No. 13-______

IN THE

# Supreme Court of the United States

EDWARD LANE,

*Petitioner*,

v.

STEVE FRANKS,

*Respondent.*

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

**PETITION FOR A WRIT OF CERTIORARI**

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

## QUESTIONS PRESENTED

1. Is the government categorically free under the First Amendment to retaliate against a public employee for truthful sworn testimony that was compelled by subpoena and was not a part of the employee's ordinary job responsibilities?

2. Does qualified immunity preclude a claim for damages in such an action?

## PARTIES TO THE PROCEEDINGS BELOW

Pursuant to Rule 14.1(b), the parties to the proceedings below include petitioner, respondent, and Central Alabama Community College, a defendant-appellee below.

**TABLE OF CONTENTS**

QUESTIONS PRESENTED ................................. i

PARTIES TO THE PROCEEDINGS BELOW..... ii

TABLE OF AUTHORITIES ................................ iv

PETITION FOR A WRIT OF CERTIORARI ....... 1

OPINIONS BELOW............................................. 1

JURISDICTION ................................................... 1

STATEMENT OF THE CASE .............................. 1

REASONS FOR GRANTING THE WRIT............ 6

I. The Eleventh Circuit's Holding Conflicts With The Precedents Of Other Courts Of Appeals. .......................................................... 6

II. The Eleventh Circuit's Decision Conflicts With This Court's Precedents. ..................... 14

CONCLUSION ................................................... 24

APPENDICES .................................................... 1a

Appendix A, Court of Appeals Decision ............. 1a

Appendix B, District Court Decision ................. 9a

## TABLE OF AUTHORITIES

### Cases

*Blair v. United States*,
250 U.S. 273 (1919)................................................ 18

*Brammer-Hoelter v. Twin Peaks Charter Acad.*,
492 F.3d 1192 (10th Cir. 2007).............................. 12

*Branzburg v. Hayes*,
408 U.S. 665 (1972)....................................... passim

*Briscoe v. LaHue*,
460 U.S. 325 (1983)................................................ 18

*Calkins v. Sumner*,
13 Wis. 193 (1860).................................................. 18

*Casey v. Cabool*,
12 F.3d 799 (8th Cir. 1993).................................... 12

*Charles v. Grief*,
522 F.3d 508 (5th Cir. 2008).................................. 12

*Chrzanowski v. Bianchi*,
725 F.3d 734 (7th Cir. 2013).......................... 8, 9, 12

*Clairmont v. Sound Mental Health*,
632 F.3d 1091 (9th Cir. 2011)........................ passim

*Connick v. Myers*,
461 U.S. 138 (1983).......................................... 15, 21

*Dahlia v. Rodriguez*,
No. 10-55978, -- F.3d ----, 2013 WL 4437594
(9th Cir. Aug. 21, 2013) ......................................... 11

*Davis v. Cook Cnty.*,
534 F.3d 650 (7th Cir. 2008).................................. 12

*Fairley v. Fermaint*,
482 F.3d 897 (7th Cir. 2007)....................................9

*Garcetti v. Ceballos*,
547 U.S. 410 (2006)....................................... passim
*Huppert v. City of Pittsburg*,
574 F.3d 696 (9th Cir.2009).................................. 11
*Karl v. City of Mountlake Terrace*,
678 F.3d 1062 (9th Cir. 2012).......................... 10, 13
*Morales v. Jones*,
494 F.3d 590 (7th Cir. 2007).......................... 5, 9, 14
*Morris v. Crow*,
142 F.3d 1379 (11th Cir. 1998).............................. 20
*Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*,
391 U.S. 563 (1968)................................... 14, 16, 22
*Piemonte v. United States*,
367 U.S. 556 (1961)............................................... 19
*Rehberg v. Paulk*,
132 S. Ct. 1497 (2012)........................................... 19
*Reilly v. City of Atlantic City*,
532 F.3d 216 (3d Cir. 2008) ........................... passim
*Snyder v. Phelps*,
131 S. Ct. 1207 (2011)............................................ 21
*United States v. Calandra*,
414 U.S. 338 (1974).......................................... 18, 19
*United States v. Havens*,
446 U.S. 620 (1980)............................................... 18
*United States v. N.Y. Tel. Co.*,
434 U.S. 159 (1977)............................................... 19
*United States v. Nixon*,
418 U.S. 683 (1974)............................................ 7, 18
*United States v. Schmitz*,
634 F.3d 1247 (11th Cir. 2011).......................... 3, 22

*Wilburn v. Robinson*,
480 F.3d 1140 (D.C. Cir. 2007) .............................. 12

**Statutes**

28 U.S.C. § 1254(1) ...................................................... 1

Ala. Code § 36-26-10(b)(5) .......................................... 17

Ala. Code § 36-26A-3 .................................................. 17

**Other Authorities**

Public Employees for Environmental
Responsibility, State Whistleblower Laws –
Overview,
http://www.peer.org/assets/docs/wbp2/overvie
w.pdf ........................................................................ 18

*Schmitz Fraud Trial Begins Today*,
The Birmingham News, Aug. 18, 2008 ................. 22

*Schmitz's Case Grows into War of Words*,
The Birmingham News, May 7, 2008 ................... 22

Virginia Martin, *CITY Coordinator Testifies
About Schmitz's Work*,
The Birmingham News, Feb. 17, 2009.................. 22

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Edward Lane respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is unpublished. The district court's opinion (Pet. App. 9a-35a) is unpublished.

## JURISDICTION

The court of appeals issued its judgment on July 24, 2013. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

This is a First Amendment retaliation case arising from a public employee's truthful subpoenaed testimony in a federal fraud prosecution. Petitioner alleges that respondents terminated him in retaliation for his compelled testimony at the criminal trial of a corrupt legislator who abused her position to defraud the government. Affirming the district court, the court of appeals held that respondents were completely free under the First Amendment to retaliate against petitioner for that testimony by firing him. The court of appeals expressly recognized that its decision conflicts with the precedent of at least two other circuits.

1. Petitioner is the former Director of the Community Intensive Training for Youth Program ("CITY") of Central Alabama Community College. CITY is a training program for at-risk youth that

operated in part with federal funding. This case arises from petitioner's testimony in a federal fraud prosecution brought by the U.S. Attorney for the Northern District of Alabama against Suzanne Schmitz, an Alabama state legislator. The United States prosecuted Schmitz for fraudulently arranging and concealing a no-show job for herself with CITY.

The prosecution subpoenaed petitioner to testify both before a federal grand jury and at two criminal trials. Pet. App. 12a. Petitioner truthfully testified that, in the course of an audit of CITY's finances, he learned that Representative Schmitz was receiving a paycheck from CITY—and indeed was one of its highest-paid employees—but was not doing any work for CITY. *Id*. 3a, 12a-13a. Petitioner attempted to require Schmitz to perform work commensurate with her position, including by assigning her to work as a counselor. Schmitz refused. After petitioner terminated Schmitz for nonperformance, Schmitz informed another CITY employee that she intended to "get [petitioner] back," and that, if petitioner ever sought funds for CITY from the legislature, she would inform him, "you're fired." *Id*. 2a, 11a.

In the wake of petitioner's testimony, the grand jury returned an indictment charging Schmitz with fraud in connection with federal funds and mail fraud. Petitioner testified again at Schmitz's two criminal trials (the first of which ended in a mistrial), and a jury convicted Schmitz of all counts but one. *Id*. 3a. In subsequently affirming Schmitz's conviction for mail fraud, the Eleventh Circuit explained that:

> Schmitz engaged in a calculated and extensive pattern of fraudulent conduct designed to allow her to collect a state-government salary while performing almost no work. She accomplished this scheme through demonstrably false reports and time sheets. And, when people started asking questions, she used her status as state legislator to keep the scheme going.

*United States v. Schmitz*, 634 F.3d 1247, 1265 (11th Cir. 2011). All told, Schmitz fraudulently obtained $177,251.82 in public funds. She was ultimately sentenced to thirty months' imprisonment, and forced to pay restitution.

Soon after petitioner testified at Schmitz's first trial, respondent Steve Franks—President of the Central Alabama Community College—fired petitioner. Pet. App. 3a. The stated rationale for the termination was CITY's poor financial status. *Id*. 14a. Indeed, CITY nominally terminated all of its twenty-nine recent hires (including petitioner) who were deemed "probationary employees." But just two days later, Franks rescinded all the terminations but those of petitioner and one other employee. CITY then replaced petitioner with a new interim director. *Id*. 3a-4a.

2. Petitioner filed this lawsuit, alleging that his termination constituted retaliation for his testimony against Schmitz in violation of the First Amendment

and state law.[1] Pet. App. 4a. Petitioner alleged that Franks terminated him as retribution for the testimony, in collaboration with Schmitz and her political allies. *Id*. 4a, 14a-15a. He sought damages and equitable relief, including reinstatement to the "position in which he would have worked absent the Defendant's retaliatory treatment." *Id.* 23a-24a.

Franks filed a motion for summary judgment, which the district court granted. The court recognized that "genuine issues of material fact exist in this case concerning Dr. Franks' true motivation for terminating Mr. Lane's employment," but it held that petitioner's claims were barred. *Id*. 21a. The district court held that petitioner's compelled testimony was not entitled to any First Amendment protection. Applying Eleventh Circuit precedent, the court explained that

> Mr. Lane's testimony did not occur in the workplace, but he learned of the information that he testified about while working as Director at C.I.T.Y. Because he learned the information while performing in his official capacity as Director at C.I.T.Y., the speech can still be considered as part of his official job duties and not made as a citizen on a matter of public concern.

*Id*. 29a.

---

[1] Petitioner also initially brought claims against Central Alabama Community College and claims under state law. He has not pursued those claims, and they are not at issue here.

On petitioner's appeal, the Eleventh Circuit affirmed, agreeing with the district court that no constitutional violation had occurred because petitioner's speech was not protected. Pet. App. 4a. The court read its precedent to hold that subpoenaed testimony regarding facts that relate to a public employee's official duties is not protected speech because it is not made "as a public comment" on the employer's practices. *Id*. 6a (quotation marks omitted). The court explained that the fact "[t]hat Lane testified about his official activities pursuant to a subpoena and in the litigation context, in and of itself, does not bring Lane's speech within the protection of the First Amendment." *Id*. 7a. It brushed aside the fact that petitioner's "official duties did not distinctly require him to testify at criminal trials" by stating that "formal job descriptions do not control." *Id*. Instead, it deemed dispositive that petitioner had been subpoenaed to testify because he was "acting pursuant to his official duties as CITY's Director when he investigated Schmitz's work activities, spoke with Schmitz and other CACC officials about Schmitz's employment, and ultimately terminated Schmitz's employment." *Id*.

The Eleventh Circuit did not identify any court that had adopted its view of the First Amendment and acknowledged that "[o]ther circuits seem to have decided this issue differently." *Id*. 7a n.3. It cited as examples the Third and Seventh Circuits' adoption of the opposite rule that subpoenaed testimony is always protected by the First Amendment. *Id.* (citing *Morales v. Jones*, 494 F.3d 590, 598 (7th Cir. 2007) and *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008)).

But the Eleventh Circuit deemed those decisions inconsistent with its own precedent, and gave them no weight. *Id.*

The court further held that because no First Amendment violation had occurred at all, it necessarily followed that Franks would be entitled to qualified immunity vis-à-vis a claim for damages. *Id*. 4a n.2. Having resolved the issue solely as a matter of First Amendment law and qualified immunity, the court of appeals declined to "decide about Franks's defense of sovereign immunity." *Id*. 4a.

This petition followed.

## REASONS FOR GRANTING THE WRIT

In denying any First Amendment protection to petitioner's subpoenaed testimony, the Eleventh Circuit applied a uniquely restrictive interpretation of the First Amendment. That holding conflicts with the precedents of at least three other federal circuits, as well as with this Court's holdings regarding public employee speech and the public interest in sworn testimony.

### I. The Eleventh Circuit's Holding Conflicts With The Precedents Of Other Courts Of Appeals.

The Eleventh Circuit's decision denying First Amendment protection to subpoenaed testimony conflicts with settled precedent in the Third, Seventh, and Ninth Circuits.

1. In *Reilly v. City of Atlantic City*, 532 F.3d 216, 231 (3d Cir. 2008), the plaintiff police officer conducted

an internal corruption investigation and then related the results of that investigation in sworn testimony. After he was disciplined in retaliation, he filed suit. The Third Circuit held that the First Amendment's protections apply to that testimony. *Id.*

The Third Circuit reasoned 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." *Id.* (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006)). On its view, "[t]he notion that all citizens owe an independent duty to society to testify in court proceedings is . . . well-grounded in Supreme Court precedent." *Id.* at 229. It cited *Branzburg v. Hayes*, 408 U.S. 665, 686 (1972), which held that the so-called newsman's privilege was "outweighed by the general obligation of a citizen to appear before a grand jury or at trial, pursuant to a subpoena, and give what information he possesses," as well as *United States v. Nixon*, 418 U.S. 683, 709 (1974), which explained:

> The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

*See Reilly*, 532 F.3d at 229.

The Third Circuit specifically rejected the defendants' argument that under this Court's decision in *Garcetti*, the plaintiff officer's testimony was

unprotected because it "stemmed from his official duties in the investigation." *Id.* at 231.

The Third Circuit further found that the defendants were not entitled to qualified immunity, reasoning that "[t]he protected status of courtroom testimony was clearly established" well before, and was not called into question by, *Garcetti*. *Id*. at 232.

The Seventh Circuit has adopted the identical rule that "[w]hen a public employee gives testimony pursuant to a subpoena, fulfilling the 'general obligation of [every] citizen to appear before a grand jury or at trial,' he speaks 'as a citizen' for First Amendment purposes." *Chrzanowski v. Bianchi*, 725 F.3d 734, 741 (7th Cir. 2013) (quoting *Branzburg*, 408 U.S. at 686). In *Chrzanowski*, a state prosecutor provided subpoenaed testimony against his supervisor, and was subsequently fired. *Id*. at 736-37. The court found his speech protected, and held that qualified immunity did not apply. *See id*. at 743.

The Seventh Circuit reasoned that "[c]areful attention to the reasoning behind *Garcetti*" dictated its result. *Id*. at 741. The court explained that *Garcetti*'s rule distinguishing between unprotected speech made pursuant to official duties and protected private speech rested on three bases: first, that the individual employee does not have a personal stake in speech made pursuant to official duties; second, that restrictions on speech made pursuant to official duties do not undermine the societal value of public speech, because the public employee remains free to participate in civic discourse; and finally, that a contrary approach would interject the federal courts

into garden-variety disputes between public employees and their superiors. *Id*.

The Seventh Circuit concluded that subpoenaed testimony does not implicate any of these concerns. First, "the individual person has a strong interest in complying with the demands of a subpoena: apart from whatever desire a public employee might have to assist in the administration of justice, failure to comply with a subpoena can result in lengthy incarceration." *Id*. Second, "[t]he public also has a substantial interest in hearing such speech." *Id*. at 742. Indeed, the root of the subpoena power is the notion that the "'public . . . has a right to every man's evidence.'" *Id*. (quoting *Branzburg*, 408 U.S. at 688). And finally, there is no risk that protecting subpoenaed testimony would constitutionalize employment grievances, because employers have no legitimate interest in dissuading their employees from testifying truthfully pursuant to a subpoena. *Id*. The Seventh Circuit's ruling is consistent with a settled line of that court's precedent. *See Morales v. Jones*, 494 F.3d 590, 603-04 (7th Cir. 2007) (holding that a police officer's testimony at a civil deposition for a co-worker's lawsuit was protected speech); *Fairley v. Fermaint*, 482 F.3d 897, 902 (7th Cir. 2007) (holding that the First Amendment protected prison guards who testified about prison conditions in support of inmate lawsuits).

The Ninth Circuit applies a similar rule. In *Clairmont v. Sound Mental Health*, 632 F.3d 1091 (9th Cir. 2011), the court held that the First Amendment prohibits retaliation against a mental health worker

who testified under subpoena in a criminal proceeding. The defendant argued that the testimony was pursuant to the employee's duties because "the content . . . described the nature of his duties as a contract counselor." *Id*. at 1106. Relying on *Garcetti*, the Ninth Circuit rejected that argument, explaining that public employees are the most likely to be well-informed about the subject matter of their employment, so that it is "'essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.'" *Id*. (quoting *Garcetti*, 547 U.S. at 421). Because there was "no evidence that testifying in court . . . was a part of [the plaintiff's] official duties," the speech was properly regarded as private speech. *Id*. The court further rejected the defendant's claim to qualified immunity, as the relevant right had been long established. *Id*. at 1110.

Similarly, in *Karl v. City of Mountlake Terrace*, 678 F.3d 1062 (9th Cir. 2012), a confidential administrative assistant gave subpoenaed deposition testimony in a civil rights lawsuit. The court held that her testimony related to a matter of public concern, and that, indeed, it was "not a close case." *Id*. at 1069 (quotation marks omitted). The employee's testimony was properly characterized as that of a private citizen, even though "her relevant knowledge was acquired by virtue of her position" because "[w]hile [her] knowledge about certain work-related matters may owe its existence to her job as a confidential assistant, her testimony . . . does not." *Id*. at 1072. The court noted that a confidential assistant had no "duty under state law . . . to testify truthfully as part of her professional responsibilities." *Id*. at 1071 n.4. And it

rejected the defendant's claim of qualified immunity as foreclosed by *Garcetti*, holding that "a reasonable official would also have known that a public employee's speech on a matter of public concern is protected if the speech is not made pursuant to her official job duties, even if the testimony itself addresses matters of employment." *Id*. at 1074 (citing *Garcetti*, 547 U.S. at 421). *See also Dahlia v. Rodriguez*, No. 10-55978, -- F.3d ----, 2013 WL 4437594, at *1 (9th Cir. Aug. 21, 2013) (en banc) (overruling the holding of *Huppert v. City of Pittsburg*, 574 F.3d 696 (9th Cir. 2009), that a police officer's testimony regarding departmental corruption was not protected because, under California law, police officers were required to testify to grand juries as part of their jobs).

2. The Eleventh Circuit correctly acknowledged that other courts of appeals would have resolved the First Amendment issue in petitioner's favor. *See* Pet. App. 7a n.3. Under the precedent of the Third, Seventh, and Ninth Circuits, petitioner's subpoenaed testimony would have been entitled to full First Amendment protection as citizen speech on a matter of public concern. The fact that those courts have decided multiple cases specifically rejecting the rationale adopted by the Eleventh Circuit demonstrates that the conflict is intractable and cannot be resolved without this Court's intervention.[2]

---

[2] This case also implicates a secondary conflict over the proper standard of review governing whether speech is made in

The Third and Seventh Circuits adopt the most protective rule, holding categorically that whenever a public employee testifies pursuant to a subpoena, the First Amendment protects the speech. *See Reilly*, 532 F.3d at 231; *Chrzanowski*, 725 F.3d at 741. As the Third Circuit explained, the First Amendment therefore applies even if "an employee's official responsibilities provided the initial impetus to appear in court." *Reilly*, 532 F.3d at 231. Here, petitioner testified pursuant to a subpoena, and under the precedent of these two circuits, his speech would be protected on that basis alone.

---

the course of an employee's duty. The Eleventh Circuit held that "[w]hether the subject speech was made by the public employee speaking as a citizen or as part of the employee's job responsibilities is a question of law for the court to decide." Pet. App. 6a. The Fifth, Tenth, and D.C. Circuits agree. *See Charles v. Grief*, 522 F.3d 508, 513 n.17 (5th Cir. 2008); *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1202-03 (10th Cir. 2007); *Wilburn v. Robinson*, 480 F.3d 1140, 1149 (D.C. Cir. 2007). The Third, Seventh, Eighth, and Ninth Circuits, on the other hand, have reached a contrary result, holding that "whether a particular incident of speech is made within a particular plaintiff's job duties is a mixed question of fact and law" to be resolved by the trier of fact. *Reilly*, 532 F.3d at 227; *see also Davis v. Cook Cnty.*, 534 F.3d 650, 653 (7th Cir. 2008); *Casey v. Cabool*, 12 F.3d 799, 803 (8th Cir. 1993) ("[A]ny underlying factual disputes concerning whether the speech at issue [is] protected should [be] submitted to the jury."); *Clairmont*, 632 F.3d at 1105. Because this case was decided on summary judgment, it provides an appropriate vehicle for illuminating this conflict as well.

The Ninth Circuit's rule favors public employers slightly more; it permits an inquiry into whether the petitioner's job duties include sworn testimony. But that court would have ruled in petitioner's favor because here, as in *Clairmont*, there was "no evidence that testifying in court . . . was a part of [petitioner's] official duties." 632 F.3d at 1106. Petitioner was a civil servant directing a program for at-risk youth. He was not a law enforcement official, nor was he the sort of employee who would regularly appear in court for any reason. All he did was cooperate with a subpoena, issued by a federal court, to appear and testify truthfully. That subpoena was issued to him in his individual capacity, and the consequences for defying the subpoena were his alone to bear. Under the Ninth Circuit's rule, petitioner's speech would have been protected.

The Eleventh Circuit reached a contrary result in this case by emphasizing that "the subject matter of [petitioner's] testimony touched only on acts he performed as part of his official duties," Pet. App. 7a. But the Third, Seventh, and Ninth Circuits have all held that same fact to be essentially irrelevant. *See Karl*, 678 F.3d at 1074 ("[A] public employee's speech on a matter of public concern is protected if the speech is not made pursuant to her official job duties, even if the testimony itself addresses matters of employment."); *Reilly*, 532 F.3d at 231 ("[T]he speech at issue on this appeal, Reilly's trial testimony, appears to have stemmed from his official duties in the investigation," but "the act of offering truthful testimony is the responsibility of every citizen, and the First Amendment protection associated with fulfilling

that duty of citizenship is not vitiated by one's status as a public employee."); *Morales*, 494 F.3d at 598 ("Morales testified about speech he made pursuant to his official duties and we must determine whether that fact renders his deposition unprotected. We hold that it does not.").

Moreover, the Third, Seventh, and Ninth Circuits would each have held that Franks was not entitled to qualified immunity. As the various courts of appeals explained, this Court's public employee speech cases and its cases regarding the importance of sworn testimony all indicate that sworn testimony by public employees merits First Amendment protection. *See Clairmont*, 632 F.3d at 1109; *Morales*, 494 F.3d at 605-06 (Rovner, J., concurring); *Reilly*, 532 F.3d at 232; This Court's precedents have been on the books for years, and certainly long before 2009, when petitioner was terminated.

## II. The Eleventh Circuit's Holding Conflicts With This Court's Precedents.

Certiorari also is warranted because the Eleventh Circuit's holding is contrary to this Court's precedents regarding both public employee speech and the role of sworn testimony.

"[A] citizen who works for the government is nonetheless a citizen." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). Because "the threat of dismissal from public employment is . . . a potent means of inhibiting speech," *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 574 (1968), "[t]he First Amendment limits the ability of a public employer to

leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens," *Garcetti*, 547 U.S. at 417. Those liberties necessarily include the right to participate in public affairs, and to comment on matters of public concern. *See Connick v. Myers*, 461 U.S. 138, 145 (1983); *Pickering*, 391 U.S. at 573-74.

This Court has held that the employee's First Amendment interests must give way to an employer's prerogatives in two circumstances. First, some speech is altogether unprotected. "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick*, 461 U.S. at 146. Thus, for example, "an employee grievance concerning internal office policy" does not receive First Amendment protection. *Id*. at 154. Similarly, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti*, 547 U.S. at 421.

Second, if the speech is protected, "[t]he question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Id*. at 418. In such cases, the court must find "a balance between the interests of the [employee], as

a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. Thus, any restriction on protected employee speech "must be directed at speech that has some potential to affect the entity's operations." *Garcetti*, 547 U.S. at 418.

In *Garcetti v. Ceballos*, this Court synthesized these principles to hold that "[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Id*. at 419. Because the parties in *Garcetti* agreed that the employee's speech was made in the course of his duties, the Court held it unprotected, and declined to establish "a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." *Id*. at 424. However, the Court did specify that "[t]he proper inquiry is a practical one," and that courts should take care to ensure that employers do not "restrict employees' rights by creating excessively broad job descriptions" in an effort to disable First Amendment protection for employee speech. *Id*.

When a public employee speaks on a matter of public concern, the First Amendment protects that speech not only to vindicate the rights of the employee himself, but also to safeguard "the public's interest in receiving the well-informed views of government employees engaging in civic discussion." *Id*. After all,

public employees are "the members of a community most likely to have informed and definite opinions" about topics that relate to their employment, such that repressing their views would impoverish public debate, imposing "widespread costs" on society in general. *Id*. (quotation marks and citation omitted).

Society has a strong interest in facilitating sworn testimony in public corruption investigations, lest the corruption continue unchecked. Public employees have vital information relating to fraud, waste, and abuse in the government. If the First Amendment fails to protect them when they speak out, there is a substantial risk that they will be deterred from coming forward in the first instance, especially in cases like this one involving powerful public figures who express their willingness to retaliate against whistleblowers. *See* Pet. App. 2a, 11a.[3]

[3] As this case illustrates, the existing patchwork of whistleblower protections cannot vindicate society's interest in combating corruption. Count I of petitioner's amended complaint sought relief under the Alabama State Employees Protection Act, which protects public employees from retaliation if the employee "reports, under oath or in the form of an affidavit, a violation of a law, a regulation, or a rule, promulgated pursuant to the laws of this state, or a political subdivision of this state, to a public body." Ala. Code § 36-26A-3. The district court denied that claim for two reasons. First, the statute expressly exempts "[a]ll officers and employees of the state's institutions of higher learning" from the scope of its coverage, so petitioner cannot state a claim under it. Ala. Code § 36-26-10(b)(5). Second, federal courts enforcing federal laws do not qualify as "public bodies" under the statute, so petitioner's grand jury testimony is categorically not protected by

The societal interest in public employee speech is at its zenith in cases involving subpoenaed testimony. A citizen's "duty to testify has been regarded as 'so necessary to the administration of justice' that the witness' personal interest in privacy must yield to the public's overriding interest in full disclosure." *United States v. Calandra*, 414 U.S. 338, 345 (1974) (quoting *Blair v. United States*, 250 U.S. 273, 281 (1919)). Thus, "'public policy . . . requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible.'" *Briscoe v. LaHue*, 460 U.S. 325, 333 (1983) (quoting *Calkins v. Sumner*, 13 Wis. 193, 197 (1860)); *see also United States v. Havens*, 446 U.S. 620, 626 (1980) ("There is no gainsaying that arriving at the truth is a fundamental goal of our legal system."). The obligation to respond to a subpoena overrides not only an individual's interest in privacy, but also a journalist's interest in protecting his sources, *Branzburg v. Hayes*, 408 U.S. 665, 690-91 (1972), and even a President's executive prerogative, *see United States v. Nixon*, 418 U.S. 683, 709 (1974). Just recently, this Court recognized the importance of such testimony when it held that grand

---

the statute. The Alabama statute is not unique—indeed, it is not even unusual. State whistleblower statutes often include idiosyncratic limitations or exhaustion requirements that render them inapplicable in crucial cases. *See, e.g.*, Public Employees for Environmental Responsibility, State Whistleblower Laws – Overview, http://www.peer.org/assets/docs/wbp2/overview.pdf (last visited Oct. 15, 2013) (comparing and contrasting features of state whistleblower laws).

jury witnesses are absolutely immune from suits arising from their testimony. *See Rehberg v. Paulk*, 132 S. Ct. 1497, 1506 (2012).

Importantly, the obligation to respond truthfully to a subpoena is "shared by *all citizens*," and not incidental to public employment. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (emphasis added) (citing *Branzburg*, 408 U.S. at 669); *see also Calandra*, 414 U.S. at 345 ("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 of course owes to his society the duty of giving testimony to aid in the enforcement of the law."); *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 175 n.24 (1977). No citizen—whether employed by a government or not—may refuse to comply with a subpoena without risking contempt. And public employment will not shield a citizen from the obligation to testify truthfully. A testifying public employee—like any other citizen—is individually compelled to give his evidence. He is not summoned in his official capacity, and the penalty if he does not comply does not run to his office, but instead affects him directly and personally. He alone bears the risk of perjury and contempt, and therefore it is his own interest and society's interest in the truth, and not the interests of his employer, that are at stake when he testifies.

Consequently, when a public employee responds to a subpoena, the most natural conclusion is that he is speaking "as a citizen addressing matters of public concern." *Garcetti*, 547 U.S. at 417. Indeed, in

*Garcetti*, Justice Souter highlighted—without any disagreement from the majority—the unique importance of sworn testimony, arguing that on remand, the plaintiff's "claim relating to truthful testimony in court must surely be analyzed independently to protect the integrity of the judicial process." *Id*. at 444 (Souter, J., dissenting).

Of course, it may be possible to imagine cases in which a public employee's duties include such testimony—and in such cases, the most natural conclusion may not be correct—but this is not such a case. Petitioner's job was to direct the CITY program: to manage its budget and staff, and to ensure that it provided a safe, productive environment for young people who needed help getting back on track. Nowhere—in his official job responsibilities, or anywhere else—was there any obligation to testify in the federal criminal trial of a corrupt legislator.

In reaching a contrary result, the Eleventh Circuit erred twice. First, without acknowledging the import of this Court's decision in *Garcetti*, or any of this Court's settled precedents relating to the societal interest in subpoenaed testimony, the court of appeals applied its prior precedent to hold that truthful testimony "given merely 'in compliance with a subpoena to testify truthfully'—and not as a 'public comment on . . . office policies and procedures, the internal workings of the department, the quality of its employees or upon any issue at all'— . . . was unprotected under the First Amendment." Pet. App. 6a-7a (quoting *Morris v. Crow*, 142 F.3d 1379, 1382-83 (11th Cir. 1998)).

This reasoning is wrong because it enacts a crabbed interpretation of the concept of "speech on a matter of public concern." Under the Eleventh Circuit's interpretation, speech apparently only relates to a matter of public concern if the speaker subjectively intends to make a personal political statement about his employer. But this Court's precedents are not so narrow. In *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011), for example, this Court explained that "[s]peech 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, or when it is a subject of legitimate news interest: that is, a subject of general interest and of value and concern to the public" (internal quotation marks and citations omitted). This Court's precedents also call for courts to evaluate the "content, form, and context" of the speech, "as revealed by the whole record." *Connick*, 461 U.S. at 147-48.

The Eleventh Circuit spurned this inquiry, affording no weight to the "context" of petitioner's statements: subpoenaed testimony in the federal corruption trial of an elected official. As the cases relating to subpoenas, *supra*, establish, the context of subpoenaed testimony should be dispositive, because messages delivered by a subpoenaed witness to a federal court relate *ipso facto* to matters of public concern, *i.e.*, to society's interest in knowing the truth and upholding the law.

Here, however, that general interest in justice is only the tip of the iceberg, because the content of petitioner's testimony was itself plainly a matter of

public concern. Schmitz's federal criminal case, as explained by panel that upheld her conviction, involved "a calculated and extensive pattern of fraudulent conduct designed to allow her to collect a state-government salary while performing almost no work. . . . And, when people started asking questions, she used her status as state legislator to keep the scheme going." *United States v. Schmitz*, 634 F.3d 1247, 1265 (11th Cir. 2011). The outcome of the case resulted in the removal of an elected official from office. And regular developments in the case repeatedly made headlines. *See, e.g.*, Virginia Martin, *CITY Coordinator Testifies About Schmitz's Work*, The Birmingham News, Feb. 17, 2009; *Schmitz Fraud Trial Begins Today*, The Birmingham News, Aug. 18, 2008; *Schmitz's Case Grows into War of Words*, The Birmingham News, May 7, 2008. It is difficult to imagine a better paragon of a "matter of public concern."

The Eleventh Circuit erred a second time when it emphasized that "the subject matter of [petitioner's] testimony touched only acts that he performed as part of his official duties" to support its conclusion that the testimony itself was pursuant to those duties. Pet. App. 7a. That holding flies in the face of this Court's admonition in *Garcetti* and in *Pickering* that public employees—by virtue of their expertise and experience—may possess knowledge that is uniquely valuable. It makes no sense to hold, as the Eleventh Circuit did, that speech offered in a public forum far removed from petitioner's place of employment, for a purpose unrelated to that employment, is unprotected

merely because it related to facts that he learned while on the job. This Court's cases stand for exactly the opposite proposition: that the public has a strong interest in hearing from public employees on matters of public concern that implicates those employees' specialized knowledge. This case bears that out: the people best situated to testify regarding Schmitz's corruption were employees of the CITY program, who witnessed firsthand her failure to perform; and of those employees, petitioner was the best situated of all.

The Eleventh Circuit's analysis is not merely wrong in light of this Court's precedents, but obviously so. As the decisions of the Third, Seventh, and Ninth Circuits establish, a close reading of this Court's cases forecloses the flippant treatment that the Eleventh Circuit here afforded to petitioner's testimony. Although the Eleventh Circuit applied its precedent, both that holding and the court's conclusion regarding qualified immunity should be reversed. Any other result would sanction retaliation against a citizen who did nothing more than his duty—as a citizen—to tell the truth in support of a federal criminal investigation.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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

October 15, 2013

**APPENDIX A**

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

---

No. 12-16192

Non-Argument Calendar

---

Docket No. 4:11-cv-00883-KOB

EDWARD R. LANE,

Plaintiff-Appellant,

versus

CENTRAL ALABAMA COMMUNITY COLLEGE, STEVE FRANKS, Dr.,

Defendants-Appellees.

---

Appeal from the United States District Court
for the Northern District of Alabama

---

(July 24, 2013)

Before MARTIN, FAY, and EDMONDSON, Circuit Judges.

PER CURIAM:

Edward Lane appeals the district court's grant of summary judgment in favor of Steve Franks, the president of Central Alabama Community College ("CACC"), in his 42 U.S.C. § 1983 lawsuit alleging retaliation in violation of the First Amendment. No reversible error has been shown; we affirm.

In September 2006, Lane accepted a probationary position as Director of CACC's Community Intensive Training for Youth Program ("CITY"), a program for at-risk youth. Soon after assuming his duties, Lane audited CITY's finances and discovered that then-state representative Suzanne Schmitz was listed on CITY's payroll but was not reporting for work and had not otherwise performed tangible work for the program.

When Lane raised his concerns about Schmitz internally, he was warned by CACC's then-president and by CACC's lawyer that terminating Schmitz's employment could have negative repercussions for both Lane and CACC. Despite these warnings, Lane terminated Schmitz's employment with CITY after Schmitz refused to report to work.

Schmitz filed a lawsuit seeking to get her job back. Schmitz also commented to another CITY employee that she planned to "get [Lane] back" for terminating her and that, if Lane requested money from the state legislature, she would tell him "you're fired."

Soon after Schmitz's job termination, the FBI began investigating Schmitz and contacted Lane for information. Lane testified before a federal grand jury and -- pursuant to a subpoena -- testified at Schmitz's

August 2008 federal criminal trial for mail fraud and fraud involving a program receiving federal funds.

Lane testified that Schmitz had not reported to work and had not submitted time sheets. Lane described a couple of telephone conversations he had with Schmitz during which Lane asked about Schmitz's work responsibilities and explained that he needed to account for her day-to-day activities for CITY. Lane instructed Schmitz -- verbally and in writing -- to start reporting daily to CITY's Huntsville office. Over the phone, Schmitz responded by telling Lane that she had gotten her job through her connections with the Executive Secretary of the Alabama Education Association. Schmitz later sent a letter in which she refused to report to the Huntsville office and requested that she be allowed to "continue to serve the CITY Program in the same manner as [she had] in the past." Lane testified the he had expressed his concerns about Schmitz's position with CACC's interim president, who agreed that Lane needed to get Schmitz to report to work. Lane testified to these facts again at Schmitz's second criminal trial in February 2009.

In late 2008 -- due to substantial budget cuts -- Lane and Franks began discussing the possibility of employee layoffs, including laying off all probationary employees. In January 2009, Franks sent termination letters to 29 CITY employees with less than 3 years of service, which included Lane. A few days later, however, Franks rescinded nearly all of those terminations: Lane was one of only two employees whose termination was not rescinded. According to

Franks, he rescinded the other terminations after discovering that many of the CITY employees were not in fact probationary.

Lane filed a civil action against Franks -- in both his official and individual capacity -- alleging that Franks terminated Lane in retaliation for testifying against Schmitz, in violation of the First Amendment.[1] The district court granted Franks's motion for summary judgment. Although the district court couched its decision in terms of qualified immunity, it determined that Lane's speech was made pursuant to his official duties as CITY's Director, not as a citizen on a matter of public concern. We reach the same conclusion. Because Lane has failed to establish a *prima facie* case of retaliation, we do not decide about Franks's defense of sovereign immunity.[2]

---

[1] On appeal, Lane has abandoned expressly (1) his claims against CACC; (2) his claims for violation of the Alabama State Employee Protection Act, Ala. Code § 36-26A-3; (3) his claims for violation of 42 U.S.C. § 1985; and (4) his claim for money damages against Franks in his official capacity.

[2] Having concluded that Lane failed to establish even a prima facie case for a violation of a federal right, we necessarily also conclude that Lane failed to demonstrate that Franks violated a federal right of Lane's that was already clearly established before Franks acted. Thus, even if -- if, which we think is not correct -- a constitutional violation of Lane's First Amendment rights occurred in these circumstances, Franks would be entitled to qualified immunity in his personal capacity. *See Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002) (government officials acting within the scope of their discretionary authority are immune from individual civil liability

We review a district court's grant of summary judgment de novo, and we view the evidence and all reasonable factual inferences in the light most favorable to the nonmoving party. *Skop v. City of Atlanta*, 485 F.3d 1130, 1136 (11th Cir. 2007). "Summary judgment is appropriate if the evidence establishes 'no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *McCormick v. City of Fort Lauderdale*, 333 F.3d 1234, 1243 (11th Cir. 2003).

To establish a claim of retaliation for protected speech under the First Amendment, a public employee must show, among other things, that he "spoke as a citizen on a matter of public concern." *See Garcetti v. Ceballos*, 126 S. Ct. 1951, 1958 (2006) (a decision further restricting public employees' protected speech). A government employee whose speech is made pursuant to his official duties is not speaking as a citizen. *See id.* at 1960; *Battle v. Bd. of Regents*, 468 F.3d 755, 760 (11th Cir. 2006). Even if an employee was not required to make the speech as part of his official duties, he enjoys no First Amendment protection if his speech "owes its existence to [the] employee's professional responsibilities" and is "a product that 'the employer itself has commissioned or created'". *See Abdur-Rahman v. Walker*, 567 F.3d 1278, 1286 (11th Cir. 2009).

---

if the official's conduct violates no "clearly established statutory or constitutional rights of which a reasonable person would have known.").

Whether the subject speech was made by the public employee speaking as a citizen or as part of the employee's job responsibilities is a question of law for the court to decide. *See Vila v. Padron*, 484 F.3d 1334, 1339 (11th Cir. 2007). In determining whether a government employee's statement is protected by the First Amendment, "we look to the content, form, and context of a given statement, as revealed by the whole record." *Abdur-Rahman*, 567 F.3d at 1283.

In *Morris v. Crow*, we determined that a police officer's speech -- which consisted of the officer's accident report and his subpoenaed deposition testimony made in conjunction with judicial proceedings, "reiterat[ing]" the observations made in his accident report -- was unentitled to First Amendment protection. 142 F.3d 1379 (11th Cir. 1998). Because the officer prepared his accident report in the normal course of his official duties, the report did not constitute speech "made primarily in the employee's role as citizen." *Id*. at 1382. And because the officer's deposition testimony was given merely "in compliance with a subpoena to testify truthfully" -- and not as a "public comment on sheriff's office policies and procedures, the internal workings of the department, the quality of its employees or upon any issue at all" -- it was unprotected under the First Amendment. *Id*. at 1382-83 ("The mere fact that Morris's statements were made in the context of a civil

deposition cannot transform them into constitutionally protected speech.").[3]

No one disputes that Lane was acting pursuant to his official duties as CITY's Director when he investigated Schmitz's work activities, spoke with Schmitz and other CACC officials about Schmitz's employment, and ultimately terminated Schmitz's employment. That Lane testified about his official activities pursuant to a subpoena and in the litigation context, in and of itself, does not bring Lane's speech within the protection of the First Amendment. *See id.* Furthermore, because formal job descriptions do not control, that Lane's official duties did not distinctly require him to testify at criminal trials falls short of triggering First Amendment protection. *See Abdur-Rahman*, 567 F.3d at 1283.

Although not dispositive, we consider it pertinent that the subject matter of Lane's testimony touched only on acts he performed as part of his official duties.

---

[3] Other circuits seem to have decided this issue differently. *See Morales v. Jones*, 494 F.3d 590, 598 (7th Cir. 2007) (concluding that a public employee's subpoenaed deposition testimony about speech he made pursuant to his official duties was protected by the First Amendment); *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008) (explaining that a police officer's trial testimony was protected by the First Amendment because, although the testimony stemmed from the officer's official duties, the officer had an "independent obligation as a citizen to testify truthfully."). But *Morris* is the law in this Circuit on the question of public employee speech per a subpoena in the context of judicial proceedings.

*See Abdur-Rahman*, 567 F.3d at 1282. As in *Morris*, nothing evidences that Lane testified at Schmitz's trial "primarily in [his] role as a citizen" or that his testimony was an attempt to comment publicly on CITY's internal operations.

In the light of our precedents, the record fails to establish that Lane testified as a citizen on a matter of public concern: as a matter of law, he cannot state a claim for retaliation under the First Amendment. Franks was entitled to summary judgment.

AFFIRMED.

**APPENDIX B**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

| | | |
|---|---|---|
| Edward R. Lane, | ) | |
| | ) | |
| Plaintiff, | ) | |
| vs. | ) | CV-11-BE-0883-M |
| | ) | |
| Central Alabama Community College, | ) | |
| et al., | ) | |
| | ) | |
| Defendants. | ) | |

MEMORANDUM OPINION

This matter comes before the court on Defendants Central Alabama Community College and Dr. Franks' "Motion for Summary Judgment." (Doc. 34). Plaintiff Mr. Lane brought state and federal retaliation claims against CACC, Dr. Franks in his official capacity, and Dr. Franks in his individual capacity for allegedly terminating him in retaliation for testimony he gave at a criminal trial.

The court finds that the Eleventh Amendment and the doctrine of qualified immunity bar Mr. Lane's

claims against CACC, an arm of the state of Alabama, his claims against Dr. Franks, in his official capacity as President of CACC, and his claims against Dr. Franks in his individual capacity as discussed below. Thus, the court will grant the Defendants' Motion for Summary Judgment as to all claims.

I. STATEMENT OF FACTS

A. Factual History

Mr. Lane's Employment Status at C.I.T.Y.

On September 26, 2006, Defendant Central Alabama Community College ("CACC") hired Plaintiff Edward Lane as the probationary Director, the highest ranking position, of the Community Intensive Training for Youth (C.I.T.Y.) Program at CACC. C.I.T.Y. is a statewide program for underprivileged youth with multiple offices throughout Alabama. In his job as Director, Mr. Lane ran the program, including day-to-day operations, hiring and firing of employees, and making financial decisions.

Mr. Lane's original hire letter in 2006 was from CACC's then-President, Linda McGuirt, and Ms. McGuirt informed Mr. Lane that she was his supervisor. In the summer of 2007, however, Chancellor Byrne determined that Mr. Lane was actually an employee of the Board of Directors of C.I.T.Y., not an employee of Central Alabama Community College and sent C.I.T.Y.'s business manager a letter to that effect. In August 2007, the President of the C.I.T.Y. Board of Directors, Helen McAlpine, sent Mr. Lane a letter offering him a probationary appointment as Director of the C.I.T.Y.

program beginning August 1, 2007; Mr. Lane accepted the appointment from the Board of Directors.

C.I.T.Y.'s Financial Problems during Mr. Lane's Employment

As soon as he took his position at C.I.T.Y., Mr. Lane began an audit to evaluate the program's financial position because C.I.T.Y. was experiencing significant financial problems. During this audit, Mr. Lane discovered that then-state representative Suzanne Schmitz was listed on C.I.T.Y.'s payroll but did not appear to be coming to work or producing any tangible work product. John Caylor, CACC's attorney, warned Mr. Lane that taking actions against Ms. Schmitz could have bad repercussions for both Mr. Lane and CACC. On October 19, 2006, Mr. Lane terminated Ms. Schmitz from her employment at C.I.T.Y. After her termination, Ms. Schmitz commenced a civil lawsuit to get her job back at C.I.T.Y., and she made comments to Charles Foley, then-Madison County C.I.T.Y. program coordinator, that she planned to "get [Mr. Lane] back" for her termination. (Doc. 38, at 10). Ms. Schmitz also said that if Mr. Lane was to request money for C.I.T.Y. from the state legislature, she would tell him, "You're fired." *Id*.

When Mr. Lane was hired in 2006 by the then-President of CACC, Ms. McGuirt, C.I.T.Y's Mobile and Montgomery programs were slated to close because of loss of grant money. Mr. Lane decided to keep these programs and started a new program in Lauderdale County. Mr. Lane did not instruct anyone at C.I.T.Y to actively look for grant opportunities or write grant

applications; he also was not looking or applying for grants himself. The two-year college system had a department that received federal grants, and C.I.T.Y. requested some of these grants under Mr. Lane's direction.

Mr. Lane claims that he was able to keep all of the programs running because he successfully controlled expenditures at C.I.T.Y. CACC disputes the alleged "controlled expenditures" and claims that Mr. Lane was only able to keep all of the programs running because of a one-time legislative appropriation and a one-time private donation. CACC further claims that Mr. Lane did not try to do anything to gain funding for the program except submit a budget to the legislature every year. The Alabama legislature only appropriated sufficient funding to C.I.T.Y for one year under Mr. Lane's leadership, and then it cut C.I.T.Y's funding dramatically. In 2008, C.I.T.Y.'s budget was cut by $1.75 million, approximately one-fourth of its budget.

Mr. Lane's Testimony in Suzanne Schmitz's Criminal Case

After Mr. Lane terminated Ms. Schmitz, the FBI began investigating Ms. Schmitz and C.I.T.Y. On November 13, 2006, Mr. Lane testified before a grand jury that Ms. Schmitz was fired because she did not "show up for her job." Mr. Lane claims that he also testified as to how Ms. Schmitz got her job at C.I.T.Y., but no evidence exists to support that contention.

On August 26, 2008, pursuant to a subpoena, Mr. Lane testified at Ms. Schmitz's federal criminal trial for mail fraud and fraud involving a program receiving federal funds. Mr. Lane testified that he fired Ms.

Schmitz because of her failure to come to work or do her job at C.I.T.Y. Mr. Lane also testified that Ms. Schmitz got her job at C.I.T.Y. through Dr. Paul Hubbert, Executive Secretary of the Alabama Education Association, and that people within the C.I.T.Y. program were afraid to question Ms. Schmitz's employment because they were afraid of losing funding from the legislature. Also at the criminal trial, Larry Palmer, C.I.T.Y.'s Regional Coordinator, testified that C.I.T.Y. hired Ms. Schmitz because of the influence of Roy Johnson, the previous Chancellor of CACC, and Dr. Hubbert. Mr. Lane also testified that when he pressed Ms. Schmitz about her failure to perform her job at C.I.T.Y., she responded that she "needed to call Mr. Hubbert." Mr. Lane testified to the same facts again in Ms. Schmitz's second criminal trial on February 18, 2009.

Mr. Lane's Termination from C.I.T.Y.

In January 2008, Defendant Dr. Steve Franks assumed the position of President of CACC under then-Chancellor of Alabama's two-year college system, Bradley Byrne. Even before Mr. Lane began reporting to Dr. Franks, Mr. Lane was considering a Reduction in Force ("RIF") at C.I.T.Y. On November 20, 2008, Mr. Lane began reporting to Dr. Franks, but had only very little contact with Dr. Franks during his employment with C.I.T.Y.

Mr. Lane communicated C.I.T.Y.'s budget problems to Dr. Franks in November 2008, including his recommendation for a RIF. Mr. Lane and Dr. Franks continued their talks about a RIF throughout the end of 2008 and by the end of 2008, C.I.T.Y. was in

danger of not making its payroll on time every month, if at all. Dr. Franks agreed with Mr. Lane's RIF recommendation, and Dr. Franks initially responded that all probationary employees should be terminated.

On November 20, 2008, Chancellor Byrne dissolved the C.I.T.Y. Board of Directors and communicated that in accordance with the administrative law ruling in *Robinson, Schmidt, & Settle v. City Skills Training Consortium & Central Ala. Comm. College*, No. OAH-06-388, all C.I.T.Y. employees were to be considered employees of CACC.

The Defendants claim that on January 9, 2009, Dr. Franks made the financial decision to terminate Mr. Lane and other probationary employees associated with the C.I.T.Y. program. Dr. Franks did not give Mr. Lane any reason for his termination, but Dr. Franks testified that "Lane was terminated due to financial difficulties facing the C.I.T.Y. program." (Doc. 38, at 18). Dr. Franks consulted with Chancellor Byrne before terminating Mr. Lane. Mr. Lane disputes that Dr. Franks made this decision based on financial reasons and believes that Dr. Franks was actually retaliating against Mr. Lane for testifying in Ms. Schmitz's trial.

The Defendants allege that no one, including Ms. Schmitz, instructed Dr. Franks to fire Mr. Lane or suggested to Dr. Franks that he should fire Mr. Lane. Mr. Lane disputes this fact, claiming that a jury could "easily infer" that Dr. Hubbert instructed or suggested Dr. Franks should terminate Mr. Lane. (Doc. 38, at 5). Mr. Lane also claims that Dr. Franks often had discussion with Dr. Hubbert about the C.I.T.Y.

program during the 2009 legislative session, but Dr. Franks specifically testified that he did not consult Dr. Hubbert about his decision to terminate Mr. Lane.

Mr. Lane offered no evidence that Dr. Franks had an agreement with Ms. Schmitz or Betty Carol Graham, another state representative, to fire Mr. Lane as a result of his testimony against Ms. Schmitz. Dr. Franks testified that he never discussed Mr. Lane with either Mrs. Schmitz or Mrs. Graham prior to Mr. Lane's termination. Similarly, Ms. Schmitz testified that she never talked to Dr. Franks or anyone else within the two-year system who was in a position to do anything about Mr. Lane's employment after Mr. Lane had testified against her. In fact, Dr. Franks testified that he only met Ms. Schmitz once briefly at a legislative session, and Ms. Schmitz testified that she did not remember ever meeting Dr. Franks or having any dealings with him.

Dr. Frank's appointment of Larry Palmer as Interim Director

At the time of Mr. Lane's termination, Dr. Franks named Larry Palmer, then-regional coordinator, as interim director of C.I.T.Y. Mr. Palmer had been a C.I.T.Y. employee since the 1990s and had served as interim director once before. When he assumed the role of interim director, Mr. Palmer continued his role as regional coordinator as well and served in both capacities. Upon his appointment, Mr. Palmer received a raise because of his added responsibilities and was making the same salary Mr. Lane had made before he was terminated. CACC was able to save costs because Mr. Palmer was performing two jobs for one salary.

Mr. Palmer remained interim director until September 2009 when the C.I.T.Y. program ceased to exist, and Mr. Palmer was terminated along with all C.I.T.Y. employees.

Dr. Frank's recision of some C.I.T.Y. Employees' Termination

Sometime shortly after Dr. Franks terminated the C.I.T.Y. employees (a dispute exists as to when), Dr. Franks decided to rescind the termination of some of the Lauderdale and Franklin County employees he fired on January 9, 2009. The Defendants claim that Dr. Franks made this decision on January 23, 2009, and Mr. Lane claims that Dr. Franks sent out the recision letters on January 29, 2009. Regardless, the decision was made before Mr. Lane testified at Ms. Schmitz's second trial on February 19, 2009.

Dr. Franks testified that he rescinded some of the terminations because he learned that these employees were not probationary employees. At the time the employees who had been terminated were hired, a six month probationary period existed for C.I.T.Y. employees. Thus, even though the employees were later deemed CACC employees, at the time of their employment for Fair Dismissal Act purposes, they were employed under C.I.T.Y.'s six-month probationary period, as opposed to CACC's three-year probationary period and were not considered probationary employees when Dr. Franks fired them.

Mr. Lane was one of two employees whose termination was not rescinded. A dispute exists as to why Dr. Franks did not rescind Mr. Lane's termination. Dr. Franks testified that he believed Mr.

Lane was a probationary employee because he was hired by CACC as evidenced by his initial hire letter, and the CACC probationary period was three years. The Defendants claim that Dr. Franks thought Mr. Lane was in a fundamentally different category than the other employees because he was the director of the entire C.I.T.Y. program and not simply an employee. When asked why he considered Mr. Lane different than the other C.I.T.Y. employees whose termination he rescinded, Dr. Franks responded: "because he was the only employee that had an appointment letter from the president of [CACC]." (Doc. 38, at 19).

Mr. Lane alleges that Dr. Franks did not rescind his termination because Dr. Franks possessed a "retaliatory motivation." (Doc. 38, at 3). Mr. Lane claims that the timing of his termination is very suspicious; it was "right around the time that the budget process was beginning in the legislature." (Doc. 38, at 20). Dr. Franks knew that Mr. Lane had testified at Ms. Schmitz's first criminal trial, but Mr. Lane never discussed the contents of his testimony with Dr. Franks. Mr. Lane also testified that he believed "the totality of the situation" and "Dr. Franks' actions" led him to believe he was being retaliated against for his testimony. (Doc. 38, at 21).

The Defendants claim that Mr. Lane had no reason to believe that Dr. Franks was out to get him or that Dr. Franks' stated reasons for termination and not rescinding that termination were untruthful or pretextual. The Defendants also claim that Dr. Franks did not even remember that Mr. Lane had previously testified in Ms. Schmitz's criminal case and that he did

not know Mr. Lane was planning on testifying in her second criminal trial.

The parties do not dispute that Dr. Franks was not aware of any statements by Ms. Schmitz that she would see to it that Mr. Lane would lose his job after he testified against her. The parties do not dispute that Mr. Lane did not discuss with anyone at the College Department of Post Secondary Education, including Dr. Franks, that he was going to testify at Ms. Schmitz's second criminal trial before he did in fact testify. Dr. Franks had already terminated Mr. Lane when Mr. Lane received notice that he would be testifying at the second trial, and Dr. Franks did not know about the second trial until after it occurred. Dr. Franks never told Mr. Lane not to testify, and neither Dr. Franks nor CACC ever attempted to prevent Mr. Lane from testifying before the grand jury or at either trial.

B. Procedural History

This case was originally filed in the Middle District of Alabama on January 3, 2011. Mr. Lane's Complaint alleged three counts: (I) violation of the State Employee Protection Act under Ala. Code 36-26A-3; (II) retaliation for the exercise of protected First Amendment speech; and (III) a violation of 42 U.S.C. 1985, conspiring to injure witnesses for testifying. (Doc. 2-1). It was transferred to this court on March 4, 2011. On March 11, 2011, CACC filed a Motion to Dismiss for failure to state a claim. (Doc. 4). This court denied the Motion to Dismiss as to Counts I and II and granted it as to Count III. (Doc. 9).

On May 24, 2011, Mr. Lane filed an Amended Complaint alleging the same counts as his original complaint. (Doc. 11). On June 3, 2011, the Defendants filed a Motion to Dismiss Count III, the conspiracy charge, of the Amended Complaint. (Doc. 12). The court construed Mr. Lane's response to Defendants' Motion to Dismiss as a voluntary dismissal of Count III and thus dismissed Count III without prejudice. (Doc. 15). As Mr. Lane's Amended Complaint stands now, Count I seeks relief from Dr. Franks for violation of the State Employee Protection Act and Count II seeks relief from Dr. Franks and CACC for termination in retaliation for speech protected by the First Amendment. On April 30, 2012, after discovery by both parties, CACC filed this Motion for Summary Judgment. (Doc. 34).

II. STANDARD OF REVIEW

Summary judgment allows a trial court to decide cases when no genuine issues of material fact are present and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56. When a district court reviews a motion for summary judgment, it must determine two things: (1) whether any genuine issues of material fact exist; and if not, (2) whether the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a

genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56). The moving party can meet this burden by offering evidence showing no dispute of material fact or by showing that the non-moving party's evidence fails to prove an essential element of its case on which it bears the ultimate burden of proof. *Celotex*, 477 U.S. at 322-23. Rule 56, however, does not require "that the moving party support its motion with affidavits or other similar materials negating the opponent's claim." *Id*.

Once the moving party meets its burden of showing the district court that no genuine issues of material fact exist, the burden then shifts to the non-moving party "to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991).

In reviewing the evidence submitted, the court must "view the evidence presented through the prism of the substantive evidentiary burden," to determine whether the nonmoving party presented sufficient evidence on which a jury could reasonably find for the nonmoving party. *Anderson*, 477 U.S. at 254; *Cottle v. Storer Commc'n, Inc.*, 849 F.2d 570, 575 (11th Cir. 1988). The court must refrain from weighing the evidence and making credibility determinations, because these decisions fall to the province of the jury. *See Anderson*, 477 U.S. at 255; S*tewart v. Booker T. Washington Ins. Co.*, 232 F.3d 844, 848 (11th Cir. 2000); *Graham v. State Farm Mut. Ins. Co.*, 193 F.3d 1274, 1282 (11th Cir. 1999).

Furthermore, all evidence and reasonable inferences drawn from the underlying facts must be viewed in the light most favorable to the non-moving party. *Graham*, 193 F.3d at 1282.

The nonmoving party "need not be given the benefit of every inference but only of every reasonable inference." *Id*. Additionally, "conclusory assertions. . ., in the absence of supporting evidence, are insufficient to withstand summary judgment." *Holifield v. Reno*, 115 F.3d 1555, 1564 n. 6 (11th Cir. 1997). After both parties have addressed the motion for summary judgment, the court must grant the motion if no genuine issues of material fact exist and if the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

III. LEGAL ANALYSIS

Although some genuine issues of material fact exist in this case concerning Dr. Franks' true motivation for terminating Mr. Lane's employment, no genuine issues of material fact exist in the proffered agreed upon statement of facts that bear on the issue of immunity. Because the court finds the Defendants are entitled to judgment as a matter of law and no genuine issues of material fact exist with regard to this dispositive issue, the court will grant summary judgment for the Defendants on this ground.

A. Absolute Immunity

1. Central Alabama Community College

Defendant CACC argues that the Eleventh Amendment to the United States Constitution bars Mr. Lane's claim against CACC for retaliation for

protected speech. The Eleventh Circuit has held that "state universities are 'agencies or instrumentalities' of the state, and thus are immune from suit in federal court." *University of South Alabama v. American Tobacco Co.*, 168 F.3d 405, 412 (11th Cir. 1999) (quoting *Harden v. Adams*, 760 F.2d 1158, 1163-64 (11th Cir. 1985)). Both the Southern District of Alabama and the Middle District of Alabama have specifically ruled that community colleges are entitled to Eleventh Amendment immunity. *See Morris v. Wallace Community College-Selma*, 125 F. Supp. 2d 1315, 1335 (S.D. Ala. 2001) ("Alabama's state law sovereign immunity extends to community colleges. . ." (citing *Williams v. John C. Calhoun Community College*, 646 So. 2d 1, 2 (Ala.1994))); *Wright v. Chattahoochee Valley Community College*, 2008 WL 4877948 (M.D. Ala. 2008) ("State educational institutions, such as [Chattahoochee Valley Community College] are agencies or instrumentalities of the state and thus are immune from suit in federal court." (internal quotations omitted)).

Mr. Lane argues that CACC is not immune from suit for prospective equitable relief, and because Mr. Lane seeks "placement in the position in which he would have worked absent the Defendant's retaliatory treatment," "injunctive relief," and "such other legal or equitable relief," the Eleventh Amendment does not bar Mr. Lane's suit. (Doc. 11). However, the Eleventh Amendment bars monetary and equitable relief against the state and its instrumentalities. *Morris*, 125 F. Supp. 2d, at 1335 (citing *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 120 (1984)). CACC, as a community college, is an arm or

instrumentality of the state and is immune from legal or equitable suit under the Eleventh Amendment. Therefore, the court will GRANT Defendants' Motion for Summary Judgment as to CACC on Count II of the Amended Complaint.

2. Dr. Franks in his Official Capacity

a. Money Damages

The Defendants argue that Dr. Franks acting in his official capacity as president of CACC is not a "person" subject to suit pursuant to 42 U.S.C. § 1983. Mr. Lane argues that Dr. Franks is only immune to the extent that the Eleventh Amendment bars relief for money damages against the State. Because Mr. Lane concedes that he cannot seek money damages against Dr. Franks in his official capacity and because "the Eleventh Amendment bars suits against state officials in federal court seeking compensatory or retroactive relief," the court will dismiss all claims against Dr. Franks that seek money damages. *See Summit Medical Associates, P.C. v. Pryor*, 180 F.3d 1326, 1337 (11th Cir. 1999) (citing *Green v. Mansour*, 474 U.S. 64, 68 (1985)).

b. Equitable Relief

In Count I of his Amended Complaint, the only equitable relief Mr. Lane seeks is "any and all other relief, both at law and in equity" to which he may be entitled. (Doc. 11). In Count II of his Amended Complaint, Mr. Lane seeks "placement in the position in which he would have worked absent the Defendant's retaliatory treatment," "injunctive relief," and "such

other legal or equitable relief" to which he may be entitled. (Doc. 11).

Generally, "state officials sued for damages in their official capacity are immune from suit in federal court" unless the plaintiff is seeking "prospective equitable relief to end continuing violations of federal law" under *Ex parte Young*. *Pears v. Mobile County*, 645 F. Supp. 2d 1062, 1078, n. 22 (S.D. Ala. 2009); Ex parte Young, 209 U.S. 123 (1908). To obtain relief for an ongoing violation of federal law under *Ex parte Young*, the plaintiff must allege that "a violation of federal law by a state official is ongoing as opposed to . . . violated at one time or over a period of time in the past." *Summit Medical Associates*, 180 F.3d at 1338 (citing *Ex parte Young*, 478 U.S. at 277-78).

In *Pears*, the court dismissed the plaintiff's § 1983 claims because," the record [was] devoid of evidence of a continuing violation of federal law by defendants; rather, [plaintiff's] requests for reinstatement and other prospective relief [were] hinged exclusively on discrete acts that occurred in 2006 and early 2007, rather than any ongoing, continuing malfeasance today." *Id*. at n. 22. Like the plaintiff in *Pears*, Mr. Lane requests reinstatement and other generalized equitable relief that is "hinged exclusively" on a "discrete act,"– his termination in 2009. Mr. Lane does not claim that Dr. Franks is engaging in any ongoing violation of federal law that necessitates the prospective injunctive relief contemplated in *Ex parte Young*.

In *Edelman v. Jordan*, the Supreme Court refused to allow retroactive restitution when it would "to a

virtual certainty be paid from state funds, and not from the pockets of individual state officials who were the defendants in the action." 415 U.S. 651, 668 (1974). The Eleventh Circuit has also stated that, "[I]f prospective relief would invade a state's sovereignty as much as an award of money damages would, the action will be barred by the Eleventh Amendment." *Summit Medical Associates*, 180 F.3d at 1337 (citing *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997)). The Defendants rightfully point out that Mr. Lane's reinstatement would interfere with CACC, an arm of the State, making employment decisions and would require the State to pay Mr. Lane's salary once he was reinstated. The Eleventh Amendment bars this type of prospective relief that implicates a state's sovereignty interests and funds.

Because Mr. Lane's alleged claims for prospective relief do not fall under the *Ex parte Young* exception to Eleventh Amendment immunity, and the prospective relief Mr. Lane seeks significantly implicates Alabama's sovereignty interests and state treasury, the court will DISMISS all claims against Dr. Franks in his official capacity seeking equitable relief.

3. Dr. Franks in his Individual Capacity

The Defendants argue that Dr. Franks is also immune in his individual capacity because he was acting in his official capacity as President of CACC when he terminated Mr. Lane and state officials are immune in their individual capacities when the state is the real party in interest.

The Defendants rely on *Harbert Intern., Inc. v. James* for the proposition that "[A] suit is against the

sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." 157 F.3d 1271, 1277 n. 3 (11th Cir. 1998) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101, 101 n.11 (1984)); *see also Alexander v. Chattahoochee Valley Comm. Coll.*, 325 F. Supp. 2d 1274, 1296 (M.D. Ala. 2004) (dismissing claims against the community college president in her individual capacity because they were barred by the Eleventh Amendment).

Mr. Lane's reinstatement would compel Alabama to act through Dr. Franks and would cost the state an amount of money equal to Mr. Lane's salary. Dr. Franks seems to fit into the framework of a government official who is immune in his individual capacity because the state is the real party in interest in this case. Even if Dr. Franks is not immune under the doctrine of sovereign immunity, however, he is still immune in his individual capacity from suit under the doctrine of qualified immunity.

B. Qualified Immunity

Defendants argue that even if Dr. Franks is not absolutely immune from suit in his individual capacity under the Eleventh Amendment, he is immune under the doctrine of qualified immunity. Qualified immunity protects government officials performing discretionary functions from suit in their individual capacities unless the official violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Hope v.*

*Pelzer*, 536 U.S. 730, 739 (2002) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "The purpose of this immunity is to allow government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation, protecting from suit all but the plainly incompetent or one who is knowingly violating the federal law." *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002) (internal quotation marks and citations omitted).

To receive qualified immunity, a government official "must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002). Government officials act within the scope of their discretionary authority if "the actions were (1) 'undertaken pursuant to the performance of [their] duties' and (2) 'within the scope of [their] authority.'" *Lenz v. Winburn*, 51 F.3d 1540, 1545 (11th Cir. 1995) (quoting *Rich v. Dollar*, 841 F.2d 1558, 1564 (11th Cir. 1998)). "Exercising judgment . . . in the administration of a department or agency of government" is a recognized discretionary function. *Ex parte Cranman*, 792 So. 2d 392, 405 (Ala. 2000).

Mr. Lane concedes that Dr. Franks was acting within the scope of his discretionary authority as President of CACC when he terminated Mr. Lane's employment and subsequently did not rescind the termination. Because the Defendants have established that Dr. Franks was acting within his discretionary authority, the burden now shifts to Mr. Lane to show that qualified immunity is inapplicable in this case. *See Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir.

2002) ("Once the defendant establishes that he was acting within his discretionary authority, the burden shifts to the plaintiff to show that qualified immunity is not appropriate.").

The Supreme Court has articulated a two-part test to determine whether qualified immunity is appropriate. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001). First, the court must ask this threshold question: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right[?]" *Gonzalez v. Reno*, 325 F.3d 1228, 1234 (11th Cir. 2003) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). Second, "[i]f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Id*. (citing *Saucier*, 533 U.S. at 201).

"A constitutional right is clearly established if controlling precedent has recognized the right in a 'concrete and factually defined context.'" *Chesser v. Sparks*, 248 F.3d 1117, 1122 (11th Cir. 2001). "If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993).

The court recognizes that it is commonly known and well-established that a state cannot "discharge a public employee in retaliation for protected speech." *Tindal v. Montgomery County Comm'n*, 32 F.3d 1535, 1539 (11th Cir. 1994). A public employee's right to speech, however, is not absolute, and the Eleventh Circuit utilizes the *Pickering* balancing test to

determine whether a state actor has retaliated against an employee for protected speech. *Bryson v. City of Waycross*, 888 F.2d 1562, 1565 (11 Cir. 1989); *Pickering v. Board of Education*, 391 U.S. 563 (1968).

First the court must determine whether Mr. Lane "spoke as a citizen on a matter of public concern." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). In *Garcetti*, the Supreme Court identified two factors to be used in determining whether the public employee spoke as a citizen: (1) whether the speech occurred in the workplace, and (2) whether the speech was made as part of the public employee's job duties. *Garcetti*, 547 U.S. at 420-421. The Supreme Court made clear that, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes," and that the statements of public employees retain their official status when "there is no relevant analogue to speech by citizens who are not government employees." *Id*. at 421, 423-24. In determining whether a statement is protected under the First Amendment, the court must "look to the content, form, and context of a given statement, as revealed by the whole record." *Vila v. Padron*, 484 F.3d 1334, 1340 (11th Cir. 2007). Here, Mr. Lane's testimony did not occur in the workplace, but he learned of the information that he testified about while working as Director at C.I.T.Y. Because he learned the information while performing in his official capacity as Director at C.I.T.Y., the speech can still be considered as part of his official job duties and not made as a citizen on a matter of public concern, as the Eleventh Circuit has ruled in similar cases.

In *Abdur-Rahman v. Walker*, the Eleventh Circuit ruled that sewer inspectors' reports were not made as citizens on matters of public concern because they were made pursuant to the inspectors' official job duties:

> [T]he reports of inspectors to their supervisors about sewer overflows they were required to investigate are not protected under the First Amendment. The inspector's reports about sewer overflows concerned information they requested and investigations they performed for the purpose of fulfilling their assigned job duties. The inspectors' reports 'owe their existence' to their official responsibilities and cannot reasonably be divorced from these responsibilities.

567 F.3d 1278, 1283 (11th Cir. 2009) (quoting *Garcetti*, 547 U.S. at 421). Additionally, in *Vila v. Padron*, the Eleventh Circuit ruled that a Community College Vice President's complaints about possible unethical and illegal conduct within the Community College fell "squarely within her official job duties and [were] not protected by the First Amendment." 484 F.3d 1334, 1339 (11th Cir. 2007).

In this case, Mr. Lane investigated Ms. Schmitz's job duties and ultimately terminated her employment with CACC because it was one of his job duties to hire and fire employees within the C.I.T.Y. Program. He fired Ms. Schmitz in his capacity as Director of C.I.T.Y., and he was subpoenaed to testify as to his investigation and subsequent termination of Ms. Schmitz in his capacity as Director of C.I.T.Y. Mr.

Lane argues that he could not have been called to testify in his official position as C.I.T.Y. Director because he testified in Ms. Schmitz's second trial after he was terminated from C.I.T.Y. The court does not find this argument persuasive because Mr. Lane was employed by C.I.T.Y. when he learned the information about which he testified, which is the relevant point in time. The court is persuaded that qualified immunity applies to Dr. Franks' action because Mr. Lane was not speaking as a citizen on a matter of public concern but rather speaking pursuant to his official job duties as Director of C.I.T.Y. The court, however, will also consider the parties' arguments about whether the fact that Mr. Lane testified pursuant to a subpoena establishes that Dr. Franks was acting in contravention to clearly established law when he testified in Ms. Schmitz's criminal case.

The only controlling cases concerning testimony given pursuant to a subpoena are *Martinez v. City of Opa-Locka*, 971 F.2d 708 (11th Cir. 1992) and *Morris v. Crow*, 142 F.3d 1379 (11th Cir. 1998). The Defendants argue that under *Martinez* and *Crow*, Dr. Franks was not on fair notice that Lane's testimony in his official capacity as Ms. Schmitz's former supervisor and pursuant to a subpoena was protected speech, such that basing Mr. Lane's termination on that testimony would violate the First Amendment. Mr. Lane argues that at the time of his termination *Martinez* conclusively established that a public employee could not be punished in retaliation for testifying pursuant to a subpoena.

In *Martinez*, the City hired the plaintiff as Director of the Purchasing Department. The City Commission, which had general legislative and policy-making authority, subpoenaed the plaintiff to testify concerning the purchasing practices of the City. At these appearances, the plaintiff testified that the City Manager violated the City's prescribed bid procedures. After making these statements and a similar statement to an investigator from the State Attorney's Office, the City Manager terminated the plaintiff's employment. The plaintiff filed a three count suit in federal court under 42 U.S.C. § 1983 against the City and the City Manager in his individual capacity claiming that she was fired in retaliation for her exercise of free speech. The Court ruled that the plaintiff's speech "clearly affected a matter of public concern" because she provided information concerning the expenditure of public funds and testified before the City's legislative body. *Martinez*, 971 F.2d at 712. The plaintiff's speech was protected when made pursuant to a subpoena and in front of a municipal body that had general legislative and policymaking authority. *Id*.

In *Morris v. Crow*, however, a deputy sheriff alleged the sheriff fired him in retaliation for deposition testimony he gave under subpoena in a civil suit implicating a fellow deputy in a fatal traffic accident. The Court found that the deputy did not testify under subpoena to "make public comment on sheriff's office policies and procedures [or] the internal workings of the department," but rather in compliance with the subpoena to testify truthfully. *Crow*, 142 F.3d at 1382. The Court affirmed the Sheriff's qualified immunity in the case, stating that, "[t]he mere fact

that [the deputy]'s statements were made in the context of a civil deposition cannot transform them into constitutionally protected speech." *Id*. at 1383.

The court notes that the Eleventh Circuit decided *Martinez* in 1992 and *Crow* in 1998; both decisions were rendered before the Supreme Court's decision in *Garcetti* in 2006 and the Eleventh Circuit's decisions in Walker in 2009 and Vila in 2007. Thus, the decisions relating to testimony given pursuant to subpoenas do not address whether the public employee's speech was made as part of his official duties and thus not as a citizen on a matter of public concern. Although the plaintiff's testimony pursuant to a subpoena was protected speech in *Martinez*, the mere presence of a subpoena did not defeat the officer's qualified immunity in *Crow*. Despite the plaintiff's contentions, *Martinez* and *Crow* do not create a clear and binding precedent so well-established that Dr. Franks should have known that he was violating Mr. Lane's Constitutional rights by terminating him, if he terminated him because of his testimony in Ms. Schmitz's criminal trial.

The fact intensive nature of First Amendment retaliation cases creates a maze of case law so discrete in its application and wavering in its precedential force that very rarely will the plaintiff be able to prove that "'case law, in factual terms, has . . . staked out a bright line.'" *Chesser v. Sparks*, 248 F.3d 1117, 1123 (2001) (quoting Post, 7 F.3d at 1557). The question to ask in qualified immunity cases is not whether "the very action in question has previously been held unlawful;" it is whether "the unlawfulness of the

action [was] apparent in the light of pre-existing law." *Williams v. Consol. City of Jacksonville*, 341 F.3d 1261, 2169-70 (11th Cir. 2003) (internal citations omitted). The court finds that a reasonable government official in Dr. Frank's position would not have had reason to believe that the Constitution protected Mr. Lane's testimony made pursuant to a subpoena at Ms. Schmitz's trial because the unlawfulness of his action was not "recognized . . . in a 'concrete and factually defined context.'" *Chesser*, 248 F.3d at 1122 (quoting *Lassiter v. Ala. A & M Univ. Bd. of Trustees*, 28 F.3d 1146, 1149 (11th Cir. 1994)). Thus, summary judgment is appropriate in this case.

IV. CONCLUSION

The Eleventh Amendment bars Mr. Lane's claims against CACC and Dr. Franks in his official capacity as President of CACC. Even if the Eleventh Amendment does not bar Mr. Lane's claim against Dr. Franks in his individual capacity, which the court finds it does, the court also finds that Mr. Lane's right to free speech under the First Amendment as a testifying witness under subpoena in a criminal trial was not clearly established, as is required under Saucier, to defeat Dr. Franks' qualified immunity. Thus, all of Mr. Lane's claims are barred by the Eleventh Amendment or the doctrine of qualified immunity. For these reasons, the court will GRANT Defendants' Motion for Summary Judgment and DISMISS WITH PREJUDICE all of Mr. Lane's claims against CACC and Dr. Franks. The court will simultaneously enter a separate order to that effect.

DONE and ORDERED this 18th day of October, 2012.

__/s/__________________________________

KARON OWEN BOWDRE
UNITED STATES DISTRICT JUDGE