D. Pa. Apr. 1, 2013); *Bowyer v. D.C.*, 910 F. Supp. 2d 173, 202-03 (D.D.C. 2012); *Carr v. City of Camden*, No. 09-4717 (NLH)(KMW), 2012 WL 4051884, at *6 (D.N.J. Sept. 13, 2012); *Hayburn v. City of Phila.*, No. 11-6673, 2012 WL 3238344, at *4 (E.D. Pa. Aug. 7, 2012); *Frisenda v. Inc. Vill. of Malverne*, 775 F. Supp. 2d 486, 510 (E.D.N.Y. 2011); *Minten v. Weber*, 832 F. Supp. 2d 1007, 1022-24 (N.D. Iowa 2011); *Moore v. Money*, No. 11-cv-122, 2011 WL 5966957, at *4 (S.D. Ohio Nov. 29, 2011); *Ramirez v. Cnty. of Marin*, No. 10-02889 WHA, 2011 WL 5080145, at *9 (N.D. Cal. Oct. 25, 2011); *Proper v. Sch. Bd. of Calhoun Cnty. Fla.*, No. 10-cv-287-RS-EMT, 2011 WL 3608678, at *3 (N.D. Fla. Aug. 12, 2011); *Matthews v. Lynch*, No. 07-cv-739 (WWE), 2011 WL 1363783, at *1 (D. Conn. Apr. 11, 2011), *aff'd,* 2012 WL 1873657 (2d Cir. May 24, 2012); *Whitfield v. Chartiers Valley Sch. Dist.*, 707 F. Supp. 2d 561, 571-77 (W.D. Pa. 2010); *Reid v. City of Atlanta*, No. 08-cv-01846-JOF, 2010 WL 1138456, at *8 (N.D. Ga. Mar. 22, 2010); *Kerstetter v. Pa. Dep't of Corrs. SCICoal Twp.*, No. 08-cv-1984, 2010 WL 936457, at *7-8 (M.D. Pa. Mar. 12, 2010); *Mullins v. N.Y.C.*, 634 F. Supp. 2d 373, 390-91 (S.D.N.Y. 2009), *aff'd*, 626 F.3d 47 (2d Cir. 2010); *Foster v. Thompson*, No. 05-cv-305-TCK-FHM, 2008 WL 4682264, at *11-12 (N.D. Okla. Oct. 21, 2008); *Davis v. City of E. Orange*, No. 05-3720 (JLL), 2008 WL

And commentators have also noted the "split over whether testimony given by public employees pursuant to the subpoena power constitutes protected speech." *E.g.*, Note, *Be a Liar or You're Fired! First Amendment Protection for Public Employees Who Object to Their Employer's Criminal Demands*, 66 Vand. L. Rev. 1541, 1555 (2013).

Finally, on a question of such importance, four circuits and six years of division are plenty. As long as the conflict persists, the First Amendment will mean something different in the Eleventh Circuit than it does in at least three others. Such inconsistency is anathema to the very notion of a single federal Constitution. Because uniformity in this area of the law is particularly important, the Court should grant certiorari now instead of allowing the conflict to fester. Moreover, this case is an ideal vehicle to decide the questions presented, which were the only issues on which the Eleventh Circuit opined.

In sum, the questions presented give rise to an acknowledged circuit split over important questions of federal law. This Court should grant certiorari to resolve the conflict.

4328218, at *5 (D.N.J. Sept. 17, 2008); *Hook v. Regents of Univ. of Cal.*, 576 F. Supp. 2d 1223, 1232 (D.N.M. 2008), *aff'd,* 394 F. App'x 522 (10th Cir. 2010); *Williams v. Johnson*, 537 F. Supp. 2d 141, 151-52 (D.D.C. 2008).

II. Respondent's Qualified Immunity Argument Does Not Undermine The Case For Certiorari.

The petition presents two questions: whether a First Amendment violation occurred; and whether respondent is entitled to qualified immunity. Pet. i. Like the first question, the qualified immunity question is itself an important issue of federal law on which the courts of appeals disagree. Respondent does not dispute this, but instead argues that the Eleventh Circuit's qualified immunity holding was correct, and therefore obviates the need to reach the first question.

For several reasons, respondent's contention is irrelevant to this Court's certiorari determination. First, if qualified immunity applies at all, it applies only to petitioner's claim for damages, not his claim for prospective relief.[3] Thus, qualified immunity cannot resolve the entire case. Second, in the face of the conceded circuit split, respondent's argument only illustrates why this Court should grant certiorari: if the Eleventh Circuit's qualified immunity decision was correct, then the Court should grant certiorari to correct the contrary holdings of three circuits;

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[3] Respondent mistakenly argues that petitioner "is only appealing" the Eleventh Circuit's holding as it relates to damages. BIO 3. Not so. The petition seeks review of the Eleventh Circuit's entire judgment, waiving only petitioner's claims against the college, and under state law. *See* Pet. 4 n.1. The first question presented plainly encompasses petitioner's official-capacity and individual-capacity First Amendment claims against respondent, and both remain at issue. *Id*. i.

conversely, if the Eleventh Circuit was incorrect, then the Court should grant certiorari and reverse. Either way, the Court should grant certiorari. Finally, even assuming that the Court could avoid the First Amendment question by ruling on qualified immunity grounds, it should only do so after considering the merits. *Cf. Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012) ("We granted certiorari on two questions . . . We elect to address only the [qualified immunity] question.").

Respondent is also wrong because qualified immunity does not protect his decision to fire petitioner in retaliation for subpoenaed testimony. Qualified immunity does not apply if an "official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Id*. When respondent terminated petitioner, all of the principles underlying petitioner's claim were clearly established by this Court's precedents. To wit:

- "The First Amendment's guarantee of freedom of speech protects government employees from termination because of their speech on matters of public concern." *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 675 (1996) (emphasis removed). *See also Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006); *Connick v. Myers*, 461 U.S. 138, 147 (1983); *see* Pet. 14-17.

- Subpoenaed testimony is citizen speech—not employee speech—because a subpoena independently obligates a citizen to testify. *See, e.g.*, *United States v. Calandra*, 414 U.S. 338, 345 (1974) ("The duty to testify has long been recognized as a basic obligation

that every citizen owes his Government."); *see* Pet. 18-20.

- Testimony describing an elected official's misconduct constitutes speech on a matter of public concern. *See, e.g.*, *Connick*, 461 U.S. at 148 (explaining that speech that would allow the public to "evaluat[e] the performance of . . . an elected official" would constitute speech on a matter of public concern, as would speech that "bring[s] to light actual or potential wrongdoing or breach of public trust"); see Pet. 21-22.

- The fact that petitioner's testimony described corruption in his workplace does not mean that he spoke in the course of his official duties. Indeed, society has a heightened interest in receiving firsthand accounts of events that occur in government offices. *See, e.g.*, *Garcetti*, 547 U.S. at 420 ("'Were [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues.'") (quoting *San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam)); *Pickering v. Bd. of Educ. of Twp. High School. Dist. 205*, 391 U.S. 563, 571-72 (1968) (explaining that because teachers are well-informed about school issues, "it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal"); *see* Pet. 22-23.

Together, these authorities clearly establish that a public employer may not retaliate against an employee for sworn testimony in a corruption trial, even when the testimony describes events that occurred in the workplace. The Eleventh Circuit's contrary conclusion is erroneous, and should be reversed.

II. Respondent's Sovereign Immunity Argument Does Not Undermine The Case For Certiorari.

Respondent also argues that he is entitled to sovereign immunity. BIO 7-8. That issue is not before the Court. As respondent acknowledges, the Eleventh Circuit expressly declined to reach it. *Id*. 7; Pet. App. 4a. Moreover, it is not "fairly included" in either question presented because it raises Eleventh Amendment issues that fall outside the boundaries of the First Amendment questions raised by the petition. S. Ct. R. 14.1(a). There is accordingly no realistic prospect that this Court would reach out to address sovereign immunity in the first instance as an alternative ground for affirmance. Instead, this is an issue that the Eleventh Circuit can address on remand.

Furthermore, respondent offers no analysis beyond a single sentence quoted from the district court opinion. *See* BIO 7-8. But there is a reason that the Eleventh Circuit did not affirm on this basis. When the court addresses this issue on remand, it will likely conclude that respondent is not, in fact, entitled to immunity.

First, the Eleventh Amendment does not bar petitioner's official-capacity claim for reinstatement to the "position in which he would have worked absent the Defendant's retaliatory treatment." Pet. App. 23a-24a. Under *Ex parte Young*, 209 U.S. 123 (1908), sovereign immunity does not shield a state official's violations of federal law from a claim for prospective injunctive relief. While respondent has argued that *Ex*

parte Young is inapplicable because petitioner's termination does not constitute an *ongoing* violation of federal law, every circuit to have addressed the question, including the Eleventh Circuit, has held to the contrary that a claim for reinstatement is precisely the sort of prospective injunctive relief authorized by *Ex parte Young*. *See, e.g.*, *Cross v. Ala. Dep't of Mental Health & Mental Retardation*, 49 F.3d 1490, 1503 (11th Cir. 1995) ("Appellees' request for reinstatement is not barred by the Eleventh Amendment."); *Lassiter v. Ala. A&M Univ. Bd. of Trs.*, 3 F.3d 1482, 1485 (11th Cir. 1993), *vacated on other grounds*, 28 F.3d 1146 (1994) (same). *See also State Emps. Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 96 (2d Cir. 2007) (collecting cases and explaining that "[e]very Circuit to have considered the issue, including our own, has held that claims for reinstatement to previous employment satisfy the *Ex parte Young* exception to the Eleventh Amendment's sovereign immunity bar").[4]

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[4] Respondent argues that reinstatement is unavailable because the CITY program was terminated along with its employees. BIO 3. However, as petitioner pointed out below, the program was renamed and moved to a new department, and at least some CITY employees were transferred along with it. *See* Pet. C.A. Reply Br. 6 n.4. Petitioner has asked for reinstatement to the position he would be in but for the retaliation. The lower courts can determine what position that might be. To the extent respondent argues that the restructuring of the CITY program somehow renders *Ex parte Young* inapplicable, the Second Circuit, at least, has rejected that argument, and the Eleventh Circuit can address it on remand. *See Rowland*, 494 F.3d at 96-97.

Second, sovereign immunity does not bar petitioner's individual-capacity claim for damages because "a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally." *Alden v. Maine*, 527 U.S. 706, 757 (1999). Respondent asserts that Alabama is the real party in interest, but does not explain why. To the extent that he has some other as-yet-unidentified argument to make—and to the extent it has been preserved—the proper forum to present it is the Eleventh Circuit on remand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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