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

BRIEF OF RESPONDENT STEVE FRANKS IN OPPOSITION TO PETITIONER EDWARD LANE'S PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Under this Court's precedent, did the Eleventh Circuit correctly hold that petitioner Edward Lane's speech was not protected by the First Amendment where it found that that speech was made pursuant to his official job duties as the Director of the CITY Program at Central Alabama Community College?

2. Under both sovereign and qualified immunity doctrines, does respondent Steve Franks have immunity from petitioner Edward Lane's First Amendment retaliation claim brought pursuant to 42 U.S.C. § 1983?

PARTIES TO THE PROCEEDING BELOW

Pursuant to Rule 14.1(b), the parties to the proceeding below were petitioner and respondent. Central Alabama Community College was a defendant below, but was not part of the appeal to the Eleventh Circuit and is not part of this appeal. Central Alabama Community College is an instrumentality of the State of Alabama. It has no parent corporations and does not issue stock.

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STATEMENT OF THE CASE

Many of the alleged facts in petitioner Edward Lane's Statement of the Case are immaterial to the questions presented, misstated, and/or unsupported. As such, respondent Steve Franks states:

Respondent became President of Central Alabama Community College ("CACC"), an Alabama community college and an instrumentality of the State of Alabama, in January 2008. Pet. App. 10a, 13a-14a, 21a-22a. From September 2006 to January 2009, petitioner held a probationary position as Director of the Community Intensive Training for Youth Program ("CITY") at CACC. Pet. App. 2a-3a, 10a, 14a. In his job as Director, petitioner ran the CITY Program, including day-to-day operations, hiring and firing of employees, and making financial decisions. Pet. App. 10a.

Soon after becoming Director, and before respondent came to CACC, petitioner audited CITY's finances and discovered that then-state representative Suzanne Schmitz ("Schmitz") was listed on CITY's payroll but was not reporting for work and had not otherwise performed work for CITY. Pet. App. 2a, 11a. Petitioner thereafter terminated Schmitz's employment on October 19, 2006 after she refused to report to work. *Id.* "No one disputes that [petitioner] was acting pursuant to his official duties as CITY's Director when he investigated Schmitz's work activities, spoke with Schmitz and other CACC officials about Schmitz's employment, and ultimately terminated

Schmitz's employment." Pet. App. 7a; *see also* Pet. App. 10a.

The FBI investigated Schmitz and criminal charges were brought. Pet. App. 2a-3a, 12a. Petitioner was subpoenaed to testify and did testify in Schmitz's August 2008 criminal trial.[1] Pet. App. 2a-3a, 12a-13a. Respondent never instructed petitioner not to testify or otherwise attempt to prevent him from testifying. Pet. App. 18a. There has never been a dispute that respondent "was not aware of any statements by Ms. Schmitz that she would see to it that [petitioner] would lose his job after he testified against her." *Id.*; *see also* Pet. App. 15a.

At the 2008 criminal trial, petitioner testified about conversations he had with Schmitz about her work responsibilities and about Schmitz's failure to report to work even after he instructed her to do so. Pet. App. 3a. He also testified that he fired Schmitz because of her failure to come to work or do her job at CITY. Pet. App. 12a-13a. On these facts, both the court of appeals and the district court found that petitioner's speech was made pursuant to his official duties as the Director of CITY, and, thus, was not protected under the First Amendment. *See* Pet. App. 4a, 7a, 29a.

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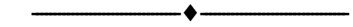
[1] Petitioner's testimony at Schmitz's February 2009 trial is not at issue since respondent had already terminated petitioner when petitioner received notice that he would be testifying at that trial and respondent did not know about that trial until after it occurred. Pet. App. 18a.

Even so, respondent did not terminate petitioner's employment "soon" after he testified at Schmitz's criminal trial, but over four months later, along with 28 other CITY employees, due to financial reasons. *Cf.* Pet. 3 *with* Pet. App. 3a-4a, 12a-14a. Respondent testified that he did not rescind petitioner's termination when he rescinded the terminations of most of the other employees because, unlike the other employees, petitioner was still probationary. Pet. App. 3a-4a, 10a. Respondent's subsequent decision to name Larry Palmer as Interim Director of CITY actually saved CACC money. Pet. App. 15a.

Finally, petitioner does not state whether he is appealing the court of appeal's affirmance of the judgment in favor of respondent in his official or individual capacity or both. It is clear, however, that he is only appealing that affirmance insofar as the court of appeals determined that petitioner is not entitled to recover money damages. *See* Pet. i. Regardless, money damages are the only relief possible since the CITY Program of which petitioner was Director and to which he requested reinstatement "ceased to exist," and all CITY employees were terminated, over four years ago. Pet. App. 16a.



SUMMARY OF THE ARGUMENT

The Court should deny the writ because (i) the Eleventh Circuit's holding that petitioner's speech was not protected by the First Amendment is not in

conflict with this Court's precedent, and (ii) the alleged split among less than half the circuits does not warrant certiorari review. The Court should also deny the writ because, even accepting petitioner's argument that the Eleventh Circuit erred in holding that petitioner's speech was not protected, respondent Franks would still be entitled to immunity.

REASONS FOR DENYING THE WRIT

I. There is no conflict with this Court's precedent and the Court should refrain from deciding an issue that has been considered by less than half the circuit courts.

Petitioner misstates that the question on this appeal is whether subpoena testimony that "was not a part of the employee's ordinary job responsibilities" is protected by the First Amendment. *See* Pet. i. Both the court of appeals and the district court found that petitioner's speech *was* made pursuant to his official duties as the Director of CITY, and, thus, was not protected, which is consistent with this Court's decisions, including *Garcetti v. Ceballos*, 547 U.S. 410 (2006). *See* Pet. App. 4a, 7a, 29a.

As in *Garcetti*, the lower courts in this action found that "[t]he controlling factor" was that petitioner's speech was "made pursuant to his duties" as the Director of CITY. *See* 547 U.S. at 421. Petitioner's implication that the court of appeals erred in stating that petitioner's job description did not control, *see*

Pet. 5, is due to be rejected, since that is exactly what the Court held in *Garcetti*: "The proper inquiry is a practical one. . . . [T]he listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." *See* 547 U.S. at 424-25. To the extent petitioner is claiming that the court of appeals somehow misapplied *Garcetti*, that is not a reason for granting his petition. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Finally, the small number of circuits (only four) to have considered the issue of whether subpoena testimony is or should always be protected by the First Amendment weighs against granting certiorari at this time and favors allowing this issue to become more developed in the lower courts. This is especially compelling where the perceived "conflict" among circuits is, at most, just six years old.

II. The Court should refrain from deciding a constitutional question unnecessarily since respondent Steve Franks would still have immunity even if the Court adopts the interpretation of the First Amendment advanced by petitioner.

Respondent has always denied that petitioner's subpoenaed testimony had anything to do with the

termination of petitioner's employment. But, even accepting as true that it did, respondent would still have immunity. The Court should thus deny certiorari because even if it were to hold that petitioner's speech was protected by the First Amendment because he was speaking as a citizen and not in his capacity as the Director of CITY, as petitioner argues, the outcome would still be the same. *See Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011) ("Courts should think carefully before expending scarce judicial resources to resolve difficult and novel questions of constitutional . . . interpretation that will have no effect on the outcome of the case.") (citation and quotation marks omitted); *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

Petitioner asks the Court to decide a constitutional question unnecessarily. *See Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012) (recognizing that the decision whether to "grant qualified immunity on the ground that a purported right was not 'clearly established' by prior case law, without resolving the often more difficult question whether the purported right exists at all[,] comports with our usual reluctance to decide constitutional questions unnecessarily") (*citing Pearson v. Callahan*, 555 U.S. 223, 227, 236, 241 (2009)); *Morse v. Frederick*, 551 U.S. 393, 428-29 (2007) (Breyer, J., concurring in part and dissenting

in part) ("More importantly, we should also adhere to a basic constitutional obligation by avoiding unnecessary decision of constitutional questions."). The Court should adhere to "the general rule of constitutional avoidance" and "the older, wiser judicial counsel not to pass on questions of constitutionality unless such adjudication is unavoidable" and deny the writ. *See Pearson*, 555 U.S. at 241 (citation, quotation marks, and ellipses omitted).

A. Sovereign Immunity

Respondent has sovereign immunity from petitioner's First Amendment retaliation claim in his official capacity because he is not a "person" subject to suit under 42 U.S.C. § 1983, by which petitioner's First Amendment retaliation claim is brought. Pet. App. 23a; *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989).

Similarly, regardless of whether petitioner's speech was protected, respondent has sovereign immunity from any claim for damages in both his official *and* individual capacities since CACC, and, consequently, the State of Alabama, not respondent, is the real party in interest. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100-02 (1984). The court of appeals did not find it necessary to reach this issue. Pet. App. 4a. However, as the district court found, respondent "seems to fit into the framework of a government official who is immune in his individual capacity because the state is the real party

in interest." Pet. App. 25a-26a, 34a. Thus, respondent would still be immune from petitioner's action even if the Court were to find that the court of appeals erred in holding that petitioner's speech was not protected. *See Pennhurst*, 465 U.S. at 100-02.

B. Qualified Immunity

Even if the Court adopts the interpretation of the First Amendment advanced by petitioner, qualified immunity would still preclude a claim for damages against respondent in his individual capacity (any official capacity claim being barred). This is because, at the very least, respondent was not on fair notice, and petitioner has never shown, that it was clearly established at the time of petitioner's August 2008 testimony that (1) petitioner's testimony was not made pursuant to his official duties as the Director of CITY, but, rather, was citizen speech protected by the First Amendment, and (2) that testimony pursuant to a subpoena is always protected.

"Qualified immunity shields government officials from civil damages liability unless the official violated a . . . constitutional right that was clearly established at the time of the challenged conduct." *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012). "To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Id.* (citation and quotation marks omitted). While the Court does "not require a case directly on point, . . . existing precedent

must have placed the . . . constitutional question beyond debate." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011). "The constitutional question in this case falls far short of that threshold." *Id.*

"Here, the right in question is not the general right to be free from retaliation for one's speech," *Reichle*, 132 S. Ct. at 2094, but the more specific right to be free from retaliation on account of subpoenaed testimony, even where the testimony was made pursuant to an employee's official duties. However, "[t]his Court has never held that there is such a right." *See id.* If it were to do so now, respondent would still have qualified immunity because neither this Court's precedent nor Eleventh Circuit precedent, at the time of the challenged conduct, was clearly established. *See id.* at 2093-94. As correctly recognized by the court of appeals, Eleventh Circuit precedent established just the opposite. Pet. App. 5a-8a; *see also* Pet. 23 (acknowledging that "the Eleventh Circuit applied its precedent" in disposing of this action below).

Petitioner's argument that this is not a settled issue among four circuits *supports* respondent's qualified immunity from this action.[2] *See Pearson*,

[2] Most of the cases cited by petitioner to support his argument that there is a conflict among the circuits were decided in the last three years, after petitioner's termination. Such cases are irrelevant to the issue of whether the law was clearly established at the time of that termination. *See Ashcroft v. al-Kidd*, 131 S. Ct. at 2083 ("existing precedent must have placed

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555 U.S. at 244-45 ("'If judges thus disagree on a constitutional question, it is unfair to subject [a defendant] to money damages for picking the losing side of the controversy.'") (citation omitted). That another circuit may have held that respondent is not immune is irrelevant. *See* Pet. 14. The law of other circuits could not clearly establish law in the Eleventh Circuit. *See, e.g.*, *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) ("Under the established federal legal system the decisions of one circuit are not binding on other circuits."); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1176 (D.C. Cir. 1987) ("The federal courts . . . should strive to avoid conflicts, but each has an obligation to engage independently in reasoned analysis. Binding precedent for all is set only by the Supreme Court . . . .").

"[T]he salient question . . . is whether the state of the law [when respondent terminated petitioner] gave [respondent] fair warning that [his] alleged treatment of [petitioner] was unconstitutional." *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002). The state of this Court's law, and certainly of the Eleventh Circuit's law, failed to do so. Petitioner's general statement that "the Eleventh Circuit's holding is contrary to this Court's precedents regarding both public employee speech and the role of sworn testimony[,]" Pet. 14, is not enough to overcome respondent's qualified

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the . . . constitutional question beyond debate") (citation and quotation marks omitted).

immunity. "[T]he right allegedly violated must be established, not as a broad general proposition, but in a particularized sense so that the contours of the right are clear to a reasonable official . . . ." *Reichle*, 132 S. Ct. at 2094 (citations and quotation marks omitted). That is not the case here. *See id.* at 2093-94.

Petitioner's reliance on the general law in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), for determining whether an employee's speech is speech as a citizen is inapposite. As discussed in Section I., the holdings of the lower courts in this action are consistent with *Garcetti*. Even so, as recognized by petitioner, the Court expressly *declined* to establish "'a comprehensive framework for defining the scope of an employee's duties where there is room for serious debate.'" Pet. 16 (*citing Garcetti*, 547 U.S. at 424). Nor could Justice Souter's dissent in *Garcetti*, cited by petitioner on page 20 of his petition, create clearly established law. *See* 21 C.J.S. *Courts* § 198 ("Dissenting opinions are not binding."); *see also, e.g.*, *Purcell v. BankAtlantic Fin. Corp.*, 85 F.3d 1508, 1513 (11th Cir. 1996) ("[A] dissenting Supreme Court opinion is not binding precedent."); *accord United States v. Ameline*, 409 F.3d 1073, 1083 n.5 (9th Cir. 2005).

Likewise, petitioner's citations to multiple cases for the broad general proposition that subpoenaed testimony is important, a point which respondent does not dispute, should be given little weight. *See Reichle*, 132 S. Ct. at 2094. None of those cases establish that subpoenaed testimony is always protected speech. Only *Branzburg v. Hayes*, 408 U.S. 665

(1972), and *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), discuss First Amendment jurisprudence at all, but in the unrelated context of a journalist's obligation to respond to a grand jury subpoena when confidential information or a confidential informant is involved. *See Reichle*, 132 S. Ct. at 2094.

Finally, *Rehberg v. Paulk*, 132 S. Ct. 1497 (2012) and *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), cited by petitioner on pages 19 and 21 of his petition, could not have clearly established that subpoena testimony was always protected speech when respondent terminated petitioner in 2009. *See Ashcroft v. al-Kidd*, 131 S. Ct. at 2083. Even so, *Snyder* dealt with the separate issue of whether a person's speech was on a matter of public concern, which does not change the result in this action. Even if petitioner's speech was on a matter of public concern, as petitioner argues, *see* Pet. 21-22, it was not clearly established at the time of that speech that petitioner was speaking as a citizen, as opposed to pursuant to his responsibilities as Director of the CITY Program, which is a separate analysis from whether his speech involved a matter of public concern. *See generally Garcetti*, 547 U.S. 410.

In short, the Court should not reach the constitutional question because qualified immunity clearly bars petitioner's action. *See, e.g.*, *Reichle*, 132 S. Ct. at 2093.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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