No. 13-483

IN THE

Supreme Court of the United States

EDWARD LANE,

Petitioner,

v.

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

Respondents.

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

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Is the government categorically free under the First Amendment to retaliate against a public employee for truthful sworn testimony that was compelled by subpoena and was not a part of the employee's ordinary job responsibilities?

2. Does qualified immunity preclude a claim for damages arising from such retaliation?

PARTIES TO THE PROCEEDINGS BELOW

Pursuant to Rule 14.1(b), the parties to the proceedings below include petitioner, respondent Steve Franks, and Central Alabama Community College, a defendant-appellee below that is no longer a party to the case. Respondent Susan Burrow was added to the case after certiorari was granted because she has assumed the office of president of Central Alabama Community College, which Franks formerly held.

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BRIEF FOR THE PETITIONER

Petitioner Edward Lane respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-8a) is unpublished. The district court's opinion (Pet. App. 9a-35a) is unpublished.

JURISDICTION

The court of appeals issued its judgment on July 24, 2013. Pet. App. 1a. The petition for a writ of certiorari was filed on October 15, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The First Amendment to the Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const. amend. I.

STATEMENT OF THE CASE

This First Amendment retaliation case arises from a public employee's truthful subpoenaed testimony in a federal fraud prosecution. Petitioner claims that respondent Steve Franks terminated his employment in retaliation for petitioner's subpoenaed testimony during the prosecution of a corrupt legislator who abused her office to defraud a state program for at-risk youth. Affirming the district court, the Eleventh

Circuit held as a matter of law that respondent was permitted to fire petitioner for his testimony.

1. In 2006, Central Alabama Community College (CACC) hired petitioner as acting director of the Community Intensive Training for Youth Program (CITY). Pet. App. 2a. CITY was a program for at-risk youth who otherwise might face incarceration. *Id*. The program provided skills and guidance that the children could use to complete school and achieve their potential. CITY operated multiple locations, using both state and federal funds. *Id*. 10a, 12a. "In his job as Director, [petitioner] ran the program, including day-to-day operations, hiring and firing of employees, and making financial decisions." *Id*. 10a. It is undisputed that petitioner's official duties did not include testifying in court. *See id.* 7a.

This case arises from petitioner's testimony in a federal fraud prosecution brought by the United States Attorney for the Northern District of Alabama against Suzanne Schmitz, an Alabama state legislator. The United States prosecuted Schmitz for fraudulently arranging and concealing a no-show job for herself at CITY.

The prosecution subpoenaed petitioner to testify before a federal grand jury and at two criminal trials. *Id*. 12a. Petitioner truthfully testified that, in the course of an audit of CITY's finances, he learned that Schmitz was receiving paychecks from CITY—and in fact was one of its highest-paid employees—without ever reporting for work. *Id*. 2a-3a, 12a-13a. Petitioner attempted to require Schmitz to perform tasks commensurate with her position, including counseling

children. Schmitz refused. *Id*. 3a. Petitioner was then warned by CITY and CACC employees that he should tread carefully, lest he provoke retaliation from Schmitz or the legislature. *Id*. 2a, 11a. And indeed, after petitioner terminated Schmitz for nonperformance, Schmitz vowed to retaliate against him, informing another CITY employee that she planned to "get [petitioner] back," and that, if petitioner ever sought funds for CITY from the legislature, she would inform him, "you're fired." *Id*. 2a, 11a.

In the wake of petitioner's testimony, the grand jury returned an eight-count indictment charging Schmitz with mail fraud and fraud in connection with a program receiving federal funds. In 2008 and 2009, petitioner testified—again under subpoena—at Schmitz's two criminal trials (the first of which ended in a mistrial). *Id*. 3a, 12a-13a. A jury convicted Schmitz of all counts but one. *See United States v. Schmitz*, 634 F.3d 1247, 1258 (11th Cir. 2011). Affirming Schmitz's conviction for mail fraud, the Eleventh Circuit explained that:

> Schmitz engaged in a calculated and extensive pattern of fraudulent conduct designed to allow her to collect a state-government salary while performing almost no work. She accomplished this scheme through demonstrably false reports and time sheets. And, when people started asking questions, she used her status as state legislator to keep the scheme going.

Id. at 1265. In total, Schmitz fraudulently obtained $177,251.82 in public funds. *Id*. at 1258. She was

sentenced to thirty months' imprisonment and forced to pay restitution. *Id*.

In January 2009, after petitioner testified at Schmitz's first trial, and just before CITY was due to request additional funds from the state legislature, respondent Franks—then President of CACC—fired petitioner, Pet. App. 3a, ostensibly for financial reasons, *id*. 14a. Indeed, CITY terminated twenty-nine employees (including petitioner) who were deemed "probationary employees" because they had not been at CITY long enough to earn tenure. *Id*. 3a. But just two days later, Franks rescinded all the terminations except those of petitioner and one other employee, who had been at CITY for less than six months. *Id*. 3a-4a, 16a-17a.[1]

2. Petitioner filed this lawsuit, alleging that his termination violated the First Amendment. Pet. App. 4a.[2] His complaint alleges that Franks—either collaborating with or under pressure from Schmitz's political allies, or to appease them—terminated petitioner in retaliation for his truthful subpoenaed

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[1] Franks claimed that he reinstated the other employees because he came to doubt whether they were still in their probationary periods. But like the others, petitioner had been employed by CACC for more than six months, which was the probationary period under the contract he had signed in August 2007. Pet. App. 11a, 16a.

[2] Petitioner also brought claims against CACC, as well as claims under 42 U.S.C. § 1985 and the state whistleblower statute, Ala. Code § 36-26A-3. Petitioner did not pursue these claims on appeal, and they are not at issue here. Pet. App. 4a n.1.

testimony. *Id*. 4a, 14a-15a. Petitioner sued Franks in both his individual and official capacities, *id*. 4a, seeking damages as to the former and equitable relief as to the latter, including reinstatement to the "position in which he would have worked absent the Defendant's retaliatory treatment." *Id.* 23a.

Franks moved for summary judgment, which the district court granted. Pet. App. 10a. The court recognized that "genuine issues of material fact exist in this case concerning Dr. Franks' true motivation for terminating Mr. Lane's employment," *id*. 21a, but it nonetheless granted Franks' motion, holding that the First Amendment did not apply because petitioner testified as an employee, not a citizen. The court explained that:

> Mr. Lane's testimony did not occur in the workplace, but he learned of the information that he testified about while working as Director at C.I.T.Y. Because he learned the information while performing in his official capacity as Director at C.I.T.Y., the speech can still be considered as part of his official job duties and not made as a citizen on a matter of public concern.

Id. 29a. The court also ruled in the alternative that Franks was entitled to sovereign immunity in both his official and individual capacities. *See id*. 25a-26a.

3. The Eleventh Circuit affirmed with respect to the district court's First Amendment holding. Pet. App. 4a. The court of appeals read its precedent to hold that "[e]ven if an employee was not required to make the speech as part of his official duties, he enjoys

no First Amendment protection if his speech owes its existence to [the] employee's professional responsibilities and is a product that 'the employer itself has commissioned or created." *Id*. 5a (citing *Abdur-Rahman v. Walker*, 567 F.3d 1278, 1286 (11th Cir. 2009)) (internal quotation marks omitted). It elaborated that subpoenaed testimony regarding facts that relate to a public employee's official duties is therefore not protected because it is not made "as a public comment" on the employer's practices. *Id*. 6a (quotation marks omitted).

Applying that standard, the Eleventh Circuit explained that the fact "[t]hat Lane testified about his official activities pursuant to a subpoena and in the litigation context, in and of itself, does not bring Lane's speech within the protection of the First Amendment." *Id*. 7a. It brushed aside that petitioner's "official duties did not distinctly require him to testify at criminal trials" by stating that "formal job descriptions do not control." *Id*. But the court of appeals did not believe that petitioner was actually required to testify because of his job. Instead, petitioner's testimony was unprotected, the court concluded, because "the subject matter of Lane's testimony touched only on acts he performed as part of his official duties," and "nothing evidences that Lane 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*. 7a-8a (internal quotation marks omitted). The court of appeals therefore held that "as a matter of law," petitioner could not "state a claim for retaliation under the First Amendment." *Id*. 8a.

The Eleventh Circuit did not identify any court that had adopted its view of the First Amendment, and acknowledged that "[o]ther circuits seem to have decided this issue differently." *Id*. 7a n.3. It cited as examples the Third and Seventh Circuits' decisions holding that the First Amendment protected subpoenaed testimony. *Id.* (citing *Morales v. Jones*, 494 F.3d 590, 598 (7th Cir. 2007), and *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008)).

The court further held that because no First Amendment violation had occurred at all, it necessarily followed that Franks was entitled to qualified immunity against any claim for damages. Pet. App. 4a n.2. Having resolved the entire case as a matter of First Amendment law and qualified immunity, the court declined to "decide about Franks's defense of sovereign immunity." *Id*. 4a.

This Court granted certiorari. 133 S. Ct. 999 (2014) (mem).[3]

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[3] Subsequently, the state of Alabama advised petitioner that Franks had resigned. It therefore substituted respondent Susan Burrow, the current president of CACC, for the official capacity claim. The state attorney general's office represents Burrow. Franks remains the respondent for the claim against him in his individual capacity, and is separately represented.

SUMMARY OF ARGUMENT

This Court's precedents clearly establish that because petitioner's testimony related to matters of public concern, and was not offered pursuant to his official duties, the First Amendment protects it. This is true whenever a public employee testifies under subpoena, and not in the course of his duties. In such cases, employers may impose discipline for the testimony only if they show that the testimony's disruptive effects on the workplace outweigh the employee's interest in testifying, and society's interest in hearing the testimony.

For more than half a century, this Court has recognized that the First Amendment protects public employees from retaliation for speech relating to matters of public concern. The Court summarized its settled precedents in *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006), explaining that "[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively."

Garcetti also recognized an exception to this general rule: when an employee speaks not as a citizen, but instead pursuant to his official duties, the First Amendment does not impede employer discipline. The rationale for the *Garcetti* exception is that although public employees retain the rights of citizenship, employers have the right to control employees' job performance, even if the employees' duties also include writing and speaking.

Under this Court's long-settled precedents, the First Amendment protects petitioner's subpoenaed testimony at Schmitz's federal corruption prosecution because in every relevant sense, petitioner's testimony constituted citizen speech upon a matter of public concern—and not speech in petitioner's capacity as CITY's director. It therefore falls squarely within the ordinary and long-settled rule protecting such speech, and not the *Garcetti* exception.

First, the content, form, and context of petitioner's testimony establish that it related to matters of public concern. The content—which revealed corruption by an elected official, and touched upon a scandal that rocked Alabama's community college system—spoke to issues and values at the heart of the First Amendment. The form and context—sworn, subpoenaed testimony in support of a federal corruption prosecution, delivered at a grand jury and then at a public trial—likewise establish the inherently public nature of petitioner's statements, as well as their civic value. Indeed, this Court has been emphatic that subpoenaed testimony is speech of the highest value, as it enables the judicial system to achieve its ultimate goal: the truth.

Second, petitioner spoke as a citizen, and not as an employee, when he testified. It is undisputed that petitioner's responsibilities were managing CITY's staff and budget, and overseeing its day-to-day operations—not testifying in federal prosecutions, or in any other judicial proceeding. Thus, petitioner was not subpoenaed to testify as CITY's director speaking on the organization's behalf, but instead as an

individual and a fact witness. He alone had to decide whether to comply, to assert privilege, or to move to quash or narrow the subpoena. He alone risked contempt or perjury sanctions if he resisted the subpoena. When he testified, he alone was responsible for choosing his words. And in the course of responding, he took time away from his work to describe Schmitz's corruption to the grand jury and at Schmitz's first trial, and he then testified at Schmitz's second trial even though he had already been terminated from his job. These facts establish that petitioner testified as a citizen, and not as a public employee, even though the subject matter of his testimony described events that occurred at work.

In this case, as in others in which the Court has recognized protection for employee speech, the First Amendment interests transcend petitioner's individual interest in speaking, and include society's interest in hearing his truthful testimony. A long line of this Court's precedents holds that every citizen is obligated—as a citizen, and regardless of the identity of his employer—to testify for the benefit of the public. This Court has held that the integrity of the judicial process hinges on the candor of witnesses, and has facilitated testimony by construing protections for witnesses broadly and privileges against testifying narrowly. Petitioner's truthful testimony—which enabled the executive branch to root out corruption, and the federal courts to administer the law—is an iconic example of a citizen participating in valuable public discourse, and thus engaging in behavior that the First Amendment has always protected. Moreover, society's interest is especially pronounced in

corruption cases, in which subpoenaed testimony is often critical to uncover well-concealed illegality, and in which the perpetrators often are powerful individuals capable of intimidating witnesses.

Against these weighty First Amendment interests, there is no risk that First Amendment protection for petitioner's testimony will unduly impair the smooth functioning of public offices, and no reason consistent with *Garcetti* to deny protection to his speech. Although a public employer may control official communications to ensure that they further the employer's interests and mission, an employer has no right to dictate how employees testify in court; indeed, attempting to do so would be unlawful, and possibly criminal. That is because the purpose of sworn testimony is not to advance the employer's mission, but instead to promote society's search for truth—a mission that employers have no authority to impede.

This Court's settled precedents thus compel reversal on both the First Amendment issue, and on the issue of qualified immunity. Immunity is not available when, as here, an official violates a clearly established right. By January 2009, when petitioner was terminated, all of this Court's modern public employee speech cases supported his right to testify. If petitioner can prove the other elements of his claim at trial, he is therefore entitled not only to prospective relief from respondent Burrow, but also to damages from respondent Franks.

In the court below, Franks did not rely on this Court's precedents. Instead, he argued that petitioner was not entitled to relief under circuit precedent. That

contention is unpersuasive. Even if Franks' description of the lower court's decisions was correct, those cases cannot trump this Court's controlling precedents. Franks' argument also fails on its own terms. On-point circuit cases—from the Eleventh Circuit and other circuits that have addressed speech resembling petitioner's—clearly establish his right to testify.

The judgment of the Eleventh Circuit should therefore be reversed.

ARGUMENT

When public officials violate a citizen's constitutional rights, they can be held liable for prospective relief. If the citizen's right was clearly established when the violation occurred, the officials are also liable for damages. This case presents two questions: whether the First Amendment protects petitioner's subpoenaed testimony at all; and whether petitioner's right to testify was clearly established so as to support a claim for damages. These questions substantially overlap, and neither one is difficult. Put simply, no state official—in January 2009 or today—could reasonably believe that it is permissible to retaliate against a witness for his subpoenaed testimony assisting a federal corruption prosecution. This brief will prove as much, without approaching the word limit.[4]

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[4] References to subpoenaed testimony in this brief refer to situations, like this case, in which an employee testifies on his

I. This Court's Precedents Clearly Establish That The First Amendment Protects Petitioner's Testimony.

The First Amendment protects truthful subpoenaed testimony because it is citizen speech on a matter of public concern. When a citizen—whether a public employee or not—responds to a subpoena from a court of law commanding him to testify, his testimony contributes to public discourse and society's pursuit of truth and justice. The citizen has a strong interest in the content of his testimony, and society has perhaps an even stronger interest in hearing it. The First Amendment has always safeguarded these interests against official retaliation.

1. For more than six decades, this Court has recognized that public employers may not require citizens to forsake their constitutional rights as a condition of employment. *See, e.g.*, *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605-06 (1967); *Shelton v. Tucker*, 364 U.S. 479, 487-88 (1960); *Wieman v. Updegraff*, 344 U.S. 183, 190-91 (1952). In *Pickering v. Board of Education*, 391 U.S. 563, 574 (1968), this Court—recognizing that "the threat of dismissal from public employment is . . . a potent means of inhibiting speech"—applied this principle to hold that "absent

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own behalf as a fact witness. Different concerns may apply when an employee testifies as the representative of his employer—whether under Federal Rule of Civil Procedure 30(b)(6), or as a designee for an agency before an investigative or legislative body. The Court need not address such cases here.

proof of false statements knowingly or recklessly made by him, a [public employee's] exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." *Id*. (footnote omitted). The Court also recognized that if the speech in question "interfered with the regular operation" of the employer, then discipline might be warranted. *Id*. at 573. It therefore admonished courts, when necessary, to "balance . . . 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." *Id*. at 568.

Since then, this Court has consistently affirmed that 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, e.g.*, *Connick v. Myers*, 461 U.S. 138, 145 (1983); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1979); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977); *Perry v. Sindermann*, 408 U.S. 593, 598 (1972). The First Amendment does not preclude employer discipline for speech that does not relate to matters of public concern—*e.g.*, homemade pornography, *City of San Diego v. Roe*, 543 U.S. 77, 78, 84 (2004) (per curiam), or workplace grievances, *Connick*, 461 U.S. at 147—but if the speech even "touch[es] upon a matter of public concern," the First Amendment applies, *id*. at 149.

If the speech does touch upon a matter of public concern, then a public employer contemplating an adverse response must demonstrate that its interests in the efficient provision of public services outweigh the First Amendment interests in protecting the speech. *See id.* "[T]he state's burden in justifying a particular discharge varies depending upon the nature of the employee's expression." *Id*. A strong showing of disruption is required to justify discipline for high value speech—*e.g.*, speech that allows the public to "evaluat[e] the performance of . . . an elected official," or speech that "bring[s] to light actual or potential wrongdoing or breach of public trust." *See id*. at 148.

2. This Court synthesized its holdings in *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006), reaffirming that "[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." The Court clarified that this rule does not, however, protect employees who merely "make statements pursuant to their official duties." *Id*. at 421.

The Court began by citing the long line of precedents establishing that "the First Amendment protects a public employee's right . . . to speak as a citizen addressing matters of public concern." *See id*. at 417 (citing *Pickering*, 391 U.S. at 568; *Connick*, 461 U.S. at 147; *Rankin v. McPherson*, 483 U.S. 378, 384 (1987); *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 466 (1995)). This is because "a citizen who works for the government is nonetheless a citizen," and does not relinquish either the rights or

obligations of citizenship by accepting public employment. *See Garcetti*, 547 U.S. at 419.

The Court further explained that "the First Amendment interests at stake extend beyond the individual speaker," and include "the public's interest in receiving the well-informed views of government employees . . . ." *Id.* Relying on settled precedent, the Court reasoned that public employees' participation is often necessary for "informed, vibrant dialogue in a democratic society," and it recognized that "widespread costs may arise when dialogue is repressed." *Id.* (citing *Pickering*, 391 U.S. at 572; *Roe*, 543 U.S. at 82; *Nat'l Treasury Emps. Union*, 513 U.S. at 470).

Against these interests, the Court noted that "[g]overnment 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*, 547 U.S. at 418. The Court thus refused "to recognize First Amendment claims based on employees' work product," because "[t]he prospect of [First Amendment] protection does not . . . invest [employees] with a right to perform their jobs however they see fit." *Id*. at 422.

Applying that standard, the Court held that when deputy prosecutor Richard Ceballos prepared a memorandum for his superiors, the First Amendment did not protect that document because Ceballos did not write it as a citizen, but instead "as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case." *Id*. at 421.

The Court stressed that "[w]hen he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean that his supervisors were prohibited from evaluating his performance." *Id*. at 422. Thus, Ceballos' supervisors were entitled to discipline him in order to ensure that his "official communications [we]re accurate, demonstrate[d] sound judgment, and promote[d] the employer's mission." *Id*. at 423.

The Court was explicit that its ruling did not turn on the fact that "[t]he memo concerned the subject matter of Ceballos' employment," because "[t]he First Amendment protects some expressions related to the speaker's job." *Id.* at 421 (citing *Pickering*, 391 U.S. at 573, *Givhan*, 439 U.S. at 414). Indeed, it is "'essential that [public employees] be able to speak out'" on questions related to their employment, as they are the ones "'most likely to have informed and definite opinions'" on those subjects. *Id*. (quoting *Pickering*, 391 U.S. at 572).

3. Applying these well-settled precedents here, petitioner's testimony in the Schmitz prosecution plainly constituted speech "on a matter of public concern." *Garcetti*, 547 U.S. at 418. Speech deals with matters of public concern "when it can be fairly considered as relating to any matter of political, social, or other concern to the community, 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) (internal quotation marks and citations omitted). To

make this determination, the Court "examine[s] the content, form, and context," of the speech. *Id*. (internal quotation marks omitted); *Connick*, 461 U.S. at 147-48.

The content, form, and context of petitioner's testimony all establish that it addressed matters of public concern. Indeed, petitioner's testimony passes the test on its content alone. This Court has already recognized that speech that allows the public to "evaluat[e] the performance of . . . an elected official" is of public concern, as is speech that "bring[s] to light actual or potential wrongdoing or breach of public trust." *Connick*, 461 U.S. at 148. Petitioner's speech accomplished that by describing Schmitz's corruption. Moreover, the Schmitz trial generated substantial news attention and public interest.[5] And the broader issue underlying the trial—of legislators supplementing their income by taking jobs in the community college system, a practice known as "double dipping"—likewise generated substantial news

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[5] *See, e.g.*, *State Representative Schmitz Indicted For Fraudulent Scheme Which Netted Her $177,251.82*, States News Service, Jan. 31, 2008; Virginia Martin, *CITY Coordinator Testifies About Schmitz's Work*, The Birmingham News, Feb. 17, 2009, http://blog.al.com/spotnews/2009/02/city_coordinator_testifies_abo.html; *Sue Schmitz Was Convicted of Federal Fraud Charges and Removed as Alabama Representative*, The Birmingham News, Feb. 25, 2009, http://blog.al.com/twoyear/2009/02/sue_schmitz_was_convicted_of_f.html; *Sue Schmitz to Spend 30 Months in Prison*, Fox, July 22, 2009, http://www.myfoxal.com/story/10772838/sue-schmitz-to-spend-30-months-in-prison.

interest, as well as additional prosecutions, changes in personnel in the community college system, and ultimately reform of state ethical rules.[6]

The form and context of petitioner's testimony also establish its public character and value. That is generally true of subpoenaed testimony in judicial proceedings—particularly in criminal cases, in which the public interest in law and order stands front and center. Respondents have already conceded "that subpoenaed testimony is important." BIO 11. But that understates the point. As this Court has explained, "arriving at the truth is a fundamental goal of our legal system." *United States v. Havens*, 446 U.S. 620, 626 (1980). Consequently:

> The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts . . . . To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for

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[6] *See* Brett J. Blackledge, *Legislator Tells Grand Jury About College Job*, The Birmingham News, Mar. 14, 2008, http://blog.al.com/twoyear/2008/03/march_14_2008_legislator_tells.html; *Double Dipping Measure Approved*, Cullman Times, Aug. 23, 2007, http://www.cullmantimes.com/local/x1116129279/Double-dipping-measure-approved; *Alabama Supreme Court: Double-Dipping Must Go!*, Politics Alabama, May 30, 2009, http://politicsalabama.blogspot.com/2009/05/alabama-supreme-court-double-dipping.html; Mike Cason, *Sen. Quinton Ross Might Challenge Alabama's "Double Dipping" Law*, AL.com, Oct. 23, 2013, http://blog.al.com/wire/2013/10/sen_quinton_ross_running_for_r.html.

> the production of evidence needed either by the prosecution or by the defense.

United States v. Nixon, 418 U.S. 683, 709 (1974).

Recognizing that "'public policy . . . requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible,'" this Court has recognized broad immunities for testifying witnesses in both trials and grand juries, including for public employees. *Briscoe v. LaHue*, 460 U.S. 325, 333 (1983) (quotation marks omitted); *Rehberg v. Paulk*, 132 S. Ct. 1497, 1506 (2012). This protection is necessary to ensure that witnesses "testify fully and frankly," without fear of "retribution." *Douglas Oil Co. v. Petrol Stops NW*, 441 U.S. 211, 219 (1979). Simultaneously, "[b]ecause of the key role of the testimony of witnesses in the judicial process, courts have historically been cautious about privileges" against testifying, *Nixon*, 418 U.S. at 710 n.18, and the Court has consistently rejected efforts to create or "expansively construe[]" such privileges "in derogation of the search for truth," *id*. at 710. Thus, the obligation to testify outweighs a journalist's interest in protecting his sources, *Branzburg v. Hayes*, 408 U.S. 665, 690-91 (1972), and even a president's executive prerogative, *see Nixon*, 418 U.S. at 713.

Thus, individually and together, the content, form, and context of petitioner's testimony all establish that he spoke on matters of public concern.

4. Petitioner also clearly spoke as a citizen, and not in his capacity as director of the CITY program. This inquiry into whether an employee testified

pursuant to his duties "is a practical one." *Garcetti*, 547 U.S. at 424. As a practical matter, petitioner's responsibilities included overseeing CITY's day-to-day operations, and managing its staff and budget. Pet. App. 10a. In the ordinary course of his duties, petitioner would never expect to testify in a federal criminal prosecution, or for that matter in any court. Indeed, not even the court of appeals believed that petitioner's testimony was part of his job responsibilities. The Eleventh Circuit acknowledged—and respondents never disputed—that petitioner's "official duties did not distinctly require him to testify at criminal trials." *Id*. 7a.

Petitioner was thus subpoenaed in his individual capacity as a fact witness, and not as a surrogate for CITY. *Cf. e.g.*, Fed. R. Civ. P. 30(b)(6) (requiring subpoenaed organizations to designate witnesses to testify on their behalf). Petitioner alone had to decide whether to comply with the subpoena, ignore it, assert privilege, or move to quash or narrow it. In answering the questions put to him, petitioner chose his own words: No third party was permitted to influence his testimony, *see* 18 U.S.C. § 1512 (criminalizing witness tampering), and, subject to petitioner's obligation not to lie, the content of his testimony was entirely up to him. Additionally, if petitioner had lied, or otherwise failed to comply with the subpoena, he alone would have borne the risk of perjury or contempt sanctions, including possible "lengthy incarceration." *Chrzanowski v. Bianchi*, 725 F.3d 734, 472 (7th Cir. 2013), *petition for cert. filed* 82 U.S.L.W. 3282 (Oct. 18, 2013) (No. 13-498) (collecting examples); *see also* 18 U.S.C. § 401(3) (permitting federal courts to punish,

"by fine or imprisonment, or both," those who fail to comply with a "lawful writ, process, order, rule, decree, or command"). Finally, when petitioner testified to the grand jury and at Schmitz's first trial, he spent time away from his office and his work to do so. When petitioner testified at Schmitz's second trial, he had already been terminated from his position—again establishing that he did not testify in the course of his duties as a public employee (which, by then, were nonexistent), but instead as a citizen.

Consistent with these facts, this Court's precedents clearly establish that the obligation to respond to a subpoena is "shared by *all citizens*" by virtue of their citizenship—and not by virtue of their employment. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (emphasis added) (citing *Branzburg*, 408 U.S. at 669); *see also 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."); *Piemonte v. United States*, 367 U.S. 556, 559 n.2 (1961) ("Every citizen of course owes to his society the duty of giving testimony to aid in the enforcement of the law."); *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 175 n.24 (1977) ("[P]rivate citizens have a duty to provide assistance to law enforcement officials when it is required."). The overwhelming weight of long-settled precedent thus establishes that when public employees respond to subpoenas, they, like any other citizen, are fulfilling their duty to society, not to their employer. And when public employees—*e.g.*, the President—have attempted to use their official roles to evade a subpoena, this

Court has established that they, like any other citizen, owe answers to the courts. *See Nixon*, 418 U.S. at 713.

This Court's cases also establish that subpoenaed testimony, like other citizen speech, vindicates a core "First Amendment interest": "the public's interest in receiving the well-informed views of government employees." *Garcetti*, 547 U.S. at 419; *see also Roe*, 543 U.S. at 82; *Waters v. Churchill*, 511 U.S. 661, 674 (1994); *Pickering*, 391 U.S. at 572-73. That interest is particularly strong in corruption investigations, which, as explained by the Department of Justice, "cannot be successful without truthful witnesses . . . ." Patrick Fitzgerald, *The Costs of Public Corruption—And the Need for the Public to Fight Back*, U.S. Dep't of Justice, http://www.justice.gov/usao/briefing_room/fin/corruption.html. Because "voluntary assistance from the public in corruption cases is often hard to come by, we use many investigative techniques that assist us in gathering evidence and requiring cooperation, such as the use of grand jury subpoenas, grants of immunity, consensual recordings, and wiretaps." *Id*. But if the First Amendment fails to protect public employees who testify, there is a substantial risk that they will be chilled from doing so, especially in cases, like this one, involving powerful public figures who threaten retaliation. *See* Pet. App. 2a, 11a.[7] And if witnesses

[7] As this case illustrates, the existing patchwork of whistleblower protections cannot vindicate society's interest in combating corruption. Indeed, petitioner sought relief under the state whistleblower statute, but his claim failed because the statute protects neither employees of the higher education system

are chilled from testifying, perpetrators are likely to continue or expand their corrupt misdeeds.

On the other hand, the concern for the employer's supervisory interests that motivated this Court to deny protection to the memorandum in *Garcetti* is completely absent here. No public employer has a legitimate interest in controlling the content of a subpoenaed witness's testimony. Indeed, any attempt to do so might even be criminal, depending on the means employed. *See* 18 U.S.C. § 1512. To the extent that anybody has the right to supervise the content and conduct of testimony, it is the court to which such testimony is presented, and not the witness' employer. Indeed, affording managerial discretion to public employers over the content of subpoenaed testimony would pit their interests directly against those of the courts—a nonsensical outcome that would undermine the integrity of the judicial process, inhibit the search for truth, and subvert the values that the First Amendment seeks to uphold. Because the employer's supervisory interest in subpoenaed testimony is nil, *Garcetti* provides no support for departing from the Court's prior precedent and stripping that testimony of protection.[8] Indeed, *Garcetti*'s emphasis on the

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nor testimony in federal court. *See Lane v. Cent. Ala. Cmty. Coll.*, No. 11-cv-0883-KOB, 2012 WL 5873351, at *2 (N.D. Ala. Nov. 20, 2012).

[8] In *Pickering*, this Court concluded that the First Amendment protected a teacher's letter to the editor criticizing school budgeting decisions because "the interest of the school administration in limiting teachers' opportunities to contribute to

sanctity of citizen speech dovetails seamlessly with this Court's holdings that subpoenaed testimony is a citizen's obligation.

5. These rules were clearly established at the time petitioner was terminated, and so qualified immunity does not protect respondents from liability. Qualified immunity shields government officials "from liability for civil damages" unless their conduct "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).[9] The immunity "ensure[s] that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier v. Katz*, 533 U.S. 194, 206 (2001). It thus "balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

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public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." 391 U.S. at 573. So too here: CACC and Franks had no greater interest in controlling petitioner's testimony than they would have had in controlling testimony by any other citizen—that is to say, they have zero interest in both cases.

[9] Because qualified immunity applies only to claims for damages, only respondent Franks is even potentially entitled to it; it does not shield respondent Burrow from petitioner's official-capacity claim for prospective relief.

Immunity is therefore "lost when plaintiffs point either to 'cases of controlling authority in their jurisdiction at the time of the incident' or to 'a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.'" *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2086 (2011) (Kennedy, J., concurring) (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)). This Court does "not require a case directly on point before concluding that the law is clearly established." *Stanton v. Sims*, 134 S. Ct. 3, 5 (2013) (internal quotation marks omitted). Instead, it is enough if "in light of pre-existing law," the "unlawfulness" of the official's conduct is "apparent." *Hope v. Pelzer*, 536 U.S. 730, 740 (2002).

Thus, the question for immunity purposes is: Could Franks reasonably have believed in January 2009 that he was permitted to retaliate against an employee witness assisting in a federal corruption prosecution? As explained above, the answer under this Court's precedents is clearly "No." Consequently, immunity does not apply, and if petitioner can prove the other elements of his claim at trial, then he is entitled not only to prospective relief, but also to damages.

6. The Eleventh Circuit reached a contrary result by adopting flawed logic and badly misreading *Garcetti*. The court of appeals held that petitioner's sworn testimony was not entitled to protection because, in its view, "nothing evidences that Lane 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." Pet. App. 8a. Quoting language from *Garcetti*, the court also reasoned that "[e]ven if an employee was not required to make the speech as part of his official duties, he enjoys no First Amendment protection if his speech 'owes its existence to [the] employee's professional responsibilities' and is 'a product that "the employer itself has commissioned or created."'" *Id*. 5a (quoting *Abdur-Rahman v. Walker*, 567 F.3d 1278, 1286 (11th Cir. 2009), which in turn quoted *Garcetti*). The Eleventh Circuit erred, and it did so plainly.

First, petitioner *did* testify primarily—indeed solely—in his "role as a citizen." Petitioner's employer did not command him to testify—a federal court did, using a subpoena issued to petitioner as a citizen and an individual, and not as the director of CITY.

This Court's precedents do not require more. Neither *Garcetti* nor any of this Court's modern public employee speech cases authorize courts to engage in a free-roving inquiry into whether a public employee spoke "primarily" as a citizen. If, for example, an employee gave a speech at his church, proclaiming that he was speaking "as a Christian," that would not strip his speech of protection. If a public employee wrote a letter to a newspaper editor, claiming that she was writing "as a woman," that would not strip her speech of protection. Such speech all falls within the larger category of "citizen speech": it is the sort of speech that typical citizens engage in every day, which the First Amendment has always protected. Testifying, which is also every citizen's duty, *e.g.*, *Calandra*, 414 U.S. at 345, likewise falls within that

category. Under this Court's cases, the only time that speech on a topic of public concern falls outside the protected category of citizen speech is "when public employees make statements pursuant to their official duties." *See Garcetti*, 547 U.S. at 421.

The court of appeals provided no reason, and no authority, for its contrary conclusion. In fact, it acknowledged that "Lane's official duties did not distinctly require him to testify at criminal trials." *Id*. 7a. The court of appeals brushed past that critical fact by stating that "formal job descriptions do not control." But even accepting that general premise,[10] the court never explained how petitioner was doing his job, whether formally or otherwise, by testifying in federal criminal proceedings. All it said was that "the subject matter of Lane's testimony touched only on acts he performed as part of his official duties." *Id*. But as even the court of appeals acknowledged, under this Court's precedents, that is not enough to strip speech of First Amendment protection. *Id*. Indeed, this Court has repeatedly held that because public employees

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[10] That statement is taken out of its context in *Garcetti*. When this Court held that formal job descriptions do not necessarily define the scope of an employee's official duties, it did so in order to "reject . . . the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions." 547 U.S. at 424. The Court's reasoning thus also rejects the Eleventh Circuit's attempt in this case to define petitioner's duties using an "excessively broad" brush that obscures "the duties [he] actually [was] expected to perform." *Id*. at 424-25.

have unique knowledge about their workplaces, statements related to their jobs often will warrant protection. *See, e.g.*, *Garcetti*, 547 U.S. at 419, *Roe*, 543 U.S. at 82; *Pickering*, 391 U.S. at 572.

Second, the Eleventh Circuit's finding that petitioner was not "attempt[ing] to comment publicly on CITY's internal operations" is equally flawed, most obviously because petitioner *did* comment publicly on CITY's internal operations. His testimony revealed—to a grand jury, and then to the world—that for years before petitioner took over as director, Schmitz had taken home government paychecks without doing any work. That is an important comment about CITY's internal operations, and it is also a comment about Schmitz's corruption—also a matter of public concern. *See, e.g.*, *Connick*, 461 U.S. at 148. Moreover, petitioner's voluntary compliance with the subpoena manifested his personal desire to testify. The fact that petitioner was *also* fulfilling his duty as a citizen does not justify stripping his speech of protection.

More deeply, the court of appeals erred by attempting to parse petitioner's motivations for testifying, and by concluding that speech is protected only when the speaker subjectively intends to make a public comment. Such a motive-based rule would unlock Pandora's box, permitting governments to censor speech that is not motivated solely by the speaker's personal desire to express an opinion—including speech for commercial gain, answers to questions posed by others, and statements made for any other ulterior motive, *e.g.*, to impress a third party. All of these, however, are typical citizen speech.

A motive-based rule would thus "chill core political speech" by inviting authorities to punish speech on matters of public concern and insulate their actions by alleging prohibited intent (or, as in this case, the absence of protected intent). *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007). Moreover, a motive-based test "could lead to the bizarre result that identical" statements would receive different levels of First Amendment protection, based on speculative and difficult assessments of the speaker's motivation. *Id*.

A motive-based approach also improperly discounts "the public's interest in receiving the well-informed views of government employees" on matters of public concern. *Garcetti*, 547 U.S. at 419; *Roe*, 543 U.S. at 82; *Givhan*, 439 U.S. at 414; *Pickering*, 391 U.S. at 572-73. That interest persists no matter what motivates a witness to testify: Whether the witness testifies for the personal satisfaction of expressing himself, to comply with a civic duty, both, or neither, the public benefits when the Constitution protects his speech. On the other hand, the opposite rule means that society suffers.

That is why, in a variety of First Amendment contexts, this Court has wisely rejected efforts to strip valuable public speech of protection because of the speaker's motivation. *See, e.g.*, *Wis. Right to Life*, 551 U.S. at 468 (rejecting an intent-based standard to evaluate political ads); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988) (prohibiting use of ill motive to create liability for speech about public figures). Indeed, in *Garcetti*, the Court held that whether an employee derives "personal gratification

from" speaking is "immaterial" to whether the speech is protected; the only relevant inquiry is whether the employee actually was doing his job at the time he spoke. 547 U.S. at 421.

Independently, the Eleventh Circuit's "public comment" holding is incompatible with this Court's recognition—since at least 1979—that the First Amendment protects public employee speech that was not intended as a public comment. *See*, *e.g.*, *Givhan*, 439 U.S. at 415-16 ("Neither the [First] Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public. We decline to adopt such a view of the First Amendment.").

Third, the Eleventh Circuit was simply wrong to hold that "[e]ven if an employee was not required to make the speech as part of his official duties, he enjoys no First Amendment protection if his speech owes its existence to [the] employee's professional responsibilities and is a product that the employer itself has commissioned or created." Pet. App. 5a (internal citations and quotation marks omitted). The second half of this sentence was wrenched from its context in *Garcetti*, where this Court stated:

> Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do. It is immaterial whether he experienced some personal gratification from writing the memo; his First Amendment rights do not depend on his job satisfaction. The significant point is that the memo was written

> pursuant to Ceballos' official duties. Restricting speech that *owes its existence to a public employee's professional responsibilities* does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what *the employer itself has commissioned or created*. Contrast, for example, the expressions made by the speaker in *Pickering*, whose letter to the newspaper had no official significance and bore similarities to letters submitted by numerous citizens every day.

547 U.S. at 421-22 (emphasis added).

The topic sentence of this paragraph makes it clear that it does not support the Eleventh Circuit's conclusion that "[e]ven if an employee is not required to make the speech as part of his official duties," it may nevertheless be unprotected. Pet. App. 5a. In fact, this Court plainly stated the opposite: that speech "owes its existence" to the employer, and is "commissioned and created" by the employer, when it is what the employee "was employed to do," or when it is uttered "pursuant to [the employee's] official duties," and not merely when it has some attenuated relationship with the employee's job responsibilities. *Garcetti*, 547 U.S. at 421-22. Put another way, *Garcetti* bars "First Amendment claims based on government employees' work product," *id*. at 422; it does not bar every claim that "concern[s] the subject matter of [the speaker's] employment," *id*. at 421.

A broader rule would chill employees from speaking critically about their workplaces, because

they could never be sure whether a court would decide that the speech somehow "owed its existence" to their jobs. That would contravene not only *Garcetti*, but all of this Court's modern public employee speech cases. For example, in any case in which the employee communicated internally, including *Givhan* and *Connick*, the speech could be unprotected because the employee would not have been in a position to have those conversations but for her employment. In any whistleblowing case, a broad reading of the "owes its existence" language could strip the employee's speech of protection because the employee would not have learned of the relevant facts but for his employment. And in any case in which the employee was motivated by a desire for better working conditions or more effective government, including perhaps *Pickering* itself, the speech could be unprotected because a non-employee would not share that motivation.

Applied to subpoenaed testimony, the court of appeals' broad reading of the "owes its existence" language contravenes this Court's precedents holding that witnesses deserve protection, and that courts should take every measure to ensure candid and complete testimony. This Court's pristine history of protecting witnesses counsels against adopting a rule that permits retaliation against them.

The court of appeals' rule is also difficult to administer because it requires courts to engage in probing inquiries about why an employee spoke. *Cf. Wis. Right to Life*, 551 U.S. at 468 (explaining that an intent-based test not be workable, and would require, at a minimum, costly, fact-dependent litigation). Here,

that would require an inquiry into why petitioner was subpoenaed, and a further inquiry into why he answered questions the way he did. It would also require an investigation as to whether he could have learned the information that he learned on the job in another way. The inquiry would be comparably thorny in every case, and it finds no footing in this Court's decisions.[11]

II. Eleventh Circuit Precedent And Persuasive Authorities Also Clearly Established Petitioner's Right To Testify.

By the time this Court decided *Garcetti v. Ceballos*, 547 U.S. 410 (2006), petitioner's First Amendment right to testify in a federal corruption prosecution was clearly established. It is unsurprising, then, that in presenting his case to the court of appeals, Franks relied not on this Court's

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[11] As noted in the petition (at 11-12 n.2), this case also implicates a circuit conflict over whether the citizen vs. official duties inquiry constitutes a question of law, a question of fact, or a mixed question. The Eleventh Circuit held that, like the public concern inquiry in this Court's pre-*Garcetti* cases, this issue presents a question of law. Pet. App. 6a. But unlike the "public concern" inquiry, the question whether an employee spoke pursuant to his duties necessarily requires factual findings—including what the employee's duties are, and whether he was performing them at the time he spoke. Here, petitioner disputes that he spoke pursuant to his official duties. To the extent that this Court agrees that this constitutes either a question of fact or a mixed question, it should therefore reverse the decisions below, which affirmed summary judgment for respondents despite the existence of disputed questions of material fact.

cases, but on circuit precedent to justify his actions. *See* Franks C.A. Br. 40-53. That reliance was misplaced, and cannot support a claim for qualified immunity.

1. First, when this Court's controlling precedents clearly establish a right, contrary lower-court decisions cannot undermine it. *See United States v. Gallo*, 195 F.3d 1278, 1284 (11th Cir. 1999) ("As a rule, our prior precedent is no longer binding once it has been substantially undermined or overruled by either a change in statutory law or Supreme Court jurisprudence or if it is in conflict with existing Supreme Court precedent."). This Court's precedents clearly establish that because petitioner spoke on a matter of public concern, and did not do so pursuant to his official duties, the First Amendment protects petitioner's testimony. No contrary lower court precedent can justify immunity in the face of that controlling law.

2. Respondents' argument is also flawed on its own terms because Eleventh Circuit precedent and the most on-point precedents from other circuits actually supported petitioner when he was terminated in January 2009. Thus, even if this Court's precedents did not themselves clearly establish petitioner's right, "'controlling authority in [the Eleventh Circuit] at the time of the incident,'" and "'a consensus of cases of persuasive authority'" did. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2086 (2011) (Kennedy, J., concurring) (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)).

The Eleventh Circuit case that most closely resembles this one is *Martinez v. City of Opa-Locka*,

971 F.2d 708 (11th Cir. 1992). There, the employee worked for the city as the director of its purchasing department, responsible for overseeing procurement. *Id*. at 710. The City Commission, sitting as a Board of Inquiry and investigating misconduct, subpoenaed her to testify regarding procurement practices. *Id*. The employee testified that the City Manager had violated bid procedures to purchase substantial amounts of furniture for City Hall. *Id*. She made similar statements to the state attorney's office. *Id*. After she was terminated in retaliation, the employee sued under 42 U.S.C. § 1983, alleging violations of the First and Fourteenth Amendment. The Eleventh Circuit not only recognized her claim, but denied the defendant qualified immunity. *Id*. at 713. The court examined the content, form, and context of the testimony, and reasoned that:

> The content of Martinez' statements before the Board of Inquiry and to the State Attorney's office provided information concerning the expenditure of public funds in violation of City's Code of Ordinances. The form of her expression was testimony before the City's legislative body and statements to an investigator of the State Attorney's office. She made her statements in the context of an examination into the activities of City personnel by officials with authorized investigatory powers.

Id. at 712. The court explained that this speech, which enabled "members of society to make informed decisions about the operation of their government merits the highest degree of first amendment

protection." *Id*. (quotation marks and citation omitted). It noted that the employee's "expression clearly was made at a proper time, place and manner, and the context in which she made her statements *required* her to furnish information respecting City purchasing practices." *Id*. (emphasis in original). The court further held that these rules were "clearly established" at the relevant time, so that qualified immunity did not apply. *Id*. at 713. *Martinez* has never been overruled, and remains good law in the Eleventh Circuit.

The facts of *Martinez* align with this case. Like Ms. Martinez, petitioner was subpoenaed by a public investigative body (the grand jury), to testify about official malfeasance (Schmitz's fraud). Like Ms. Martinez, petitioner testified truthfully, and like Ms. Martinez, his testimony illuminated issues of public concern. Thus, it was not possible for a public official in the Eleventh Circuit to conclude that it was permissible, consistent with *Martinez*, to retaliate against petitioner. Indeed, petitioner's case is perhaps stronger than *Martinez* because in that case, the court did not comment on whether Ms. Martinez was expected to testify in her official capacity. But petitioner's responsibilities included no such obligation. Pet. App. 7a.

Similarly, in *Tindal v. Montgomery County Commission*, 32 F.3d 1535 (11th Cir. 1994), a public employee testified, under subpoena, in her coworkers' sexual harassment suit. The court held her speech protected, explaining that because it "took place in a public forum (a federal district court proceeding), not

in a private context," and because it "supported the discrimination and harassment claims of other individuals, not of [the witness] herself," the speech touched on a matter of public concern. *Id*. at 1540 (emphasis removed). As in *Martinez*, the court denied qualified immunity to the defendant. *See id.* at 1540-41.

To be sure, in the Eleventh Circuit, *Martinez* and *Tindal* do not stand for the proposition that subpoenaed testimony is *always* protected. However, they do establish that when, as here, a subpoenaed witness testifies in a public corruption proceeding, the testimony warrants protection. The Eleventh Circuit's subsequent cases do not undermine that conclusion.

The court below relied heavily on *Morris v. Crow*, 142 F.3d 1379, 1381 (11th Cir. 1998) (per curiam), a case in which a deputy sheriff prepared a report after another officer caused a death in a traffic accident. The reporting officer was then deposed in a civil wrongful death suit brought by the victim's family, where he "reiterated the conclusions regarding his observations of the accident." *Id*. at 1382. The court thus held that the report, which "discussed only his investigation and reconstruction of a single traffic accident," and "which was generated pursuant to [the employee's] official and customary duties as an accident investigator," was not entitled to protection. *Id*. It further held that the testimony was not entitled to protection because it 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*." *Id*. at 1383 (emphasis added).

The *Morris* panel distinguished *Martinez*, reasoning that the speech in that case deserved protection because it "clearly affected matter of public concern where statements involved public funds spent in violation of city ordinance, were in the form of testimony before city's legislative body and statements to an investigator with state attorney's office, and were made in the context of an examination into activities of city personnel." *Id*.

Morris was wrongly decided at the time, and this Court's subsequent decision in *Garcetti* makes that clear: by emphasizing that citizen speech on matters of public concern is always protected, this Court rejected *Morris'* focus on the speaker's motivations, as opposed to the role in which he spoke. But whatever the merits of *Morris*, the facts of that case bear no resemblance to those here, and the *Morris* court's statements distinguishing *Martinez* equally distinguish this case. Unlike the officer in *Morris*, petitioner did not merely recite the contents of a typical report in a civil deposition held behind closed doors; he testified in a federal corruption prosecution—to a grand jury, and then in a public trial—during which he revealed that an elected official had abused her position of trust and defrauded the very people who had elected her to office. Thus, *Morris* would not have provided any support to a public official seeking to justify retaliation against petitioner.

Prior to petitioner's termination in 2009, the Eleventh Circuit had only denied protection for

testimony one other time—in an unpublished, non-precedential case that did not involve a subpoena or judicial proceedings. In *Green v. Barrett*, 226 F. App'x 883, 884 (11th Cir. 2007), the chief jailer of a prison testified at an emergency hearing after a prisoner attempted to escape. The purpose of the hearing was only to determine whether the prisoner had to be transferred to a maximum security prison, the jailer testified in her capacity as a jailer, and it is not clear that the hearing was even open to the public. *Id*. *Green* is therefore distinguishable from *Tindal*, from *Martinez* (which the *Green* court distinguished), and from this case.[12]

Importantly, neither *Morris* nor *Green* involved testimony to a grand jury or in a criminal trial. But the Eleventh Circuit had previously held that because "the public has a right to everyone's evidence, the citizen has a concomitant duty to appear and to testify before a grand jury when subpoenaed to do so; it is a basic obligation that every citizen owes his Government." *Grand Jury Proceedings (Williams) v.*

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[12] In the court of appeals, Franks relied heavily on *Abdur-Rahman v. Walker*, 567 F.3d 1278, 1286 (11th Cir. 2009), a case decided in May 2009, which denied First Amendment protection to sewer inspectors for reports to supervisors about water quality issues. That case is irrelevant to the qualified immunity analysis because it was decided after Franks acted. Moreover, like *Morris*, that case had nothing to do with testimony or corruption—and is therefore distinguishable. Finally, as explained on pages 31-34, *supra*, and by the dissent in *Abdur-Rahman* itself, 567 F.3d at 1289-91, that case plainly misread *Garcetti*.

United States, 995 F.2d 1013, 1016 (11th Cir. 1993) (internal quotation marks omitted). The court had also recognized that testimony at a hearing that is "open to the public," like the Schmitz trial, merits greater protection than speech at a private hearing. *See Maggio v. Sipple*, 211 F.3d 1346, 1353 (11th Cir. 2000). Thus, the most relevant Eleventh Circuit cases supported petitioner.

On-point cases from other circuits also put Franks on notice that it would be unlawful for him to terminate petitioner in retaliation for his testimony. By January 2009, the Third Circuit had decided *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008), and the Seventh Circuit had decided both *Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007), and *Fairley v. Fermaint*, 482 F.3d 897 (7th Cir. 2007)—three post-*Garcetti* cases holding that the First Amendment protected subpoenaed testimony.

In *Reilly*, a police officer testified about corruption in his own department, relating the results of an internal investigation. 532 F.3d at 220. After suffering retaliation, he sued, and the defendants asserted qualified immunity. *Id*. at 219. The Third Circuit evaluated the defense in light of *Garcetti*, asking whether the officer "spoke as a citizen when he testified." *Id*. at 228. Reviewing this Court's decisions, the court of appeals reasoned that "[t]he notion that all citizens owe an independent duty to society to testify in court proceedings is . . . well-grounded in Supreme Court precedent." *Id*. at 229 (citing *Piemonte v. United States*, 367 U.S. 556, 559 n.2 (1961); *United States v. Mandujano*, 425 U.S. 564, 576

(1976); *United States v. Calandra*, 414 U.S. 338, 345 (1974); *New York v. O'Neill*, 359 U.S. 1, 11 (1959); *Blackmer v. United States*, 284 U.S. 421, 438 (1932); *Blair v. United States*, 250 U.S. 273, 281 (1919); *Branzburg v. Hayes*, 408 U.S. 665, 686 (1972); *United States v. Nixon*, 418 U.S. 683, 708 (1974)).

The Third Circuit also considered its own precedent, as well as that of other circuits, and determined that the "overwhelming weight of authority conclud[es] that an employee's truthful testimony in court is protected by the First Amendment." *Reilly*, 532 F.3d at 230 (citing *Pro v. Donatucci,* 81 F.3d 1283, 1290 (3d Cir. 1996); *Green v. Phila. Hous. Auth.*, 105 F.3d 882, 887 (3d Cir. 1997); *Herts v. Smith*, 345 F.3d 581, 586 (8th Cir. 2003); *Catletti ex rel. Estate of Catletti v. Rampe*, 334 F.3d 225, 229-30 (2d Cir. 2003); *Worrell v. Henry*, 219 F.3d 1197, 1204-05 (10th Cir. 2000); *Wright v. Ill. Dep't of Children & Family Servs.*, 40 F.3d 1492, 1505 (7th Cir. 1994); *Robinson v. Balog*, 160 F.3d 183, 189 (4th Cir.1998); and *Reeves v. Claiborne Cnty. Bd. of Educ.*, 828 F.2d 1096, 1100 (5th Cir. 1987), all of which held that the First Amendment protected public employees' truthful testimony).

Acknowledging that none of those cases was decided after *Garcetti*, the Third Circuit noted that only one precedential post-*Garcetti* decision had discussed First Amendment protection for a public employee's testimony: the Seventh Circuit's opinion in *Morales*, which held that a police officer's subpoenaed civil deposition testimony was protected because the testimony itself was not part of what the officer was

employed to do, "even though the officer testified about speech that was made pursuant to his official duties." *Reilly*, 532 F.3d at 230 (citing *Morales*, 494 F.3d at 598). Determining that the case before it was closer than *Morales* because Reilly had testified about an official investigation, the Third Circuit nevertheless held that "the act of offering truthful testimony is the responsibility of every citizen, and the First Amendment protection associated with fulfilling that duty of citizenship is not vitiated by one's status as a public employee." *Reilly*, 532 F.3d at 231. Moreover:

> When a government employee testifies truthfully, s/he is not "simply performing his or her job duties"; rather, the employee is acting as a citizen and is bound by the dictates of the court and the rules of evidence. Ensuring that truthful testimony is protected by the First Amendment promotes "the individual and societal interests" served when citizens play their vital role in the judicial process.

Id. (quoting *Garcetti*, 547 U.S. at 423).

At the time petitioner was terminated, *Reilly* was the most detailed, on-point case available. And this case is *a fortiori* from *Reilly*, because the police officer there frequently testified about his investigations, but petitioner's job did not require him to testify.

The Seventh Circuit's holding in *Morales* provided further persuasive authority establishing petitioner's rights. There, two police officers suffered retaliation after informing a prosecutor of allegations that the police chief and deputy chief had harbored the deputy chief's brother, who was wanted on felony warrants.

494 F.3d at 592. The officers' speech included conversations among themselves, a conversation with a state prosecutor, and subpoenaed statements in a civil deposition. *Id*. at 597. The officers sued, and the defendants argued that the officers' speech was not protected under *Garcetti* because it was pursuant to their duties. *Id*. at 595-96. The court held that the internal conversations and discussions with the prosecutor were not protected because they were part of a police investigation. *Id*. at 597. However, the court also held that the "deposition testimony [was] a different story" because "[b]eing deposed in a civil suit pursuant to a subpoena was unquestionably not one of Morales' job duties because it was not part of what he was employed to do." *Id*. at 598. Thus, even though the officer "testified *about* speech he made pursuant to his official duties," that fact did not "render[] his deposition unprotected." *Id*. (emphasis added).

The Seventh Circuit also addressed this issue briefly in *Fairley v. Fermaint*, 482 F.3d 897, 902 (7th Cir. 2007), a case in which two prison guards alleged that they had been retaliated against for standing up for inmates' rights, including by testifying on the inmates' behalf in civil suits. The court acknowledged that "[a]ssistance to prisoners and their lawyers in litigation is not part of a guard's official duties," and so the testimony would be protected under *Garcetti*. *Id*. It also explained that "[i]t was clearly established long before the events of which plaintiffs complain that state actors may not assault witnesses in federal litigation. That's a crime, *see* 18 U.S.C. § 1512(a)(2), so no public official could think the conduct proper." *Id*.

The facts of this case closely resemble those of *Morales*, and are *a fortiori* from *Reilly*. Here, as in *Morales*, petitioner's official duties did not include testifying in any court, and certainly did not include participating in federal law enforcement investigations.

In sum, the controlling precedents of this Court, the decisions of the Eleventh Circuit, and a consensus of persuasive authorities from other circuits all established petitioner's First Amendment right to testify in the Schmitz case. While it may be *possible* to cite *Morris v. Crow* as inspiration for the decision below—perhaps with a "*cf.*" signal—the persuasive value of that case is *de minimis* in light of the factual distinctions between that case and this one, not to mention this Court's decision in *Garcetti*, the Eleventh Circuit's prior controlling holding in *Martinez*, the Third Circuit's scholarly decision in *Reilly*, and the Seventh Circuit's decisions in *Morales* and *Fairley*. When the weight of contemporaneous precedent so strongly establishes a right, qualified immunity does not protect an official who violates it. No public official—whether in 2009 or today—could reasonably believe that it is permissible to retaliate against a federal witness in a corruption prosecution.

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

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