No. 13-483

In the Supreme Court of the United States

EDWARD R. LANE, PETITIONER

v.

STEVE FRANKS, IN HIS INDIVIDUAL CAPACITY, AND SUSAN BURROW, IN HER OFFICIAL CAPACITY AS ACTING PRESIDENT OF CENTRAL ALABAMA COMMUNITY COLLEGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE IN PART AND REVERSAL IN PART

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Assistant Attorney General
IAN HEATH GERSHENGORN
Deputy Solicitor General
RACHEL P. KOVNER
Assistant to the Solicitor General
DOUGLAS N. LETTER
MATTHEW M. COLLETTE
ROBERT D. KAMENSHINE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the First Amendment affords protection to a public employee who has been compelled by subpoena to provide sworn testimony concerning facts related to his employment.

2. Whether, if the First Amendment provides such protection, qualified immunity precludes an award of damages because the First Amendment right was not clearly established at the time that petitioner was dismissed.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 7
Argument:
I. A government employee's testimony disclosing information learned through public employment is not categorically excluded from First Amendment protection 10
A. Speech by a government employee is protected if it is made as a citizen on a matter of public concern and the government's interest as an employer does not outweigh the interests advanced by the speech 11
B. Speech that discloses information learned from public employment may be speech "as a citizen" under the First Amendment 14
C. The court of appeals erred in finding petitioner's speech unprotected 24
II. Respondent Franks is entitled to qualified immunity from damages in his individual capacity 27
Conclusion 35

TABLE OF AUTHORITIES

Cases:

Abdur-Rahman v. *Walker*, 567 F.3d 1278 (11th Cir. 2009) 5, 16, 32
Ashcroft v. *al-Kidd*, 131 S. Ct. 2074 (2011) 27, 29, 34
Battle v. *Board of Regents,* 468 F.3d 755 (11th Cir. 2006) 32
Bivens v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) 2

Cases—Continued: Page

Branzburg v. *Hayes*, 408 U.S. 665 (1972) 19
Briscoe v. *LaHue*, 460 U.S. 325 (1983) 19, 20
City of San Diego v. *Roe*, 543 U.S. 77 (2004) 25
Connick v. *Myers,* 461 U.S. 138 (1983).....11, 12, 18, 25, 26
D'Angelo v. *School Bd. of Polk Cnty.*, 497 F.3d 1203 (11th Cir. 2007)..... 32
Fairley v. *Fermaint*, 482 F.3d 897 (7th Cir. 2007)..... 34
Gabelli v. *SEC*, 133 S. Ct. 1216 (2013) 22
Garcetti v. *Ceballos*, 547 U.S. 410 (2006)..... *passim*
General Dynamics Corp. v. *United States*, 131 S. Ct. 1900 (2011) 22
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982) 28
Hunter v. *Bryant*, 502 U.S. 224 (1991) 27
Hustler Magazine, Inc. v. *Falwell*, 485 U.S. 46 (1988)..... 23
Karl v. *City of Mountlake Terrace*, 678 F.3d 1062 (9th Cir. 2012)..... 26
Martinez v. *City of Opa-Locka*, 971 F.2d 708 (11th Cir. 1992)..... 6, 31, 32, 33
McAuliffe v. *City of New Bedford*, 29 N.E. 517 (Mass. 1892)..... 11
Mitchell v. *Forsyth*, 472 U.S. 511 (1985) 27
Morales v. *Jones*, 494 F.3d 590 (7th Cir. 2007), cert. denied, 552 U.S. 1099 (2008) 34
Morris v. *Crow*, 142 F.3d 1379 (11th Cir. 1998) 6, 30, 31, 32, 34
Pearson v. *Callahan*, 555 U.S. 223 (2009)..... 28, 30
Pickering v. *Board of Educ.,* 391 U.S. 563 (1968).....7, 11, 12, 17, 23
Rankin v. *McPherson*, 483 U.S. 378 (1987) 23
Reichle v. *Howards*, 132 S. Ct. 2088 (2012)..... 9, 27, 28, 35

Cases—Continued: Page

Reilly v. *City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008), cert. denied, 555 U.S. 1170 (2009) 30, 34
Rosenberger v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) 13, 16
Safford United Sch. Dist. No. 1 v. *Redding,* 557 U.S. 364 (2009) 30
Snyder v. *Phelps*, 131 S. Ct. 1207 (2011) 25
Tindal v. *Montgomery Cnty. Comm'n*, 32 F.3d 1535 (11th Cir. 1994) 33
United States v. *Nixon*, 418 U.S. 683 (1974) 19, 26
United States v. *Schmitz*, 634 F.3d 1247 (11th Cir. 2011) 3, 20
United States ex rel. Tuohy v. *Ragen*, 340 U.S. 462 (1951) 21
Vila v. *Padron*, 484 F.3d 1334 (11th Cir. 2007) 5, 32
Waters v. *Churchill*, 511 U.S. 661 (1994) 12
Wilson v. *Layne*, 526 U.S. 603 (1999) 28, 29, 35

Constitution, statutes and regulation:

U.S. Const.:
Amend. I ..... *passim*
Amend. XI 6, 26
18 U.S.C. 401(3) 21
18 U.S.C. 1623 21
28 U.S.C. 1826(a) 21
42 U.S.C. 1983 ..... 4, 5, 27
Ala. Code § 36-26A-3 (1975) 5
28 C.F.R. 16.26(b) 18

Miscellaneous: Page

Department of Justice:

Fact Sheet: the Department of Justice Public Corruption Efforts, http://www.justice.gov/opa/pr/2008/March/08_ag_246.html..... 20

Report to Congress on the Activities and Operations of the Public Integrity Section For 2012, http://www.justice.gov/criminal/pin/docs/2012-Annual-Report.pdf..... 20

Webster's Third New International Dictionary (1993)..... 15

In the Supreme Court of the United States

No. 13-483

EDWARD R. LANE, PETITIONER

v.

STEVE FRANKS, IN HIS INDIVIDUAL CAPACITY, AND SUSAN BURROW, IN HER OFFICIAL CAPACITY AS ACTING PRESIDENT OF CENTRAL ALABAMA COMMUNITY COLLEGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE IN PART AND REVERSAL IN PART

INTEREST OF THE UNITED STATES

This case presents the question whether the First Amendment protects a public employee who testifies before a federal grand jury and at a federal criminal trial when the testimony concerns information learned through the employee's public employment. The United States is both the nation's largest public employer and the principal enforcer of federal civil and criminal laws. Accordingly, the United States has interests both in ensuring that all citizens provide truthful testimony in federal proceedings and in ensuring that public employers may manage their work-

places efficiently. The United States therefore has a substantial interest in this question.

This case also presents the question whether respondent was entitled to qualified immunity on the ground that it was not clearly established that the First Amendment prohibited petitioner's employer from firing petitioner for his testimony regarding information learned through public employment. Because the Court's resolution of that question may affect federal officials' entitlement to qualified immunity in actions pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the United States has a substantial interest in the resolution of this question.

STATEMENT

1. In 2006, petitioner Edward Lane became director of Community Intensive Training for Youth (CITY), a financially troubled program for at-risk youth operated by Central Alabama Community College (CACC). Pet. App. 2a, 10a-11a. The appointment was probationary. *Id.* at 10a. As director—the highest-ranking employee at CITY—petitioner's responsibilities included hiring and firing employees, making financial decisions, and overseeing the program's day-to-day operations. *Ibid.*

When petitioner became director of CITY, he began an audit of the program's finances. Pet. App. 2a, 11a. During the audit, petitioner learned that Suzanne Schmitz, an Alabama State Representative, was on the payroll but was not reporting for work. *Ibid.* He raised the issue with the then-president of CACC and with the college's lawyer, who warned him that firing Schmitz could have negative repercussions for petitioner and for the college. *Ibid.* After Schmitz

refused to show up to work, however, Lane fired her. *Ibid.* Schmitz then told another CITY employee that she intended to "get [petitioner] back" and that if petitioner asked for money from the state legislature, she would tell him, "[y]ou're fired." *Ibid.*

Soon after petitioner fired Schmitz, the Federal Bureau of Investigation (FBI) began a criminal investigation of Schmitz's no-show employment. Pet. App. 2a. The FBI sought information from petitioner, who testified before a federal grand jury in November 2006. *Id.* at 2a, 12a. In January 2008, the grand jury indicted Schmitz on four counts of wire fraud and four counts of theft concerning a program receiving federal funds. See *United States* v. *Schmitz*, 634 F.3d 1247, 1256-1257 (11th Cir. 2011).

Petitioner was one of a number of CITY employees called to testify at Schmitz's trial in August 2008. Pet. App. 2a-3a, 12a; see *Schmitz*, 634 F.3d at 1253-1256 (describing trial evidence). Petitioner's testimony, which he gave pursuant to subpoena, concerned information that petitioner learned while performing his duties as director of the CITY program. Pet. App. 3a. Petitioner described how Schmitz had failed to show up to work; failed to submit time sheets; and failed to comply with petitioner's direction to begin reporting daily to CITY's Huntsville office. *Id.* at 3a, 13a. He also described how Schmitz had told petitioner that she had gotten her job through connections. *Id.* at 3a. After the jury at Schmitz's first trial failed to reach a verdict, petitioner testified to these facts again at a retrial in February 2009. *Id.* at 3a, 13a. Schmitz was convicted of mail fraud and other charges. See *Schmitz*, 634 F.3d at 1251.

Respondent Steve Franks became president of CACC in January 2008. Pet. App. 13a. Petitioner advised Franks in November 2008 of CITY's budget problems and recommended a reduction in force. *Ibid.* By the end of that year, CITY was in danger of failing to meet its payroll due to its financial problems. *Id.* at 13a-14a. Franks accepted the recommendation of a reduction in force and, according to respondents, decided to terminate all probationary employees. *Id.* at 14a. In January 2009, Franks sent termination letters to petitioner and 28 other employees who had fewer than three years of service with the program. *Id.* at 3a. One of the remaining CITY employees was named interim director. *Id.* at 15a-16a.

A few days later, however, Franks rescinded all of the terminations except for those of petitioner and one other employee—a decision that Franks explained occurred after Franks discovered that those employees were not, in fact, probationary. Pet. App. 3a-4a, 16a-17a. The CITY program continued to operate for approximately seven months until, in September 2009, the program was eliminated, and its remaining employees were terminated. *Id.* at 15a-16a.

2. a. Petitioner filed suit to challenge his termination. Petitioner sued Franks under 42 U.S.C. 1983, contending that Franks had violated the First Amendment by firing petitioner and failing to reinstate him as retaliation for petitioner's grand jury and trial testimony. Pet. App. 18a-19a, 23a. Petitioner sought damages from Franks in his individual capacity and sought equitable relief, including reinstatement, from Franks in his official capacity.[1] See *id.* at

[1] Petitioner raised additional claims in district court that he did not pursue on appeal. Petitioner claimed that his dismissal had

23a-26a. In response, Franks denied he had any retaliatory motive when he dismissed petitioner, and further claimed that dismissing petitioner for his testimony would not have violated the First Amendment. See *id.* at 17a, 29a. Franks also raised a defense of sovereign immunity. See *id.* at 25a.

The district court granted summary judgment to Franks. The court concluded that the record raised "some genuine issues of material fact * * * concerning Dr. Franks' true motivation for terminating [petitioner's] employment." Pet. App. 21a. It found, however, that Franks was entitled to qualified immunity as to the claims against him in his individual capacity, because it was not clearly established that dismissing petitioner for his testimony would have violated the First Amendment. *Id.* at 26a-34a. Petitioner had "learned of the information that he testified about while working as Director at C.I.T.Y." *Id.* at 29a. As a result, the court concluded, petitioner's "speech can still be considered as part of his official job duties and not made as a citizen on a matter of public concern, as the Eleventh Circuit has ruled in similar cases." *Id.* at 29a-31a (discussing *Abdur-Rahman* v. *Walker*, 567 F.3d 1278 (11th Cir. 2009); *Vila* v. *Padron*, 484 F.3d 1334 (11th Cir. 2007)).

---

violated the Alabama State Employee Protection Act, Ala. Code § 36-26A-3 (1975)—a whistleblower protection measure that the district court found inapplicable. Pet. App. 4a, 18a. Petitioner also claimed a violation of 42 U.S.C. 1985, which prohibits conspiracies to deter or influence testimony in federal court. Petitioner voluntarily dismissed this claim. Pet. App. 4a, 19a. Petitioner also raised, but abandoned on appeal, claims against CACC and claims for money damages against Franks in his official capacity. *Id.* at 4a.

Further, the district court found, it was not clearly established that this First Amendment analysis changed because petitioner was testifying pursuant to subpoena. Pet. App. 31a-33a (discussing *Morris* v. *Crow*, 142 F.3d 1379 (11th Cir. 1998) (per curiam); *Martinez* v. *City of Opa-Locka*, 971 F.2d 708 (11th Cir. 1992) (per curiam)). The court determined that the claims against Franks also were barred by the Eleventh Amendment. *Id*. at 23a-26a.

b. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 2a-8a. It held that petitioner's testimony was not protected by the First Amendment because petitioner's speech was that of an employee, not that of a citizen. *Id.* at 4a. The court relied on *Morris* v. *Crow*, *supra,* which had found a law enforcement officer's sworn deposition testimony unprotected when it largely reiterated statements that the officer had made in an accident report he prepared as part of his job duties. Pet. App. 6a-7a. In petitioner's case, as in *Morris,* "the subject matter of [petitioner's] testimony touched only on acts he performed as part of his official duties." *Id.* at 7a. In addition, "[a]s in *Morris,* nothing evidences that [petitioner] testified at Schmitz's trial 'primarily in [his] role as a citizen' or that his testimony was an attempt to comment publicly on CITY's internal operations." *Id.* at 8a (quoting *Morris*, 142 F.3d at 1382; third brackets in original). The court also concluded that *Morris* foreclosed the claim that a government employee's speech concerning official duties received protection because it had been given pursuant to subpoena. *Id.* at 7a & n.3.

The court of appeals added that "even if * * * a constitutional violation of [petitioner's] First Amend-

ment rights occurred in these circumstances, Franks would be entitled to qualified immunity in his personal capacity" because the First Amendment right at issue had not been clearly established. Pet. App. 4a n.2. The court did not reach Franks' Eleventh Amendment defense in light of its other rulings. *Id.* at 4a.

SUMMARY OF ARGUMENT

Public employees do not uniformly lack First Amendment protection for testimony, pursuant to subpoena, about information learned through their work for the government. Because the constitutional status of such speech was not clearly established at the time of petitioner's dismissal, however, respondent Franks is entitled to qualified immunity from an award of damages in his individual capacity.

1. A. The need to operate efficient and collegial workplaces justifies governments—like other employers—in taking action against employee speech that undermines their operations. At the same time, citizens do not give up their freedom of speech entirely by entering government service. The First Amendment protection afforded to government employees depends on a balancing of these interests. For almost fifty years, the Court has addressed these interests under the framework of *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), by treating the speech of a public employee as protected when the employee speaks as a citizen on a matter of public concern, and the government employer lacks an adequate justification for treating the employee differently from other members of the public. See *Garcetti* v. *Ceballos*, 547 U.S. 410, 418 (2006).

Garcetti construed the requirement that a person must speak "as a citizen" to receive First Amendment

protection. It held that government employees do not speak as "citizens," entitled to constitutional protection, when they speak pursuant to their job responsibilities. This holding reflected a balancing of categorically strong government interests in controlling speech that the government itself commissioned against categorically weak private interests in such speech.

B. The court of appeals erred in extending *Garcetti* to hold that public employees uniformly lack First Amendment protection when they testify, under subpoena, about information learned through their public employment. *Garcetti* classified as unprotected speech "pursuant to" employment duties, which it equated with speech in which "the employee is simply performing his job duties." 547 U.S. at 421-423. The interest-balancing analysis that supported *Garcetti's* holding does not support a blanket rule foreclosing First Amendment protection for testimony that concerns information learned through public employment. To the contrary, that analysis supports the rule that an employee who testifies before a grand jury or at a federal criminal trial speaks "as a citizen," not as an employee, at least when such testimony is not part of the employee's job responsibilities. The public interests in open debate, accurate adjudication, and prosecution of public corruption would be best served by such a rule. And while government employers have legitimate interests in limiting employees' disclosures of job-related information under some circumstances, those interests have limited weight in many testimonial contexts. The fact that there was no evidence that petitioner intended to give public commentary—

rather than simply to fulfill the requirements of a subpoena—has no relevance to this analysis.

C. If this Court addresses, in the first instance, whether petitioner's employer was entitled to dismiss him for his testimony under the balancing framework of *Pickering*, it should find that such action would not have been justified here. Petitioner gave his testimony bearing on public corruption as a citizen, and that testimony addressed a matter of public concern. Respondents have suggested no managerial justification that would have supported dismissing petitioner for his speech. Accordingly, petitioner's claim for equitable relief should proceed.

2. Because it was not clearly established when petitioner was dismissed that the First Amendment protects public employees' testimony devoted to information obtained through their public employment, respondent Franks is entitled to qualified immunity from damages in his individual capacity.

A. The defense of qualified immunity bars damages awards against government officials for their discretionary acts, except in cases in which a government official "violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Reichle* v. *Howards*, 132 S. Ct. 2088, 2093 (2012). Damages may not be awarded unless any reasonable official would have known that his actions violated the right at issue.

B. It was not clearly established when petitioner was dismissed that petitioner's testimony—dealing only with acts petitioner performed in his official duties—was the constitutionally protected speech of a citizen, not the unprotected speech of an employee. *Garcetti* declined to set out a framework that defined

unprotected employee speech. And neither *Garcetti* nor any of this Court's other decisions have dealt directly with public-employee testimony of this type. Further, as both of the lower courts in this case acknowledged, the precedents of the relevant court of appeals strongly suggested that testimony such as petitioner's lacked constitutional protection. Since no controlling authority or robust consensus of persuasive authority placed the constitutional question here beyond debate, Franks is entitled to immunity from damages.

ARGUMENT

I. A GOVERNMENT EMPLOYEE'S TESTIMONY DISCLOSING INFORMATION LEARNED THROUGH PUBLIC EMPLOYMENT IS NOT CATEGORICALLY EXCLUDED FROM FIRST AMENDMENT PROTECTION

The court of appeals held that the First Amendment did not protect petitioner's testimony because it consisted entirely of information petitioner learned through government employment and because petitioner did not intend his testimony to be commentary on a matter of public concern. That holding was erroneous. When government employees are subpoenaed to testify about facts learned through their employment, the public interest in speech free of governmental control is often strong, and the government's interest as employer in controlling that speech is not sufficiently strong to justify a categorical rule denying First Amendment protection to such speech. Because in this case, petitioner's testimony involved a matter of public concern and implicated no legitimate managerial interest, petitioner's testimony was protected by the First Amendment.

A. Speech By A Government Employee Is Protected If It Is Made As A Citizen On A Matter Of Public Concern And The Government's Interest As An Employer Does Not Outweigh The Interests Advanced By The Speech

1. For almost 50 years, whether the speech of a government employee is protected under the First Amendment has depended on "a 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 the public services it performs through its employees." *Pickering* v. *Board of Educ.*, 391 U.S. 563, 568 (1968). In earlier years, the First Amendment was not understood to limit government personnel actions based on employee speech. See *Connick* v. *Myers,* 461 U.S. 138, 144 (1983); *McAuliffe* v. *City of New Bedford*, 29 N.E. 517, 517 (Mass. 1892) (Holmes, J.) ("The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.").

Pickering, however, concluded that such employment actions were best analyzed under a balancing approach, in light of the legitimate interests on both sides. On one hand, "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." 391 U.S. at 568. "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti* v. *Ceballos*, 547 U.S 410, 418-419 (2006).

On the other hand, "public employees do not surrender all their First Amendment rights by reason of their employment." *Garcetti*, 547 U.S. at 417. "[A] citizen who works for the government is nonetheless a citizen," *id.* at 419, and "the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern, *id.* at 417 (citing cases); see also *Pickering*, 391 U.S. at 568.

Pickering established a two-step framework to balance these interests. First, a court must determine whether the employee spoke "as a citizen on a matter of public concern"; if not, then the First Amendment provides no protection. Second, if the employee spoke as a citizen on a matter of public concern, the court must assess 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. *Garcetti*, 547 U.S. at 418; see also *Waters* v. *Churchill*, 511 U.S. 661, 667 (1994) (plurality); *Connick*, 461 U.S. at 142.

Conducting this analysis in *Pickering* itself, this Court extended First Amendment protection to a letter to the editor from a teacher criticizing the school board that employed him. The Court found that the teacher's speech had been as a citizen on a matter of public concern—the school budget—and that while the letter was "critical" of his employer, it did not "impede[] the teacher's proper performance of his daily duties in the classroom" or "interfere[] with the regular operation of the schools generally." 391 U.S. at 572-573.

2. *Garcetti* construed the requirement in *Pickering* that speech must be "as a citizen" to be protected

under the First Amendment. To do so, it looked to *Pickering*'s "overarching objectives" of safeguarding employees' ability to participate in public debate and ensuring the government had a free hand to manage its operations. *Garcetti,* 547 U.S. at 417-420. *Garcetti* concluded that employees' speech pursuant to their job responsibilities is unprotected because it is speech of an employee, rather than speech of a citizen. The Court reasoned that, as a categorical matter, such statements involve strong interests on the part of the government in controlling its own message and the employees' speech interests are correspondingly weak.

As to private interests, the Court reasoned, when the government controls speech that employees produce as part of their jobs, the government does not infringe "any liberties the employee might have enjoyed as a private citizen," because such control "simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Garcetti,* 547 U.S. at 421-422 (citing *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)).

On the other side of the balance, the government has "heightened interests in controlling speech made by an employee in his or her professional capacity," because "[o]fficial communications have official consequences, creating a need for substantive consistency and clarity." *Garcetti,* 547 U.S. at 422-423. As a result, "[s]upervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment and promote the employer's mission." *Ibid.* In light of the interests uniformly present when employees speak as part of their job duties, the Court

concluded that "the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities." *Id.* at 424.

The Court applied this rule to reject a First Amendment claim based on speech that was conceded to be pursuant to an employee's job duties. *Garcetti*, 547 U.S. at 421. The plaintiff, a prosecutor, had alleged that he was fired based in part on a memorandum that he wrote as part of his job as the "calendar deputy." Because it concluded that the First Amendment "does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities," the Court found the speech unprotected. *Id.* at 424. Since the parties agreed that the plaintiff "wrote his disposition memo pursuant to his employment duties," the Court "ha[d] no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." *Ibid.*

B. Speech That Discloses Information Learned From Public Employment May Be Speech "As A Citizen" Under The First Amendment

Garcetti held that when a public employee speaks pursuant to job responsibilities, the employee speaks as an employee and not as a citizen, and First Amendment protection is thus categorically unavailable. Contrary to the Eleventh Circuit's decision here, however, *Garcetti* did not foreclose First Amendment protection whenever the employee's speech "touche[s] only on acts [the speaker] performed as part of his official duties." Pet. App. 7a. Nor does *Garcetti*'s reasoning support a blanket denial of First Amendment protection to such speech. At least when provid-

ing testimony is not a regular part of a public employee's job responsibilities, testimony before a federal grand jury or at a federal criminal trial is generally speech of a citizen, not speech of an employee, and that is so even if the testimony covers only information learned through public employment. Where the testimony addresses a matter of public concern, under *Pickering*, such testimony is protected in the absence of a countervailing legitimate interest on the part of the government employer.

1. *Garcetti* held that statements qualify as the unprotected speech of an "employee" when they are made "pursuant to" the employee's official duties. 547 U.S. at 413. In distinguishing between the categorically unprotected speech of individuals speaking as employees and the potentially protected speech of those speaking as citizens, *Garcetti* referred to speech "pursuant to" employment duties a dozen times. This phrase is most naturally read to reach only speech "in the course of carrying out" employment duties. See *Webster's Third New International Dictionary* 1848 (1993). And *Garcetti* made this meaning plain when it equated speech that is pursuant to employment duties with speech "fulfilling a [work] responsibility," speech as "part of what [the employee] * * * was employed to do," 547 U.S. at 421, speech that was part of the employee's "perform[ing] the tasks he was paid to perform," *id.* at 422, and speech in which "the employee is simply performing his job duties," *id.* at 423.

The Court should not be understood to have expanded the scope of its holding by referring—in a sentence on which the court of appeals has relied for a broader rule—to "speech that owes its existence to a public employee's professional responsibilities." See

Abdur-Rahman v. *Walker*, 567 F.3d 1278, 1283 (11th Cir. 2009) (quoting *Garcetti*, 547 U.S. at 421). The very next sentence of *Garcetti* indicates that this statement referred to speech "the employer itself has commissioned or created"—in other words, speech the employer called for the employee to make. 547 U.S. at 422. And the Court reinforced this meaning with a citation to a case involving the government's right to control those who speak on its behalf. *Ibid.* (citing *Rosenberger*, 515 U.S. at 833).

The scope of the Court's holding in *Garcetti* is especially clear in its guidance regarding how to determine whether speech is pursuant to employment duties. To ascertain whether speech was outside the scope of the First Amendment as employee speech, the Court called for a "practical" inquiry into "the duties an employee actually is expected to perform." 547 U.S. at 424-425. By directing courts to focus on employees' job duties, rather than the basis of employees' knowledge, the Court made clear that *Garcetti*'s holding did not extend as far as the Eleventh Circuit believed.

2. The Eleventh Circuit was wrong to expand *Garcetti* to deny First Amendment protection to all speech that conveys information learned through public employment. *Garcetti* excluded from protection speech pursuant to an employee's job duties after finding that such speech uniformly couples weak individual interests in free expression with strong interests in managerial control. No comparable categorical balancing justifies rendering unprotected all speech that concerns information learned through public employment.

a. There are often strong private and public interests in the uniquely well-informed speech of public employees conveying information learned from their job responsibilities. First, government employees themselves have an interest in engaging in such speech. Were government employees unable to draw from—and describe—their professional experiences while participating in public debate, their ability to participate meaningfully would be limited. Cf. *Garcetti*, 547 U.S. at 421-422.

More critically, treating speech as categorically unprotected when it contains information learned through public employment would strip protection from speech that this Court has recognized to be of particularly great public value. See *Pickering*, 391 U.S. at 572; *Garcetti*, 547 U.S. at 419, 421. *Garcetti* and *Pickering* recognized that public employees' speech on topics related to their employment is of special value precisely *because* public employees gain knowledge through their work that may inform civic debate. Thus, *Pickering* rejected the proposition that teachers could be restrained from speaking about revenue-raising proposals of the school board in part because teachers are "the members of a community most likely to have informed and definite opinions" about school funding. 391 U.S.at 572. *Garcetti* noted that "[t]he same is true of many other categories of public employees." 547 U.S. at 421. *Garcetti* declined to interpret the category of unprotected employee speech in a manner that would encompass any "expressions related to the speaker's job" precisely because doing so would disserve the public interest in hearing speech from a particularly informed group of speakers. *Ibid.* It would similarly disserve public

debate to strip such speakers of First Amendment protection in every case where they share facts learned from public employment that underlie their opinions.

To be sure, government employers often have legitimate interests in limiting the dissemination of information to which employees have access due to public employment, by virtue of the government's "wide discretion and control over the management of [their] personnel and internal affairs." *Connick*, 461 U.S. at 150 (citation omitted). For instance, government employers have interests in prohibiting the disclosure of sensitive or confidential information, which may range from tax records and trade secrets to information about law enforcement sources or sensitive investigative techniques. See 28 C.F.R. 16.26(b) (identifying sensitive information whose disclosure is not authorized even in judicial proceedings without high-level approvals); see also *Pickering,* 391 U.S. at 570 n.3 (noting that "need for confidentiality" is an interest that may justify dismissal of employees for truthful statements). The need for "substantive consistency and clarity" in communications about an entity's activities, see *Garcetti*, 547 U.S. at 422, can also support the designation of particular employees as the exclusive spokespersons who respond to queries about particular activities. But these significant government interests can be addressed under the second step of *Pickering*'s tailored approach, by considering whether there are particular interests present that overcome the employee's speech interests. They are not sufficiently pervasive to justify the categorical exclusion from First Amendment protection that the Eleventh Circuit imposed. Cf. *id.* at 422

(adopting rule concerning statements pursuant to employment duties in reliance on categorical determination that "[e]mployers have heightened interests in controlling speech made by an employee in his or her professional capacity").

b. In the particular context of employee testimony before a grand jury or at a federal criminal trial, the *Garcetti* balance should be struck precisely contrary to the way the Eleventh Circuit believed: at least when the testimony is not part of the employee's job responsibilities, such testimony from an employee is speech by a citizen, not an employee, for purposes of *Pickering*.

Striking the balance in that fashion best serves the truth-seeking processes of grand juries and trials. See *Garcetti*, 547 U.S. at 422 (noting "our precedents' attention to the potential societal value of employee speech"). This Court has long recognized that "[t]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence," *United States* v. *Nixon*, 418 U.S. 683, 709 (1974), which in turn requires that—absent a valid claim of privilege—the public must have access to "every man's evidence." *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972) (citation omitted) (declining to create reporter's privilege). It has also acknowledged that if a witness fears adverse consequences from her statements, the witness may have an incentive to "shade his testimony." *Briscoe* v. *LaHue*, 460 U.S. 325, 333 (1983). As the Court explained in justifying the absolute immunity of witnesses, a witness fearing civil liability "might be reluctant to come forward to testify" and, once on the witness stand, their "testimony

might be distorted," because "[e]ven within the constraints of the witness' oath there may be various ways to give an account or to state an opinion." *Ibid.* Because the prospect of losing a job, no less than the prospect of civil liability, may provide an incentive for witnesses to shade their testimony, the truth-seeking function of trials would be best served by a rule that treats employee testimony as citizen speech, subject to *Pickering* balancing, even when the statements focus on matters learned through public employment.

That rule is particularly appropriate given the public interest in the detection and prosecution of official corruption. The more than 1000 prosecutions for federal corruption offenses that are brought in a typical year, see DOJ, *Report to Congress on the Activities and Operations of the Public Integrity Section For 2012*, http://www.justice.gov/criminal/pin/docs/2012-Annual-Report.pdf, at 24-30; DOJ, *Fact Sheet: the Department of Justice Public Corruption Efforts*, http://www.justice.gov/opa/pr/2008/March/08_ag_246.html, often depend on evidence about activities that government officials undertook while in office. This may require testimony from other government employees. The case at hand illustrates that point: to establish that a state legislator held a no-show job, prosecutors relied heavily on testimony from those who worked at the government program where the legislator was nominally employed, including a computer technician, a regional coordinator for the CITY program, and a business manager, in addition to petitioner. See *United States* v. *Schmitz*, 634 F.3d 1247, 1253-1255 (11th Cir. 2011). A rule treating public employees' testimony as citizen speech even if it concerns matters

learned through public employment helps to protect this vital speech.

Finally, public employees who testify pursuant to subpoena have an additional personal interest in being protected against employment actions. Such employees face civil or criminal sanctions for failing to testify or for testifying falsely. Their interest in speaking about information learned through public employment is therefore not simply their interest in expression but also their interest in avoiding criminal and civil consequences for noncompliance that they would bear directly. See, *e.g.*, 18 U.S.C. 401(3) (criminalizing failure to comply with court "order, rule, decree, or command"); 28 U.S.C. 1826(a) (authorizing court to "summarily order [the] confinement" of a witness "in any proceeding before or ancillary to any court or grand jury of the United States [who] refuses without just cause shown to comply with an order of the court to testify or provide other information"); 18 U.S.C. 1623 (criminalizing perjury).

By contrast, the government's interest in sanctioning employees for testimony that is not given as part of official duties is not so strong that it invariably trumps the speech interests at stake. To be sure, the government may have a strong interest in supervising employees' testimony in some cases in which giving testimony is not itself part of the official duties of the employee. For instance, agencies may, by regulation, create centralized review and approval processes for subpoenas that seek information learned by government employees through their official duties. See *United States ex rel. Tuohy* v. *Ragen*, 340 U.S. 462 (1951). In addition, where the government has a claim of privilege over information to which its employees

have access, the government has a compelling interest in requiring its employees to safeguard its interests by invoking that privilege. See, *e.g., General Dynamics Corp.* v. *United States*, 131 S. Ct. 1900, 1905 (2011) (noting that "compelling necessity of governmental secrecy" requires "a Government privilege against court-ordered disclosure of state and military secrets"); *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1223 (2013) (stating that the "[g]overnment can be expected to assert various privileges, such as law enforcement, attorney-client, work product, or deliberative process").

When, however, employees are subpoenaed in their personal capacity to testify about facts that are not protected from disclosure, in a manner that complies with applicable regulations, government employers have no legitimate interest in preventing the employee from appearing or from telling the truth. Indeed, in the particular case here, respondents have never asserted that petitioner's testimony disserved any legitimate government interest.

3. A public employee's motive is irrelevant to this analysis. In concluding that petitioner's testimony was the categorically unprotected speech of an "employee," rather than the speech of a citizen, the court of appeals relied in part on the fact that petitioner had not offered evidence "that his testimony was an attempt to comment publicly on CITY's internal operations." Pet. App. 8a; see also *id.* at 6a.

This line of inquiry, however, is not compatible with this Court's approach to employee speech. When this Court has found statements to be protected speech as a citizen on a matter of public concern, it has done so without regard to whether the speaker's

motive was to contribute to debate. See, *e.g.*, *Pickering*, 391 U.S. at 568-575 (concluding that plaintiff who spoke as citizen on matter of public concern could be dismissed only on showing that statements were knowingly or recklessly false or based on balancing of government and private interests); *Rankin* v. *McPherson*, 483 U.S. 378 (1987) (finding statements to be constitutionally protected speech as citizen on matter of public concern without analysis of speaker's motive). Conversely, the Court has found motive immaterial when it has found employee speech unprotected. See *Garcetti*, 547 U.S. at 421 (finding it "immaterial whether [an employee] experienced * * * personal gratification from writing" memorandum at issue).

This is not coincidental, because the balancing of interests that has controlled the employee-speech jurisprudence, see, *e.g.*, *Garcetti*, 547 U.S. at 417-423, is largely unaffected by employees' motivations. On the one hand, the public interest in obtaining truthful testimony is equally served when an employee is motivated by the objective of "compl[ying] with a subpoena to testify truthfully" as when the employee motivated by a desire to give "public comment." See Pet. App. 6a. Similarly, the public has an interest in "receiving the well-informed views of government employees" regardless of the employees' motives. *Garcetti*, 547 U.S. at 419. Even statements not supported by laudable motivations "contribute to the free interchange of ideas and the ascertainment of truth." *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 53 (1988) (citation omitted). On the other side of the balance, an employer's interests in operating efficiently, avoiding workplace discord, and controlling the articulation of the

government's own message exist independent of the motivation of employees to engage in employment-related speech. Accordingly, in an approach that seeks to balance the interests at stake, an employee's motive is not part of the test.

C. The Court Of Appeals Erred In Finding Petitioner's Speech Unprotected

Because testimony is not categorically excluded from First Amendment protection when it concerns information learned from public employment, and because testimony such as that at issue here is speech "as a citizen" regardless of the employee's motive for testifying, the court of appeals erred in concluding that petitioner's testimony was categorically unprotected employee speech. Petitioner's speech was not pursuant to employment duties because there was no evidence below that testifying in connection with criminal cases was "part of what [petitioner] * * * was employed to do," *Garcetti,* 547 U.S. at 421, or among the "tasks he was paid to perform," *id.* at 422. Rather, the record reflected that as director of the CITY program, petitioner's responsibilities involved hiring and firing employees, making financial decisions, and overseeing the day-to-day operations of a program serving youth. Pet. App. 10a. Accordingly, contrary to the decision below, petitioner's speech was protected by the First Amendment if it addressed a matter of public concern and if the interests served by the speech were not outweighed by countervailing government interests under *Pickering*. In light of its categorical exclusion of petitioner's testimony from First Amendment protection, the Eleventh Circuit did not apply the remainder of the *Pickering* analysis to the speech at issue here. Accordingly, this Court

could reasonably remand the case to the court of appeals to conduct the *Pickering* analysis.

To the extent that this Court elects to conduct the *Pickering* analysis in the first instance, it should conclude that there was no basis to dismiss petitioner for his testimony. Petitioner's testimony involved a classic matter of public concern. Speech addresses a matter of public concern when it relates "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." *Snyder* v. *Phelps*, 131 S. Ct. 1207, 1216 (2011) (citation and internal quotation marks omitted); see also *City of San Diego* v. *Roe*, 543 U.S. 77, 84 (2004) (per curiam). This Court has looked to "the content, form, and context of a given statement" to determine whether a statement is addressed to such a matter. *Connick*, 461 U.S. at 147-148.

Petitioner's statements satisfy this standard. This Court has explained that "there is a demonstrated interest in this country that government service should depend upon meritorious performance rather than political service," *Connick*, 461 U.S. at 149, and that "[e]xposing governmental inefficiency and misconduct is a matter of considerable significance," *Garcetti*, 547 U.S. at 425. Petitioner's testimony addressed these matters: It exposed misconduct on the part of a state legislator and inefficiency in the management of a government program. The form and context of petitioner's statements reinforce this conclusion. An employee's giving testimony pursuant to subpoena in judicial proceedings does not suggest that the employee's statements were, in context, "most accurately characterized as an employee grievance."

Connick, 461 U.S. at 154. On the contrary, because the integrity of judicial proceedings depends on the truthful testimony of witnesses, see *Nixon*, 418 U.S. at 709, the context heightened the public interest at stake. See, *e.g.*, *Karl* v. *City of Mountlake Terrace*, 678 F.3d 1062, 1069 (9th Cir. 2012) (suggesting that "an employee's testimony may be a matter of public concern if it contributes in some way to the resolution of a judicial or administrative proceeding in which discrimination or other significant government misconduct is at issue") (internal quotation marks omitted).

Finally, petitioner's employer had no "adequate justification for treating the employee differently from any other member of the general public" based on his speech. *Garcetti*, 547 U.S. at 418. Respondents neither demonstrated nor alleged any managerial interest that was undermined by petitioner's testimony. Because petitioner did not "personally confront[] his immediate supervisor" or "exercise[his] rights to speech at the office" his manner of speech was not likely to engender workplace disruption. *Connick*, 547 U.S. at 153. Nor have respondents suggested any lawful interest in barring the disclosure of the information about which petitioner testified. As a result, respondents would not have been justified under *Pickering* in dismissing petitioner based on his testimony, and petitioner's claims for equitable relief should be permitted to proceed. Since the Eleventh Circuit did not resolve whether petitioner's claims for equitable relief such as reinstatement are barred under the Eleventh Amendment, that issue may be addressed by the court of appeals in the first instance.

II. RESPONDENT FRANKS IS ENTITLED TO QUALIFIED IMMUNITY FROM DAMAGES IN HIS INDIVIDUAL CAPACITY

Although petitioner alleged facts that would, if true, establish retaliation in violation of the First Amendment, the dismissal of claims against Franks in his individual capacity should be affirmed, because Franks is entitled to qualified immunity.

A. Under the defense of qualified immunity to claims under 42 U.S.C. 1983, damages may not be awarded against a government official in his personal capacity "unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Reichle* v. *Howards*, 132 S. Ct. 2088, 2093 (2012). By barring damage awards against "all but the plainly incompetent and those who knowingly violate the law," *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (citation omitted), qualified immunity "protects the balance between vindication of constitutional rights and government officials' effective performance of their duties by ensuring that officers can 'reasonably anticipate * * * when their conduct may give rise to liability for damages." *Reichle*, 132 S. Ct. at 2093 (citation omitted). In addition, by "giv[ing] government officials breathing room to make reasonable but mistaken judgments about open legal questions," *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2085 (2011), the doctrine curbs the "inhibition of discretionary action" and "deterrence of able people from public service" to which an individual damages remedy might otherwise lead, in addition to avoiding the "distraction of officials from their governmental duties" that can be a cost of trial, *Mitchell* v. *Forsyth*, 472 U.S. 511, 525-526 (1985).

To defeat the qualified immunity defense, a plaintiff must establish that (i) the defendant committed "a violation of a constitutional right" and (ii) "the right at issue was 'clearly established' at the time of [the] defendant's alleged misconduct." *Pearson* v. *Callahan*, 555 U.S. 223, 232 (2009). "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982).

The inquiry into whether a right was "clearly established" requires that a court first define the right at the appropriate level of specificity. Framed "as a broad general proposition"—for instance, that "the First Amendment prohibits government officials from subjecting an individual to retaliatory actions" for their speech as citizens—any constitutional prohibition would be clearly established, and no official would be entitled to qualified immunity. *Reichle*, 132 S. Ct. at 2094 (citations omitted); *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999). Instead, a right must be established "in a 'particularized' sense so that the 'contours' of the right are clear to a reasonable official." *Reichle*, 132 S. Ct. at 2094 (citation omitted).

Once the right is framed at the appropriate level of specificity, a court must ask whether "every reasonable official would [have understood] that what he is doing violates that right." *Reichle*, 132 S. Ct. at 2093 (citation and internal quotation marks omitted; brackets in original). While this standard does not "require a case directly on point," it requires either "controlling authority" or "a robust 'consensus of cases of

persuasive authority'" of sufficient clarity to have placed "the statutory or constitutional question beyond debate." *Al-Kidd*, 131 S. Ct. at 2084 (quoting *Wilson*, 526 U.S. at 617).

B. At the time petitioner was dismissed, it was not clearly established that dismissing petitioner for his testimony would violate petitioner's First Amendment rights. Because the First Amendment provides no cause of action based on a public employer's response to an employee's speech unless the employee has "spoke[n] as a citizen on a matter of public concern," *Garcetti*, 547 U.S. at 418, a constitutional violation could be clearly established only if it would have been clear to any reasonable official that petitioner spoke as a citizen, not as an employee, when he gave subpoenaed testimony that "touched only on acts he performed as part of his official duties." Pet. App. 7a.

Certainly *Garcetti* did not establish that proposition. *Garcetti* made clear that speech pursuant to an employee's official duties is unprotected, but did not address whether speech devoted exclusively to disclosing information learned through public employment falls within that unprotected category. Speech of that type was not before the Court in *Garcetti*. And because the issue was not presented in the case before it, the Court declined to delineate the boundary between protected citizen speech and unprotected employee speech, stating that it did not have occasion to "articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." 547 U.S. at 424.

Nor has any other decision of this Court, prior to or after *Garcetti,* conferred protection on speech consisting entirely of information an employee learned

through public employment. While *Pickering* and subsequent cases treated speech as protected when employees expressed views that were informed by their government positions, none of those cases addressed speech that simply relayed information about acts performed as part of a speaker's official duties. See Pet. App. 7a-8a. Accordingly, none of those cases considered whether speech of that type is so closely tied to employees' job responsibilities as to constitute speech as an employee rather than a citizen.

Also insufficient for qualified immunity purposes are this Court's cases supporting the notion that "all citizens owe an independent duty to testify in court proceedings." Pet. Br. 41 (citing *Reilly* v. *City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008), cert. denied, 555 U.S. 1170 (2009), and collecting cases). While those cases may establish the obligation of every citizen to testify when called, they do not clearly establish that every person who testifies invariably does so as a citizen, and not as an employee.

C. The cases of the courts of appeals likewise did not provide clear notice that it was unconstitutional to fire an employee based on testimony that related solely to the employee's job responsibilities. This Court has looked to the precedent of the circuit in which a case arose as part of its determination of clearly established law. See, *e.g., Pearson,* 555 U.S. at 244; *Safford United Sch. Dist. No. 1* v. *Redding,* 557 U.S. 364, 378 (2009). Here, as the courts below recognized in petitioner's case, Eleventh Circuit law at the time of petitioner's dismissal did not clearly establish that his testimony was constitutionally protected, but instead pointed strongly to the conclusion that testimony of this type was unprotected. In *Morris* v.

Crow, 142 F.3d 1379 (1998) (per curiam), the case on which the court of appeals relied most heavily below, a plaintiff claimed to have been fired from his job in a sheriff's office based in part on a civil deposition in which the plaintiff recounted his investigation of a car crash involving another officer. The plaintiff had investigated the crash and prepared an accident report as part of his job, but there was no "evidence that [the plaintiff] gave deposition testimony for any reason other than in compliance with a subpoena to testify truthfully in [a] civil suit." *Id.* at 1382.

Morris held that the speech was unprotected. In analyzing the plaintiff's claim, *Morris* anticipated *Garcetti* by holding that employee speech is protected only when it "was made primarily in the employee's role as citizen, rather than primarily in the role of employee," 142 F.3d at 1382, though it recognized that the Supreme Court had not then decided "whether speech that occurs in the course of and as part of an employee's ordinary duties is protected," *id.* at 1381. *Morris* then found the plaintiff's testimony to be unprotected speech of an employee, emphasizing that the testimony principally "reiterated" the plaintiff's "conclusions regarding his observations of [an] accident" that he had made and then described in an accident report as part of his job duties. *Id.* at 1382. *Morris* also noted that there was no evidence that the plaintiff's speech had been motivated by a desire to participate in public debate, emphasizing that the speech could not "be characterized as an attempt to make public comment on sheriff's office policies and procedures, the internal workings of the department, the quality of its employees, or upon any issue at all." *Ibid.* It distinguished on this ground a prior case that

had found testimony to be protected. *Id.* at 1382-1383 (discussing *Martinez* v. *City of Opa-Locka*, 971 F.2d 708, 712 (11th Cir. 1992) (per curiam)).

As the court of appeals noted shortly after petitioner's firing, other cases in the Eleventh Circuit had also found no First Amendment violation in the dismissal of employees for speech closely related to their employment, notwithstanding claims that the employees had not been required to engage in the speech as part of their work. See *Abdur-Rahman*, 567 F.3d at 1284 (noting that "[i]f we had examined only whether the employees' official responsibilities required them to speak" the court "would have reached a different result" in *D'Angelo* v. *School Bd. of Polk Cnty.*, 497 F.3d 1203 (11th Cir. 2007), *Vila* v. *Padron*, 484 F.3d 1334 (11th Cir. 2007), and *Battle* v. *Board of Regents*, 468 F.3d 755 (11th Cir. 2006)).

And in reliance on *Garcetti* and Eleventh Circuit cases, *Abdur-Rahman* squarely held that speech about "information acquired and observations made during the course of performing [an employee's] official duties"—like petitioner's speech—was unprotected. 567 F.3d at 1286. Applying *Garcetti*, the court defined the employee-speech category to reach statements that conveyed information learned through government work: the speech "owed its existence to [the] employee's professional duties," *id.* at 1283 (citing *Garcetti*, 547 U.S. at 424), and the court saw "no relevant analogue to speech by citizens" insofar as the speech reported information learned through government work, *id.* at 1285-1286 (quoting *Garcetti*, 547 U.S. at 424). Although *Abdur-Rahman* was decided several months after petitioner's dismissal, it confirms that reasonable jurists could disagree regarding

whether, after *Garcetti*, speech devoted solely to conveying information learned in public employment qualified as unprotected employee speech. In short, a government employee in the Eleventh Circuit would not have taken from the case law a rule that an employee speaks as a citizen unless their speech is part of their job responsibilities. Nor would such an employee have surmised that such speech is protected merely because it comes in the form of testimony.

The cases cited by petitioner do not establish—let alone clearly establish—a rule to the contrary. Petitioner relies on two earlier cases in which the Eleventh Circuit had concluded that particular testimony of public employees had been constitutionally protected. See Pet. Br. 35-37 (discussing *Tindal* v. *Montgomery Cnty. Comm'n*, 32 F.3d 1535 (11th Cir. 1994) (deposition in lawsuit alleging race and sex discrimination); *Martinez*, 971 F.2d at 712 (testimony before legislative body investigating noncompliance with purchasing rules)). But as noted above, *Morris* subsequently indicated that an employee's testimony concerning work activities is unprotected absent "evidence that [a plaintiff] gave * * * testimony for any reason other than in compliance with a subpoena to testify truthfully." 142 F.3d at 1382. The court even explicitly indicated that *Martinez* could be distinguished on those grounds. *Id.* at 1382-1383. In light of *Morris*, these earlier cases cannot be read to clearly establish that employee testimony concerning work activities is protected absent evidence that the testimony was motivated by an objective other than subpoena compliance. Indeed, petitioner concedes that in light of *Morris,* the cases that he cites cannot be read to establish First Amendment protection for all em-

ployee testimony. See Pet. Br. 39. And were there ambiguity as to the line between protected and unprotected testimony, the district court was surely correct that "*Martinez* and *Crow* do not create clear and binding precedent so well-established" that Franks should have known that petitioner's speech fell on the protected side of the line. Pet. App. 33a.

Finally, petitioner suggests that no reasonable person in Franks' position could have believed petitioner's testimony was that of an employee in light of decisions of the Third and Seventh Circuits finding testimony to be constitutionally protected when it disclosed information learned through a public employee's job. Pet. Br. 41-45 (discussing *Reilly, supra*; *Morales* v. *Jones*, 494 F.3d 590 (7th Cir. 2007); *Fairley* v. *Fermaint*, 482 F.3d 897 (7th Cir. 2007)). As discussed above, however, Franks' own jurisdiction had taken a different approach. See *Morris*, 142 F.3d at 1382; Pet. App. 7a n.3 (acknowledging *Reilly* and *Morales* but noting that "*Morris* is the law in this Circuit on the question of public employee speech per a subpoena in the context of judicial proceedings"). Petitioner cites no authority to suggest that an official acts unreasonably in adhering to controlling authority in the official's own jurisdiction. And in any event, especially in light of the Eleventh Circuit's contrary jurisprudence, the views of the two circuits on which petitioner relies cannot be said to represent "a robust 'consensus of cases of persuasive authority'" concerning employee speech after *Garcetti* that is sufficient to place the constitutional question in this case "beyond debate." *Al-Kidd*, 131 S. Ct. at 2084 (citation omitted). When "judges * * * disagree on [the] constitutional question" presented, it would be "unfair to

subject [government officials] to money damages for picking the losing side of the controversy." *Wilson*, 526 U.S. at 618; see also, *e.g.*, *Reichle*, 132 S. Ct. at 2097.

CONCLUSION

The judgment of the court of appeals should be affirmed as to the claims against Franks in his individual capacity and reversed as to the claims against Burrow in her official capacity.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Assistant Attorney General
IAN HEATH GERSHENGORN
Deputy Solicitor General
RACHEL P. KOVNER
Assistant to the Solicitor General
DOUGLAS N. LETTER
MATTHEW M. COLLETTE
ROBERT D. KAMENSHINE
Attorneys

MARCH 2014