

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 EDWARD R. LANE, :

4 Petitioner : No. 13-483

5 v. :

6 STEVE FRANKS, IN HIS :

7 INDIVIDUAL CAPACITY, AND :

8 SUSAN BURROW, IN HER :

9 INDIVIDUAL CAPACITY AS :

10 ACTING PRESIDENT OF :

11 CENTRAL ALABAMA :

12 COMMUNITY COLLEGE :

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14 Washington, D.C.

15 Monday, April 28, 2014

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17 The above-entitled matter came on for oral
18 argument before the Supreme Court of the United States
19 at 11:08 a.m.

20 APPEARANCES:

21 TEJINDER SINGH, ESQ., Washington, D.C.; on behalf of
22 Petitioner.

23 IAN H. GERSHENGORN, ESQ., Deputy Solicitor

24 General, Department of Justice, Washington, D.C.; for
25 United States, as amicus curiae, supporting affirmance

Official

1 in part and reversal in part.

2 LUTHER J. STRANGE, III, ESQ., Attorney General,

3 Montgomery, Ala.; for Respondent Burrow.

4 MARK T. WAGGONER, ESQ., Birmingham, Ala.; for Respondent

5 Franks.

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1 P R O C E E D I N G S

2 (11:08 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 13-483, Lane v. Franks.

5 Mr. Singh?

6 ORAL ARGUMENT OF TEJINDER SINGH

7 ON BEHALF OF THE PETITIONER

8 MR. SINGH: Mr. Chief Justice, and may it
9 please the Court:

10 Petitioner, Mr. Edward Lane, alleges that
11 Respondent, Steve Franks, fired him in retaliation for
12 his testimony before a Federal grand jury in district
13 court on a matter that is undisputedly a public concern,
14 the misconduct of a State legislator.

15 Petitioner testified about events that he
16 learned while working, but the testimony itself was not
17 a part of his job responsibilities.

18 This Court should hold that Petitioner's
19 testimony implicates the First Amendment because he
20 spoke as a citizen on a matter of public concern. It
21 should further hold that this was clearly established in
22 2009 when Respondent Franks fired him.

23 Those fold -- holdings follow from a long
24 line of this Court's precedents, which establishes that
25 the First Amendment applies to all public employee

1 speech on matters of public concern, except when the
2 employee speaks pursuant to his official duties.

3 The remainder of the case, including the
4 application of the Pickering balancing test and
5 Respondent's other defenses can all be addressed on
6 remand.

7 This Court can also leave for another day
8 the question of whether a public employee who testifies
9 in court but pursuant to his official responsibilities
10 would be protected.

11 The way the case has shaken out in the
12 briefing, the principal point of contention has become
13 whether the fact that Petitioner learned the facts about
14 which he testified at work is sufficient to deprive his
15 testimony of protection.

16 But for decades --

17 JUSTICE ALITO: What if it -- what if the
18 person who testified had the definite job responsibility
19 of investigating possible corruption in the agency?
20 Suppose that that person was something like an Inspector
21 General.

22 MR. SINGH: If --

23 JUSTICE ALITO: When would the testimony
24 be -- be within the scope of the person's job duties?

25 MR. SINGH: I think it would depend on the

1 circumstances of the particular case.

2 And that would be the exact next question,
3 because the responsibility to investigate by itself does
4 not necessarily also include the responsibility to
5 testify. And so in certain cases you could imagine
6 where there is an internal investigator whose job is to
7 deal with issues internally and that wouldn't be covered
8 by job responsibilities. But there may be other cases
9 in which that investigator also regularly testifies.

10 In this case, there is no dispute that my
11 client's responsibility was to manage the staff of his
12 department and therefore to deal with issues that arose.
13 But there is also no dispute that he was never expected
14 to testify in court and that this testimony was all the
15 result of a subpoena issued by a Federal court in
16 response to a request from Federal prosecutors. And so
17 I think that that is the -- that case gets us towards
18 the harder question that this Court doesn't have to
19 decide in this case.

20 JUSTICE ALITO: Well, just to follow up on
21 that, could there be ever a situation in which a
22 government employee's testimony is within the scope of
23 that employee's duties if the employee is not -- does
24 not testify on behalf of his employer?

25 MR. SINGH: I think that there is --

1 JUSTICE ALITO: If the employee is
2 subpoenaed by -- by the opposite side, then you would
3 say that's enough, that makes the testimony outside the
4 scope of the employee's responsibilities?

5 MR. SINGH: I think that would be strong
6 evidence. In Garcetti v. Ceballos this Court
7 articulated the scope of an employee's duties and the
8 determination of whether an employee is acting in the
9 scope of those duties is a practical inquiry, and so it
10 would vary considerably case to case. I think the fact
11 of a subpoena is strong evidence that when an employee
12 testifies he is not doing so because it's his job to do
13 so. There is a separate and very strong obligation.
14 But again, that's really just one --

15 JUSTICE SOTOMAYOR: So I think you're --
16 let's use the quintessential example, police officers or
17 lab technicians. Generally they are called by the
18 prosecutor, but occasionally they are called by defense
19 attorneys. So when are they immunized and when are they
20 not? When are they acting within the scope of their
21 duties and when are they not?

22 MR. SINGH: Your Honor, in those cases I
23 think there would be an argument that in every case they
24 are acting in the scope of their duties if you consider
25 the practical circumstances that give rise to that

1 testimony. But there is also an argument, and this is
2 sort of the strong version of the First Amendment, the
3 argument that we make -- this is not the rule that we
4 are asking for, but this is the rule that's asked for by
5 the ACLU, by a couple of the other amici.

6 The strong version of the First Amendment
7 argument is that even in those circumstances there is a
8 separate and a superior obligation to testify truthfully
9 to the court, that is, to provide information in a way
10 that is unbiased toward the interests of the employer.
11 And recognizing First Amendment protection furthers that
12 interest because it frees the employee to testify
13 candidly and completely. And, Your Honor mentioned the
14 word "immunity" --

15 JUSTICE SOTOMAYOR: So what happens in a
16 situation where a police officer gets on the stand and
17 in testifying honestly admits to corruption, admits to
18 -- or does it in a slovenly way, comes to court dressed
19 in a clown suit? Could the employer fire him then?

20 MR. SINGH: I think the answer is almost
21 certainly yes, and that occurs through the application
22 of the Pickering balancing test. The way that First
23 Amendment protection for employee speech has worked
24 since the 1960s is that when speech relates to a matter
25 of public concern, the speech -- the First Amendment

1 applies.

2 The next question, which is whether the
3 employer discipline is nevertheless permitted, is a
4 function of a balancing of the employee's interest in
5 speaking and society's interest in hearing the speech
6 versus the employer's interest in effectively and
7 efficiently providing public services.

8 In the case of the clown suit, in the case
9 of testimony that's unprepared, reflects badly on the
10 department, all of those are justifications that any
11 employer can use to argue that, even though the First
12 Amendment applies, discipline is nevertheless warranted.

13 JUSTICE GINSBURG: Is there any -- would
14 there be any Pickering balancing in this case?

15 MR. SINGH: If this Court --

16 JUSTICE GINSBURG: If the Court says that
17 speech is protected, would there be any need to go on
18 these facts into a Pickering balance?

19 MR. SINGH: Your Honor, we don't believe
20 that in the summary judgment record there is any
21 evidence that my client's speech was at all disruptive,
22 and that's why the United States has argued that if you
23 perform the balancing test here yourself you can find in
24 our favor. Nevertheless, we think it's okay to remand
25 that question. We haven't briefed it. We haven't asked

1 you to decide it.

2 JUSTICE GINSBURG: But we are asked to
3 decide the qualified immunity and how can we find there
4 is no qualified immunity in view of the Morris v. Crow
5 decision?

6 MR. SINGH: We think the Morris decision is
7 plainly distinguishable. There are a few arguments that
8 we would raise against that decision. The first is, and
9 this is a point that's been made by not only us but also
10 the United States and the Alabama attorney general, that
11 Morris is flatly contrary to this Court's precedents.
12 All of the emphasis in Morris on whether the employee
13 was intending to speak out on a matter of public concern
14 finds no support in the way this Court has applied the
15 rules relating to public employee speech. But --

16 JUSTICE SOTOMAYOR: That means the Eleventh
17 Circuit is wrong. Should the employee be victimized
18 because they were following circuit bad precedent?
19 Whether it's good or bad doesn't matter under our
20 jurisprudence.

21 MR. SINGH: Your Honor, I would be willing
22 to concede, if the case were clearly on point, that
23 qualified immunity should perhaps nevertheless apply. I
24 think it's highly questionable, but it's an open
25 question and I would be willing to concede that.

1 The reason -- the real reason that Morris is
2 not a problem for us at all is that Morris is not close
3 to the facts of this case. In Morris, a sheriff's
4 accident investigator prepared an internal report
5 describing a car accident in which another sheriff
6 caused a civilian death. The report surmised that the
7 accident was the sheriff's fault. And then he was
8 subpoenaed to testify in the civil wrongful death case.
9 He was shortly fired thereafter.

10 He brought a claim seeking both
11 protection of the report itself, which of course is on
12 all fours with this Court's decision in Garcetti holding
13 that an internal memorandum prepared in the course of
14 official duties is not protected. He also sought
15 protection for his deposition testimony describing it.

16 We do think the Eleventh Circuit was wrong
17 to hold that that testimony was unprotected, but it's of
18 no moment, because private, closed door civil deposition
19 testimonies describing bad driving are nothing like
20 public trial testimony describing public corruption.

21 CHIEF JUSTICE ROBERTS: Is there a different
22 Eleventh -- Is there a different Eleventh Circuit case
23 he should have looked at? I mean, you don't think this
24 is close, but is there a closer precedent that he should
25 have looked at?

1 MR. SINGH: Yes, Mr. Chief Justice, there
2 is. In 1992 the Eleventh Circuit decided a case called
3 Martinez v. City of Opa-Locka.

4 CHIEF JUSTICE ROBERTS: Yes, but it was
5 expressly distinguished in Morris.

6 MR. SINGH: But it was distinguished only on
7 grounds that would also distinguish this case. The
8 grounds on which the Eleventh Circuit distinguished
9 Martinez in Morris were that the testimony was in a
10 public proceeding and that it identified public
11 corruption, which is exactly what happened here. And so
12 we think there is no sound basis upon which the Eleventh
13 Circuit could say Morris doesn't apply -- Martinez
14 doesn't apply and Morris does.

15 JUSTICE KAGAN: Well, why should we get to
16 that question? It wasn't decided below. It's their
17 law. Why shouldn't we kick it back to the Eleventh
18 Circuit?

19 MR. SINGH: I'm sorry, I think the qualified
20 immunity question was decided below. The Eleventh
21 Circuit both found that there was no constitutional
22 right, but also I believe footnote 2 of the court's
23 opinion says because we find that there is no right we
24 would also find no qualified immunity.

25 JUSTICE KAGAN: My mistake.

1 MR. SINGH: And so the issue is squarely
2 before you. And I think that it's -- getting to that
3 question does not require the Court to do very much
4 work. We're not asking for a new rule of law relating
5 to qualified immunity. We're not asking you to dilute
6 the protection that officers currently have. What we
7 are asking for is a relatively straightforward
8 application of this Court's precedents in, for example,
9 Groh.

10 JUSTICE BREYER: We might have to send it
11 back. If we were to say, yes, they did violate the
12 Constitution, next question would be is it clear? I
13 mean, the Second Circuit thought they didn't
14 violate the Constitution. Isn't that right?

15 MR. SINGH: That's correct, Your Honor.

16 JUSTICE BREYER: And so they say obviously
17 they didn't violate the Constitution, they didn't
18 clearly violate the Constitution. So if we were to say,
19 no, you did violate the Constitution, that footnote does
20 not express any view.

21 MR. SINGH: That's -- that's correct. The
22 Eleventh Circuit did not rule on whether --

23 JUSTICE BREYER: So if they got the whole
24 thing wrong from beginning to end, they might have to
25 send it back, we send it back and say you got it wrong, it

1 did violate the Constitution; now tell us if it's clear.

2 So which should we do, decide it ourselves
3 whether it was clear, it's a matter of Eleventh Circuit
4 precedent or should we send it back to their tender
5 mercy?

6 MR. SINGH: I think you should decide the
7 question, Your Honor. I think that the principal
8 guidance that the lower courts require is clarity about
9 what the constitutional standard is. Once you write the
10 opinion explaining that there was a violation of the
11 Constitution in this case, I think that that opinion
12 will establish that it's clear and it will establish
13 that it was clear in 2009.

14 CHIEF JUSTICE ROBERTS: Those are two very
15 different things. You spend a fair amount of time in
16 your brief talking about court of appeals decisions from
17 other circuits. But I think it's a little bit of a
18 heroic leap to assume that employees are familiar with
19 court of appeals decisions in their own circuit. Do you
20 really think we should be looking at the opinions from
21 other circuits in deciding whether the law was clearly
22 established in a different circuit?

23 MR. SINGH: In -- in Ashcroft vs. al-Kidd,
24 this Court articulated the standard for qualified
25 immunity as either there's controlling precedent in the

1 jurisdiction or there is a consensus of persuasive
2 authorities. And we've cited a couple of cases decided
3 after Garcetti from other circuits holding that public
4 employee speech was protected. I don't want that to
5 obscure the fact that before Garcetti, there were many,
6 many, many more cases. There was an overwhelming
7 consensus in the circuits that this type of testimony
8 was protected. The Eleventh Circuit really is out on
9 its own here. And when you consider the strength of
10 that consensus --

11 CHIEF JUSTICE ROBERTS: Well, if you say the
12 Eleventh Circuit is out on its own, it seems to me to be
13 a concession that their law is different from the law
14 that you're arguing for. And, again, my point is: Do
15 you ask a -- a State employee to recognize, yes, this is
16 the law in the Eleventh Circuit, but they're out on
17 their own. So we're going to follow a -- a different
18 law?

19 MR. SINGH: Your Honor, our argument is that
20 the Eleventh Circuit was wrong, but until this case,
21 they weren't wrong enough to justify this result. In
22 1992, the Martinez case set down clear markers that
23 would allow and should have compelled a result in our
24 favor. In this case, Martinez was raised below and the
25 Eleventh Circuit simply ignored it, choosing to rely

1 instead on Morris. We think that was a very grave
2 mistake of interpreting not only this Court's law, but
3 Eleventh Circuit law. And we think that especially in
4 light of this Court's precedents, that misinterpretation
5 of Eleventh Circuit precedent was especially egregious.

6 JUSTICE SOTOMAYOR: I go back to my point,
7 which is they got it wrong. But do we expect the
8 employee to know they got it wrong or under what
9 circumstances do we expect them to know?

10 MR. SINGH: I think an instructive case is
11 Groh v. Ramirez. In that case, it was a Fourth
12 Amendment case involving a warrant that didn't state
13 particulars on its face. The district court found that
14 there was no Fourth Amendment violation at all. The
15 circuit court affirmed on grounds of qualified immunity,
16 and this Court reversed on both grounds, said there was
17 a violation and the violation was clear.

18 And one of the points that the Court made,
19 and this is in Footnote 9 of the Court's opinion, was
20 that that was not a case in which, for example, police
21 officers make split-second judgments in the field. That
22 was a case where an officer had ample time to figure out
23 what the law was. Here we're dealing with a university
24 administrator, who has a general counsel, who has the
25 ability to consult that counsel before making any

1 personnel decisions. And the qualified immunity
2 standard has always asked, what would a reasonable
3 official in the position of the relevant Defendant have
4 done. So there may be cases in which it would be very
5 hard for an employee --

6 JUSTICE SOTOMAYOR: All right. Tell me what
7 you want as your rule. Anyone subpoenaed in a criminal
8 trial is protected?

9 MR. SINGH: No, Your Honor. We're not
10 asking the Court to rule that broadly in this case. All
11 we want is a rule that says when a public employee
12 testifies on a matter of public concern and does not do
13 so pursuant to his job responsibilities, the First
14 Amendment protects that testimony subject to the
15 Pickering balance that it always has. And that is, in
16 fact, the rule that this Court laid down in Garcetti.
17 To the extent that any clarification is required, the
18 only clarification would be that even when the testimony
19 describes facts that the employee learned in the course
20 of employment, it's still protected. But that's not a
21 leap at all from this Court's precedents.

22 If I could reserve the remainder of my time.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.
24 Mr. Gershengorn?

25 ORAL ARGUMENT OF IAN H. GERSHENGORN

1 FOR UNITED STATES, AS AMICUS CURIAE, SUPPORTING
2 AFFIRMANCE IN PART AND REVERSAL IN PART

3 MR. GERSHENGORN: Mr. Chief Justice, and may
4 it please the Court:

5 In Garcetti, this Court recognized that the
6 government, like any private employer, has a strong
7 interest in managing and supervising its employees as
8 they do their jobs. That managerial interest extends
9 even to the thousands of agents, investigators,
10 technicians, and other employees who -- across the
11 government who are expected, as part of their job
12 responsibilities, to testify in court.

13 In our view, when government employees
14 testify, they sometimes speak as citizens and they
15 sometimes speak as employees. We agree that Petitioner
16 here spoke as a citizen when he testified, but we
17 disagree with the suggestion of some of the amici that
18 government employees always speak as citizens rather
19 than as --

20 JUSTICE KENNEDY: Yes. What's an example of
21 a subpoena that requires the employee to testify, but
22 that he's not testifying on public matters?

23 MR. GERSHENGORN: Your Honor, I think the
24 example would be a police officer executing a warrant.
25 We think the subpoena isn't really the right test.

1 There are times when --

2 JUSTICE KENNEDY: But my hypothetical is
3 there is a subpoena, you are required to testify.

4 MR. GERSHENGORN: I think, Your Honor --

5 JUSTICE KENNEDY: And then you've -- you
6 indicate that there are some matters on which the
7 employee is not -- not protected.

8 MR. GERSHENGORN: Your Honor, we think --

9 JUSTICE KENNEDY: What is an example of
10 that?

11 MR. GERSHENGORN: We think that, for
12 example, a police officer whose job it is to investigate
13 and testify about what he saw to support a warrant or
14 something like that would be a situation which he could
15 be subpoenaed by -- by the defense to testify, for
16 example, and it would still be part of his job
17 responsibilities. The fact of the subpoena doesn't
18 change that a technician or an officer or an
19 investigator may be called to testify as part of his
20 duties. I take --

21 CHIEF JUSTICE ROBERTS: So you could fire
22 him because he testified?

23 MR. GERSHENGORN: Your Honor, there is a
24 range of discipline -- disciplinary activities that
25 would be available to employees. I think what Garcetti

1 says --

2 JUSTICE KENNEDY: I -- I still can't get the
3 hypothetical. What -- what am I --

4 MR. GERSHENGORN: I'm sorry, Your Honor.

5 JUSTICE KENNEDY: I -- I just can't imagine
6 a case that's not -- not a matter of public interest.
7 Now, I can assume that if -- if the employee indicates
8 that he was dishonest or if he indicates that he's
9 clearly incompetent, some of the hypotheticals given in
10 the early argument, I understand that. But so far as
11 the subject matter, it's the subject matter is of public
12 concern. Necessarily, if it's a subpoena, is it not, or
13 am I wrong?

14 MR. GERSHENGORN: No. Your Honor, we would
15 say that in a criminal case -- I want to distinguish
16 between the public concern aspect of the test and then
17 the citizen employee aspect. Because they really are
18 distinct. In a criminal case if you are subpoenaed, we
19 would say that you are testifying on a matter of public
20 concern. But that's not the same question as whether
21 you're testifying as a citizen or as an employee, which
22 is exactly what this Court addressed in Garcetti. We do
23 think that Petitioner, someone who was not regularly
24 expected to testify in court as part of his government
25 responsibilities, would be testifying as a citizen on a

1 matter of public concern.

2 However, there will be situations, and the
3 government has thousands of people whose job it is to
4 investigate, who are records custodians, sometimes even
5 testify on a 30(b)(6) on behalf of the government,
6 they're actually speaking for the government, who could
7 be called by subpoena, who would then be testifying as
8 employees even though their speech is on a matter of
9 public.

10 JUSTICE KAGAN: But if the
11 subpoena is not to the government and if the subpoena is
12 just to the particular person? What are the -- what's
13 the context in which that person should not receive a
14 minimum of protection subject to Pickering balancing,
15 but that that should be -- why not consider that
16 protected?

17 MR. GERSHENGORN: Your Honor, because that's
18 exactly what the Court held in Garcetti. The government
19 shouldn't be disabled from being able to judge and
20 evaluate the -- the performance of its employees. For
21 example, the employee may show a lack of judgment; the
22 employee may be belligerent. Juries may not be
23 believing this --

24 JUSTICE KENNEDY: But that was Justice Kagan's
25 qualification. That's the Pickering balance.

1 MR. GERSHENGORN: Your Honor, but this is --
2 that is, I think what we would -- that's what the -- the
3 ACLU amicus urges, and we strongly urge the Court not to
4 do that. That argument was available in Garcetti, as
5 well. It's always available to say, just take this at
6 step two of the balance, but that would --

7 JUSTICE SOTOMAYOR: Well, wait a minute.
8 What are you doing about the truth-finding functions of
9 the -- of a trial setting when you're saying or telling
10 people, employees, don't go and tell the truth because
11 if the truth hurts your employer, you're going to be
12 fired?

13 MR. GERSHENGORN: Your Honor, there is a --

14 JUSTICE SOTOMAYOR: That there's
15 something -- you can be always fired for some other
16 reason that the employer can point to under Pickering or
17 otherwise, but what kind of message are we giving when
18 we're telling employees, you're subpoenaed for any reason in
19 a trial, go and tell a falsehood because otherwise you
20 can be fired?

21 MR. GERSHENGORN: Your Honor, if it's actual
22 instruction to do a falsehood, there's a range of
23 protections that the government -- that -- that are
24 available. There are whistleblower -- there are
25 whistleblower statutes, Federal prosecution --

1 JUSTICE SOTOMAYOR: You mean the
2 Constitution doesn't protect someone in a trial from
3 telling the truth? That it's not a matter of public
4 concern that an employee tell the truth?

5 MR. GERSHENGORN: Your Honor, it is a matter
6 of public concern. But we think it's the same as in
7 Garcetti. What was at issue in Garcetti was a false
8 affidavit to the Court to support a warrant. And what
9 this Court says -- what it said was it was part of the
10 employee's job to -- to investigate. And in that
11 situation he was acting on behalf of the government.

12 Now, we would say that you don't have to
13 reach this question, but we urge the Court not to hold
14 what the ACLU -- and I gather Petitioner is -- is
15 stepping back from here -- a broad rule saying that any
16 time an employee testifies in court, it is automatically
17 speech as a citizen, as distinct from on a matter of
18 public concern. We think that that would really intrude
19 on the government's ability to -- to supervise its
20 employees who are testifying. As I say, there may be
21 lack of candor, there may be belligerent -- belligerency
22 and things like that that the government has to be able
23 to -- to react to and rely on whistleblower statutes and
24 criminal prosecutions and First Amendment protections in
25 true whistleblowing context for -- to provide protection

1 for the -- for -- for employees.

2 If I could just touch briefly on the
3 qualified immunity. We do not think that this case
4 should be sent back. We think -- we agree with the
5 Chief Justice and Justice Sotomayor that the Eleventh
6 Circuit decision was sufficiently clear that an employee
7 could not be said to have been either plainly
8 incompetent or intentionally violating the law when it
9 relied on that Eleventh Circuit precedent --

10 JUSTICE KAGAN: Well, Mr. Gershengorn, could
11 I ask the question that I tried and failed to ask
12 Mr. Singh? Because Justice Breyer is, of course,
13 completely right. This footnote 2 doesn't really answer
14 the question. It answers it on a hypothesis that the
15 constitutional issue came out in a certain way, and then
16 it said, a fortiori there is
17 immunity. So it didn't really -- if there was a
18 different decision as to the constitutional question, it
19 didn't answer the question of qualified immunity. And,
20 of course, it's Eleventh Circuit law. Why would we be
21 deciding it.

22 MR. GERSHENGORN: Your Honor, we don't think
23 that you should send it back precisely because three
24 judges -- for several reasons, but among them, that
25 three judges below read their own precedent to say that

1 this was not unconstitutional. We think in the
2 qualified immunity context, what this Court has said is
3 that a reasonable official should not be penalized for
4 picking the losing side of a judicial controversy. The
5 Eleventh Circuit construed its -- its own precedent to
6 authorize or at least not make unconstitutional this
7 action. And that is enough. Under this Court's
8 precedents, an employee should be able to look to the
9 precedent of his own court, of his own circuit,
10 particularly when what that court is doing is not
11 interpreting something for the first time, but
12 construing its own precedent.

13 Mr. Chief Justice, you asked if there were
14 other cases. We think *Morris v. Crow* is enough. But we
15 also think that *Green v. Barrett*, which is the only
16 post-*Garcetti* case, and it's cited in both of the red
17 briefs, is even a stronger precedent and actually
18 reinforces everything that was at issue in *Morris v.*
19 *Crow*. In *Green v. Barrett*, that was testimony at a
20 court hearing. And I think the rule coming out of the
21 Eleventh Circuit, which a reasonable employee could have
22 relied on, was that testimony, when the motive is to
23 comply with the subpoena and the subject matter was
24 related to information you learned on your job, that was
25 not protected even if it's presented in the course of a

1 civil deposition or if it's presented at a court
2 hearing.

3 And so Your Honor, we really don't think
4 there is any need to -- to send this case back. We
5 don't think that Groh or Hope are cases that are
6 reasonably helpful to -- to Petitioner here, because
7 those are cases in which the courts of appeals actually
8 decided the constitutional question against the
9 Petitioner. Now, they did find qualified immunity and
10 this Court reversed. But it would be very unusual and I
11 think unprecedented in this Court's history to find a
12 situation in which the court of appeals actually found
13 no Constitutional violation and yet this Court denied
14 qualified immunity. So we don't think there is any need
15 to send it back.

16 If there are no further questions.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.
18 General Strange.

19 ORAL ARGUMENT OF MR. LUTHER J. STRANGE, III

20 ON BEHALF OF RESPONDENT BURROW

21 MR. STRANGE: Mr. Chief Justice, and may it
22 please the Court:

23 As attorney general, I stand here before you
24 with a particular interest, a keen interest really, in
25 the situations that both the public employees in this

1 case find themselves: Mr. Lane, who we argue is
2 entitled to First Amendment protection because he was
3 talking about a matter as a citizen, a matter of public
4 concern; and Mr. Franks, who we believe is entitled to
5 rely on sovereign -- I mean, qualified immunity because
6 he was relying on the precedent of this circuit and with
7 the law in this area was not clearly established.

8 As attorney general, I get to supervise
9 these people every day and we depend on people like
10 Mr. Lane or people who find themselves in that
11 situation, who are willing to and need to be able to
12 testify in cases involving public corruption. And the
13 case at the heart -- the situation at the heart of this
14 case was one of the most egregious public corruption
15 situations in Alabama's history. It led to a total
16 rewrite of our public corruption laws and our ethics
17 laws. And if we can't depend on people like Mr. Lane or
18 people in a situation like Mr. Lane to feel free to
19 testify as citizens on matters of public concern --

20 JUSTICE SOTOMAYOR: Why should it matter
21 then if an employee's job is to investigate corruption?
22 If that's their job and they are called by you to
23 testify at a corruption trial and then they are fired
24 for it, should it really matter that it's part of their
25 job or not?

1 MR. STRANGE: Your Honor, I think it should.
2 And I think the -- as we point out in our brief, I think
3 the Court has the right rule and the right test in
4 Garcetti, because the Court clearly recognized there are
5 a group of employees who are paid by money appropriated
6 by the government to do jobs exactly like you described,
7 to investigate cases. Child welfare caseworkers and so
8 forth, they are in a category that has a less -- we've
9 already made the decision, the Court has, that they have
10 not the entire free speech rights that the First
11 Amendment allows to employees.

12 JUSTICE SOTOMAYOR: But that seems
13 counterintuitive to me. Why do we let -- why do we put
14 people at risk for telling the truth?

15 MR. WAGGONER: Well, I wouldn't characterize
16 it --

17 JUSTICE SOTOMAYOR: To tell the truth about
18 something? And I'm assuming if they lie, they can be
19 fired. But why are we --

20 MR. STRANGE: Well, I agree with my
21 colleague from the Department of Justice. There are
22 very -- lots of legitimate reasons that a court -- I
23 think in Garcetti, the Court acknowledged this, that why
24 the government has to supervise, has to take a look at
25 the overall --

1 JUSTICE SOTOMAYOR: Look, I certainly understand
2 people -- government being able to tell people don't
3 go out and talk to the newspapers about this, don't go
4 out and talk about X publicly, because we should be able
5 to control those kinds of disclosures. But why are we
6 putting people at risk for doing -- telling fundamental
7 truth in a public forum like a trial?

8 MR. STRANGE: Well, I think certainly as the
9 top prosecutor in the State of Alabama, I expect and
10 insist the value of the testimony is that they are
11 telling the truth.

12 The question I guess is, are they at risk
13 for doing that? And I think in -- a public employee in
14 the category of Mr. Lane, they shouldn't be. I think
15 they are protected under the First Amendment because
16 they are speaking as citizens on matters of public
17 concern. Police officers, child welfare folks, we
18 expect them to tell the truth, too, but they are in a
19 slightly different category. And as my colleague from
20 DOJ said, they have other protections. And I hope in
21 Alabama they get a medal for telling the truth, however
22 the truth comes out.

23 But I'd like to get to one thing that I think
24 helps settle some -- a number of these issues, and
25 that's what we say in our brief, which is the core

1 holding of the Garcetti test. And maybe it will
2 clarify. We think it will answer most of these
3 questions as they arise. And the fundamental test is
4 this, as we say in our brief: Whether the employee's
5 job duties encompassed the speech in question. That's
6 not an exact test, but it's a test that certainly in our
7 view protects Mr. Lane in this situation. He was a
8 director of a program for at-risk youth. He wasn't
9 anticipated or expected to testify in any forum.
10 Certainly he is knowledgeable about his job and what
11 happened there. He was a valuable witness in this case.

12 Let me switch over to the question of
13 qualified immunity, because I take a slightly different
14 position. There, I think that people in Mr. Franks's
15 position, people who have to supervise employees, are
16 entitled to rely on the law of their circuit. Because I
17 agree with, I think, the Chief Justice, we can't expect
18 employees who have to make decisions all the time to be
19 aware of what's going on in other circuits and so forth.
20 We don't think the Eleventh Circuit got it right. We
21 think if they had applied the test that I just
22 articulated, the core, they would have come out possibly
23 differently.

24 CHIEF JUSTICE ROBERTS: But what about the
25 Martinez case? I mean, Morris talks about it in a way

1 that suggests that it's quite different. And it seems
2 closer to the Petitioner's situation than Morris.

3 MR. STRANGE: Well, Mr. Chief Justice, you
4 know, I think if you're in Franks's position or if you
5 have employees like that, there may be reasonable
6 variables -- maybe that case had made sense. Maybe the
7 Morris case made sense. What I think happens, I think
8 the Eleventh Circuit looked at its previous -- they
9 picked the Morris case. They looked at their previous
10 precedent, and they thought what the Court had said in
11 Martinez -- I mean in -- I'm sorry, in Garcetti,
12 applied. They went further than Garcetti did. They
13 talked about testimony. They went beyond Garcetti.
14 They thought it was reasonable in what they had said
15 before and they made this decision. And I think Franks
16 has got to be able to rely on that.

17 CHIEF JUSTICE ROBERTS: So you think if
18 every other circuit has come out the other way and you
19 have what -- well, let's take the dictum. There is an
20 Eleventh Circuit case that, it's dictum. Are the
21 employees supposed to -- are they protected by following
22 that, or do they have to follow the consensus in the
23 other circuits?

24 MR. STRANGE: I think they are protected,
25 Your Honor, if they rely on the law of their circuit

1 unless the law is clearly established by this Court.
2 For example, I can't picture a situation where the
3 Eleventh Circuit -- and that's not this situation,
4 because I think the Eleventh Circuit made its
5 determination based on language that it felt like it
6 could hang its hat on in Garcetti. We think that was
7 wrong, but I don't think it's so unreasonable that they
8 couldn't rely on it.

9 And if it's something that's reasonable for
10 the Court to rely on even though there's a split in the
11 circuits, I don't think it's clearly established, in
12 which case I think a person who is trying in good faith
13 to, you know, manage his government employees to rely
14 on.

15 Well, if there are no further questions,
16 thank you, Your Honor.

17 CHIEF JUSTICE ROBERTS: Thank you, General.
18 Mr. Waggoner.

19 ORAL ARGUMENT OF MARK T. WAGGONER
20 ON BEHALF OF RESPONDENT FRANKS

21 MR. WAGGONER: Mr. Chief Justice, and may it
22 please the Court:

23 The Court should affirm the Eleventh
24 Circuit's decision on the First Amendment issue. But
25 regardless of how it rules, we agree with the United

1 States and the State of Alabama that Dr. Franks is still
2 entitled to qualified immunity from damages in his
3 individual capacity in this case.

4 There is no reason for the Court to depart
5 from its precedent, primarily in the Garcetti decision,
6 to affirm the Eleventh Circuit. The issuance of a
7 subpoena, the Court has already rejected in Garcetti
8 that the forum of speech is determinative. So we do not
9 believe that the issuance of a subpoena in and of itself
10 entitles a speaker to protection of the First Amendment.

11 It is the character of the speech, rather,
12 that -- that has to be looked at to determine whether
13 the speech is -- is protected under the First Amendment.

14 JUSTICE GINSBURG: Garcetti turned on what
15 were -- what were the job duties of the particular
16 person, and there the job duty was to investigate. Here,
17 the distinction is, everybody agrees, that it's not part
18 of the job description of Lane.

19 MR. WAGGONER: Yes, Your Honor. In
20 Garcetti, the Court declined to set out a comprehensive
21 framework for defining of an employee's job duties when
22 there is room for serious debate. That is why, in this
23 case, we have suggested to the Court that it adopt the
24 framework that we have set out that was originally
25 articulated in Garcetti about whether there is a citizen

1 analog for the speech.

2 The Eleventh Circuit in this case held that
3 it was not distinctly one of the job duties of Mr. Lane
4 to testify; however, his testimony was inseparable from
5 his job duties, and we do believe that when he
6 testified, that it was pursuant to his official duties.

7 There is a gap in -- in Garcetti about
8 the -- the definition where the Court declined to set
9 out a comprehensive framework where there is room for
10 debate. And that's --

11 CHIEF JUSTICE ROBERTS: I -- I still don't
12 understand or didn't understand what it is you're
13 saying. If he testifies, and you don't -- you want to
14 keep the corruption secret. You know, you don't want to
15 reveal it and he testifies truthfully and reveals it.
16 Can he be disciplined for that?

17 MR. WAGGONER: Your Honor, under the citizen
18 analog test or inquiry that the Court began to
19 articulate in Garcetti, if the testimony is factual,
20 based solely on the job duties, as it was here,
21 inseparable from the job duties, and it is information
22 that a citizen would not know, that only the testifier
23 would know, then that is not protected speech under
24 Garcetti.

25 It's not the subpoena, and it's not

1 because it's testimony. It is the character of the
2 speech and whether a --

3 CHIEF JUSTICE ROBERTS: Well, what is he --
4 what is he supposed to do? I mean, he gets a subpoena,
5 and the -- the other side or somebody, this independent
6 counsel, says, you know, what's going on? What do you
7 know about, you know, from your job responsibilities?
8 What happened or did you -- is this person taking money?
9 Is this person showing up? What's he supposed to do?

10 He says, gosh, if I -- if I answer, I'm
11 going to lose my job or could, and if I don't or answer
12 falsely -- the Fifth Amendment protects him from
13 incriminating himself. It doesn't protect the
14 department he works for from being incriminated.

15 MR. WAGGONER: Mr. Chief Justice, we would
16 never suggest that anybody not comply with a subpoena,
17 comply with an investigation, or testify truthfully.

18 CHIEF JUSTICE ROBERTS: But you are
19 suggesting he can be fired if he does it.

20 MR. WAGGONER: If -- if it does not offend
21 the First Amendment, and we believe that's why we're
22 here. We're talking about the Garcetti precedent and
23 whether the free speech under the First Amendment clause
24 to the Constitution is implicated. And as this Court
25 said --

1 JUSTICE SOTOMAYOR: Is Garcetti right on
2 that point as it relates to testimony? That -- that's
3 really the issue that's of public concern. Is Garcetti
4 right? Is the line between it being a part of your
5 duties or not sensical in any way?

6 MR. WAGGONER: Yes, Your Honor.

7 JUSTICE SOTOMAYOR: We've all agreed that
8 getting fired for admitting something, doing it in -- in
9 an improper way, a whole host of things can get you
10 fired. But if someone is called to testify truthfully
11 about a matter of public concern, and they testify that
12 way, should they be able to be fired under the First
13 Amendment?

14 MR. WAGGONER: Only, Your Honor, if the --
15 well, of course, as the Court observed in Garcetti,
16 there's a powerful network of legislative enactments
17 that -- that prohibit retaliating against an employee or
18 penalizing an employee for testifying truthfully.

19 Certainly, witness tampering laws,
20 obstruction of justice laws, whistleblower laws, Section
21 1985, which Mr. Lane originally had a count in his
22 complaint under, but we do believe that under Garcetti,
23 you have to first look at whether the employee is
24 speaking as a citizen.

25 The Petitioner and some of the -- the other

1 parties here conflate the citizen analysis that the
2 Court articulated in Garcetti and the public concern
3 analysis. Of course, this was a matter of public
4 concern, this trial that Mr. Lane testified in. But you
5 have to look at, as -- again, as you held in Garcetti,
6 that whether or not there was speech by a citizen. And
7 you have to look at those two --

8 JUSTICE KAGAN: But are you suggesting that
9 when somebody learns something from his job, that that
10 means it's not speech by a citizen?

11 MR. WAGGONER: Only if -- it depends on the
12 speech that -- that follows from knowing something on
13 your job. The Court has long articulated speech that is
14 close to the heart of the First Amendment, whether it is
15 opinion speech, whether it is engaging in public debate,
16 whether public dialogue, expressing viewpoints,
17 criticizing the government, criticizing superiors. But
18 factual testimony based only on knowledge that an
19 employee has pursuant to their official duties would not
20 be protected speech because of the character of the
21 speech and because that information is only gathered as
22 part of their official duties.

23 JUSTICE ALITO: What if that -- what if the
24 same information -- what if the employee writes a
25 newspaper article or gives an interview and reveals the

1 same information? Would that be subject to Pickering?

2 MR. WAGGONER: Well, it depends on the
3 character of the speech, Your Honor. And if --

4 JUSTICE ALITO: Well, what if it's about
5 corruption in my government? In the place where I work,
6 there are a lot of no-show jobs, and so the person
7 writes an article that says that. Is that a matter
8 of --

9 MR. WAGGONER: That sounds like -- that
10 sounds like protected speech, as in Pickering, Your
11 Honor. That's a -- the classic example of an employee
12 writing a letter to the editor criticizing the --

13 JUSTICE KAGAN: No, but when he's using
14 factual matter that he only knows because he's an
15 employee in a particular branch of government.

16 MR. WAGGONER: Then that would not be
17 protected speech. It's not the forum -- under Garcetti,
18 it's not the forum that is dispositive. It's the
19 character of the speech and whether speaking as an
20 employee and whether just relaying information that the
21 employee possesses pursuant to their official duties.

22 CHIEF JUSTICE ROBERTS: When you say it's
23 protected, does that -- you mean under the -- it
24 qualifies under the first step in Garcetti. It doesn't
25 mean that he can't be disciplined under the Pickering

1 analysis that follows that.

2 MR. WAGGONER: Well, if it's not citizen
3 speech under Garcetti, then you don't get to public
4 concern, and then you don't get to Pickering balancing.

5 CHIEF JUSTICE ROBERTS: Right. But even if
6 it is, you could say that it is -- when you say it's
7 protected, you mean that just it gets to the Pickering
8 analysis, not that -- not that the employee is --

9 MR. WAGGONER: Correct. It meets the
10 speaking as a citizen on a matter of public concern.

11 JUSTICE SCALIA: So your -- your position is
12 you cannot speak as a citizen if -- if your speech
13 consists of disclosing material that you knew as an
14 employee. Why is that true?

15 MR. WAGGONER: Your Honor, because, as in --
16 as in Garcetti, where the Court said that when you're
17 speaking pursuant to official job duties --

18 JUSTICE SCALIA: Yes, but this is not an
19 official job duty. It's just a matter that I know of
20 because of my job. Why does that mean that when I
21 disclose that, I am not speaking as a citizen?

22 MR. WAGGONER: Yes, Your Honor. It would
23 also depend on the speech itself and the character of
24 the speech. If -- if you engage in opinion testimony,
25 writing letters to the editor, then --

1 JUSTICE SCALIA: No, I'm just --

2 MR. WAGGONER: -- the possibility of a --

3 JUSTICE SCALIA: I'm just talking about
4 facts, no opinions, just facts. But I learned those
5 facts on the job as an employee, and I -- is it your
6 position that whenever you are reciting those facts, you
7 cannot be speaking as a citizen?

8 MR. WAGGONER: That would not be protected
9 speech, Your Honor.

10 JUSTICE KAGAN: But then, I mean, we've said
11 several times things like this: Government employees
12 are often in the best position to know what ails the
13 agencies for which they work. In other words, expecting
14 that people will know things because they work in a
15 place and that they can take what they know as a result
16 of working in a place and go out and be a citizen.

17 MR. WAGGONER: And that is certainly true,
18 Your Honor.

19 And when an employee, as in Pickering, takes
20 that knowledge that they have gained in their public
21 employment and engages in the speech, type of speech,
22 that is close to the heart of the First Amendment when
23 you're engaging in public debate addressing --

24 JUSTICE GINSBURG: But in Pickering it was
25 something that anybody could know. It didn't depend

1 upon the job, learning on the job. I thought in
2 Pickering the --

3 MR. WAGGONER: Some --

4 JUSTICE GINSBURG: -- any citizen could have
5 known that information. Here, the knowledge comes only
6 because of the public employment.

7 MR. WAGGONER: Yes, Your Honor. In
8 Pickering, I believe some of the -- some of the
9 information was certainly subject to public knowledge.
10 And Your Honor is right that here the testimony given by
11 Mr. Lane was inseparable from his job duties. It was --
12 it was knowledge that he gained by his interactions with
13 his subordinate employee discussing with her the terms
14 and conditions of her employment, and he merely -- as
15 the United States observed, he merely relayed that
16 information in -- in the -- in the trial.

17 But because he was not expressing
18 viewpoints, engaging in opinion testimony, the -- the
19 forum of -- of the -- the trial did not endow that
20 speech which -- with constitutional protection.

21 JUSTICE ALITO: Well, let me make sure I
22 understand what you're saying. Two employees know that
23 there is someone who has a no shot -- no-show job where
24 they work. One of them writes a letter to the editor
25 and says: John Doe has a no-show job. One of them

1 testifies pursuant to subpoena in a criminal trial:

2 John Doe has a no-show job.

3 Is -- is it your view that Pickering does
4 not apply in either of those situations, or it applies
5 in -- in the latter but not in the former?

6 MR. WAGGONER: Pickering does not apply.
7 The Pickering balancing does not apply in either of
8 those situations.

9 JUSTICE ALITO: Neither one.

10 CHIEF JUSTICE ROBERTS: Really? Well, let's
11 say it's -- his job is to investigate corruption in the
12 agency. And he writes a letter saying: Here's all -- I
13 have these, you know, facts; here's all this corruption
14 in the agency, and -- and he writes it to the -- a
15 letter to the editor. Surely he can be disciplined for
16 that. I mean, let's say the -- his superiors were not
17 ready to call off the investigation at that point.

18 MR. WAGGONER: If his letter to the editor
19 merely relayed factual testimony that he possessed only
20 pursuant to his official job duties, that would not be
21 protected speech.

22 Now, in the letter to the editor, certainly
23 like in Pickering, where the -- the employee goes beyond
24 that and expresses views, criticizes the school board,
25 and that sort of --

1 JUSTICE SCALIA: Where -- where -- where did
2 you get this notion that the First Amendment only
3 applies to the expression of views and not to the
4 conveyance of -- of facts?

5 MR. WAGGONER: So we --

6 JUSTICE SCALIA: All of us can be protected
7 from knowing certain facts and that would not violate
8 the First Amendment?

9 MR. WAGGONER: Yes, Your Honor. We believe
10 that that test is -- at least was begun to be
11 articulated in Garcetti, where the Court said that where
12 speech has no relevant citizen analog, that it is not --

13 JUSTICE SCALIA: So the government --

14 MR. WAGGONER: -- protected speech.

15 JUSTICE SCALIA: -- can presumably prohibit
16 anybody teaching, what, economics, the facts of -- of
17 economics?

18 MR. WAGGONER: No, Your Honor. And I -- I
19 believe --

20 JUSTICE SCALIA: The facts of World War II.

21 MR. WAGGONER: No, Your Honor. We -- I --
22 we are talking about a -- a -- in a different context.
23 I know --

24 JUSTICE SCALIA: I don't know where you get
25 it from. I've never heard of this distinction, the

1 First Amendment protects only opinions and not facts.
2 I've never heard of it.

3 MR. WAGGONER: Well, Your Honor, we believe
4 that it's -- it's a long-time precedent of this Court
5 that speech, certainly in the Hustler, Falwell v.
6 Hustler case, where it talked about speech that is close
7 to the heart of the First Amendment, expressing
8 viewpoints, engaging in opinion, public debate, that
9 that is certainly protected speech.

10 CHIEF JUSTICE ROBERTS: Well, I thought it
11 was just because the facts came from your employment.
12 If you're conducting an investigation and you find out
13 that, you know, so-and-so is taking a bribe because
14 that's your job, I don't know that you have a First
15 Amendment right to go out and say that, when, for
16 example, your superior would say, oh, we are about to
17 set up a sting operation, we are going to get the -- the
18 goods on her. And you say, well, I think I'd rather
19 write a letter to the editor saying that she -- she has
20 been caught, you know, taking a bribe.

21 MR. WAGGONER: Well, Your Honor, we are
22 saying that speech would not be protected if it is
23 merely relaying information that an employee has
24 pursuant to their official duties and when that --

25 JUSTICE GINSBURG: And that wouldn't make

1 any difference whether it was fact, opinion, views. I
2 thought your distinction was -- was clear. You are
3 saying if you learn the information on the job, then
4 you're not protected, and it doesn't matter whether it's
5 opinion, expression, as long as what you were speaking
6 about is something that you've learned on the job. I
7 thought that was your position.

8 MR. WAGGONER: I -- maybe I should clarify,
9 Your Honor.

10 It -- it is our position that if it is
11 information that is learned on the job and is not
12 relayed in just a factual context and it -- and it goes
13 into that speech that is closer to the heart of the
14 First Amendment, then it would be protected speech, Your
15 Honor.

16 If it was the --

17 JUSTICE GINSBURG: Give me an example of
18 an opinion that would be protected First Amendment
19 speech, as you said, and yet is based on facts you
20 learned only because of your public employment.

21 MR. WAGGONER: Your Honor, I would -- I
22 would suggest something close to the Pickering fact
23 situation where a letter to the editor was written that
24 in -- that contained opinion speech, debate speech,
25 critical speech. And assuming that that was based

1 solely on information that the employee had pursuant to
2 their official duties, then that would be protected
3 speech.

4 I think the -- under the citizen analogue
5 analysis, there is a pretty limited range of speech that
6 would not be protected. But it would apply here, where
7 Mr. Lane testified pursuant to his -- his official
8 duties and relayed information that he only had because
9 of his interactions with Miss Schmitz and it was -- and
10 it was solely factual testimony, that that is not
11 protected speech, even though a subpoena was issued
12 because, as the Court said in Garcetti, the forum is not
13 dispositive.

14 JUSTICE KAGAN: But if I could just
15 understand what you're saying. Are -- are you saying
16 that, no matter what the employee's official duties are,
17 as long as he gets information because he is a public
18 employee and he is in a workplace, that that's what
19 matters?

20 I mean, I know all kinds of things about a
21 workplace that go beyond exactly what my official
22 responsibilities are. So if I communicate things that I
23 learn in a workplace, but, you know, I have nothing to
24 do with prosecuting corruption or with investigating
25 corruption, do I count as an employee, or do I not count

1 as an employee in that context?

2 MR. WAGGONER: I think the question there,
3 Your Honor, as the Court articulated in Garcetti, is
4 it -- is it pursuant to your official job duties? For
5 example, in this case, Mr. Lane, his official duties
6 were to manage and hire and fire his subordinate
7 employees, in this case, Miss Schmitz. So he was
8 acting -- and nobody -- nobody here disputes that he was
9 acting pursuant to his official duties when he did that.
10 And because he -- he testified solely to those facts,
11 his testimony in Court was inseparable from those job
12 duties, then his speech was not protected.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 Mr. Singh, you have 5 minutes remaining.

15 REBUTTAL ARGUMENT OF TEJINDER SINGH.

16 ON BEHALF OF THE PETITIONER

17 MR. SINGH: Thank you. I'd like to begin,
18 if I might, by just talking about the subject of
19 qualified immunity and the import of the Eleventh
20 Circuit and what it did and didn't decide.

21 The Eleventh Circuit clearly has decided
22 that in 2009, when Petitioner was fired, the law has not
23 clearly established a right to testify in the Eleventh
24 Circuit. That was decided in this case and so I think
25 there is no point to remanding it. Nothing about this

1 Court's decision in 2014 is going to change the Eleventh
2 Circuit's belief about what the law was in 2009. And so
3 I think you should decide the question. On that issue,
4 I think it's very telling that both of the sovereigns in
5 this case say that we win under a straightforward
6 application of Garcetti cited in 2006. You look at
7 Respondent Burrow's brief and repeatedly she urges,
8 don't make a new rule of law; just apply the rule of law
9 you had in Garcetti. The United States makes the same
10 argument. Page 16 of its brief argues that, "The
11 holding of Garcetti was especially clear about the
12 factors a Court should consider in deciding whether an
13 employee testified pursuant to his responsibilities."

14 CHIEF JUSTICE ROBERTS: So the Eleventh
15 Circuit really got it wrong.

16 MR. SINGH: Absolutely, Your Honor.

17 CHIEF JUSTICE ROBERTS: But it's still the
18 precedent that governs in this situation unless you're
19 going to have the employees analyze the law in the other
20 circuits or unless you're going to have the employees
21 look at the Eleventh Circuit opinion and say, I know
22 that's what it says, but it's wrong.

23 MR. SINGH: Your Honor, I think if Supreme
24 Court precedent is clear, then contrary to Eleventh
25 Circuit precedent shouldn't be controlling and employees

1 shouldn't be entitled to rely on it, and that's
2 certainly the implication of what this Court said in
3 Hope v. Pelzer. In Hope v. Pelzer, one of the arguments
4 that the defendants made was that there were a variety
5 of district court decisions that supported their view of
6 the law. And this Court said that the import of
7 judicial precedent is a function of the judicial
8 hierarchy. And when, as here, Supreme Court precedent
9 sets the rules, Eleventh Circuit precedent can't supply
10 a contrary rule.

11 CHIEF JUSTICE ROBERTS: So you're requiring
12 the government employee in this case to be a better
13 analyzer of Supreme Court precedent than the three
14 Eleventh Circuit judges.

15 MR. SINGH: Your Honor, I think that that is
16 not what we're requiring, because our argument in this
17 case is supplemented by what I think is an equally
18 strong argument that Eleventh Circuit precedent really
19 did not support this outcome, that the Court went very,
20 very far out on a limb in this case.

21 And I might just talk about the one case
22 that the Solicitor General mentioned, the Green v.
23 Barrett case. This is an unpublished case issued in
24 2007 in which the chief jailer of a jail attended a
25 hearing at a court, and it's not even 100 percent clear

1 why this hearing was at a court. It was an emergency
2 hearing convened to decide whether a particular prison
3 over which the jailer had responsibility was a safe
4 place to keep a particularly dangerous inmate. And she
5 was fired after that testimony.

6 There is no indication that it was even a
7 public hearing. There's no indication that it was the
8 sort of judicial proceedings we're talking about here.
9 And I think when you compare that case, again, to the
10 precedential decision in Martinez in 1992, no one could
11 have looked at those cases and come to the conclusion
12 that it's really a good idea for a State employer to
13 fire a Federal witness in retaliation for their truthful
14 testimony.

15 That's the conclusion that Franks would have
16 had to be able to reach in 2009. You would have had to
17 examine the body of this Court's precedents, which
18 consistently have held that even knowledge gained in the
19 course of employment is subject to First Amendment
20 protection. That's been the rule in Mr. Pickering's
21 case, where he talked about how his work at the high
22 school was the reason he knew that certain statements
23 were false. It was the case in the Mount Healthy case
24 where all a teacher did was disclose a memorandum, an
25 internal memorandum, to a radio station. That's been

1 established since the 1960s. And there was nothing that
2 Franks could have looked to or pointed to in 2009 that
3 would have said firing somebody in retaliation for
4 truthful testimony in a Federal corruption trial is
5 permissible. Thank you.

6 If there are no further questions.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 The case is submitted.

9 (Whereupon, at 12:04 p.m., the case in the
10 above-entitled matter was submitted.)
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