No. 13-483

IN THE

Supreme Court of the United States

EDWARD LANE,

Petitioner,

v.

SUSAN BURROW, ACTING PRESIDENT OF CENTRAL ALABAMA COMMUNITY COLLEGE, and STEVE FRANKS,

Respondents.

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

BRIEF FOR RESPONDENT STEVE FRANKS

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QUESTIONS PRESENTED

1. Under this Court's precedent, did the Eleventh Circuit correctly hold that petitioner Edward Lane's factual trial testimony pursuant to a subpoena was not protected by the First Amendment?

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

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PARTIES TO THE PROCEEDINGS BELOW

Pursuant to Rule 24.1(b), the parties to the proceedings below were petitioner Edward Lane, respondent Steve Franks (in both his individual and official capacities), and Central Alabama Community College, a defendant-appellee below.

Steve Franks is now retired from his former position as President of Central Alabama Community College. Respondent Susan Burrow, the current president of Central Alabama Community College, has been substituted for Steve Franks on petitioner Edward Lane's official capacity claim.

PRELIMINARY STATEMENT

This is not a case in which the Court should overturn well settled precedents such as *Garcetti v. Ceballos*, 547 U.S. 410 (2006). This is also not a case that should call into question those values that define us as Americans, such as the freedom of speech that has been at the core of our liberties since the inception of our nation or the citizen's duty to obey and testify truthfully when subpoenaed. Petitioner Edward Lane ("Lane") invokes these values in defense of his position, asking the Court to adopt a categorical rule in an area – the workplace of the government employee – where the Court has traditionally taken great care to avoid doing so, instead opting to carefully examine the specific circumstances of each case.

Existing jurisprudence, such as *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983), gave rise to the delicate balancing of the government's interest in efficiency and the government employee's interest in free speech. This approach was arrived at after much analysis and forethought, and there is nothing in either *Garcetti* or in this appeal that should necessitate its demise. *Garcetti*, *Pickering*, and the case at bar can and should be harmonized, and a categorical approach, such as the one for which Lane advocates, is out of order.

The answer to the First Amendment question presented in this case resides in *Garcetti*. In that opinion's discussion of the "theoretical underpinnings" of the Court's government employee decisions, 547 U.S. at 423, the Court identified the key to the question currently before it: "When a public employee speaks pursuant to employment responsibilities, . . . there is no relevant analogue to speech by citizens who are not government employees." *Id.* at 424. Coupled with the Court's instruction that the location (*i.e.*, forum) of the speech is not dispositive, *see id.* at 420, the critical question for the "citizen analogue" analysis becomes whether a citizen would have had access to the information contained in the speech and whether it was merely factual in nature, or whether it was the kind of speech that resides closer to the heart of the First Amendment (*i.e.*, ideas and opinion relating to civic discussion and public debate), such that the speech could have been made by a citizen. *See id.* at 423-24.

Where, as here, the speech (1) was entirely based on information not available to citizens, (2) was merely factual in nature, and (3) did not consist of the kind of "ideas and opinion" speech found in debate or advocacy, it is not as close to the heart of First Amendment values, and the issuance of a subpoena triggering its occasion does not alter its character. In these circumstances, adoption of the broad categorical rule

Lane favors – protection of all subpoenaed speech simply by virtue of the issuance of the subpoena – is ill advised, renders the location or forum of the speech determinative, and is otherwise unsupported by precedent. The Eleventh Circuit's decision should be affirmed.

Furthermore, respondent Steve Franks ("Franks") is entitled to qualified immunity from Lane's claim of First Amendment retaliation because it was not clearly established at the time of Lane's termination that his testimony was protected speech under the First Amendment. This Court's precedent did not clearly establish such protection, and Eleventh Circuit precedent actually established just the opposite.

STATEMENT OF THE CASE

Background

From September 2006 to January 2009, Lane held a probationary position as Director of the Community Intensive Training for Youth Program ("CITY") at Central Alabama Community College ("CACC"). Pet. App. 2a-3a, 10a, 14a. In his job as Director, Lane ran CITY, including day-to-day operations, hiring and firing of employees, and making financial decisions. *Id.* at 10a.

Soon after becoming Director, and well before Franks ever came to CACC or the State of

Alabama, Lane audited CITY's finances and discovered that then-state representative Suzanne Schmitz ("Schmitz") was listed on CITY's payroll but was not reporting for work and had not otherwise performed work for CITY. *Id.* at 2a, 11a. Lane thereafter terminated Schmitz's employment on October 19, 2006, after she refused to report to work. *Id.* "No one disputes that Lane was acting pursuant to his official duties as CITY's Director when he investigated Schmitz's work activities, spoke with Schmitz and other CACC officials about Schmitz's employment, and ultimately terminated Schmitz's employment." *Id.* at 7a; *see also id.* at 10a. Further, no one disputes that Franks, who did not come to CACC until 2008, was not involved in Schmitz's 2006 termination. *See Lane v. Franks*, No. 4:11-cv-00883-KOB (N.D. Ala. 2012), Docket Entry ("DE") 35-3[1] (Franks Decl.) ¶¶ 2-3.

Franks had a career in Arkansas spanning eleven years prior to returning to Alabama in January 2008 to take the position of President of CACC under Bradley Byrne, then-Chancellor of

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[1] In addition to being electronically available on the district court's docket via PACER, the documents referenced herein are also contained in the Expanded Record Excerpts, Volumes I-II, filed by Lane with the Eleventh Circuit on January 15, 2013, or in Appellee's Supplemental Expanded Record Excerpts filed by Franks with the Eleventh Circuit on April 3, 2013.

Alabama's two-year college system, who was attempting to rid the two-year system of the scandal that included Schmitz's termination and (later) criminal indictment. *See id.* ¶ 2. Lane did not begin reporting to Franks until November 20, 2008. Pet. App. 13a.

The subject testimony

The FBI investigated Schmitz, and criminal charges were brought. Pet. App. 2a-3a, 12a. All of Lane's testimony against Schmitz occurred either before he came under Franks' supervision in November 2008 or after Lane was terminated in January 2009. *Id.* at 2a-3a, 12a-13a. Lane testified before a grand jury against Schmitz on November 13, 2006, while Franks was still in Arkansas and was not associated with Alabama's two-year college system in any way. *Id.* at 12a; *see also* DE-35-3 (Franks Decl.) ¶ 2-3. He testified "that Schmitz did not show up for her job at" CITY. DE-35-1 (Lane Dep.) 188:4-18; DE-11 (Am. Compl.) ¶ 30; DE-38-3 (Excerpts from Lane's 2008 testimony ("2008 testimony")) 202 ("Q: And in the grand jury, did you testify . . . as to the lack of work performed by [Schmitz]? A: I did."); Pet'rs Br. 2.

Thereafter, Lane was subpoenaed to testify and did testify in Schmitz's August 2008 criminal trial in federal court, before he began reporting to Franks in November 2008. Pet. App. 2a-

3a, 12a-13a. Lane again testified "that Schmitz did not show up for her job at the CITY Program . . . ." DE-35-1 (Lane Dep.) 188:4-18; DE-11 (Am. Compl.) ¶¶ 29-31; *see also generally* DE-38-3 (2008 testimony). Specifically, he testified that he "found that Ms. Schmitz didn't report to any particular – her office was there in Huntsville, [Alabama,] but from what I could ascertain, she had not been coming to this office." DE-38-3 (2008 testimony) 172. He also testified about conversations he had with Schmitz about her work responsibilities, Schmitz's failure to report to work even after he instructed her to do so, and that he fired Schmitz because of her failure to come to work or do her job at CITY. Pet. App. 3a, 12a-13a; DE-38-3 (2008 testimony) 177-87. Lane did not offer any opinions, only factual testimony. *See generally* DE-38-3 (2008 testimony);[2] *see also* DE-11 (Am. Compl.) ¶ 31 ("On August 26, 2008, Lane testified to these *facts* again during Schmitz's criminal trial in federal court.") (emphasis added).

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[2] Full transcripts of Lane's 2008 and 2009 trial testimony are available on PACER. *See United States v. Schmitz*, No. 5:08-cr-00014-RDP-PWG (N.D. Ala.) DE-118 & DE-195. The Court may take judicial notice of this testimony. *See* FED. R. EVID. 201; *see also, e.g.*, *Horne v. Potter*, 392 F. App'x 800, 802 (11th Cir. 2010) (courts may take judicial notice of court documents in the public record); *accord Powell v. Rios*, 241 F. App'x 500, 501 n.1 (10th Cir. 2007) (same); *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) (same).

After the November 2008 trial resulted in a mistrial, Lane testified at Schmitz's February 2009 trial, pursuant to a subpoena, when he was no longer a CACC employee. Pet. App. 13a. Lane's testimony at Schmitz's February 2009 trial is not at issue since Franks had already terminated Lane when Lane received notice that he would be testifying at that trial, and there is no dispute Franks did not know about that trial – and certainly not Lane's testimony therein – until after it occurred. *Id.* at 18a. Even so, as at the November 2008 trial, Lane's testimony in the February 2009 trial was solely factual. *See generally* DE-38-5 (Excerpts from Lane's 2009 testimony); *see also* Pet. App. 3a, 12a-13a; DE-11 (Am. Compl.) ¶ 32 ("On February 18, 2009, Lane again testified to these *facts* in a second federal criminal trial of Schmitz.") (emphasis added).

Franks never instructed Lane not to testify or otherwise attempted to prevent him from testifying. Pet. App. 18a. Lane states in his brief that after he terminated Schmitz, she "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.'" Pet'rs Br. 3. Importantly, there has never been any evidence that Franks was made aware of these statements, and "[t]he parties do not dispute that Dr. Franks was not aware of any statements by Ms. Schmitz that she

would see to it that Mr. Lane would lose his job after he testified against her." Pet. App. 18a. There is no dispute that Franks never had any contact with or even met Schmitz. *See* DE-35-3 (Franks Decl.) ¶ 3.

Finally, while both Lane and respondent Susan Burrow cite several newspaper articles discussing Schmitz's criminal trials and the general investigations pertaining to the corruption scandal in Alabama's two-year college system, Pet'rs Br. 18-19, Burrow Br. 3-5, 7-8, none of those articles mentions Franks, who was brought in under Chancellor Byrne to be part of the solution, not the problem.

Lane's termination

Franks did not terminate Lane's employment soon after he testified at Schmitz's 2008 criminal trial, but over four months later, along with 28 other CITY employees, due to financial reasons. *Compare* Pet. 3 *with* Pet. App. 3a-4a, 12a-14a.

In 2008, CITY's budget had been cut significantly, by $1.75 million, which was approximately one-fourth of CITY's entire budget. DE-35-3 (Franks Decl.) ¶ 6; *see also* Pet. 3a. Consequently, Lane was already considering a Reduction in Force ("RIF") at CITY before he began re-

porting to Franks in November 2008. Pet. App. 13a-14a; *see also id.* at 3a.

Lane communicated these budget problems to Franks in November 2008, *id.* at 13a, as well as his belief that due to those problems, it was imperative that they start to put together a RIF policy to present to Chancellor Byrne. DE-35-1 (Lane Dep.) 148:16-149:19; *see also* Pet. App. 13a-14a. Lane and Franks also had discussions "during the November/December time frame" about RIFs. DE-35-2 (Franks Dep.) 64:13-65:4; *see also* Pet. App. 13a-14a.

By the end of 2008, CITY was in danger of not making its monthly payroll on time every month, if at all. Pet. App. 13a-14a. Both Franks and Lane readily acknowledge that "[t]here was not going to be enough money allocated every month to pay all the employees." DE-35-3 (Franks Decl.) ¶ 6; DE-35-1 (Lane Dep.) 149:10-19. Franks therefore agreed with Lane's November 2008 assessment that a reduction in force was necessary. Pet. App. 13a-14a.

Franks' initial response was that they needed to terminate all the probationary employees. *Id.* As such, Franks made a financial decision to terminate Lane, and multiple other probationary employees associated with CITY, on January 9, 2009. *Id.* Lane and the other terminated employees "had not reached three

years of service, and, thus, were still considered probationary." DE-35-3 (Franks Decl.) ¶ 5; *see also* DE-35-2 (Franks Dep.) 65:14-66:10.

Franks thereafter rescinded the termination of certain employees, none of whom held a Director position like Lane, due to an ambiguity in their probationary service. *See* Pet. App. 3a-4a, 16a. Franks did not rescind Lane's termination when he rescinded the terminations of most of the other employees because he believed that Lane was in a fundamentally different category than the other employees: he was the director of the entire CITY program, and not simply an employee. *Id.* at 16a-17a. Franks believed that Lane had always been a CACC employee subject to a three-year, as opposed to a six-month, probationary period. *See id.*; *see also* DE-35-2 (Franks Dep.) 70:6-9.

Lane testified that he has never had any reason to believe that Franks was out to get him or that Franks' stated reasons for his termination and not rescinding that termination were not the real reasons:

> Q: Did you ever have any words with Dr. Franks, any disagreement with him?
>
> A: No.

> Q: Did he ever give you any indication that he didn't like you?
>
> A: He did not.
>
> Q: Or that he had any kind of agenda or anything like that against you?
>
> A: No.
>
> Q: Do you have any reason to believe that he was being less than honest and truthful with you with everything that he said?
>
> A: No.

DE-35-1 (Lane Dep.) 231:9-22.

Unfortunately, budget problems continued to plague CITY, and the "program went out of existence" in September 2009. DE-35-2 (Franks Dep.) 33:12-18; *see also* DE-35-3 (Franks Decl.) ¶ 6; Pet. App. 15a-16a.

Course of the proceedings

On January 3, 2011, almost two years after his termination and without any prior notice to his former employer that he believed his termination was in any way retaliatory, Lane filed an action in the district court alleging, among other claims, First Amendment retaliation against Franks. *See* Pet. App. 18a. He later amended his complaint, but still alleged the same claims. *See id.* at 19a.

On April 30, 2012, Franks moved for summary judgment, arguing, *inter alia*, that Lane's testimony was not protected speech and that Franks had qualified immunity from such claim regardless. *See generally* DE-34. On October 18, 2012, the district court, relying on Eleventh Circuit precedent, found that Lane's speech was not protected and granted Franks' motion. *See* Pet. App. 29a-31a, 34a-35a. It also found that, in any event, "a reasonable government official in Dr. Frank's [*sic*] position would not have had reason to believe that the Constitution protected Mr. Lane's testimony made pursuant to a subpoena at Ms. Schmitz's trial because the unlawfulness of his action was not recognized in a concrete and factually defined context." *Id.* at 34a (citation, quotation marks, and ellipses omitted).

On appeal, the Eleventh Circuit affirmed the district court's determination "that Lane's speech was made pursuant to his official duties as CITY's Director, not as a citizen on a matter of public concern." *Id.* at 4a. The court reasoned 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.* at 7a. It then discussed and applied its own precedents to hold that the record failed "to establish that Lane testified as a citizen on a matter of public concern . . . ." *Id.* at 8a; *see also id.* at 6a-7a. Lane's petition for a writ of certiorari followed.

SUMMARY OF THE ARGUMENT

The Eleventh Circuit's decision should be affirmed because Lane's testimony was not protected by the First Amendment. The categorical rule pressed by Lane – that all subpoenaed testimony should be protected under the First Amendment – is overbroad and out of place in this area of the law which traditionally has been the site of careful balancing tests, *see Pickering*, 391 U.S. at 568, attention to an "enormous variety of fact situations," *id.* at 569, and an emphasis that "[t]he proper inquiry is a practical one[,]" *Garcetti*, 547 U.S. at 424.

The Court need not look far for the answer to the First Amendment question posed by this case. It is contained in *Garcetti*, where the Court, in discussing the "theoretical underpinnings" of its government employee decisions, 547 U.S. at 423, states: "When a public employee speaks pursuant to employment responsibilities, . . . there is no relevant analogue to speech by citizens who are not government employees." *Id.* at 424. *Garcetti* also held that the location of the speech is not dispositive. *Id.* at 420. The "citizen analogue" inquiry demands more. It requires that a court determine (a) whether a citizen would have had access to the information contained in the speech and whether it was merely factual in nature, or (b) whether it was the kind of speech that resides closer to the heart of the First Amendment (*i.e.*, ideas and opinion relating to civic discussion and public debate), such that the speech could have been made by a citizen, as in the "letter to the editor" or "political discussion with a co-worker" examples given by the Court in *Garcetti*. *See id.* at 423-24.

This critical distinction sorts properly between speech that is part of the free flow of ideas and opinions, which has a citizen analogue, and speech that could not have been spoken by a citizen. It sorts properly between the routine testimony of police officers about traffic stops or arrests (no citizen analogue) and letters to the editor, like that penned by the teacher in *Pickering*,

that could have been written by a citizen (citizen analogue). It sorts properly between "sensitive or confidential information," ranging from tax records and trade secrets to information about law enforcement sources (no citizen analogue), US Br. 18, and political speech with a co-worker, *Garcetti*, 547 U.S. at 423-24 (citizen analogue).

Where, as here, the speech was entirely based on information not available to citizens and was merely factual in nature – consisting of Franks' correspondence with and his firing of Suzanne Schmitz – the Eleventh Circuit properly found the speech unprotected because it "touched only on acts [Lane] performed as part of his official duties." Pet. App. 7a. The Eleventh Circuit's decision should be affirmed.

Even if the Court holds (which it should not) that Lane's speech is protected by the First Amendment, Franks still has qualified immunity because the law was not clearly established that his speech was so protected. As evidenced by the granting of certiorari in this case, the issue of whether subpoenaed testimony of a government employee is protected by the First Amendment is far from settled. The Court's decision in *Garcetti* left the question open, 547 U.S. at 424 ("We thus have 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"), and Eleventh Circuit precedent

squarely held that Lane's speech was not protected under *Morris v. Crow*, 142 F.3d 1379 (11th Cir. 1998). Pet. App. 7a n.3 ("*Morris* is the law in this Circuit on the question of public employee speech per a subpoena in the context of judicial proceedings."); *id.* at 8a. Moreover, the fact that a circuit split exists on the question assists rather than hurts Franks' argument that the law was not clearly established. Franks is thus entitled to qualified immunity, and the Eleventh Circuit's decision should be affirmed.

ARGUMENT

I. The Eleventh Circuit Correctly Held that Lane's Testimony Was Not Protected by the First Amendment.

This case stands at the intersection of several important values: free speech, the importance of citizen testimony under subpoena, and the government's interest in efficiency. The Court's existing precedents – when properly harmonized – are sufficient to ensure that all of these interests are honored. The Eleventh Circuit's decision should be affirmed.

A. Settled Government Employee First Amendment Precedents Eschew a Categorical Approach and Are Based on Careful Assessment of the Government Employee's Free Speech Rights and the Government's Interests in the Particular Case.

The Eleventh Circuit's judgment that Lane's factual subpoenaed testimony was not protected is supported by this Court's precedents.

As the Court has recognized, "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of *ideas* and *opinions* on matters of public interest and concern." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (emphasis added). Vigorous public debate and the "freedom to speak one's mind" are at the core of the protection provided by the First Amendment, which all citizens of this nation hold particularly dear. *See id.* at 51 (citations and quotation marks omitted) (Court is "vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions"); *see also, e.g.*, *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011) ("As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate."). So it is that "[t]he freedom of speech . . . guaranteed by the Constitution embraces at the least the liberty to discuss

publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (citation and quotation marks omitted).

Government employees, like all citizens, should participate in and contribute to vibrant dialogue in a democratic society. Indeed, "[p]ublic employees are often the members of the community who are likely to have informed *opinions* as to the operations of their public employers, operations which are of substantial concern to the public." *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (emphasis added). Thus, the Court's First Amendment jurisprudence is concerned with "civic discussion," "public debate," and "vibrant dialogue in a democratic society," *i.e.*, with employees (whether they be private or public) being allowed to offer *opinions* on a variety of topics – including their employment – without fear of retaliation by their employer. *See Garcetti*, 547 U.S. at 419-20.

However, the Court has also acknowledged that all speech is not the same. For example, as noted in Justice Breyer's dissent in *Garcetti*, "the First Amendment cannot offer all speech the same degree of protection. Rather, "judges must apply different protective presumptions in different contexts, scrutinizing government's speech-related restrictions differently" depending upon

the nature of the speech. 547 U.S. at 444-45 (comparing *Burson v Freeman*, 504 U.S. 191 (1992) (political speech) with *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980) (commercial speech) and *Rust v. Sullivan*, 500 U.S. 173 (1991) (government speech)); *see also Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010) (discussing level of scrutiny applicable to misleading commercial speech). It is out of just such an acknowledgment that *Pickering*, *Connick*, and *Garcetti* came to pass, and the decision at issue in this action is congruous with those precedents.

1. *Pickering* Balancing.

In *Pickering v. Board of Education*, 391 U.S. 563 (1968), the Court recognized that the nature of the speech at issue – government employee speech – necessitated a different approach. Pickering was a teacher who sent a letter to a local newspaper criticizing the manner in which the Board of Education and district superintendent had handled proposals to raise new revenue for the schools. 391 U.S. at 564. The Board determined that the letter was "detrimental to the efficient operation and administration of the schools of the district" and fired Pickering. *Id.* Pickering argued, successfully, that his rights to freedom of speech were violated. *Id.* at 565. In holding in Pickering's favor, the Court set out its balancing test, which provided for balancing "the interests of the [government employ-

ee], 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. The Court noted the "enormous variety" of situations in which such statements may be made and thus declined to "lay down a general standard," or a bright-line rule, to govern the analysis. *Id.* at 569.

Twenty-five years later, the Court, in *Connick v. Myers*, 461 U.S. 138 (1983), declined once again to set out a "general standard" due to the "enormous variety" of differing situations. 461 U.S. at 154 (citation omitted). Using the *Pickering* balancing test, this time the Court held in favor of the Government, noting that "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Id.* at 149.

2. *Garcetti*: Declining To Protect Government Employee Speech Made "Pursuant to the Employee's Official Duties."

In 2006, the Court decided *Garcetti v. Ceballos*, which presented the question "whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties." 547 U.S. 410, 413 (2006). Ceballos, a deputy district attorney, wrote a disposition memorandum rec-

ommending dismissal of a case based on his concerns about inaccuracies in an affidavit used to obtain a critical search warrant. *Id.* at 413-14. Ceballos took heavy criticism regarding his handling of the case and claimed that in the aftermath, he was subjected to retaliatory employment actions on account of the disposition memorandum. *Id.* at 415. Garcetti argued that the actions taken were explained by legitimate reasons, such as staffing needs, and that the memorandum was not protected by the First Amendment. *Id.*

The Court held that *Pickering* and its progeny set forth two guiding inquiries: "The first requires determining whether the employee spoke as a *citizen* on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." 547 U.S. at 418 (internal citation omitted) (emphasis added). However, "[i]f the answer is yes . . . [t]he question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Id.*

As in *Pickering* and *Connick*, the Court noted "the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal," which sometimes

makes the analysis "difficult." *Id.* (citation omitted). The Court also noted the need for governmental employers to have a "significant degree of control over their employees' words and actions," because otherwise, "there would be little chance for the efficient provision of public services." *Id.* Indeed, when public employees "speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions." *Id.* at 419. Still, because "a citizen who works for the government is nonetheless a citizen," when they 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." *Id.* (emphasis added). Thus, *Pickering*'s balancing test "acknowledge[s] the necessity for informed, vibrant dialogue in a democratic society." *Id.*

According to the Court, the controlling factor was "that [Ceballos'] expressions were made pursuant to his duties as a calendar deputy." *Id.* at 421. The Court therefore held that "when public employees make statements pursuant to their official duties, *the employees are not speaking as citizens* for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* (emphasis added). The Court reasoned that "[r]estricting 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*." *Id.* at 421-22 (emphasis added).

3. The "Citizen Analogue" Inquiry Is the Key to the "Pursuant to Official Duties" Riddle.

Garcetti made a critical distinction that should guide the Court in determining whether a government employee's speech was made "pursuant to his duties." The Court first discussed speech relating to debate or complaints as the sort of speech closely related to citizenry and the heart of the First Amendment: "Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. The same goes for writing a letter to a local newspaper, *see Pickering, supra*, or discussing politics with a coworker." *Id.* at 423 (citation omitted). In contrast, "[w]hen a public employee speaks pursuant to employment responsibilities . . . *there is no relevant analogue to speech by citizens who are not government employees*." *Id.* at 424 (emphasis added).

The Court articulated this distinction in its discussion of the "theoretical underpinnings of [its] decisions[,]" *id.* at 423, and it is the lodestar

that should guide the Court's determination of whether a government employee has spoken "pursuant to his duties." It is congruent with *Pickering* and *Connick*, not in opposition to those cases. Importantly, the location or forum in which the speech occurs is not determinative. *Id.* at 420. Accordingly, it is the character of the speech that is the focus.

Under *Garcetti*, the proper inquiry, then, is whether the speech is part "of the free flow of ideas and opinions[,]" *Hustler*, 485 U.S. at 50, close to the heart of debate, part of every American citizen's birthright under the First Amendment. The teacher's speech in *Pickering* criticizing his employer in a letter to the editor clearly was. If so, such speech has a citizen analogue, the government employee has spoken as a citizen, and the speech should be subject to *Pickering* balancing to determine if it is protected by the First Amendment. If, however, the speech is not of such character – or if it would be impossible for a citizen to speak in such a way because he would not be privy to such information – "there is no relevant analogue to speech by citizens who are not government employees[,]" and thus no protection under the First Amendment. *Garcetti*, 547 U.S. at 423-24.

By focusing on the character of the speech rather than the location or forum in which it occurs, and in particular whether a citizen would

have had access to the information imparted in the speech, the "citizen analogue" inquiry prevents absurd results. Distinctions can then be drawn between, on the one hand, confidential information given to the government such as individuals' social security numbers, HIPAA information, or sensitive military information to which citizens would not have access, and on the other hand, the "letter to the editor" types of complaints or "discussions of politics" identified in *Garcetti* as having citizen analogues.[3] 547 U.S. at 423.

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[3] The United States suggests that the government employer's interest in prohibiting the disclosure of sensitive or confidential information can be addressed by the second step of the *Pickering* test. US Br. 18. But the second step of the *Pickering* test discusses the government's interest in "operat[ing] efficiently and effectively." *Garcetti*, 547 U.S. at 419. The government employer's interest in limiting the dissemination of sensitive or confidential information, given to the government in trust by citizens (such as HIPAA information) or in the course of protecting public safety (such as information regarding a law enforcement or terrorism investigation), is far stronger than its interest in efficiency. Accordingly, the "citizen analogue" inquiry is most faithful to *Garcetti* because it does not subject such speech to *Pickering* balancing unless a citizen analogue exists. Moreover, the knowledge that information given to the government may be protected by the First Amendment and thus disseminated under subpoena may chill citizens' willingness to provide the government with accurate or complete information, which would surely harm the government's efficiency interests.

Furthermore, in deciding *Garcetti*, the Court expressly declined to "articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." *Id.* at 424. It emphasized that "[t]he proper inquiry is a practical one[,]" not one that turns on formal job descriptions. *Id.* at 424-25. The "citizen analogue" inquiry is consistent with this approach and should guide the Court's determination if it is to remain faithful to the direction taken in *Garcetti* and to the "theoretical underpinnings of [its] decisions." *Id.* at 423.

Such an inquiry also makes far more sense than merely asking whether the government paid the employee for the speech, which leads to the bizarre result that, regardless of the character of the speech, sometimes the very same sentences could be protected or unprotected, based on the vagaries of pecuniary compensation.

B. Properly Applied, this Court's First Amendment Precedents Support Affirmance of the Eleventh Circuit's Decision.

In the circumstances of this case, Lane's subpoenaed testimony was limited entirely to the facts surrounding his correspondence with and firing of Suzanne Schmitz. *See supra* pp. 6-8.

The Eleventh Circuit therefore correctly considered the character of Lane's speech, which it found "touched only on acts he performed as part of his official duties[,]" Pet. App. 7a, *i.e.*, only on factual matters related to his role as Schmitz's former boss. This was information not available to citizens, and, thus, without "citizen analogue."

Lane was not engaging in "civic discussion," "public debate," or "vibrant dialogue" when he testified at Schmitz's trial. He did not criticize the government or speak critically about his superiors or the workplace, as the government employee did in *Pickering* and many of its progeny. There was no "letter to the editor," as in *Pickering*, or any functional equivalent. Lane was not picketing to express his *opinion* on matters of public corruption or, for that matter, his *opinion* on any other issue. *Compare Snyder*, 131 S. Ct. at 1213. He never entered the "marketplace of ideas." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 8 (1986). Instead, he provided only fact-based testimony related to his interactions with Schmitz while he was her boss for which there was no citizen analogue. Only Lane knew the facts of Schmitz's termination since only Lane was her boss; no citizen who was not a government employee could have provided the factual testimony provided by Lane.

Certainly the corruption scandal involving Schmitz was a matter of public concern. Howev-

er, the inquiry does not end there. The issue of whether or not a public concern exists must not be conflated with the issue of whether a government employee's speech was "pursuant to his duties." Merely reciting (1) that the speech was subpoenaed testimony, (2) that, as such, it was a matter of public concern, and (3) that therefore Lane must have been speaking as a citizen is a simplistic syllogism. *See Garcetti*, 547 U.S. at 416 ("The Court of Appeals determined that Ceballos' memo . . . was 'inherently a matter of public concern.' . . . The court did not, however, consider whether the speech was made in Ceballos' capacity as a citizen.").

It would be hard to argue that the speech in *Garcetti*, which concerned an affidavit filled with "serious misrepresentations" that could result in criminal consequences, was not an issue of public concern. The public has an interest in criminal prosecutions being conducted properly just as it has an interest in seeing corruption addressed. And yet, the Court did not hold that the presence of an issue of public concern in *Garcetti* finished the inquiry. Moreover, even under *Pickering*, if the answer to the question whether the employee spoke as a citizen of a matter of public concern is yes, only "the *possibility* of a First Amendment claim arises." *Garcetti*, 547 U.S. at 418 (citing *Pickering*, 391 U.S. at 568) (emphasis added). Lane's approach would make

such possibility an absolute certainty in the subpoena context.

Lane's testimony merely stated that Schmitz did not show up to work and described the circumstances of her firing. Such factual testimony surrounding the terms and conditions of an employee's employment has *no citizen analogue*. It is speech Lane could only make pursuant to his duties as an employee – a citizen would have no occasion to know any of the factual information he divulged. For all of these reasons, the judgment of the Eleventh Circuit in favor of Franks should be affirmed.

C. The Court Should Decline To Adopt a Bright-Line Rule Holding that Subpoenaed Testimony Is Always Protected.

No one will represent to this Court that the subpoena power is not important to securing truthful testimony, or that a citizen's testimony for the benefit of the public is not part of his duty as an American. But contrary to Lane's argument, simply uttering these broad statements does not answer the question presented – at least, not if the Court is to remain faithful to its government employee precedents. *Garcetti* did not alter the careful, nuanced approach the Court has taken for almost half a century in considering both the employee's free speech rights

and the government employer's need for efficiency. Rather, *Garcetti* began to articulate the circumstances in which the government's interest was stronger – *i.e.*, where there was no citizen analogue to the speech – so that the speech was made pursuant to the employee's official duties.

If the Court were to take a categorical approach and hold, as Lane urges, that all subpoenaed testimony is, by its nature, citizen speech, it would contravene *Garcetti*'s holding that the location of the speech is not determinative. The Eleventh Circuit recognized as much, stating that the fact that "Lane testified . . . 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." Pet. App. 7a.

Treating all subpoenaed government employee speech the same, simply by virtue of the issuance of a subpoena, would create a multitude of problems. Even Lane concedes immediate exceptions to the rule, such as witnesses called pursuant to Federal Rule of Civil Procedure 30(b)(6). *See* Pet'rs. Br. 12-13 n.4; *see also* Pet. 20 ("Of course, it may be possible to imagine cases in which a public employee's duties include such testimony. . . ."). These concessions demonstrate that a categorical rule protecting all subpoenaed testimony is unworkable.

Worse from a jurisprudential perspective, Lane's approach would impose an overly inclusive, bright-line rule into what, to date, has been a "practical" inquiry. *Garcetti*, 547 U.S. at 424. Lane's approach flies in the face of the Court's instructions in other First Amendment precedents that courts are required "to carefully review the record" and take caution to limit "the reach of [their] opinion[s] by the particular facts before [them]." *Snyder*, 131 S. Ct. at 1220.

Importantly, the "citizen analogue" inquiry is not equivalent to the statement in *Garcetti* that "speech that owes its existence to a public employee's professional responsibilities" is speech made pursuant to a public employee's duties and is therefore unprotected. *See* 547 U.S. at 421-22. Government employee speech may be informed by information the employee has come across in the context of his employment but still be protected by the First Amendment because it consists of ideas and opinion relating to civic discussion and public debate; thus, there is a citizen analogue to the speech and *Pickering* balancing is appropriate. *See, e.g., Pickering*, 391 U.S. at 572 ("Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely . . . .").

However, where there is no citizen analogue to the speech, as in this case and in *Garcetti*, because the speech is based on information possessed by the government employee to which no citizen would have access, the "theoretical underpinnings" of the Court's government employee decisions, *Garcetti*, 547 U.S. at 423, support that such speech is unprotected. This is particularly so where, as here, the speech is factual in nature rather than consisting of opinion.

This approach also properly takes account of the speech listed in the United States' amicus brief involving "sensitive or confidential information, which may range from tax records and trade secrets to information about law enforcement sources or sensitive investigative techniques." US Br. 18. There is no citizen analogue to possession of such information; a normal citizen would not have access to it. Accordingly, speech involving such information would not have the protection of the First Amendment. There is no need to weaken *Garcetti* in such a circumstance by resorting to *Pickering* balancing; the "citizen analogue" inquiry provided in *Garcetti* is adequate on its own.

Likewise, application of the "citizen analogue" analysis renders unprotected the examples listed by Burrow as problematic: "police officers [who] routinely testify about traffic stops, arrests, or investigations; crime scene techni-

cians testify[ing] about processing evidence; and laboratory technicians testify[ing] about analyzing substances to confirm the presence of illegal drugs." Burrow Br. 23. There is no citizen analogue for such testimony. Similarly, testimony pursuant to Federal Rule of Civil Procedure 30(b)(6), *see* Burrow Br. 24, would not be protected as long as the testimony was confined to facts the witness was privy to only by virtue of his employment, but would be protected if the testimony, like the teacher's letter in *Pickering*, was based on opinion and ideas involved with the debate at issue.[4]

The *Garcetti* petitioners provided another illustrative example of why the "citizen analogue" inquiry is the correct approach. In their brief to this Court, they discussed "the unending efforts of this country's law enforcement and intelligence agencies to prepare against and to prevent another terrorist attack." *Garcetti v. Ceballos*, No. 04-473, 2005 WL 1317482, at *36-37 (May 27, 2005) (Petitioners' Br. on the Merits). They focused on the "communication (writ-

[4] To the extent Lane or the amici argue that *Garcetti* should be overruled or curtailed for reasons related to academic freedom, the Court should decline to address that issue as it did in *Garcetti:* "speech related to scholarship" is not at issue in this appeal. *See* 547 U.S. at 425. The Court should leave that issue for another day when it is squarely presented.

ten or otherwise) regarding the effectiveness with which information is shared by this country's various intelligence agencies, between and amongst intelligence analysts employed by these agencies." *Id.* at *37. If such an analyst was subpoenaed to testify, Lane's approach would cloak any and all sensitive factual information testified to in the First Amendment. But under the "citizen analogue" approach, no citizen would be privy to such sensitive information, and, thus, it would not be protected. As the *Garcetti* petitioners wrote, such speech "should not be blanketed with constitutional protection because [it] lack[s] the essence of citizen speech that lies at the heart of the free speech clause of the First Amendment." *Id.*

In essence, Lane asks the Court to depart from the practical approach taken by *Garcetti* in the particular context of the subpoena, such that a government employee's subpoenaed testimony is always protected.[5] However, as noted, *Garcetti* itself contains everything the Court needs to address the question presented in the form of the "citizen analogue" lodestar. No "special justification" exists for such a departure. *See Dickerson v. United States*, 530 U.S. 428, 443 (2000) (citation and quotation marks omitted).

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[5] Even Burrow, who agrees with Lane on the outcome of the first issue, disagrees with this approach. Burrow Br. 21-27.

Lane will argue that the "citizen analogue" inquiry is equivalent to the subject matter of the government employee's employment, and that the Court held "the subject matter" of such employment "nondispositive." *Garcetti*, 547 U.S. at 421. While it is true that the subject matter of the employee's employment is nondispositive, that subject matter is not coextensive with the "citizen analogue" inquiry. Directly after the "nondispositive" statement in *Garcetti*, the Court stated that "[t]he First Amendment protects *some* expressions related to the speaker's job," *id.* (emphasis added), and cited *Pickering*. But, as shown above, the teacher's letter in *Pickering* did have a citizen analogue: "[T]he letter constituted, basically, an attack on the School Board's handling of the 1961 bond issue proposals and its subsequent allocation of financial resources between the schools' educational and athletic programs. It also charged the superintendent of schools with attempting to prevent teachers in the district from opposing or criticizing the proposed bond issue." 391 U.S. at 566. Any citizen could have written such a letter; Pickering's *opinion* on what he believed to be a mishandling of funds contributed to the public debate and, as such, was subjected to the balancing test articulated in *Pickering* and found protected by the First Amendment.

In direct contrast, there is no citizen analogue for Lane's speech, which consisted only of facts not available to a citizen, and which did not consist of opinion or debate. As such, and consistent with *Garcetti*, his speech was not protected by the First Amendment, and the Eleventh Circuit's decision should be affirmed.

II. Steve Franks Is Entitled to Qualified Immunity Because Neither the Court's Law nor Eleventh Circuit Law Clearly Established that Lane's Speech Was Protected, and the Law of Other Circuits Could Not Do So.

Franks has always denied and continues to deny that Lane's subpoenaed testimony had anything to do with the termination of Lane's employment. But even accepting as true that it did, and as the United States also acknowledges, "[b]ecause the constitutional status of [Lane]'s speech was not clearly established at the time of [his] dismissal, . . . Franks is entitled to qualified immunity from an award of damages in his individual capacity[,]" US Br. 7, which is the only claim against Franks at issue in this appeal.

It is axiomatic that "[q]ualified immunity shields government officials from civil damages liability unless the official violated a . . . constitutional right that was clearly established at the time of the challenged conduct." *Reichle v. How-*

ards, 132 S. Ct. 2088, 2093 (2012). This Court has held that "[t]o be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Id.* (citation and quotation marks omitted). While the Court does "not require a case directly on point, . . . existing precedent must have placed the . . . constitutional question beyond debate." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011). As in *Ashcroft*, "[t]he constitutional question in this case falls far short of that threshold." *Id.*

In determining whether Franks enjoys qualified immunity, "the salient question . . . is whether the state of the law [when Franks terminated Lane] gave [Franks] fair warning that [his] alleged treatment of [Lane] was unconstitutional." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). As shown, *supra* Section I, the state of this Court's law did not do so. Furthermore, the state of the Eleventh Circuit's law (which held the opposite) did not do so, either. Finally, the law of other circuits which directly contradicted Eleventh Circuit precedent did not and could not clearly establish law in the Eleventh Circuit.

A. This Court's Precedents Did Not Clearly Establish that Lane's Trial Testimony Was Protected.

To overcome a government official's qualified immunity, "the right allegedly violated must be established, not as a broad general proposition, but in a particularized sense so that the contours of the right are clear to a reasonable official . . . ." *Reichle*, 132 S. Ct. at 2094 (citations and quotation marks omitted).

Applying this law, Franks is entitled to qualified immunity because Lane has been unable to show that it was clearly established in January 2009, when Franks terminated Lane's employment, that Lane's testimony was citizen speech protected by the First Amendment. "Here, the right in question is not the general right to be free from retaliation for one's speech," *Reichle*, 132 S. Ct. at 2094, but the more specific right of a government employee to be free from retaliation on account of subpoenaed testimony. However, "[t]his Court has never held that there is such a right." *Id.* If it were to do so now, Franks would still have qualified immunity because, at the time of the challenged conduct, that right was not clearly established under this Court's or Eleventh Circuit precedent (*see infra* Section II.B). *See id.* at 2093-94.

Lane's reliance on the general law in *Garcetti* to argue that Franks is not entitled to qualified immunity is misplaced. In *Garcetti*, the Court *declined* to establish "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. As the United States points out, while *Garcetti* "made clear that speech pursuant to an employee's official duties is unprotected, [it] 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*." US Br. 29. Therefore, when Franks terminated Lane's employment "it was not clearly established that dismissing [him] for his testimony would violate [his] First Amendment rights. . . . Certainly *Garcetti* did not establish that proposition." *Id.* At the very least, "whether or not the constitutional rule applied by the court below was correct, it was not 'beyond debate.'"[6] *Stanton v. Sims*, 134 S. Ct. 3, 7 (2013) (citing *al-Kidd*, 131 S. Ct. at 2083).

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[6] That this was clearly not a settled issue is further shown by the multiple differing interpretations of *Garcetti* by Lane, Burrow, and the United States, in spite of their agreement that the Eleventh Circuit's decision was incorrect in this particular instance.

Lane's citations to multiple cases for the uncontroversial, general proposition that citizens have a duty to respond to a subpoena, a point which Franks does not dispute, are of no assistance to the Court. *See* Pet'rs Br. 22; *Reichle*, 132 S. Ct. at 2094. None of those cases establish that subpoenaed testimony is always protected speech. Only *Branzburg v. Hayes*, 408 U.S. 665 (1972), and *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), discuss First Amendment jurisprudence at all, and then only in the unrelated context of a journalist's obligation to respond to a grand jury subpoena when confidential information or a confidential informant is involved. *See Reichle*, 132 S. Ct. at 2094. The United States put it best: "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." US Br. 30.

Finally, Lane cannot overcome Franks' qualified immunity by finding "clearly established law lurking in the broad 'history and purposes of the F[irst] Amendment.'" *al-Kidd*, 131 S. Ct. at 2084 (citation omitted). The Court has repeatedly cautioned against defining clearly established law at such "a high level of generality." *Id.*; *see also* US Br. 29-30 ("Nor has any other decision of this Court, prior to or after *Garcetti*, conferred protection on speech consisting entire-

ly of information an employee learned through public employment.").

In short, regardless of how the Court rules on the First Amendment question, qualified immunity clearly bars Lane's action against Franks in his individual capacity.[7] *See, e.g.*, *al-Kidd*, 131 S. Ct. at 2085 ("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions.").

B. Eleventh Circuit Precedent Did Not Clearly Establish that Lane's Speech Was Protected, But Actually Established Just the Opposite.

Qualified immunity also applies because, as correctly recognized by the Eleventh Circuit, far from placing the First Amendment issue "beyond debate[,]" *al-Kidd*, 131 S. Ct. at 2083, Eleventh Circuit precedent established the opposite of what Lane argues. *See* Pet. App. 5a-8a; *see also* Pet. 23 (acknowledging that "the Eleventh Circuit applied its precedent" in disposing of this action below).

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[7] A ruling in favor of Franks does not leave Lane without recourse if he can, in fact, prove at trial that he was terminated for his testimony, as there is still the possibility of injunctive relief against Burrow.

The Eleventh Circuit relied on its holding in *Morris v. Crow*, 142 F.3d 1379 (11th Cir. 1998), to hold that Franks was entitled to qualified immunity. Pet. App. 6a-8a. It determined that "*Morris* is the law in this Circuit on the question of public employee speech per a subpoena in the context of judicial proceedings." *Id.* at 7a n.3. The Eleventh Circuit recognized that in *Morris*, it held that because a police "officer's deposition testimony was given merely 'in compliance with a subpoena to testify truthfully' . . . and not as a '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[,]' it was unprotected under the First Amendment." *Id.* at 6a-7a (citing *Morris*, 142 F.3d at 1382-83).

The Eleventh Circuit then applied that holding to the facts of this case to find that Lane's speech was not protected. *See id.* at 7a-8a. Franks quite obviously could not have known that his alleged action violated clearly established law, when a panel of three Eleventh Circuit judges applying Eleventh Circuit law held that it did not. *See, e.g.*, *Reichle*, 132 S. Ct. at 2097; *al-Kidd*, 131 S. Ct. at 2085; *see also* US Br. 30 ("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 any event, Lane's attempt to distinguish the facts of this case from those in *Morris* fails. Like the officer in *Morris*, Lane made no attempt to comment on policies and procedures, internal workings, or the quality of employees. *See supra* pp. 6-8. He simply testified to the facts surrounding the personnel action he took regarding Schmitz. *See Morris*, 142 F.3d at 1382. This was not a case of "civic discussion," "public debate," or "dialogue" of any kind. *See supra* Section I. Nor can Lane show that the fact that he was testifying to the "truth" automatically meant, under clearly established law, that the speech was protected. *See Morris*, 142 F.3d at 1382 ("Nor is there any evidence that Morris gave deposition testimony for any reason other than in compliance with a subpoena to testify truthfully . . . .").

Furthermore, and as Lane concedes, Pet'rs Br. 38, neither *Martinez v. City of Opa-Locka*, 971 F.2d 708 (11th Cir. 1992), nor *Tindal v. Montgomery County Commission*, 32 F.3d 1535 (11th Cir. 1994), held that subpoenaed testimony is always protected. *See Hope*, 536 U.S. at 739 (relevant inquiry is whether unlawfulness of official's conduct is apparent in "light of pre-existing law"). Rather, those cases, both decided prior to *Morris*, held that testimony pursuant to subpoe-

na under the particular circumstances therein (a Board of Inquiry proceeding regarding the employer's purchasing practices and a co-employee sex discrimination/harassment trial) was protected speech. *See Tindal*, 32 F.3d at 1539-40; *Martinez*, 971 F.2d at 712. Several years later, and as discussed above, the Court found the exact opposite in *Morris*.

At most, Lane's reliance on *Martinez* and *Tindal*, and the parties' disagreement as to whether *Martinez* or *Morris* controls, highlights a discrepancy in pre-existing law as to whether testimony pursuant to a subpoena always constitutes protected speech. This only further shows that this was not a clearly established issue.[8]

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[8] The Eleventh Circuit has also highlighted this discrepancy:

> Indeed, while there is Eleventh Circuit precedent supporting the proposition that a public employee may have a First Amendment interest in testimonial communications made in the context of investigative proceedings, *see Martinez v. City of Opa-Locka*, 971 F.2d 708 (11th Cir. 1992), there is also . . . long-standing circuit precedent that not all communications on matters of general interest to the public enjoy First Amendment protection, even if those communications are made in the course of subpoenaed testimony. *See Morris*, 142 F.3d 1379.

The Eleventh Circuit did not err in finding that Franks was entitled to qualified immunity. *See Hope*, 536 U.S. at 739.

Lane's argument that "*Martinez* has never been overruled, and remains good law in the Eleventh Circuit" should be rejected. Pet'rs Br. 37. While Lane is correct that *Martinez* has never been explicitly overruled, the same is true for *Morris*, which was decided after *Martinez*, remains good law, and constitutes the Eleventh Circuit's most recent pronouncement on the issue of whether testimony pursuant to a subpoena is protected. Despite Lane's argument that *Morris* was wrongly decided, Pet'rs Br. 39, Franks was entitled to rely on that law and Lane cannot show otherwise.[9] *See Hope*, 536 U.S. at

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Green v. Barrett, 226 F. App'x 883, 886-87 (11th Cir. 2007).

[9] While Lane argues that Franks' reliance on *Abdur-Rahman v. Walker*, 567 F.3d 1278 (11th Cir. 2009), was misplaced because that case was decided after Franks acted, *Abdur-Rahman* simply reiterated what the clearly established law in the Eleventh Circuit was at the time Franks acted, *i.e.*, that speech that owed its existence to an employee's job responsibilities was not protected. *See* 567 F.3d at 1283; *see also* US Br. 32-33 ("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.").

741 (standard for qualified immunity is "fair warning"); *see also* Burrow Br. 30-31 ("At the time of Lane's dismissal, Franks's home circuit had already rejected a First Amendment claim based on subpoenaed testimony about an employee's work activities. Even if that circuit-level precedent was wrongly decided, . . . the defense of qualified immunity does not require state officers to forecast the evolution of federal law."); *see also id.* at 33-34 ("A state officer cannot be expected to anticipate that this Court or a court of appeals will overrule a circuit precedent.").

Finally, Lane's argument that *Grand Jury Proceedings (Williams) v. United States*, 995 F.2d 1013 (11th Cir. 1993), and *Maggio v. Sipple*, 211 F.3d 1346 (11th Cir. 2000), are "relevant Eleventh Circuit cases support[ing] petitioner" is misleading. Pet'rs Br. 40-41. *Williams* did not discuss the First Amendment, and *Maggio*, while discussing the First Amendment, did not involve subpoenaed testimony. Even so, the *Maggio* court found that the individual defendants in that case were entitled to qualified immunity: "Because the analysis of First Amendment retaliation claims under the *Pickering-Connick* test involves legal determinations that are intensely fact-specific and do not lend themselves to clear, bright-line rules[,] a defendant in a First Amendment suit will only rarely be on notice that his actions are unlawful." 211 F.3d at 1354-55 (citation, quotations marks, and brackets

omitted). The same is true here and the Court should affirm Franks' qualified immunity from Lane's suit. *See Reichle*, 132 S. Ct. at 2097.

C. The Circuit Split Described by Lane in his Petition for a Writ of Certiorari Demonstrates that Franks is Entitled to Qualified Immunity.

Lane asked the Court to grant certiorari because the Eleventh Circuit's holding "conflicts with the precedents of at least three other federal circuits . . . ." Pet. 6. Now that the Court has accepted certiorari, Lane argues that Franks is not entitled to qualified immunity because he "should have known," based on the law of other circuits (despite his previous argument of a circuit split), that the law was clearly established. *See* Pet'rs Br. 41. Lane cannot have it both ways. His argument that this is not a settled issue among four circuits supports Franks' qualified immunity, even if the Court ultimately overrules the Eleventh Circuit's judgment on the First Amendment issue. *See Reichle*, 132 S. Ct. at 2097 (uncertainty in law, including appellate decisions that disagreed over the proper application of a Supreme Court case, supported officials' entitlement to qualified immunity); *Pearson v. Callahan*, 555 U.S. 223, 244-45 (2009) ("'If judges thus disagree on a constitutional question, it is unfair to subject [a defendant] to money damages for picking the losing side of the controver-

sy.'") (citation and brackets omitted); *Wilson v. Layne*, 526 U.S. 603, 617 (1999) ("Given such an undeveloped state of the law, the officers in this case cannot have been 'expected to predict the future course of constitutional law.'") (citation omitted) (discussing circuit split as supporting qualified immunity).[10]

Lane's argument that Franks should have looked to the Third Circuit's decision in *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008), where that court even acknowledged that it was "aware of no precedential appellate decision after *Garcetti* answering the question whether truthful trial testimony arising out of the employee's official responsibilities constitutes protected speech[,]" *id.* at 230, should be rejected.

Regardless, the law of another circuit could not clearly establish law in the Eleventh Circuit because the Eleventh Circuit had already addressed the issue in *Morris*. *See, e.g.*, *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) ("Under the established federal legal system the decisions of one circuit are not binding

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[10] Several amici, including the United States, also discuss and acknowledge the disagreement among the circuits on the First Amendment issue raised in this case. *See* US Br. 34-35; Alliance Defending Freedom Br. 3 (noting that *"Garcetti*'s broad job duties test has led to wide disagreement in the circuits").

on other circuits."); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1176 (D.C. Cir. 1987) ("The federal courts . . . should strive to avoid conflicts, but each has an obligation to engage independently in reasoned analysis. Binding precedent for all is set only by the Supreme Court . . . ."). For the same reason, the Seventh Circuit's decisions in *Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007), and *Fairley v. Fermaint*, 482 F.3d 897 (7th Cir. 2007), are irrelevant to the proper analysis of whether the law was clearly established in the Eleventh Circuit.

In sum, Franks is entitled to qualified immunity from Lane's money damages claim against him in his individual capacity regardless of what the Court holds on the merits of the First Amendment question.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Eleventh Circuit in favor of respondent Steve Franks on both substantive and qualified immunity grounds.

Respectfully submitted,

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