No. 13-483

IN THE

Supreme Court of the United States

EDWARD LANE,

Petitioner,

v.

STEVE FRANKS, ET AL.,

Respondents.

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

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF ALABAMA IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The American Civil Liberties Union of Alabama is a state affiliate of the national ACLU. Since its founding in 1920, the ACLU has appeared before this Court in numerous free speech cases, both as direct counsel and as *amicus curiae*, including a series of cases that have helped define the free speech rights of public employees. The ACLU has a strong interest in ensuring that all citizens are protected when they make sworn statements in a court of law.

SUMMARY OF ARGUMENT

Amici agree with petitioner that the First Amendment prohibits the government from firing an employee because he testified in response to a subpoena at a federal public corruption trial.[2] The protection for compelled testimony, however, is less a defined category than an illustration of a larger point. The First Amendment protects *all* sworn statements by public employees as part of judicial proceedings—whether compelled by a subpoena or voluntary. Distinguishing voluntary and compelled testimony would disrupt the orderly operation of the American

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[1] The parties' blanket consents to the filing of *amicus* briefs are on file with the Clerk of the Court. None of the parties authored this brief in whole or in part, and no one other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

[2] *Amici* also agree that the respondents are not entitled to qualified immunity.

judicial system and deter witnesses from coming forward. It would also conflict with an unbroken, centuries-long common-law tradition immunizing all witnesses who give testimony under oath as part of judicial proceedings. Affidavits and other voluntary statements by public employees should therefore receive the same First Amendment protection as subpoenaed testimony.

First, this Court has repeatedly emphasized that sworn testimony is indispensable to the truth-seeking function at the heart of the judicial process. This inherent public function of sworn judicial testimony is in no way altered because the testimony is offered by a public employee or because it is voluntary rather than compelled. To the contrary, whether a statement is technically compelled often reflects nothing more than chance.

This Court has also been clear that "[t]he duty to testify [is] a basic obligation that every citizen owes his Government." *United States v. Calandra*, 414 U.S. 338, 345 (1974). Accordingly, when a public employee offers sworn judicial testimony, he speaks "as a citizen on a matter of public concern," *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006), regardless of the subject matter of the testimony.

Because all sworn judicial statements reflect speech by a citizen on a matter of public concern, this Court should not announce a rule that turns on whether a statement is compulsory or voluntary. Such a distinction would serve no purpose beyond creating a perverse incentive for litigants (and courts) to expend substantial time and money on compulsory process for testimony that otherwise would be offered voluntarily. More troubling, such a rule would deter

public employees from coming forward with information in the first place, depriving litigants and the courts of relevant, and often essential, evidence.

Second, recognizing First Amendment protection for sworn statements in judicial proceedings is consistent with the longstanding common-law tradition according such statements absolute immunity from defamation liability. *See Briscoe v. LaHue*, 460 U.S. 325, 330-33 (1983). The common-law tradition of immunity for sworn judicial testimony applies to private citizens and public employees alike, whether the statement is compelled or voluntary. And while this Court has regularly held that the First Amendment protects more speech than the common law, this Court has never held the converse to be true. To the contrary, in case after case the Court has refused to create exceptions to the First Amendment for categories of speech that were protected at common law. It should not create an exception in this case, either.

ARGUMENT

I. The First Amendment Protects All Sworn Statements in Judicial Proceedings

"[A] citizen who works for the government is nonetheless a citizen," and a public employer may not "leverage the employment relationship to restrict . . . the liberties employees enjoy in their capacities as private citizens." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). It is thus "well settled" that the government cannot retaliate against an employee for exercising his "constitutionally protected interest in freedom of expression." *Id.* at 413 (quoting *Connick v. Myers*, 461 U.S. 138, 142 (1983)). Rather, the First Amendment protects public employees whenever they

speak (1) on "a matter of public concern" (2) in their capacity "as a citizen." *Id.* at 418.

As petitioner shows, a public employee's compelled testimony at a federal criminal trial easily meets these two criteria. But the same is true for any person participating under oath in the judicial process. Sworn statements relevant to a judicial proceeding always advance the judiciary's truth-seeking function, and always fulfill an individual's civic responsibility. There is no legal basis for distinguishing between voluntary and compelled testimony under the *Garcetti* framework. And such a distinction would create intractable practical problems. It would disrupt the process for acquiring evidence and undermine the free flow of information that is critical to the judicial process. Constitutional protections would in the end be triggered largely as a function of chance.

A. A Witness Giving a Sworn Statement in a Judicial Proceeding Is Always Speaking as a Citizen on a Matter of Public Concern

By their very nature, sworn judicial statements of every kind "address[] a matter of public concern." *Garcetti*, 547 U.S. at 423. "Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community.'" *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011) (quoting *Connick*, 461 U.S. at 146)). In deciding whether this standard is met, this Court looks not just at "content," but also at "form" and "context." *Id.*

In the case of sworn statements, the "form" (sworn) and "context" (a judicial proceeding) alone establish the requisite, indeed paramount, public interest. This

Court has emphasized that the development of "all relevant facts" is essential to the "integrity of the judicial system and public confidence in the system." *United States v. Nixon*, 418 U.S. 683, 709 (1974). The integrity of the judicial system, in turn, is "conservative of all other rights, and lies at the foundation of orderly government." *Chambers v. Balt. & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907). Only a judicial system fully equipped to ferret out the truth can truly secure "[t]he right to sue and defend in the courts," a right that is "one of the highest and most essential privileges of citizenship." *Id.*

It is for these reasons that, "[f]or more than three centuries," our legal tradition has recognized the "fundamental maxim" that "the public . . . has a right to every man's evidence." *United States v. Bryan*, 339 U.S. 323, 331 (1950); *accord Piemonte v. United States*, 367 U.S. 556, 559 n.2 (1961) (quoting 12 Hansard's Debates 693). "[E]xceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Nixon*, 418 U.S. at 710; *see also Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990). And the "predominant principle" of the American judicial process is to "utiliz[e] all rational means for ascertaining truth." *Nixon*, 418 U.S. at 710 n.18 (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)). As Justice White explained in *Imbler v. Pachtman*, 424 U.S. 409 (1976):

> The ability of courts . . . to separate truth from falsity, and the importance of accurately resolving factual disputes in criminal (and civil) cases are such that those involved in judicial proceedings should be given every encouragement to make a

> full disclosure of all pertinent information within their knowledge.

Id. at 439 (White, J., concurring in the judgment) (internal quotation marks omitted).

A public employee's sworn statement in a judicial proceeding is a matter of public concern to the same extent as the statement of any citizen. All sworn judicial statements advance the search for truth and ensure the integrity of the judicial process. On many subjects, public employees are the "members of [the] community most likely to have informed and definite opinions," most privy to relevant evidence, and best situated to assist the jury and the judge in exercising their constitutional responsibilities. *Pickering v. Bd. of Educ.,* 391 U.S. 563, 572 (1968); *see also Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996); *Kinney v. Weaver*, 367 F.3d 337, 361 (5th Cir. 2004) (en banc). At a minimum, encouraging the truthful testimony of a public employee is of no *lesser* concern to the community than promoting such testimony from an ordinary citizen.

In this particular case, the content of petitioner's testimony—the corruption of a state legislator—independently establishes that the testimony qualifies as speech on a matter of public concern. *See* Pet. Br. 18-19. But a case-by-case examination of content is unnecessary in light of the paramount importance of sworn truthful testimony as a whole to our system. The form and context render the speech of inherent public concern. *See United States v. Alvarez*, 132 S. Ct. 2537, 2546 (2012) ("Unlike speech in other contexts, testimony under oath has the formality and gravity necessary to remind the witness that his or her statements will be the basis for official governmental action, action that often affects the rights and liberties

of others."); *Nixon*, 418 U.S. at 710; *Bryan*, 339 U.S. at 331; *see also Reilly v. City of Atlantic City,* 532 F.3d 216, 229 (3rd Cir. 2008) ("[T]estimony is offered 'in a context that is inherently of public concern . . . .'"); *Johnston v. Harris Cnty. Flood Control Dist.*, 869 F.2d 1565, 1578 (5th Cir. 1989) (same).

Inquiring into the content of a sworn truthful statement would create an intolerable degree of unpredictability and would chill critical speech. A witness testifying should be concerned with speaking the truth, not whether a given topic or line of testimony will make his boss angry. And an employee with knowledge that could assist a judge or jury in administering the laws cannot be forced to bet her job on how a different judge, acting with the benefit of hindsight, will assess the public interest in the original proceeding. Rather, the employee's participation in the judicial fact-finding process should always be protected by the First Amendment.[3]

For similar reasons, sworn statements by a public employee in a judicial proceeding always satisfy the speech "as a citizen" portion of the *Garcetti* test,

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[3] This argument does not implicate the Court's observation in *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011), that employees who are *parties* to lawsuits might "interfere with the efficient and effective operation of government," *id.* at 2495, by, for example, "us[ing] the courts to pursue personal vendettas or to harass members of the general public," *id.* at 2496, or by "circumvent[ing]" the applicable "statutory and regulatory mechanisms" to file lawsuits "based on ordinary workplace grievances," *id.* at 2497. Whether the act of filing a lawsuit is itself protected is a distinct question from whether a sworn statement in a judicial proceeding is protected. And how speech might fare under the balancing portion of the *Pickering* test does not alter the conclusion that speech given under oath in a judicial proceeding is protected by the First Amendment in the first place.

because the employee necessarily provides such statements in her capacity as a citizen. This Court has said so in countless ways and countless cases. For example: "The duty to testify has long been recognized as a basic obligation that every citizen owes his Government." *United States v. Calandra*, 414 U.S. 338, 345 (1974). "Every citizen of course owes to his society the duty of giving testimony to aid in the enforcement of the law." *Piemonte*, 367 U.S. at 559 n.2. "It is also beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned." *Blackmer v. United States*, 284 U.S. 421, 438 (1932). "The personal sacrifice involved [in giving testimony] is a part of the necessary contribution of the individual to the welfare of the public." *Blair v. United States*, 250 U.S. 273, 281 (1919).

Hence when an individual—public employee or not—offers a sworn statement in a judicial proceeding, that individual is fulfilling a core civic duty shared among all members of society. "[This] duty of citizenship is not vitiated by one's status as a public employee." *Reilly*, 532 F.3d at 231; *accord Chrzanowski v. Bianchi*, 725 F.3d 734, 741 (7th Cir. 2013); *Jackler v. Byrne*, 658 F.3d 225, 239 (2d Cir. 2011).

The Eleventh Circuit badly misread *Garcetti* in holding that petitioner did not speak as a citizen because he "testified *about* his official activities," and because "the *subject matter* of [petitioner's] testimony touched only on acts he performed as part of his official duties." *Lane v. Cent. Ala. Cmty. Coll.*, 523 F. App'x 709, 712 (11th Cir. 2013) (per curiam) (emphases added); *see also* Pet. Br. 6, 28-29. The question is not

whether public employment is the source of the information, but whether the employee acts as a citizen *when conveying* that information. *Garcetti* could not have been more clear: the "controlling factor" is *not* whether speech "concern[s] the subject matter of [an individual's] employment" but rather whether the "expression[]" itself was made "pursuant to . . . official duties." 547 U.S. at 421. *Pickering,* too, makes this plain: the Court held that a teacher's letter to the editor was protected speech even though the letter concerned information the teacher had learned on the job. 391 U.S. at 566. The Eleventh Circuit got the cases backward: under its approach it made no difference whether petitioner expressed his speech in courtroom testimony, in a phone call to a newspaper reporter, or at a political protest.

Properly applied, *Garcetti* itself establishes that those who provide judicial testimony are engaged in speech as a citizen. *Garcetti* held that a memorandum from an assistant district attorney to his supervisor did not constitute speech as a citizen because the Court found no "relevant analogue" outside the workplace. 547 U.S. at 424. That is, distributing an internal memorandum on the merits of a prosecution is not, in *Garcetti*'s view, "the kind of activity engaged in by citizens who do not work for the government." *Id.* at 423. Precisely the opposite is true in the case of judicial testimony. Private citizens testify every day in every state across the nation. Far from reflecting speech that is peculiar to public employment, judicial testimony is a paradigmatic example of speech that has its roots in citizenship.

To be sure, certain public employees (say FBI agents, lab technicians, or agency representatives under Fed. R. Civ. P. 30(b)(6)) may in some situations

testify at the request or command of their employer and on behalf of their employer. Once the employee takes the stand, however, he is acting not only as an employee, but also as a citizen. He has a legal duty as a citizen—owed to the court and independent of his duty to his employer—to answer truthfully every question the court finds relevant. It would be dangerous indeed, and contrary to public policy, to permit his employer to then fire him for giving a truthful response. In fact, if anything, the public has an especially strong interest in according protection to witnesses who regularly testify on behalf of the government. Juries give great weight to the testimony of such witnesses, yet the witnesses are at the same time at unique risk of reprisal for giving truthful testimony that is adverse to the government's interests. "A forensic analyst responding to a request from . . . law enforcement," for example, "may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318 (2009).

That is not to say that the government would have no recourse if, say, its witness "testif[ied] poorly," Burrow Br. 24, or inappropriately revealed confidential, irrelevant information on the stand. The government would be free to argue as part of the *Pickering* balancing inquiry that the employee's testimony had interfered with government operations to an extent that justified discharge, notwithstanding the substantial public interest in truthful testimony. But such arguments are not relevant to whether the witness spoke as a citizen on a matter of public concern in the first place.

In any event, this Court need not decide how a rule that judicial statements are always protected speech

should apply in situations where an employee is testifying at the request of his employer as part of his ordinary job duties. As petitioner shows, he did not testify as part of his job duties. *See* Pet. Br. 20-22, 27-28.

B. Nothing Turns on Whether a Statement Is Compelled or Voluntary

Because the First Amendment protects all sworn statements in judicial proceedings by public employees, this Court should not hold that anything turns on whether the statements were *compelled*. The public value of sworn testimony does not depend on whether truthful testimony is secured through a mandatory or voluntary appearance. And public policy and practical considerations counsel strongly against establishing such a distinction.

1. *Compulsion Is Irrelevant to the Applicable Legal Standard*

A sworn statement relevant to a judicial proceeding is speech on a "matter of public concern" whether or not it is compelled. As discussed, the public interest at stake is the judicial truth-seeking function, which depends on encouraging anyone with relevant information to come forward. *Nixon*, 418 U.S. at 709, 710 n.18. The public good served by testimony thus turns on the fact of the testimony—that it is relevant to help resolve the underlying legal dispute—not the means by which the testimony is procured. "The object of [a subpoena] is merely to secure attendance, and a witness who gives his testimony voluntarily is performing a public function no less than when he testifies upon compulsion." Van Vechten Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 Colum. L. Rev. 463, 476-77 (1909).

This Court need look no further than its seminal decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), to appreciate the public function served by all testimony of public employees, and to see why it is absolutely essential to protect such testimony. At least six public employees testified at the *Brown* trial on the need to end segregation in public schools. One did so "over the direct protest" of his supervisor, providing critical factual information about disparities between the City of Topeka's white and African-American schools. Richard Kluger, *Simple Justice: The History of* Brown v. Board of Education *and Black America's Struggle for Equality* 413, 415 (2004). Others testified to scientific evidence establishing that segregated schools instilled a "sense of inferiority" that affected how well minority students learn—testimony that shaped this Court's decision. *Id.* at 416-17, 421-22; Patricia Sullivan, *Lift Every Voice: The NAACP and the Making of the Civil Rights Movement* 409 (2009); *see also Brown*, 347 U.S. at 494. We can't be sure whether this testimony was secured by subpoena or not—but there is no apparent reason why that should have mattered to the question whether to protect the employees against retaliation.

Similarly, the distinction between voluntary and compelled testimony has no bearing on whether an employee is acting "as a citizen." This Court has held that "*every* citizen . . . owes to his society the duty of giving testimony to aid in the enforcement of the law." *Piemonte*, 367 U.S. at 559 n.2 (emphasis added). It would be perverse to hold that public employees act as citizens only when they are forced to fulfill their civic duty, and not when they fulfill that duty of their own accord. This Court should thus recognize that whenever a public employee offers relevant testimony in a judicial proceeding, the employee acts as a citizen,

on matters of public concern, and is entitled to First Amendment protection.[4]

Highlighting the illogic of drawing a distinction between compelled and other statements is the fact that, for many witnesses, compulsion is arbitrary or a function of chance. In both civil and criminal litigation, attorneys frequently issue subpoenas to witnesses who would have voluntarily attended even absent a subpoena. Conversely, witnesses who do not wish to testify may show up under threat (but not issuance) of a subpoena. Courts should not have to resolve satellite issues involving matters outside the record to determine the reason that a witness gave a statement or appeared. The important thing is that the witness is there—and willing to tell the truth.

The courts of appeals have accordingly treated both compelled and voluntary testimony as protected speech. The Third and Fifth Circuits have held that all judicial statements, whether secured by compulsion or not, are *per se* a matter of public concern. *Swartzwelder v. McNeilly*, 297 F.3d 228, 238 (3d Cir. 2002); *Green v. Phila. Hous. Auth.*, 105 F.3d 882, 887 (3d Cir. 1997); *Johnston*, 869 F.2d at 1578. "Ensuring that truthful testimony is protected by the First Amendment promotes the individual and societal interests served when citizens play their vital role in the judicial process." *Reilly*, 532 F.3d at 231 (internal quotation marks omitted); *accord Green*, 105 F.3d at 887; *Johnston*, 869 F.2d at 1578. And there is "no reason why a voluntary appearance would

[4] Unsurprisingly, many (though not all) of this Court's statements on the duty of a citizen to testify arise in the context of compulsion. But that is true only because voluntary testimony is unlikely to produce controversy about the obligation to testify, not because voluntary testimony is any less an act of civic duty.

eliminate the public interest" of such testimony. *Green*, 105 F.3d at 887. Post-*Garcetti*, the Third Circuit has further confirmed that, "[w]hen a government employee testifies truthfully, s/he is not 'simply performing his or her job duties'; rather, the employee is acting as a citizen." *Reilly*, 532 F.3d at 231 (citation omitted) (quoting *Garcetti*, 547 U.S. at 423).

The Second, Seventh, and Tenth Circuits have similarly recognized the compelling justifications for treating all testimony, voluntary or otherwise, as speech offered by the witness as a citizen on a matter of public concern. *See Matrisciano v. Randle*, 569 F.3d 723, 731 (7th Cir. 2009); *Worrell v. Henry*, 219 F.3d 1197, 1205 (10th Cir. 2000); *Kaluczky v. City of White Plains*, 57 F.3d 202, 210 (2d Cir. 1995). In *Worrell*, the Tenth Circuit explained that "[a]ffording constitutional protection to the truthful testimony of public employees"—there, voluntary expert testimony for the defense in a capital murder trial—"protects both employees' interest in free expression and the judicial system's interest in arriving at the truth." 219 F.3d at 1205.[5]

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[5] The State of Alabama erroneously asserts that numerous courts of appeals have "rejected" a *per se* rule treating all compelled judicial testimony as speech made as a citizen on a matter of public concern. Burrow Br. at 22 n.3. The Second, Ninth, and Tenth Circuits have expressly reserved deciding whether a *per se* rule is appropriate. *See Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1103 (9th Cir. 2011); *Deutsch v. Jordan*, 618 F.3d 1093, 1099 n.1 (10th Cir. 2010); *Catletti ex rel. Estate of Catletti v. Rampe*, 334 F.3d 225, 230 (2d Cir. 2003). And the Eighth Circuit's holding that one employee's testimony did not involve a matter of public concern was driven by uniquely disturbing facts—a high school teacher had testified at his criminal trial that he believed it was permissible to have a sexual relationship with a minor. *Padilla v. S. Harrison R-II Sch. Dist.*,

Some courts of appeals have suggested that whether a statement is voluntary might be relevant to the balancing of the private and governmental interests under *Pickering*. *See, e.g.*, *Green*, 105 F.3d at 888; *cf. Hoover v. Morales*, 164 F.3d 221, 227 (5th Cir. 1998). Whatever the merits of that argument, voluntariness has no bearing on whether the sworn statement is protected by the First Amendment in the first place.

2. *Limiting First Amendment Protection to Compelled Testimony Would Create Widespread and Significant Practical Problems*

The fact that the testimony in this particular case was compelled should not make it a determinative factor for all cases. It is not just that such a distinction is legally unsustainable under the letter and purpose of the *Garcetti* framework. Carving out voluntary testimony would also affirmatively undermine the truth-seeking function at the heart of the judicial system, not to mention the First Amendment values that the *Pickering-Connick-Garcetti* line of cases aim to protect. At bottom, such a holding would be fundamentally inconsistent with this Court's admonition that "[t]he policy of the law must be to encourage testimony." *Yates v. United States*, 355 U.S. 66, 73 (1957).

First, federal and state courts across the United States regularly rely on voluntary affidavits to resolve issues in civil litigation. Among countless examples, see *City of Erie v. Pap's A.M.*, 529 U.S. 277, 302-03

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181 F.3d 992 (8th Cir. 1999). In any event, the court got it wrong—the testimony was a matter of public concern, even if the school district could still discharge the teacher under *Pickering* balancing.

(2000) (Scalia, J., concurring in the judgment); *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 185 (1988); *Roth v. Dep't of Justice*, 642 F.3d 1161, 1169 (D.C. Cir. 2011); *Hartford Cnty. v. Saks Fifth Ave. Distribution Co.*, 923 A.2d 1, 10 (Md. 2007); *In re C.H.C.*, 331 S.W.3d 426, 430 (Tex. 2011). The Court should not create a rule that would jeopardize a practice so ubiquitous and so central to the orderly operation of the judicial system.

Second, and relatedly, giving greater protection to compelled statements would encourage witnesses to demand compulsory process where it would otherwise be unnecessary, making litigation more costly and time-consuming. In the federal system, for example, compelling an individual to attend a deposition or answer written questions often requires the involvement of a judge, particularly early in the litigation. Fed. R. Civ. P. 30(a), 31(a). And subpoenaing a witness to testify via oral deposition, where a simple voluntary affidavit would do, entails considerable expense—travel, the hiring of a reporter, and attorney time, among other things. Although Rule 31 allows "depositions by written questions," that procedure too is considerably more complicated, time-consuming, and expensive than obtaining a sworn affidavit. *See* Fed. R. Civ. P. 31(a)(5), (b)(1)-(3); *see also* Fed. R. Civ. P. 30(c), (e), (f); 8A Wright & Miller, Federal Practice and Procedure § 2131 (3d ed. 2010) (depositions by written question are "cumbersome" and "rarely used").

Third, leaving voluntary testimony unprotected—even leaving the issue open—would discourage witnesses from coming forward in the first place. A public official who has information that is relevant to an ongoing public corruption investigation *may* come forward and speak to the FBI if she can be confident

that the government will later compel her testimony under subpoena, so as to insulate her from retaliatory action. But far more likely, uncertainty in the law—combined with the fact that the employee's job hangs in the balance—will dissuade the employee from coming forward altogether. Most public employees are laymen who will not even realize that it may be possible to obtain compelled process down the line. A blanket rule announced by this Court protecting all sworn testimony, on the other hand, will ensure that witnesses feel secure coming forward even if they are not yet on a party's radar screen—exactly the outcome the Court's First Amendment jurisprudence seeks to advance.

Fourth, in many cases a litigant will simply be unable to protect a public employee by supplying compulsory process—because compulsory process is not available in all situations and at all times. For example, a public employee may be perfectly willing to travel 150 miles to testify at a civil trial—but he cannot be compelled to do so by a subpoena. *See* Fed. R. Civ. P. 45(c)(1)(A) (with certain exceptions, a subpoena can only require its recipient to travel 100 miles to provide testimony). It would be bizarre indeed if the First Amendment turned on the witness's residential address.

The inability to obtain compulsory process is particularly stark in the case of prisoners, who regularly rely on voluntary sworn statements from public employees in seeking habeas relief. *See, e.g.*, *Sears v. Upton*, 130 S. Ct. 3259, 3262 & n.3 (2010) (citing school teacher's affidavit in concluding that counsel failed to conduct a constitutionally adequate penalty phase investigation in a capital case); *Johnson v. Bell*, 605 F.3d 333, 338 (6th Cir. 2010) (affidavit

from a trial witness's probation officer introduced to support *Brady* claim); *Burr v. Lassiter*, 513 F. App'x 327, 336-37 (4th Cir. 2013) (affidavits from public university professor and state coroner). It would be difficult or impossible for a *pro se* prisoner to comply with the rules for conducting a compelled deposition by written question under Rule 31—if the prisoner even has the means to hire a process server to serve the subpoena. *See* Fed. R. Civ. P. 45(b)(1). Thus, by exposing public employees to retaliation for voluntary statements, a ruling turning on compulsion would irrationally and perniciously place lower income individuals at a disadvantage in securing the truth at a trial.

Further, voluntary testimony is sometimes the only option for prisoners as a matter of law. A habeas court may require a prisoner to produce voluntary affidavits from witnesses (including a witness who is a probation officer or other public employee) before the court will review the case further or consider ordering depositions or issuing subpoenas. The statutory scheme this Court described in *Banks v. Dretke*, 540 U.S. 668 (2004), is an example. In *Banks*, the state argued that a habeas petitioner's *Brady* claim was procedurally defaulted because the petitioner had failed to seek "investigative assistance" under a Texas statute giving post-conviction courts authority to "order affidavits, depositions, interrogatories, and hearings." *Id.* at 696-97. But this Court explained that seeking such assistance would have been fruitless: the petitioner needed to produce some evidence in the first place, before the court would have issued subpoenas under the statute. *Id*. at 697. If that first witness insists on the protection of compulsion, but to obtain compulsion the prisoner needs the witness's voluntary statement, the prisoner will be

caught in a catch-22 and may never get to bring a meritorious claim.

Fifth, and finally, anything less than blanket protection risks serious intrusion by the executive branch into matters reserved to the judiciary. If a public employee may be fired for giving a sworn statement, as a practical matter she won't give the statement unless her boss wants her to. The Court cannot simply head off that outcome by protecting all compelled statements—as just explained, not all statements can be compelled, and not all witnesses will come forward if protection is uncertain. Thus, absent blanket protection, in many cases executive branch officials will ultimately control whether testimony is considered in court. And this will be so even though the testimony is truthful and relevant evidence that the witness wants to provide and the litigant wants to introduce—and, crucially, that the court wants to hear. But the Due Process Clause does not leave the power to decide what evidence may be introduced at trial to the whim of every low-level supervisor employed by a state or federal agency. Rather it assigns that power to judges who are charged with fairly and dispassionately administering the law. A decision reversing these roles would contravene the separation-of-powers doctrine, which "requires that a branch not impair another in the performance of its constitutional duties." *Loving v. United States,* 517 U.S. 748, 757 (1996). Fidelity to that doctrine instead requires this Court to foreclose the possibility that an executive branch official could deprive a court of critical evidence by threatening to fire a testifying employee.

In short, not only is there no legal reason to distinguish voluntary statements from compelled

statements under the "public concern" test, such a distinction would actively impede the flow of information that is central to our judicial system and leave many witnesses subject to retaliation for doing their civic duty. It is critical that this Court avoid a disposition that could create such a result. This Court should hold that the First Amendment protects all relevant, sworn statements by public employees in judicial proceedings.

II. This Court's Jurisprudence on Common-Law Immunity Further Demonstrates that Sworn Statements Are Always Protected by the First Amendment

A longstanding common-law tradition grants sworn statements absolute protection from defamation liability, whether or not the statement was compelled or the speaker was a public employee. And under this Court's precedents, speech that is protected at common law is also protected under the First Amendment.

A. Sworn Statements Enjoy Absolute Protection from Civil Liability

The principle that witnesses are entitled to comprehensive protection for their statements in court has roots long predating this Court's jurisprudence on speech by public employees. At common law, attorneys, parties, and most importantly witnesses enjoyed "absolute immunity" against defamation actions "for statements made in the course of a judicial proceeding." *Rehberg v. Paulk*, 132 S. Ct. 1497, 1505 (2012); *accord Briscoe v. LaHue*, 460 U.S. 325, 330-31 (1983). This rule of absolute immunity was recognized in judicial decisions as early as the sixteenth century, and was cemented in Lord Mansfield's 1772

declaration that "[n]either party, witness, counsel, jury, nor judge can be put to answer, civilly or criminally for words spoken in office." Veeder, *supra*, at 474 (quoting *R. v. Skinner*, (1772) Lofft 55); *see also Briscoe*, 460 U.S. at 330-31 (citing English common-law decisions affording damages immunity to parties and witnesses).

The reason for the common-law rule of absolute immunity is that encouraging testimony is always a matter of public concern. The leading account of the rule explains that witnesses "perform a service of the highest value in [their] disclosure of the facts," and it is therefore "indispensable . . . to the public interest that [they] speak freely and fearlessly." Veeder, *supra*, at 465, 476.[6] In other words, without immunity from subsequent liability, "[w]itnesses 'might be reluctant to come forward to testify,'" or "might be inclined to shade [their] testimony," and "the truth-seeking process . . . would be impaired." *Rehberg*, 132 S. Ct. at 1505 (quoting *Briscoe*, 460 U.S. at 333).

This common-law rule applied to all statements in judicial proceedings, whether compelled or voluntary. Veeder, *supra*, at 476 & n.41; *see also, e.g.*, *Burke v. Ryan*, 36 La. Ann. 951, 951-52 (1884) (affording absolute immunity to voluntary affidavit); *Harris v. Reams*, 2 Ohio Dec. Reprint 281, 285 (Ct. Com. Pl. 1860) (same); *Astley v. Younge*, (1759) 97 Eng. Rep. 572, 574 (K.B.) (same). As one nineteenth century judge succinctly explained, "whenever a person

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[6] This Court has repeatedly relied on Veeder's article as the definitive account of common-law immunity for speech in judicial proceedings. *Buckley v. Fitzsimmons*, 509 U.S. 259, 277 n.8 (1993); *id.* at 280 (Scalia, J. concurring); *Burns v. Reed*, 500 U.S. 478, 490 (1991); *Briscoe*, 460 U.S. at 332 n.12, 333; *Imbler*, 424 U.S. at 439 (White, J., concurring in the judgment).

testifies, either voluntarily or under process of subpoena . . . he is entitled to unqualified protection." *Perkins v. Mitchell*, 31 Barb. 461, 472 (N.Y. Gen. Term 1860). Another state-court judge of the same era provided a more detailed account of why uniform treatment was appropriate:

> [N]o book has ever yet made a distinction between witnesses who appear under process and those who appear voluntarily, as to the legal protection afforded them. There is no reason for such a distinction. It would be strange, indeed, if a witness, present in court, and being called, is sworn and testifies, is withdrawn from the protecting policy of the law, because a writ was not served on him. The object of a subpoena is to procure attendance.
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> *Harris*, 2 Ohio Dec. Reprint at 285.

The rule applied equally to affidavits and oral statements, and to preliminary proceedings as well as testimony at trial. *See* Veeder, *supra*, at 476 n.41.[7]

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[7] This Court need not address testimony at legislative proceedings, although in that context, too, there are compelling reasons to treat all sworn statements as speech by a citizen on a matter of public concern. Legislative testimony reflects an act of "[c]itizen participation" that is "absolutely vital to ensure a fully-informed and representative legislature." *Riddle v. Perry*, 40 P.3d 1128, 1132 (Utah 2002). Thus, numerous courts have extended the common-law rule of absolute immunity in defamation actions to legislative testimony. *See, e.g.*, *id.*; *Webster v. Sun Co.*, 731 F.2d 1, 5 (D.C. Cir. 1984); *Yip v. Pagano*, 606 F. Supp. 1566, 1571 (D.N.J. 1985); *Bio/Basics Int'l Corp. v. Ortho Pharm. Corp.*, 545 F. Supp. 1106, 1115 (S.D.N.Y. 1982); *Krueger v. Lewis*, 834 N.E.2d 457, 464 (Ill. App. Ct. 2005); *White v. Ashland Park Neighborhood Ass'n*, 2009 WL 1974750, at *9 (Ky. Ct. App. July 10, 2009); *DeSantis v. Emps. Passaic Cnty. Welfare Ass'n*, 568 A.2d 565, 567 (N.J. Super. Ct. App. Div. 1990);

Nor did the status of the witness as a public official make his testimony any less deserving of protection. To the contrary, "[a]bsolute privilege" applied to public employees and private persons alike because "[i]t is essential to the ends of justice that all persons participating in judicial proceedings . . . should enjoy freedom of speech in the discharge of their public duties or in pursuing their rights, without fear of consequences." *Imbler*, 424 U.S. at 440 (White, J., concurring in the judgment) (quoting Veeder, *supra*, at 469).

Absolute immunity for judicial testimony—of all varieties—remains the universal rule today. In all fifty states, if a witness provides sworn statements in a judicial proceeding, and those statements are relevant to the proceeding, the witness is categorically protected against liability for defamation.[8]

Jennings v. Cronin, 389 A.2d 1183, 1185 (Pa. Super. Ct. 1978); *Logan's Super Markets, Inc. v. McCalla*, 343 S.W.2d 892, 894-95 (Tenn. 1961); *see also* Restatement (Second) of Torts § 590A.

[8] *O'Barr v. Feist*, 296 So. 2d 152, 157 (Ala. 1974); *Lawson v. Helmer*, 77 P.3d 724, 727 (Alaska 2003); *Green Acres Trust v. London*, 688 P.2d 617, 621 (Ariz. 1984) (en banc); *Routh Wrecker Serv., Inc. v. Washington*, 980 S.W.2d 240, 243 (Ark. 1998); *Action Apartment Ass'n v. City of Santa Monica*, 163 P.3d 89, 95 (Cal. 2007); *Wagner v. Bd. of Cnty. Comm'rs*, 933 P.2d 1311, 1313-14 (Colo. 1997) (en banc); *Gallo v. Barile*, 935 A.2d 103, 107-08 (Conn. 2007); *Barker v. Huang*, 610 A.2d 1341, 1344-45 (Del. 1992); *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co.*, 639 So. 2d 606, 607-08 (Fla. 1994); *Conley v. Key*, 25 S.E. 914, 915 (Ga. 1896); *Matsuura v. E.I. du Pont de Nemours & Co.*, 73 P.3d 687, 692 (Haw. 2003); *Weitz v. Green*, 230 P.3d 743, 754 (Idaho 2010); *Thompson v. Frank*, 730 N.E.2d 143, 145 (Ill. App. Ct. 2000); *Hartman v. Keri*, 883 N.E.2d 774, 777 (Ind. 2008); *Spencer v. Spencer*, 479 N.W.2d 293, 295 (Iowa 1991); *Clear Water Truck Co. v. M. Bruenger & Co.*, 519 P.2d 682, 685 (Kan. 1974); *Morgan & Pottinger, Attorneys, P.S.C.*

This Court has further extended the common-law rule to afford witnesses categorical immunity from any liability under 42 U.S.C. § 1983 for testimony at trial or before a grand jury. *Briscoe*, 460 U.S. 325; *Rehberg*, 132 S. Ct. 1497. Indeed, in both *Briscoe* and *Rehberg*, this Court specifically rejected arguments that immunity should not shield witnesses on account of their status as public employees. *Briscoe*, 460 U.S. at

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v. Botts, 348 S.W.3d 599, 601 (Ky. 2011); *Marrogi v. Howard,* 805 So. 2d 1118, 1124-25 (La. 2002); *Dineen v. Daughan*, 381 A.2d 663, 664 (Me. 1978); *Norman v. Borison*, 17 A.3d 697, 708-09 (Md. 2011); *Aborn v. Lipson*, 256 N.E.2d 442, 443 (Mass. 1970); *Mundy v. Hoard*, 185 N.W. 872, 876 (Mich. 1921); *Matthis v. Kennedy*, 67 N.W.2d 413, 417 (Minn. 1954); *Gunter v. Reeves*, 21 So. 2d 468, 470 (Miss. 1945); *Laun v. Union Elec. Co. of Mo.*, 166 S.W.2d 1065, 1069 (Mo. 1942); *Sacco v. High Country Indep. Press, Inc.*, 896 P.2d 411, 430 (Mont. 1995); *Kocontes v. McQuaid*, 778 N.W.2d 410, 416 (Neb. 2010); *State v. Second Judicial Dist. Court ex rel. Cnty. of Washoe*, 55 P.3d 420, 424 (Nev. 2002); *Provencher v. Buzzell-Plourde Assocs.*, 711 A.2d 251, 255 (N.H. 1998); *Hawkins v. Harris*, 661 A.2d 284, 288 (N.J. 1995); *Superior Constr., Inc. v. Linnerooth*, 712 P.2d 1378, 1381 (N.M. 1986); *Andrews v. Gardiner*, 121 N.E. 341, 343 (N.Y. 1918); *Scott v. Statesville Plywood & Veneer Co.*, 81 S.E.2d 146, 148-49 (N.C. 1954); *Lauder v. Jones*, 101 N.W. 907, 917 (N.D. 1904); *Willitzer v. McCloud*, 453 N.E.2d 693, 695 (Ohio 1983); *Berman v. Lab. Corp. of Am.*, 268 P.3d 68, 71 (Okla. 2011); *DeLong v. Yu Enters., Inc.*, 47 P.3d 8, 10 (Or. 2002); *Bochetto v. Gibson*, 860 A.2d 67, 71 (Pa. 2004); *Ims v. Town of Portsmouth*, 32 A.3d 914, 928 (R.I. 2011); *Jenkins v. S. Ry. Co.*, 125 S.E. 912, 917 (S.C. 1924); *Harris v. Riggenbach*, 633 N.W.2d 193, 194-95 (S.D. 2001); *Logan's*, 343 S.W.2d at 894; *Reagan v. Guardian Life Ins. Co.*, 166 S.W.2d 909, 912 (Tex. 1942); *Krouse v. Bower*, 20 P.3d 895, 898 (Utah 2001); *Letourneau v. Hickey*, 807 A.2d 437, 441 (Vt. 2002); *Donohoe Constr. Co. v. Mount Vernon Assocs.*, 369 S.E.2d 857, 860 (Va. 1988); *Wynn v. Earin*, 181 P.3d 806, 810 (Wash. 2008); *Clark v. Druckman*, 624 S.E.2d 864, 869-70 (W. Va. 2005); *Bussewitz v. Wis. Teachers' Ass'n*, 205 N.W. 808, 810 (Wis. 1925); *Abromats v. Wood*, 213 P.3d 966, 970 (Wyo. 2009).

342; *Rehberg*, 132 S. Ct. at 1505-06. This Court held that the immunity analysis does not rest "on the status of the defendant" because "[a] police officer on the witness stand performs the same functions as any other witness." *Briscoe*, 460 U.S. at 342. In other words, because *all* witnesses contribute to the judiciary's fact-finding mission, all citizens must be encouraged to take on that responsibility, and protected when they do so.

B. The First Amendment Offers No Less Protection Than the Common Law

In assessing the First Amendment rights of public employees, the Court should not disregard the long and unbroken common-law tradition. The Court has often found that the First Amendment *expands* the protections available at common law, because the goal of the Bill of Rights was to "secur[e] for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed." *Bridges v. California*, 314 U.S. 252, 265 (1941); *see also, e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-50 (1974); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 249 (1936). But so far as we are aware, this Court has never done the opposite and held that speech that was *protected* at common law falls outside the ambit of the First Amendment.

Instead, this Court has long interpreted the First Amendment to reflect and enshrine historical and common-law protections related to speech. For example, this Court has held that "the right to attend criminal trials is implicit in the guarantees of the First Amendment" because "the freedom to attend such trials" is one "which people have exercised for centuries" and was "part of the common-law

tradition." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 574, 580 (1980) (plurality opinion) (footnote omitted). Similarly, the Court grounded the First Amendment right of access to preliminary hearings on the common-law and historical tradition granting such access. *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 10 (1986).

This Court has reiterated the point twice in the last four years alone. In *United States v. Stevens*, 559 U.S. 460 (2010), and *United States v. Alvarez*, 132 S. Ct. 2537 (2012), the Court held that a category of speech enjoys full First Amendment protection absent a historical tradition permitting restriction of that category. First, in *Stevens*, the Court held that depictions of animal cruelty were protected by the First Amendment because there was no "tradition excluding" such depictions. 559 U.S. at 469. In so doing the Court expressly rejected the Government's argument that "categories of speech may be exempted from the First Amendment's protection without any long-settled tradition of subjecting that speech to regulation." *Id.*

Two years later, in *Alvarez*, the Court declined to find any general exception to the First Amendment for untruthful speech. Justice Kennedy's opinion for the Court explained that "content-based restrictions on speech have been permitted, as a general matter, only when confined to the few 'historic and traditional categories [of expression] long familiar to the bar.'" *Alvarez*, 132 S. Ct. at 2544 (alteration in original) (quoting *Stevens*, 559 U.S. at 468); *accord Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2349 (2011) (holding that legislative recusal rules do not violate legislators' First Amendment rights because such rules have a "long-standing . . . common-law"

pedigree); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in the judgment) (observing that "the use of . . . traditional legal categories" to determine whether speech is without First Amendment protection "is preferable to . . . ad hoc balancing").

This Court has already recognized that public employee speech must get at least as much protection under the First Amendment as was available at common law. For that proposition we need look no further than the public-concern test itself. Under the common law, individuals are protected from liability for invading another person's privacy if the claim rests on speech that is "of legitimate concern to the public." Restatement (Second) of Torts § 652D. This Court then adopted that standard in *Connick v. Myers*, noting the source, to determine the circumstances in which a public employee's speech is protected. 461 U.S. at 143 n.5; *see also City of San Diego, Cal. v. Roe*, 543 U.S. 77, 83 (2004).

In short, the longstanding and consistent tradition under the common law is to give absolute protection to any sworn statement by any individual in connection with a judicial proceeding, precisely because such statements always implicate a matter of public concern. The First Amendment requires no less.

III. The Government Will Rarely Have a Legitimate Interest in Discharging its Employees for Truthful Testimony

Under this Court's familiar balancing test, a determination that a public employee has spoken as a citizen on a matter of public concern does not end the matter. The government may still discharge the

employee, but only if it can demonstrate a competing, overriding interest in preventing such speech. *Connick*, 461 U.S. at 150-51; *Pickering*, 391 U.S. at 572-73. That interest must be grounded in the "effective and efficient fulfillment of [the government's] responsibilities to the public," *Connick*, 461 U.S. at 150, and the government cannot restrict speech unless doing so is "necessary" to effective and efficient operation. *Garcetti*, 547 U.S. at 419. Finally, the "more substantially" the speech "involve[s] matters of public concern," the "stronger" the government "showing" that may be required. *Connick*, 461 U.S. at 152.

The government will rarely have a legitimate interest in preventing an employee from giving truthful testimony in a judicial proceeding. "The notion that the State may silence the testimony of state employees simply because that testimony is contrary to the interests of the State in litigation or otherwise, is antithetical to the protection extended by the First Amendment." *Hoover*, 164 F.3d at 226. Rather, the government's interest is in *promoting* such testimony, which is essential to the "integrity of the judicial system and public confidence in the system." *Nixon*, 418 U.S. at 709. An employee does not "disrupt the office," "undermine [a supervisor's] authority," or "destroy [office] working relationships," *Connick*, 461 U.S. at 154, by leaving the office to testify truthfully in a proceeding supervised by a judge. Rather, the employee fulfills a "basic obligation that every citizen *owes* his Government." *Calandra*, 414 U.S. at 345 (emphasis added). Thus, with respect to sworn testimony, a government has no "adequate justification for treating the employee differently from any other member of the general public." *Garcetti*, 547 U.S. at 418.

At a minimum, the State of Alabama certainly had no interest in preventing Edward Lane from complying with a subpoena issued by the United States and providing truthful testimony about public corruption in a federal criminal trial. *See* Pet. Br. 23-25. Under the balancing test established in *Pickering* and *Connick*, the State's decision to discharge Mr. Lane violated his First Amendment rights.

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

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