No. 13-483

IN THE

Supreme Court of the United States

EDWARD LANE,

Petitioner,

—v.—

STEVE FRANKS, IN HIS INDIVIDUAL CAPACITY, AND SUSAN BURROW, IN HER OFFICIAL CAPACITY AS ACTING PRESIDENT OF CENTRAL ALABAMA COMMUNITY COLLEGE,

Respondents.

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

BRIEF *AMICUS CURIAE* OF FIRST AMENDMENT COALITION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus First Amendment Coalition ("FAC") is a section 501(c)(3) nonprofit organization dedicated to First Amendment freedoms—primarily freedom of speech and the press—and government transparency. Founded in 1988, FAC works to enhance and protect these rights through a free legal consultation service, educational and information services, public advocacy of various kinds, and litigation, including the initiation of litigation in its own name and the filing of briefs *amicus curiae*. FAC receives support from foundations and from its members, who include individuals and corporations.

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. Consents are on file by all parties for the filing of amicus briefs in this matter.

INTRODUCTION AND SUMMARY OF ARGUMENT

A disposition memorandum written by a deputy district attorney recommending the dismissal of a case led to his firing and ultimately to this Court's ruling in *Garcetti* v. *Ceballos*, 547 U.S. 410 (2006). This case involves neither a rejected recommendation nor any disagreement about public policy between government officials, but truthful testimony by a government employee in a judicial proceeding that led to the conviction of a public official who had violated the public trust by engaging in criminal conduct. The *Garcetti* decision may not be read so expansively as to permit the dismissal of a public employee simply because he told the truth, under oath, in court. That cannot be squared with principles established and repeated throughout the history of the First Amendment: that truthful speech is at the apex of the constitutional safeguard; that truthful speech about matters of public concern and the conduct of public officials is especially protected; and that truthful testimony in court, in particular, may not serve as the basis for public sanction. Our brief is devoted to a discussion of these core principles, their evolution, and their application.

ARGUMENT

I. The United States Has Long Recognized That Expansive Protection of Truthful Speech Is Essential to a Free and Democratic Society

So firmly and repeatedly has it been stated that a central basis for protecting freedom of expression – perhaps *the* central basis – is its essential role in determining truth that it is difficult to choose amongst quotations to offer for that proposition. From Jefferson ("truth is great and will prevail if left to herself") to Holmes ("the theory of our Constitution" is that freedom of speech is both "the best test of truth" and "truth is the only ground upon which [men's] wishes safely can be carried out"), the need to protect freedom of speech, and the truth that can be revealed by it, has been paramount in First Amendment jurisprudence. An Act for Establishing Religious Freedom (enacted 1785), 12 Hening, Statutes of Virginia (1823), at 84, 85; *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). This Court has long since concluded that "[t]ruth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964).

Protection of truthful speech is deeply rooted in American history. In pre-revolutionary days, the Zenger trial offered a stark example of the value placed by the colonists on the freedom to speak truthfully. Charged with seditious libel for publishing articles critical of the Royal Governor of New York, Zenger was tried at a time when truth

was not a defense to criminal libel. Notwithstanding that law, Zenger's counsel, Andrew Hamilton, appealed to the jury to consider the defense of truth, stating:

> It is the Cause of Liberty; and I make no Doubt but your upright Conduct, this Day, will not only entitle you to the Love and Esteem of your Fellow-Citizens; but every Man, who prefers Freedom to a Life of Slavery, will bless and honour You, as Men who have baffled the Attempt of Tyranny; and by an impartial and uncorrupt Verdict, have laid a noble Foundation for securing to ourselves, our Posterity, and our Neighbors, That, to which Nature and the Laws of our Country have given us a Right, – The Liberty – both of exposing and opposing arbitrary Power (in these Parts of the World, at least) by speaking and writing Truth.

J. Alexander, A Brief Narrative of the Case and Trial of John Peter Zenger 29 (1738). Although the royal judge instructed the jurors that they should not consider truth as a defense, the jury nonetheless acquitted.

The jury's decision to acquit Zenger is neither legal precedent nor an authoritative statement of the law, but "in the popular tradition of free speech and press, Zenger's case set a very important precedent indeed. It stood for the proposition that truthful statements on matters of public concern were protected speech." Michael Kent Curtis, Free Speech, "The People's Darling Privilege" 42 (2000). Hamilton's plea that the freedom to speak the truth will deter tyranny and despotism

permeated the discussion in the years leading up to the adoption of the Bill of Rights. The account of the trial went through fourteen editions before 1791, and popular support for the outcome is evidenced by the references to Zenger in the discussions preceding the adoption of the First Amendment. *See* Zechariah Chafee, Jr., FREE SPEECH IN THE UNITED STATES 21 (1941).

Not long after the adoption of the Bill of Rights, Congress passed the Sedition Act of 1798, probably the most direct and dangerous challenge to free expression in the nation's history. But even that law allowed for the defense of truth, providing that it was a crime, punishable by a $5,000 fine and five years in prison, "if any person shall write, print, utter or publish . . . any *false*, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . , or the President . . . , with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States." 1 Stat. 596 (1798) (emphasis added).

Perhaps the best demonstration of the constitutional premium placed on truthful speech is the length this Court has gone to protect even *false* speech in the service of protecting speech that is true. That, after all, is the basis for the actual malice test established in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). After first bolstering true speech by placing the burden of proving falsity on a public official in a libel case, the *Sullivan* Court took the crucial step of protecting even false speech made without knowledge of falsity or reck-

less disregard of truth or falsity. *Id.* at 279-80. Noting the chilling effect on truthful speech by a contrary rule, the Court explained that "[a]llowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred." *Id.* at 279. The Court further observed that "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" *Id.* at 279 n.19 (quoting J. Mill, ON LIBERTY 15 (Blackwell ed. 1947)).

Ten years later, the Court began to extend these protections to private figure cases. In *Gertz* v. *Robert Welch, Inc.*, the Court held that in cases involving matters of public interest, states could not impose liability without fault, and presumed or punitive damages could not be imposed without demonstrating actual malice. 418 U.S. 323 (1974). Recognizing that the actual malice standard protected some false speech, the Court explained that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." *Id.* at 341.

Most recently, the Court required private figure plaintiffs to prove the falsity of their statements when suing over a matter of public concern. *See Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 776 (1986). In *Hepps*, the Court stated "that the common law's rule on falsity—that the defendant must bear the burden of proving truth—must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity[.]" *Id.* at 776. *Hepps* also made clear that the Court's underlying motivation was

the protection of truth, expressing its belief "that the Constitution requires us to tip [the scales] in favor of protecting true speech . . . [t]o ensure that true speech on matters of public concern is not deterred." *Id*. at 776-77.

That the First Amendment can even protect lies in the service of preventing the chilling of truthful speech is powerfully demonstrated in *United States* v. *Alvarez,* 132 S. Ct. 2537 (2012). In that particularly difficult case addressing the constitutionality of the Stolen Valor Act, which prohibited falsely claiming to have earned military decoration, the Court was deeply divided, but not on the proposition that false speech is sometimes protected for the greater good of protecting truthful speech. *Id*. at 2548. Justice Kennedy's plurality opinion concluded that even though the statute "targets falsity and nothing more," it still threatens truthful speech by "cast[ing] a chill, a chill the First Amendment cannot permit." *Id*. at 2548-49. Justice Breyer's concurring opinion, referring back to *Gertz*, observed that "as the Court has often said, the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart." *Id*. at 2553. And Justice Alito's dissenting opinion, while concluding that the Act in question was constitutional, observed that "there are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech." *Id*. at 2564.

The overriding importance of protecting truthful speech is also reflected in this Court's opinions

outside the libel area. Initially, commercial speech did not fall within the ambit of the First Amendment. *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942). Commencing with *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, the Court ruled that limitations on truthful commercial speech also required First Amendment scrutiny. 425 U.S. 748 (1976). Framing the issue as "whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity," the Court had little difficulty answering in the negative. *Id.* at 773; *see also Linmark Assocs.* v. *Township of Willingboro*, 431 U.S. 85, 95 (1977) (holding that, despite the important governmental objective of maintaining racially integrated communities, "the First Amendment disabled the State from achieving its goal by restricting the free flow of truthful information").

This was followed by *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, in which the Court articulated what would become the seminal test for the constitutionality of restrictions on commercial speech. 447 U.S. 557 (1980). Recognizing the importance of protecting truthful speech in the commercial realm, the four-part test laid out in *Central Hudson* first requires determining whether the speech at issue is true and accurate. *Id.* at 566. "If the communication is [not] misleading . . . the government's power is more circumscribed" and "[t]he State must assert a substantial interest to be achieved by restrictions on commercial speech." *Id.* at 564. Since *Central Hudson*, this Court has gradually expanded the commercial speech doctrine, largely fueled by the importance of disseminating truthful information to consumers. *See Sorrell* v. *IMS*

Health Inc., 131 S. Ct. 2653, 2670-71 (2011) ("But 'the fear that people would make bad decisions if given truthful information' cannot justify content-based burdens on speech."); *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 562 (2001) (holding that the ban on tobacco advertisements "constitute nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers."); *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 501 (1996) ("[W]hen a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.").

The law of privacy offers yet another example of this Court's consistent protection of truthful speech, especially in matters involving areas of public concern. In *Cox Broadcasting Corp.* v. *Cohn*, the Court held that an organization that accurately reported a rape victim's name from official records could not be liable for, *inter alia*, invasion of privacy. 420 U.S. 469, 491-96 (1975). Acknowledging that "the interests on both sides are plainly rooted in the traditions and significant concerns of our society," the Court stated that while "political institutions must weigh the interests in privacy with the interests of the public to know" the truth, at "the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records." *Id.* at 491, 496. Addressing similar circumstances in *Florida Star* v. *B.J.F.*, the Court cited the "overarching 'public interest, secured by

the Constitution, in the dissemination of truth,'" stating that "punishing truthful publication in the name of privacy" would be an "extraordinary measure[.]" 491 U.S. 524, 533, 540 (1989). The Court held that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order." *Id*. at 541.

The Court ruled similarly when weighing the interests at stake in the publication of the names of juvenile defendants. *See Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979) ("[S]tate action to punish the publication of truthful information seldom can satisfy constitutional standards."); *Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308, 311 (1977) (striking down an injunction prohibiting the publication of the name or a photograph of a boy being tried before a juvenile court because, once the truthful information was "publicly revealed" or "in the public domain," the court could not constitutionally restrain its dissemination).

This outcome has not varied even when the truthful information had initially been obtained illegally. In *Bartnicki* v. *Vopper*, the defendant broadcasted a conversation that was recorded, by a non-party, in violation of a federal wiretapping statute. 532 U.S. 514, 518-19 (2001). Despite acknowledging that "[p]rivacy of communication is an important interest," the Court held that "enforcement of [the relevant law] . . . implicate[d] the core purposes of the First Amendment because it impose[d] sanctions on the publication of truthful information of public concern," and, for that reason,

the non-party's "illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." *Id*. at 532-35.[2]

Even an asserted "privilege against disclosure of confidential communications" involving the President of the United States has been held insufficient to hamper the search for truthful information. *United States* v. *Nixon*, 418 U.S. 683, 710 (1974). In *Nixon*, the Court refused to quash a non-party subpoena issued to the President, stating "[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive" and the "exceptions 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." *Id*. at 709, 710.

II. The Value of Truthful Speech Is at Its Height in Judicial Proceedings

Certain legal principles are so widely known outside the legal community that every citizen can

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[2] Because of the import of the truth defense, privacy claims are difficult to sustain. *See, e.g., Lake* v. *Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 236 (Minn. 1998) ("[B]ecause of the overlap with defamation and the other privacy torts, a case has rarely succeeded squarely on a false light claim . . . . We are also concerned that false light inhibits free speech guarantees provided by the First Amendment."); *Cain* v. *Hearst Corp.*, 878 S.W.2d 577, 579-81 (Tex. 1994) ("[The Texas Supreme Court] reject[s] the false light invasion of privacy tort" because, *inter alia*, "it lacks many of the procedural limitations that accompany actions for defamation, thus unacceptably increasing the tension that already exists between free speech constitutional guarantees and tort law."). *See generally* Harry Kalven Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?* 31 Law & Contemp. Probs., 326 (1966).

recite them from memory. *See Dickerson* v. *United States*, 530 U.S. 428, 443 (2000) (upholding *Miranda* v. *Arizona*, 384 U.S. 436 (1966), because, *inter alia*, "the warnings have become part of our national culture"). First among them is the duty to testify to "the truth, the whole truth and nothing but the truth." *See United States* v. *Calandra*, 414 U.S. 338, 345 (1974) ("The duty to testify has long been recognized as a basic obligation that every citizen owes his Government."); *Piemonte* v. *United States*, 367 U.S. 556, 559 n.2 (1961) ("Every citizen . . . owes to his society the duty of giving testimony to aid in the enforcement of law."); *Blair* v. *United States*, 250 U.S. 273, 282 (1919) (in context of grand jury proceeding, holding that "the witness is bound not only to attend but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry.").

It is for this reason that "[p]erjured testimony 'is at war with justice,'" as "it can cause a court to render a 'judgment not resting on truth.'" *Alvarez*, 132 S. Ct. at 2546; *see also United States* v. *Dunnigan*, 507 U.S. 87, 97 (1993) ("To uphold the integrity of our trial system . . . the constitutionality of perjury statutes is unquestioned."). "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." *Alvarez*, 132 S. Ct. at 2546. Therefore, "[t]here is no gainsaying that arriving at the truth is a fundamental goal of our legal system." *United States* v. *Havens*, 446 U.S. 620, 626 (1980); *see also United States* v. *Mezzanatto*, 513 U.S. 196, 204

(1995) (citing with approval the adoption of court rules that "*enhance[]* the truth-seeking function of trials" and "result in more accurate verdicts") (emphasis in original); *Nix* v. *Whiteside*, 475 U.S. 157, 166 (1986). The truth seeking policy is particularly important in criminal trials. *See Jenkins* v. *Anderson*, 447 U.S. 231, 238 (1980); *Havens*, 446 U.S. at 626.[3]

To encourage the duty to testify truthfully, it is well established public policy that in-court testimony receives special protection against civil claims. At common law and today, parties and witnesses have been immune from subsequent damages suits for their testimony in judicial proceedings. *Briscoe* v. *LaHue*, 460 U.S. 325, 330-33 (1983). The courts protect this privilege because "the claims of the individual must yield to the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible." *Id.* at 332-33 (quoting *Calkins* v. *Sumner*, 13 Wis. 193, 197 (1860)).

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[3] Under the Civil Rights Act, Congress has provided, and this Court has consistently upheld, a private cause of action for witnesses against those who seek to intimidate or threaten "any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified." 42 U.S.C. § 1985(2); *Haddle* v. *Garrison*, 525 U.S. 121, 126 (1998) (an at-will employee may file a claim under 42 U.S.C. § 1985(2) for damages against a third party who conspires with his employer to fire him to deter him from testifying at an upcoming criminal trial); *Kush* v. *Rutledge*, 460 U.S. 719, 726-27 (1983) (permitting claims under § 1985(2) against state university officials for conduct related to student's lawsuit against the university).

This Court held in *Briscoe* that this immunity extends equally to testimony by public officials and private citizens. *Id.* at 335-36 & 355 n.15. More recently, this Court extended the reasoning of *Briscoe* to grand jury witnesses – again to protect truthful testimony and to discourage false testimony. *Rehberg* v. *Paulk*, 132 S. Ct. 1497, 1505 (2012) ("Without absolute immunity for witnesses . . . the truth-seeking process at trial would be impaired. 'Witnesses might be reluctant to come forward to testify,' and even if a witness took the stand, the witness 'might be inclined to shade his testimony in favor of the potential plaintiff' for fear of subsequent liability."). *Cf. Butterworth* v. *Smith*, 494 U.S. 624, 635 (1990) (recognizing the importance of a witness' "ability to make a truthful public statement" outside of court notwithstanding the longstanding recognition of a societal interest in grand jury secrecy).

By a parity of reasoning, a public employee's obligation to testify truthfully should be accompanied by the right to do so free from retaliation. If a public employee's truthful testimony were not protected by the First Amendment, the employee would be faced with an intolerable Hobson's choice if called to testify. *See Caruso* v. *City of New York*, __ F. Supp. 2d __, No. 06 Civ. 5997, 2013 WL 5382206, at *15 (S.D.N.Y. Sept. 26, 2013) (Abrams, J.) ("He or she 'could either (1) honestly answer the question, in which case, as a matter of law, she could be fired; (2) commit perjury; or (3) refuse to answer the question posed and be held in contempt.'").

Nothing in *Garcetti* requires government employees to be put to such a choice. Nothing in the First Amendment permits it.

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

Dated: March 10, 2014

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