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

REPLY BRIEF FOR THE PETITIONER

Tejinder Singh
Counsel of Record
Thomas C. Goldstein
Kevin K. Russell
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Ave. NW
Suite 404
Washington, DC 20015
(202) 362-0636
tsingh@goldsteinrussell.com

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REPLY BRIEF FOR THE PETITIONER

This case asks whether the First Amendment permits the government to retaliate against a public employee for testifying truthfully in court on a matter of public concern—without making any showing that the testimony impaired the government's legitimate interests, and even when the employee testified under subpoena, and not pursuant to his job duties.

Respondent Franks has not cited a single case, prior to this one, in which a court held that the answer was "yes." The courts below reached that unprecedented result by ignoring this Court's rulings and cherry-picking snippets from inapposite circuit precedent. Franks defends those mistakes by wrenching language from *Garcetti v. Ceballos*, 547 U.S. 410 (2006), out of context, while ignoring the Court's actual rationale and holding.

Perhaps the clearest evidence of the magnitude of the lower courts' error is that the Solicitors General of both the United States and Alabama—two sovereigns that face increased liability if the Court rules in petitioner's favor—argue that the First Amendment protects petitioner's testimony. They are joined by a diverse and impressive array of *amici*, including scholarly commentators and advocacy organizations across the ideological spectrum.[1]

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[1] This consensus stands in contrast with the lone *amicus* brief supporting respondent Franks, which waxes nostalgic about the days before this Court decided *Pickering v. Board of Education*, 391 U.S. 563 (1968), and takes the extreme view that all speech "related to the performance of one's job duties" is unprotected because that speech "owes its existence" to the

The well-founded and overwhelming consensus supporting petitioner on the merits also supports his claim that qualified immunity does not protect Franks from liability for damages. This Court's holdings clearly establish that the First Amendment applies because petitioner spoke as a citizen on a matter of public concern. To the extent that circuit decisions are inconsistent with that rule, those decisions are contrary to this Court's clear precedents and cannot support immunity. But in fact, circuit precedent also supports petitioner.

This Court should accordingly hold that the First Amendment protects petitioner's truthful testimony, and that this rule was clearly established at the time Franks fired him for that testimony.

I. Respondent Franks' Recitation Of The Facts Is Irrelevant And Misleading.

Franks begins (Br. 4-14) with a slanted reading of the facts insinuating that petitioner's termination was not retaliatory. These contentions are irrelevant to the questions presented, which do not turn on Franks'

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employee's job. Br. of Int'l Municipal Lawyers Ass'n 14-15. That, of course, is incompatible with *Garcetti*'s statement that "[t]he First Amendment protects some expressions related to the speaker's job," 547 U.S. at 421. Moreover, that reading of the phrase "owes its existence" was debunked in petitioner's brief (at 31-34), respondent Burrow's brief (at 18-19), the brief of the United States (at 15-16), the National Education Association's brief (at 12-13), and the law professors' brief (at 10-12). Indeed, even Franks disclaims reliance on that language. Franks Br. 32.

motivations, but instead on the nature of petitioner's speech. If anything, that section of Franks' brief is an implicit acknowledgment that retaliation against petitioner's testimony would have been improper.

This Court must decide this case—which was adjudicated on summary judgment—on the facts in the light most favorable to petitioner. Applying that standard, even the district court, which ruled broadly in Franks' favor, held that "genuine issues of material fact exist in this case concerning Dr. Franks' true motivation for terminating Mr. Lane's employment," so that summary judgment was inappropriate on that ground. Pet. App. 21a.

Petitioner's version of the facts, supported by substantial evidence, is that before he took the position as director of CITY, two prior directors had taken no action against Schmitz as she bilked the program via a no-show job she had arranged through powerful political allies. Notwithstanding warnings that Schmitz might retaliate, petitioner terminated her, prompting her to tell a colleague that she intended to "get [petitioner] back" and that if petitioner ever sought further funding for CITY from the legislature, she would see him fired. *Id*. 2a, 11a.

Petitioner then accurately described Schmitz's culpable conduct to the grand jury and at Schmitz's criminal trials. Franks knew about petitioner's testimony. *Id.* 17a. Then, petitioner was terminated along with twenty-eight other employees—however all but petitioner and one other were promptly rehired. *Id*. 3a. That termination occurred just before CITY's budget was due for consideration at the legislature,

and petitioner argues that he was fired either in collaboration with, or in response to pressure from, Schmitz's political allies. *Id*. 17a,

Franks claims that he knew very little about these events, and that ultimately, petitioner's termination was a financial decision, not retaliation. On summary judgment, that claim must fail because a jury is entitled to believe the far more plausible account that Franks realized that petitioner's testimony had angered and embarrassed Schmitz (who at that time had secured a hung jury) and her allies, and he fired petitioner in order to appease those people. If this Court resolves the questions presented in petitioner's favor, it should leave these issues to the lower courts on remand—and Franks does not ask otherwise.

II. The First Amendment Protects Petitioner's Testimony.

Franks argues next (Br. 27-30) that the First Amendment does not protect petitioner's speech because his testimony has no "citizen analogue." Franks never contends that petitioner's job duties—whether as formally stated, or as practically performed—included testifying in court. Instead, he argues that because the facts to which petitioner testified were only knowable by a public employee, the Court should hold that petitioner effectively spoke pursuant to his official duties.

Franks' rule misreads *Garcetti*. Moreover, by giving the government carte blanche to fire employees in retaliation for publicly discussing information they learned at work, Franks' rule shrouds the operation of

the government in near-total secrecy, undermining the principal benefit of public employee speech—knowledgeable statements that contribute unique insights to public dialogue.

In *Garcetti*, this Court recognized a limitation on the general rule—established by *Pickering* and its progeny—that when a public employee speaks on a matter of public concern, the First Amendment protects his speech. The limitation is that this protection does not apply "when public employees make statements pursuant to their official duties." 547 U.S. at 421. This rule "reflects the exercise of employer control over what the employer itself has commissioned or created," and thus affords "government employers sufficient discretion to manage their operations." *Id*. at 422. In other words, the government has a right to evaluate employee "work product," and the First Amendment does not undermine that right when the work product constitutes speech. *Id*.

As an aside, the Court addressed what the Ninth Circuit "perceived as a doctrinal anomaly." *Id*. at 423. The court of appeals had reasoned that the First Amendment must protect speech "report[ing] official misconduct," even if reported internally pursuant to the employee's official duties, because a contrary result would create incentives for government employees to air their employers' dirty laundry to the public. *Ceballos v. Garcetti*, 361 F.3d 1168, 1176 (9th Cir. 2004). This Court rejected that logic, reasoning that the goal of public employee speech doctrine is not to maximize internal reporting, but instead to ensure

that public employees retain the rights of citizenship. Thus, the Court explained:

> 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. . . . When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees.

547 U.S. at 423-24.

Franks takes this Court's rejoinder to the Ninth Circuit and runs with it, arguing that *Garcetti* in fact created a dispositive "citizen analogue inquiry," and that petitioner's testimony fails that test because no private citizen would have known the facts to which petitioner testified. Franks also argues (at 3-4, 19-20) that the "citizen analogue" inquiry encompasses whether the speech is at the "heart of the First Amendment"—which he defines narrowly to include "ideas and opinion"—or instead at the periphery—which he defines to include all statements of fact, including testimony.

Franks' contention is incorrect on every level. First, there is no independent "citizen analogue" inquiry. The question is whether the employee spoke pursuant to his duties, determined using a "practical" inquiry identifying "the duties an employee actually is expected to perform." *Garcetti*, 547 U.S. at 424-25.

That rule follows from the premise that employers have a right to control employees' performance. Franks' "citizen analogue" inquiry, by contrast, fails to identify speech that the employer has a legitimate interest in controlling, and instead protects speech—or not—based on a court's ad hoc assessment of whether that speech conforms to some amorphous notion of core citizen speech.

To the extent that a "citizen analogue" test might exist, *Garcetti* never suggested that speech would lose protection merely because it describes facts that the employee learned at work. Indeed, the entire premise of this Court's response to the Ninth Circuit, upon which Franks relies, is that employees would learn about wrongdoing during the course of their employment and report it; the Court stated that the First Amendment only protected such reports made externally—not that the speech was unprotected altogether because it conveyed insider information. *Id*. at 423-24. Indeed, the Court expressly disclaimed any knowledge-based test. *See, e.g.*, *id*. at 421 ("The First Amendment protects some expressions related to the speaker's job.") (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573 (1968), and *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414 (1979)). This is because society has a First Amendment interest in hearing the informed views of public employees, and any rule denying protection to revelations of nonpublic information learned at work would undermine that interest. *See id*.

Moreover, ambiguities in Franks' rule ensure that it would inject substantial uncertainty and confusion

into First Amendment cases. Franks argues that petitioner's testimony is unprotected because it "(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." Franks Br. 3. But assume that petitioner had revealed Schmitz's corruption in a letter to the editor of a local newspaper instead of sworn testimony. Would the nature of the information mean that his letter had no citizen analogue? Or would the fact that "numerous citizens every day" write letters to the editor, *Garcetti*, 547 U.S. at 422, mean the opposite? Or assume that only half of petitioner's testimony comprised facts that he learned at work, and the rest discussed facts that non-employees also knew. What if petitioner's factual testimony verified an uninformed conspiracy theory published on the Internet? What if petitioner supplemented his factual statements with vociferous statements of opinion? Or a single, muted statement of opinion? And what does it mean for information to be unavailable to citizens? What if citizens could learn that information by making a phone call and asking, or by filing an official request for public records? What if a public employee had shared relevant information with family, a union representative, or her attorney? Franks' explanation answers none of these questions, and this Court's precedents—which have never purported to apply Franks' test—likewise do not fill in the blanks.

Although Franks never acknowledges it, these ambiguities cast a shadow over this very case. At Schmitz's trial, the government called multiple

witnesses who were not CITY employees, but who nevertheless knew of Schmitz's misdeeds and of petitioner's decision to fire her. Foremost among these was Mary Ogles, the Assistant Executive Secretary for the Alabama Education Association, a professional organization that assisted Schmitz in her interactions with petitioner. Ogles attended the meeting at which petitioner fired Schmitz, and she testified regarding that meeting, as well as the events that preceded it, in detail. *See* Trial Transcript 122-26, 139-144, *United States v. Schmitz*, No. 08-cr-14-RDP-PWG, ECF No. 118 (N.D. Ala. Nov. 24, 2008). Petitioner likewise testified that before firing Schmitz, he told Ogles the relevant details regarding Schmitz's failure to perform her duties. *See id*. at 184-85. By that point, Ogles—a private citizen—knew most of what petitioner knew. And she was not the only non-employee who testified against Schmitz. *See id*. at 63-64, 67-70 (lobbyist testifies that Schmitz was attending a conference on days she had claimed to be working); Trial Transcript 258-61, 266, *United States v. Schmitz*, No. 08-cr-14-RDP-PWG, ECF No. 117 (N.D. Ala. Nov. 24, 2008) (high school principal testifies that Schmitz was volunteering at the school on days she had claimed to have been working); *id*. at 78, 111-17 (two employees of Northrop Grumman testify that Schmitz had not meaningfully interacted with them in their charitable efforts or their work in creating CITY's website). The defense likewise called non-employee witnesses.

Franks never discusses any of this testimony, nor explains what information petitioner had that these citizens did not, so it is unclear how his "citizen analogue" rule functions.

In addition to highlighting the difficulties inherent in Franks' rule, these examples of citizen testimony in the Schmitz trial also demonstrate that there is an obvious "citizen analogue" to subpoenaed testimony by public employees: subpoenaed testimony by other citizens. Just as citizens write letters to editors every day, they testify every day, contributing their knowledge to the judicial system's search for truth. That is one reason why this Court has repeatedly described subpoenaed testimony as an obligation of citizenship. Petitioner's speech was therefore not pursuant to his official duties, even if that question could be resolved solely by asking whether he engaged in speech that resembles speech by other citizens.

Indeed, there is no need to resort to analogies at all, because petitioner *himself* was subpoenaed in his capacity as a citizen. Franks never disputes that petitioner testified as an individual, that the burdens of compliance fell on him as an individual, and that CITY had no legitimate interest in controlling the content of his testimony. Those facts are far more probative than whether petitioner's speech can be analogized to testimony by private citizens.

Two additional points bear brief mention. First, to the extent Franks believes that statements of opinion are entitled to greater First Amendment protection than truthful factual statements, he is wrong. *See, e.g.*, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 640 n.9 (1985); *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 62 (2006). Indeed, this Court has recognized strong First Amendment protection for *false* factual statements—

and it would be highly anomalous if similar protection did not extend to true ones. *See, e.g.*, *United States v. Alvarez*, 132 S. Ct. 2537, 2544-45 (2012); *Garrison v. Louisiana*, 379 U.S. 64, 78 (1964). Similarly, that petitioner testified in litigation does not diminish the public value of his speech—especially when, as here, the subject matter of petitioner's testimony is undisputedly of public concern. In *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2500 (2011), this Court explained that "[t]he government may not misuse its role as employer unduly to distort" the "deliberative process" of litigation. "Just as the public has a right to hear the views of public employees, the public has a right to the benefit of those employees' participation in [lawsuits]," including when that participation contributes to "the public airing of disputed facts." *Id*. (quotation marks and citation omitted).

Second, Franks warns (at 26 & n.3) that if his version of the "citizen analogue" test is not adopted, public employers will have insufficient recourse against employees who divulge confidential information. This is naked scaremongering. This case does not present any secrecy concerns because petitioner was not asked to—and did not—reveal any secrets. Even had that not been the case, courts supervising testimony possess tools, including protective orders, to address legitimate secrecy concerns. Finally, as the United States explains (at18), *Pickering* balancing resolves this issue in the rare event of an improper disclosure. When employees improperly disclose confidential information, the risk of disruption will ordinarily justify employer discipline. *Pickering* balancing allows the courts to

address those circumstances as they arise. Franks' rule, by contrast, bluntly denies First Amendment protection even when speech does not raise legitimate secrecy concerns.

III. A Bright-Line Rule Protecting Subpoenaed Testimony Is Desirable, But Not Necessary.

Franks and Burrow argue that the Court should not adopt a categorical rule that the First Amendment always applies to subpoenaed testimony. To be clear, petitioner agrees that no such rule is *necessary* to decide this case. Under a straightforward application of this Court's clearly established public employee speech doctrine, petitioner prevails because he spoke as a citizen on a matter of public concern. The Court can end the inquiry there without pronouncing more broadly on the nature of subpoenaed testimony.

However, a broader rule recognizing First Amendment protection for subpoenaed testimony on matters of public concern would be desirable, because it would facilitate the judicial system's search for truth and thus uphold society's First Amendment interest in hearing public employees' valuable speech. Moreover, there is no downside to holding that the First Amendment applies because *Pickering* balancing protects employers from unduly disruptive testimony, while preventing the government from using its power as an employer to distort the truth-seeking function of the judicial process.

The marginal cases under a broader rule involve public officials who testify regularly pursuant to their

duties—including police officers and lab technicians. An argument could be made that even when such employees testify under subpoena, they are speaking pursuant to their official duties, so that the First Amendment does not apply.

But that is not correct. When an employee testifies, his oath to the court creates an obligation—independent of any obligation to his employer—to testify truthfully. Thus, it is more accurate to say that the witness simultaneously speaks as an employee *and* as a citizen. The question is therefore not which role the witness occupies, but which role takes precedence.

This Court should hold that the First Amendment applies because the witness's role as a citizen takes precedence. That is because in the event of a conflict, the judicial system's interest in discovering the truth must prevail over the employer's parochial interest in achieving a favorable litigation outcome. Of course, if the employer determines that a public employee testified poorly for some reason other than the government's disagreement with the content of his truthful speech—for example, if the testimony is false or discloses confidential information—then *Pickering* requires the courts to defer to the employer's assessment that discipline is warranted.

To reiterate, the Court need not opine on all testimony in order to resolve this case. Here, petitioner's job responsibilities—as formally stated and as practically applied—did not include testifying in Schmitz's trial. Consequently, this case bears no resemblance to the hard cases in which an employee arguably testifies pursuant to his duties, and under

this Court's precedents, Franks' conduct was clearly unconstitutional. But that more difficult fact pattern arises often, and it would be consistent with this Court's precedents to clarify that in those cases, the First Amendment applies.

IV. Franks Is Not Entitled To Qualified Immunity.

The final issue is qualified immunity. Respondent Franks confuses the inquiry by suggesting that qualified immunity protects him unless the law clearly established the "right of a government employee to be free from retaliation on account of subpoenaed testimony," Franks Br. 39, suggesting that petitioner must prove that *all* subpoenaed testimony is *always* protected. As the previous section demonstrates, the Court need not go so far in order to hold that petitioner's right to testify was clearly established. On the contrary, the only proposition that had to be clearly established was that when an employee testifies on a matter of public concern—and not because his job duties require him to do so—he speaks as a citizen, even if his testimony describes events that occurred at work. Applying this standard when petitioner was fired in 2009, the controlling precedents of this Court and the Eleventh Circuit both established petitioner's right to testify.

1. Under *Garcetti*, decided well before Franks fired petitioner, when an employee's speech relates to a matter of public concern, the scope of the employee's duties is dispositive: the First Amendment applies to speech made outside those duties, but not within them. Courts must determine the scope of the

employee's duties using a "practical" inquiry that seeks to identify "the duties an employee actually is expected to perform." 547 U.S. at 424-25. That focus on actual duties is why employers cannot draft "excessively broad job descriptions" in order to "restrict employees' rights." *Id*. at 425. *Garcetti* also expressly stated that "[t]he First Amendment protects some expression related to the speaker's job," so that even if speech "concern[s] the subject matter of [the] employment," that "is nondispositive." *Id*. at 421.

Petitioner's actual duties were to manage CITY's day-to-day operations, staff, and budget. Pet. App. 10a. Those duties never required him to testify in court. *See id*. 7a. Thus, he did not regularly, or even occasionally, appear in court for work, and his job description did not suggest that he ever would. He testified in the Schmitz prosecution because he was subpoenaed as an individual to speak about whether Schmitz had committed fraud. Under a straightforward application of *Garcetti*, then, petitioner's speech is citizen speech. That rule was clearly established in 2006, and Franks had no justification to ignore it in 2009.

Garcetti's reasoning likewise compels the conclusion that petitioner's speech is protected. The Court focused on whether the employee was performing his duties such that his employer had a right to evaluate his performance by disciplining him for speech with which it disagreed. Nobody—including Franks himself—has argued that Franks had any right to control petitioner's testimony. Moreover, *Garcetti* emphasized that "the First Amendment

interests at stake" include "the public's interest in receiving the well-informed views of government employees engaging in civic discussion." 547 U.S. at 419. Petitioner's testimony vindicated this interest by providing the public with truthful, important information. Finally, *Garcetti* put Franks on notice that petitioner's testimony was entitled to greater protection than the memorandum in that case. Justice Souter's *Garcetti* dissent noted that the court of appeals had not reached the issue of Ceballos' sworn testimony. *See id.* at 443-44 (Souter, J., dissenting). It then argued, without contradiction, that Ceballos' "claim relating to truthful testimony in court must surely be analyzed independently to protect the integrity of the judicial process." *Id*. at 444.

Thus, both the holding of *Garcetti* and its rationale support a finding that petitioner's speech was protected. And of course, *Garcetti* should be read in context. That case came at the end of a long line of cases starting with *Pickering*, all of which focused on whether the speech related to a matter of public concern—which is undisputed in this case. This Court has never denied protection to such speech because it described facts learned at work, nor has it suggested that another court could do so.

In the face of this clear authority, respondents and the United States focus on what *Garcetti* did not decide, and attempt to argue that the Court left room for other tests that might support a different result.

The United States and Franks both make a single argument about *Garcetti*: that it "did not address whether speech devoted exclusively to disclosing

information learned through public employment" was unprotected, and therefore did not clearly establish petitioner's right to testify. U.S. Br. 29; Franks Br. 40. That is incorrect. Indeed, one need only look thirteen pages earlier in the United States' brief, which accurately recognizes:

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

U.S. Br. 16. Petitioner agrees with the United States that *Garcetti*'s holding was "especially clear" in rejecting the proposition that "the basis of employees' knowledge" was relevant to the "practical inquiry" necessary to determine the scope of employees' duties. Thus, even if petitioner's testimony "disclos[ed] information learned through public employment," *Garcetti* still "clear[ly]" holds the speech protected if it was not itself made pursuant to his duties.

The United States may attempt to reconcile its statements with the following sentence: "While *Pickering* and subsequent cases treated speech as protected when employees expressed views that were

informed by their government positions, none of those cases addressed speech that simply relayed information about acts performed as part of a speaker's official duties." U.S. Br. 30. The attempt fails, however, as a matter of both legal principle and application.

First, the distinction between speech "informed by" government employment and speech that "relayed information" about government employment is contrived and illusory—akin to saying that because the *Pickering* line of cases did not expressly hold that speech made on Tuesdays is protected, it left room for a reasonable public official to conclude otherwise. *Garcetti* plainly stated that the First Amendment protects employees' speech, even if that speech "concerned the subject matter" of their employment, as long as it also related to a matter of public concern, and was not made "pursuant to their official duties." 547 U.S. at 421. This Court has never suggested that within this category of protected speech, there is some special sub-category of statements insulated from the First Amendment because they relate *only* to the subject matter of the employee's job.

Indeed, such a distinction would be arbitrary, in the same way that Franks' formulation of the "citizen analogue" test is arbitrary. Imagine a statement comprising ten sentences of text, nine of which related facts that the employee learned at work, and one of which offered a political opinion. There would be no reasonable basis for treating such a statement differently from a statement that only offered the factual description, especially in light of the

government's argument that "[t]he fact that there was no evidence that petitioner intended to give public commentary—rather than simply to fulfill the requirements of a subpoena—has no relevance to this analysis." U.S. Br. 8-9.

Second, even assuming that there is a coherent category of statements that "simply relayed information about acts performed as part of a speaker's official duties," that category would not include petitioner's testimony. When petitioner testified, he described his actions to establish a foundation for the substance of his testimony, which was a description of Schmitz's culpable conduct, *i.e.*, her refusal to work, and her insistence that her political role and connections nevertheless entitled her to a job. Petitioner was not on trial, and it was his testimony regarding *Schmitz's* actions—and not "acts [he] performed"—that mattered. That is the testimony the government sought, and that is the testimony that precipitated the retaliation in this case.[2]

The United States attempts to distinguish this Court's precedents establishing that subpoenaed testimony is a citizen's duty by arguing that "[w]hile those cases may establish the obligation of every citizen to testify when called, they do not clearly establish that every person who testifies invariably

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[2] For the same reason, petitioner disputes the Eleventh Circuit's characterization that his "testimony touched only on acts he performed as part of his official duties." Pet. App. 7a. Of course his testimony discussed those acts, but not exclusively.

does so as a citizen, and not as an employee." U.S. Br. 30. This states the point at too high a level of generality. The question is not whether these cases establish that every person who ever testifies does so as a citizen. The question is whether, in light of these cases, a reasonable official in Franks' position could conclude that petitioner did *not* testify as a citizen. He could not. Petitioner was summoned by a federal court, not his employer. The subpoena was addressed to him as an individual, and not as director of CITY. The consequences of noncompliance fell on him personally, and not on his employer, or anybody else. And he spent time away from the office to testify. This Court's cases analyzing similar subpoenas have held that regardless of a witness's employment—whether as a journalist or as President of the United States—the witness must give his evidence for the benefit of the public, because he is obligated, as a citizen, to do so. *See United States v. Nixon*, 418 U.S. 683, 709 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972). Because petitioner was fulfilling that obligation when he testified, his speech is properly—and irrefutably—characterized as citizen speech.

2. Respondent Burrow does not argue that this Court's precedents left any room for Franks to retaliate against petitioner. She argues instead (joined by Franks and the United States) that Eleventh Circuit precedent sanctioned Franks' retaliation, thereby giving rise to qualified immunity even though this Court's precedents would not. Burrow Br. 30-31.

A rule permitting public officials to ignore this Court's precedents in favor of wrongly decided circuit precedent would be highly dubious—especially in the personnel context. Franks was not a police officer making split-second decisions in the field; he was a university administrator who had ample time to consult counsel and confirm the law. To the extent that Eleventh Circuit precedent was inconsistent with this Court's holdings, he should have conformed his conduct to this Court's holdings. That is what a reasonable public official would have done, as it is common knowledge that this Court's precedents trump contrary circuit precedent. *See Hope v. Pelzer*, 536 U.S. 730, 747-48 (2002) (explaining that in qualified immunity, "the significance of federal judicial precedent is a function in part of the Judiciary's structure," such that reliance on lower court decisions is unjustified in the face of contrary higher authority).

Even assuming that wrongly decided circuit precedent could create qualified immunity, that precedent must, at least, be on point. Certainly, a public official cannot pluck snippets from inapposite cases in order to justify unconstitutional conduct, when more clearly relevant circuit precedent compels a contrary result.

But that is exactly what respondents attempt here. In his opening brief (at 38-41), petitioner explained that this case does not resemble *Morris v. Crow*, 142 F.3d 1379 (11th Cir. 1998) (per curiam), which involved a closed-door civil deposition in a wrongful death case, where the employee merely described the contents of a car accident report he had

prepared at work. *Morris* stands for the proposition that when speech does *not* relate to a matter of public concern, "[t]he mere fact that [the] statements were made in the context of a civil deposition cannot transform them into constitutionally protected speech." *Id*. at 1383. It does not speak to cases, like this one, in which the testimony itself described public corruption—a class of speech at the heart of the First Amendment.

Morris itself ruled around circuit precedent. The most important case is *Martinez v. City of Opa-Locka*, 971 F.2d 708 (11th Cir. 1992). In *Martinez*, the director of the city purchasing department testified under subpoena before the city commission, which sat as a board of inquiry, *i.e.*, as a disciplinary body, reviewing the activities of the city manager. *Id*. at 710. Martinez testified that the city manager had violated city bid procedures, and thus misused public funds. *Id*. She was fired, and brought a suit for retaliation. The court of appeals held that her testimony addressed a matter of public concern because "[s]peech that concerns 'issues about which information is needed or appropriate to enable the members of society' to make informed decisions about the operation of their government merits the highest degree of first amendment protection." *Id*. at 712 (quotation marks and citation omitted). Of course, Martinez learned the facts to which she testified in the course of her employment as director of purchasing. If that were enough to eliminate First Amendment protection, her speech could not have been protected.

Morris characterized the statements in *Martinez* as follows:

> Testimony was speech that 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.

142 F.3d at 1383. This description, of course, applies with equal or greater force to petitioner's testimony. His speech revealed violations of criminal laws, was in the form of testimony before a federal grand jury and court, and was made in the context of a federal prosecution. There simply is no basis upon which a reasonable public official could have concluded that *Morris* somehow justified retaliating against petitioner's testimony in light of *Martinez*.

Respondent Burrow, like the Eleventh Circuit below, does not even mention *Martinez*. That failure discredits her analysis. In the Eleventh Circuit, panel decisions are controlling unless overruled, *see United States v. Hogan*, 986 F.2d 1364, 1370 (11th Cir. 1993), and *Martinez* has never been overruled. Thus, to the extent that *Morris* is inconsistent with *Martinez*, *Martinez* controls. But of course, the better approach is to reconcile the cases, *see id.*, and there is no reasonable way to do so and nevertheless conclude that retaliation was justified here. Both cases involved subpoenas, and both cases involved testimony disclosing information learned by public employees at

work. Thus, neither of these factors gives rise to a distinction. The critical difference is the subject matter and the context of the testimony: *Martinez*, like this case, involved allegations of corruption aired in a grand jury investigation and a public trial; *Morris* involved allegations of bad driving in a closed-door civil deposition. Thus, no reasonable public official could decide that *Morris* controlled.

Respondents are also wrong to argue that the existence of a circuit split, or the lower courts' holdings in this case, are sufficient to support immunity. In this regard, the character of the split is important. The Third and Seventh Circuits had expressly held, after *Garcetti*, and before petitioner was terminated, that the First Amendment protects subpoenaed testimony exposing official misconduct. Prior to this case, the Eleventh Circuit had not reached a contrary result. It did so here by extending inapposite circuit precedent to protect egregious misconduct.

This case therefore resembles to those in which this Court found no immunity even though the defendants had obtained favorable rulings below. In *Groh v. Ramirez*, 540 U.S. 551, 555-56 (2004), when officers failed to comply with the Fourth Amendment's warrant requirement, the district court held that there had been no Fourth Amendment violation at all, and in the alternative that qualified immunity applied. This Court disagreed, explaining that when the warrant was facially deficient, a violation was clear and immunity did not shield the officers. *See id.* at 564-65. In *Hope*, this Court held that the practice of handcuffing inmates to a hitching post was clearly

unlawful even after the Eleventh Circuit had granted qualified immunity to the officials who had done so. 536 U.S. at 745.

The notion that state officials can retaliate against federal witnesses for their subpoenaed testimony in a corruption prosecution is every bit as egregious as the idea that an officer could execute a facially deficient warrant, or secure an inmate to a hitching post. Retaliation against petitioner's testimony is an affront to both the First Amendment and the judicial system, and no reasonable official could have thought otherwise.

CONCLUSION

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

Respectfully submitted,

Tejinder Singh
Counsel of Record
Thomas C. Goldstein
Kevin K. Russell
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Ave. NW
Suite 404
Washington, DC 20015
(202) 362-0636
tsingh@goldsteinrussell.com

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