NO. 13-483

In the
Supreme Court of the United States

EDWARD R. LANE,
Petitioner,
v.
STEVE FRANKS, IN HIS INDIVIDUAL CAPACITY, AND SUSAN BURROW, IN HER OFFICIAL CAPACITY AS ACTING PRESIDENT OF CENTRAL ALABAMA COMMUNITY COLLEGE,
Respondents.

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

REPLY BRIEF OF RESPONDENT SUSAN BURROW

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I. The First Amendment protects some speech compelled by a subpoena on a matter of public concern, including the testimony at issue here.

This Court's existing framework for adjudicating the free speech claims of public employees already protects both the employees' constitutional rights and the employer's interest in controlling speech made on its behalf. *See Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968). Under that framework, the First Amendment protects Lane's speech at state senator Schmitz's corruption trial because he was not employed or paid to testify, and he spoke about a matter of paramount public concern. There is no need for this Court to adopt a special rule that applies to subpoenaed testimony, as Lane concedes, Pet. Lane Reply Br. 12.

Franks' proposed "citizen analogue" rule for evaluating free speech claims considers "whether the speech is part of the free flow of ideas and opinions" and "in particular whether a citizen would have had access to the information." Resp. Franks Br. 25–26 (internal quotation marks omitted). This rule is flawed for several reasons.

1. First, Franks' causation-focused "citizen analogue" test looks nothing like this Court's practical analysis in *Garcetti*. The core of *Garcetti*'s test is whether the employee's job duties encompassed the speech; the primary issue under

Franks' test is, instead, whether the public had access to the same information as the public employee. Resp. Franks Br. 25–30.

Franks emphasizes facts upon which this Court declined to rely in *Garcetti*. There, this Court plainly held that whether the speech concerned "the subject matter of [the plaintiff's] employment" is "nondispositive." 547 U.S. at 421. The Court reasoned that an employee might have a greater understanding of certain issues precisely because of his job; that is one of the reasons why his freedom to speak as a citizen on matters of public concern must be protected. *See Pickering*, 391 U.S. at 571–72 ("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 operations of the schools should be spent."). Accordingly, focusing on whether an employee had exclusive access to information misses the point.

Furthermore, in *Garcetti*, the court held that the fact that the employee "expressed his views inside his office, rather than publicly, is not dispositive." 547 U.S. at 420. Franks' proposed rule would leave unprotected all speech made within a government office, because no "citizen analogue" exists, even though it might also be "the kind of activity engaged in by citizens who do not work for the government." *Id.* at 423–24.

Instead, the First Amendment protects employees' job-related expression unless the employees speak "pursuant to their official duties" as "part of what [they were] employed to do." *Id.* at 421. Only if the speech "owes its existence" to the

employee's "professional responsibilities" may the employer exercise "control over what the employer itself has commissioned or created." *Id.* at 421–22. The reason is straightforward: an employee who "performed the tasks he was paid to perform" has merely spoken for the government "as a government employee," not as a citizen. *Id.* at 422.

2. Second, Franks' proposed rule is not administrable. Information is not a scarce resource; there is no way to know in the mine-run of cases whether the employee exclusively acquired certain knowledge because of his government service. Under Franks' rule, courts would have to speculate about whether some member of the public *could* have known the same facts as the employee.

That test is easily manipulated and cannot be applied in a principled way. For example, if the Court were to apply Franks' proposed test in this case, it could just as easily result in a loss for Franks as a win. Lane testified about Schmitz's failure to perform any work or show up at her office and her resulting dismissal. Any citizen with knowledge could have recounted the same facts: a client of the CITY program could have testified that Schmitz was never there, or Schmitz's friends and family members could have testified that she did no work for the CITY program. And, as Lane points out, several private citizens testified about Schmitz's actions at her trial. Pet. Lane Reply Br. 9. Nothing about the information that Lane conveyed puts it uniquely within the knowledge of government employees.

This Court's "practical" approach requires a more principled inquiry about an employee's job duties. *Garcetti*, 547 U.S. at 424. The question whether the government paid the employee to make the speech as part of his official duties can be answered without speculation, in keeping with "the content, form, and context" of the speech. *Connick v. Myers*, 461 U.S. 138, 147–48 (1983). Even though the same sentences might be protected or unprotected, depending on the circumstances, that is a necessary consequence of this Court's First Amendment case law, which routinely treats the same speech differently according to context. *Snyder v. Phelps*, 131 S.Ct. 1207, 1218 (2011) ("'[E]ven protected speech is not equally permissible in all places and at all times.'" (quoting *Frisby v. Schultz*, 487 U.S. 474, 479 (1988)).

3. Third, Franks' invocation of First Amendment principles misses the point as well. Although Franks argues that a citizen analogue rule would give greater protection to speech that is "close to the heart of debate," Resp. Franks Br. 25, that is far from certain. For example, a public relations officer's job duties may include writing editorials, which are classic vehicles for opinion and debate. Because she is paid, in part, to write editorials, any editorial written on her employer's behalf would still be speech pursuant to her official duties. See *Garcetti*, 547 U.S. at 422 (the employer must be able to control "what the employer itself has commissioned or created").

Franks also does not explain how the speech at issue in this case deserves less protection than the kinds of speech he concedes are protected. There is

no principled reason why the First Amendment's protections should apply with less force to Lane's speech at the senator's public corruption trial than to newspaper editorials. Testimony about a government official's unlawful actions relates just as clearly to a "matter of political, social, or other concern to the community." *Phelps*, 131 S.Ct. at 1216 (internal quotation marks omitted). Arguably, such speech is even more important than letters to the editor and Franks' other examples of "vibrant dialogue" in our society. Resp. Franks Br. 19, 25–26.

II. Qualified immunity protects government employers, like Franks, who rely on binding precedent in their own circuits.

The parties all agree that *Garcetti* and *Pickering* provide the answer to the first question presented. Pet. Lane Br. 13–25; Resp. Burrow Br. 14–30; Resp. Franks Br. 18–37. *See also* U.S. Br. 11–26. But the parties—like the circuit courts that considered the issue—differ widely on the proper method of analyzing testimony under this Court's precedents. These differences compel the conclusion that, notwithstanding *Garcetti*, the law in this area is not clearly established. Like Franks and the United States, Burrow believes that Franks is entitled to qualified immunity.

Lane's arguments to the contrary reveal fundamental misconceptions about the doctrine of qualified immunity. The point of qualified immunity is to protect government employers unless Supreme Court or circuit precedent clearly established that

their conduct was unlawful. *See Ashcroft v. Al-Kidd*, 131 S.Ct. 2074, 2080 (2011); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Lane apparently believes that an employer must know not only his own circuit law, but also the law in other circuits, and he must be able to parse the distinctions between cases in his home circuit and others to determine which appellate decision is right. Especially where his home circuit's precedent "[c]onflicts [w]ith [t]he [p]recedents [o]f [o]ther [c]ourts [o]f [a]ppeals," Pet. 6, no government employer should have to perform the job of a Supreme Court Justice to determine the appropriate course of action.

Lane also misreads Eleventh Circuit precedent in contending that it did not foreclose his First Amendment claim. The court of appeals had already held in a similar case that employee testimony about the subject matter of that employee's job was unprotected. *Morris v. Crow*, 142 F.3d 1379 (11th Cir. 1998). Lane asserts that Eleventh Circuit case law "actually supported petitioner" and "*Morris* was wrongly decided at the time." Pet. Lane Br. 35, 39. But the court of appeals did not see its own precedents this way. Lane points to *Martinez v. City of Opa-Locka*, 971 F.2d 708 (11th Cir. 1992), but the court of appeals did not consider that case to be controlling or even cite it. *See* Pet. Lane Br. 35–39; Pet. App. 2a–8a. Government employers cannot be expected to know the state of the law better than the federal appellate courts. Accordingly, Lane's own arguments illustrate that Eleventh Circuit law was not clearly established in his favor. Pet. Lane Br. 34–45.

Finally, although Respondent Burrow contends that the first question presented can be resolved under this Court's existing precedents, those precedents left room for the courts of appeals to determine whether and to what extent testimony about an employee's job is protected under the First Amendment. *Cf.* Pet. Lane Reply Br. 20. Lane's persuasive argument that the Eleventh Circuit was wrong on the first question presented does not mean that the law was clearly established in his favor. Even though Lane spoke as a citizen when he testified at Schmitz's trial, Franks is entitled to qualified immunity because binding precedent in his home circuit held otherwise.

Respectfully submitted,

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