No. 18-

IN THE

Supreme Court of the United States

KELLY H. TUCKER,

Petitioner,

v.

PATRICK ATWATER, JR., IN HIS INDIVIDUAL CAPACITY AND HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF TIFT COUNTY PUBLIC SCHOOLS, AND KIM RUTLAND, IN HER INDIVIDUAL CAPACITY AND HER OFFICIAL CAPACITY AS CHAIRPERSON OF THE TIFT COUNTY BOARD OF EDUCATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case involves an off-duty teacher who was disciplined with five days of unpaid suspension by her employer for speaking against a "Black Lives Matter" protest carried out at a local Christmas parade. After Petitioner filed a Section 1983 action against her employer, the Respondents filed a Motion to Dismiss.[1] The trial court denied the motion and ruled as a matter of law that the Petitioner's speech was constitutionally protected, that the case was identical to the facts of *Pickering*, infra. and that Respondents were not entitled to qualified immunity. The Georgia Court of Appeals reversed the ruling of the trial court imposing only a "materially or fundamentally similar case" analysis and ruled that there were no cases which clearly defined the law applicable to the facts of this case. The Supreme Court of Georgia denied Petitioner's application for certiorari. However, three Justices of the Supreme Court of Georgia issued a concurrence in which they opined that the Respondents had, indeed, violated Petitioner's First Amendment rights. The concurrence also questioned whether or not a *Pickering* balancing test was even applicable to an off-duty employee and, if so, whether the balancing test applies to only potential disruption caused by the public's reaction to the employee's viewpoint.

Two questions are presented:

1) If *Pickering* and its progeny are applicable to cases involving off-duty public employees who are speaking to matters of public interest which are not

1. Because the trial court considered evidence outside of the pleadings, the appellate courts treated the ruling as a ruling on a motion for summary judgment.

directly related to their employment, was the law "clearly established" from the appropriate courts of jurisdiction in this case so as to deny the Respondents qualified immunity?

2) If *Pickering* and its progeny are not applicable to cases involving off-duty public employees who are speaking to matters of public interest which are not directly related to their employment, what standard should the Court impose to strike a balance between the employee's constitutional rights and the government's interest in protecting its ability to efficiently carry out its functions?

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The initial appellate opinion of the Georgia Court of Appeals is reported at *Atwater v. Tucker*, 343 Ga.App. 301, 807 S.E.2d 56 (2017), cert. denied, (Supreme Court of Georgia case number S18C0437, June 4, 2018). All rulings of the courts below, including the trial court, are provided in Appendices A-C.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Section 1257 as it involves the rights of an individual guaranteed under the First Amendment to the Constitution of the United States of America, as applied to the States under the Supremacy Clause, and a right of recovery authorized by 42 U.S.C. Section 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. ART. VI

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the

United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.

42 U.S.C. SECTION 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

1. Statement of the facts of the case. The following facts are undisputed in this case. Petitioner is a veteran licensed teacher with over 25 years of credible service. Petitioner is licensed to teach in the State of Georgia; holds a certification in middle grades four through eight Language Arts and Social Studies and holds a Master's Degree in Leadership. For 20 years she taught with the Tift County School system; teaching at the Eighth Street Middle School in Tifton, Georgia for last 10 years.

On December 6, 2014, a Christmas parade was held in the City of Tifton, Georgia. During the course of that parade, a small group of people staged what is commonly known as a "Ferguson protest" in which they held signs up saying "Black lives matter." The purpose of the demonstration was to protest the use of excessive force by police officers against African-American males.

Following the parade, a local celebrity posted pictures of the demonstration on her Facebook page and invited public comment on the appropriateness of the demonstration at the Christmas parade. Numerous people posted comments in response to the invitation, including Petitioner. Petitioner's post which is at the center of this case stated the following:

> "It's turned into a race matter. What about the thugs that beat the father in his vehicle because he didn't slow down. What about the thugs that shot the college baseball player because they were bored. The list can go on and on. If the dude hadn't stolen, he would be alive. I think the signs should read TAKE THE HOOD OFF YOUR HEAD, AND PULL UP YOUR DANG PANTS, AND QUIT IMPREGNATING EVERYBODY. I'm tired of paying for these sorry *&^ thugs. . .I would much rather my hard-earned money that the government takes go to people who need it, such as abused adults and children, not to mention the animals they beat and fight too. . .That's all I'm saying. . ."

The above referenced post was made on Petitioner's personal computer and while Petitioner was at home. The post was not done while Petitioner was at work.

Furthermore, at the time of the post, the Tift County Board of Education did not have any policy in place which regulated or prohibited teachers from making posts on Facebook or any other social media.

2. Statement of the actions taken by Respondents Atwater and Rutland. On January 13, 2015 (almost one full month following the subject posts), Respondent Atwater sent Petitioner a four-page charge letter in which he accused Petitioner of immorality, insubordination and willful neglect of duties. Another month later, a hearing was held by the Tift County Board of Education on February 3, 2015 to consider the charges brought by Respondent Atwater. During all of this, Petitioner remained in her teaching position at Eighth Street Middle School.

At the hearing, three school administrators testified: Principal of the Middle School Chad Stone, Assistant Principal of the Middle School Jason Clark and Dr. Lashonda Flanders who is an Assistant Principal at the Tift County High School. The transcript of the hearing was a part of the record considered by both the trial court and the Court of Appeals. Here is the testimony they gave (after two months of Petitioner's continued teaching following the Facebook post) regarding the purported influence of Petitioner's speech on the functioning of the school system.

Principal Chad Stone gave this testimony:

(At page 366 of the hearing transcript)

Q.: You mentioned that there could be issues that, this post impaired or diminished the

certificate-holder's (Petitioner's) ability to function professionally –

A.: That's what I read.

Q.: That was your opinion that things could happen in the future, correct?

A.: Nothing has happened, but I don't know if anything will happen.

Mr. Clark gave this testimony:

(Hearing transcript pg. 323-324)

Q.: Has the post had any effect on Eight Street at the school level?

A.: Not directly. I would say indirectly we had to move one student out of the class. But indirectly, it has.

Q.: Does it have the potential to cause problems at Eighth Street?

A.: Yes, sir.

Q.: What type of problems does it have the potential of causing?

A.: Just to the fact of the wrong people taking it and blowing it out of context ---

(At line 11)

Q.: Does the post affect Ms. Tucker in her performance of her duties as a teacher?

A.: It could. It has not up to this point, but it could.

Dr. Lashonda Flanders gave this testimony:

(At page 254 – 255)

Q.: And your son, Stanley Flanders, is he in Ms. Kelly Tucker's class?

A.: He is.

Q.: Do you know Ms. Tucker?

A.: I do.

Q.: How long have you known Ms. Tucker?

A.: Much of my tenure here. I've known Ms. Tucker for some time.

(At page 271 – 272)

Q.: Okay. Are you aware that (Respondent) Mr. Atwater has said that the situation has created a toxic atmosphere at Eighth Street Middle?

A.: I do not.

Q.: Are you aware of any "toxic atmosphere" at Eighth Street Middle?

A.: I do not know of.

Following that hearing, the Respondents Atwater and Rutland issued a letter in which they informed Petitioner that the Board of Education had found there was no evidence of immorality, insubordination or willful neglect of duties but that she was being suspended for 5 days without pay for "other good and sufficient cause." In addition, the Respondents Atwater and Rutland imposed the requirement that Petitioner participate in and complete a diversity training program as directed by Respondent Atwater and Principal Chad Stone.

3. Statement of the Proceedings Below. Petitioner brought this action against Respondents under 42 U.S.C. Section 1983 alleging Respondents unlawfully violated her first amendment rights by disciplining her in retaliation for her speech. Respondents filed a motion to dismiss.

The trial court denied the motion to dismiss, finding as a matter of law that the Respondents had violated Petitioner's constitutional rights; that this violation of her rights was well established by existing law and that, because of the facts of this case, the Respondents are not entitled to qualified immunity. The issue of damages was left open by the trial court. See Appendix C.

The Court of Appeals granted a discretionary appeal to the Respondents and reversed the trial court. In so doing, the Court of Appeals conceded the premise that Petitioner was speaking as a citizen and that her speech addressed a matter of public concern. However, the Court of Appeals went on to conclude, using a "materially or fundamentally similar case" analysis that the Respondents were entitled to official immunity because their actions did not violate any clearly established law. See Appendix B.

Petitioner then applied for certiorari to the Supreme Court of Georgia. On June 4, 2018, the application for certiorari was denied without a majority opinion. However, in a most unusual move, three Justices of the Supreme Court of Georgia wrote an eight-page concurrence in which they concluded that the Respondents had, indeed, violated Petitioner's First Amendment rights but agreed with the Court of Appeals that the law as applicable to the facts of this case was not clearly defined at the time of the Respondents' actions. See Appendix A.

It is from the denial of Petitioner's Application for Certiorari to the Supreme Court of Georgia that she brings this Petition for a Writ of Certiorari to this honorable Court. Should the Court decide to grant review of this case and should answer the first question presented in the affirmative, Petitioner requests that this Court reverse the decisions of the Georgia Court of Appeals and Supreme Court of Georgia and reinstate the decision of the trial court.

Should the Court decide to grant review of this case and should conclude that *Pickering* and its progeny are not applicable or should be modified as to cases involving off-duty public employees who are speaking to matters of public interest which are not directly related to their employment, Petitioner requests that this Court apply the appropriate standard as determined by this Court and remand the case to the lower courts for proceedings consistent with this Court's ruling.

REASONS FOR ALLOWANCE OF THE PETITION

This case presents "good ground" for this Court to decide the battle between an off-duty public employee's

constitutional rights and the government employer's right to infringe upon those rights in the interests of protecting the efficiency of government functions. There is no issue as to whether Petitioner's Facebook post was constitutionally protected. All of the lower courts acknowledged the fact that Petitioner was speaking as a private citizen about a matter of public concern. Furthermore, there is no dispute that the Facebook post provided the sole basis for the discipline imposed on Petitioner by the Respondents. Finally, there is no reasonable dispute over whether Petitioner was speaking on her own time about a matter that was unrelated to her work.

In recent years, this Court has expressed significant concern over the societal importance of sovereign immunity and the all too often application of what this Court has called "a high level of generality" by the lower courts in defining "clearly established law." *White v. Pauley,* ___ U.S. ___, 137 S.Ct. 548, ___ L.Ed. ___ (2017). Because this case involves an undeniable violation of Petitioner's First Amendment rights by the Respondents, it presents the opportunity to this Court to restore balance to the debate between the fundamental principles of freedom of speech and the important interest of protecting the government from unqualified liability.

In asking this Court to grant this Petition for Certiorari, Petitioner respectfully submits to this Court that, when a public employee is off-duty and speaking about a matter of public concern, the government employer seeking to restrict that speech has a burden of proof to show impediment of government function which is far greater than is required when an employee is on-duty and speaking about a matter directly related to their employment. Comparing, *United States* v. *Treasury*

Employees, 513 U. S. 454, 465, 475 (1995) (*NTEU*) and *San Diego v. Roe*, 543 U.S. 77, 125 S.Ct. 521, 160 L.Ed.2d 410 (2004). It is the clarification of what constitutes the minimum threshold of "far greater" that this petition seeks.

I. THE PROHIBITION AGAINST THE RESPONDENTS' CONDUCT WAS CLEARLY ESTABLISHED IN *PICKERING V. BOARD OF EDUCATION.*

The prohibition of using a public employee's speech on issues of public importance as the basis of discipline has been clearly established since *Pickering*:

> ***[absent proof of false statements knowingly and willingly made] a teacher's exercise of his rights to speak on issues of public importance may not furnish the basis for dismissal of him from public employment***. *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

This clear prohibition is all that a government employer needs to know to place them on sufficient notice that using protected speech as the sole basis for employment discipline or termination is unlawful.

The disagreement between the lower courts in this case was not over the application of this prohibition nor over whether Petitioner's post was constitutionally protected. Indeed, there was not even a dispute in the lower courts as to whether Respondents violated Petitioner's constitutional rights. Rather, the Georgia appellate courts

took issue with the trial court as to whether the law was "clearly established" as to some unidentified legal issue which affected the Respondents' protection of immunity from liability for their illegal conduct. Given the fact that all other issues were either conceded or not in dispute, it can only be presumed that the unidentified legal issue was that of balancing the interests of the government against the rights of the employee.

II. THE ELEVENTH CIRCUIT HAS CLEARLY ESTABLISHED THE BURDEN ON THE GOVERNMENT WHEN THE EMPLOYEE IS OFF-DUTY AND SPEAKING TO A MATTER UNRELATED TO THEIR WORK.

Petitioner respectfully submits that, at the time of the Facebook post, the law was well established in the Eleventh Circuit that mere speculation of disruptions nor isolated negative responses to an employee's speech are sufficient reasons to warrant an intrusion onto the employee's constitutional right of free speech when the employee is off-duty and speaking to a matter of public interest.

The Georgia Court of Appeals found that the Respondents' "concern" for Petitioner's post to cause disruption in efficiency of the school system was sufficient to warrant discipline even though the only actual events that had occurred were one mother who requested removal of her child from Petitioner's class and one teacher who stated that she might have problems working with Petitioner. The Court went on to find that, because 30% of the student population was African-American and because some people felt the post "stereo-typed" African-

American males, the post had the potential to cause racial issues in student discipline although the record does not contain any actual occurrence of such issues. Appendix B.

When the employee is off-duty and speaking to a matter of public interest, concern speculation and isolated negative responses to the speech are not sufficient to justify government intrusion into an employee's right of free speech. In *San Diego v. Roe*, supra., this Court ruled that a higher scrutiny balancing test applies when a public employee is off-duty and is speaking to a matter unrelated to their work:

> . . . the Court has held that when government employees speak or write on their own time on topics unrelated to their employment, the speech can have First Amendment protection, absent some governmental justification "far stronger than mere speculation" in regulating it. *United States* v. *Treasury Employees,* 513 U. S. 454, 465, 475 (1995) (*NTEU*). *San Diego v. Roe*, supra. 543 U.S. at 80.

But what is the minimum threshold of something that constitutes "far stronger than mere speculation"? Is the risk of one mother removing her child from a class or one teacher expressing concerns about working with another teacher or even a group of citizens led by a county commissioner complaining to the school Superintendent about the offensiveness of the post enough to warrant an intrusion onto an employee's right of free speech? What if the post resulted in a mass demonstration at the school and a petition by hundreds that called for removal of the teacher? In order to strike a workable balance, certiorari

is warranted to define what constitutes the minimum threshold of "far stronger than mere speculation."

The fundamental reasoning of this Court in *San Diego v. Roe* and *NTEU* was consistent with the law as it existed in the Eleventh Circuit since 1982. In *Waters v. Chaffin*, 684 F.2d 833 (11th Cir., 1982), the Court was dealing with comments made by an off-duty police officer about his superior. In addressing the question of alleged disruption of government services, the Court immediately rejected the notion of "social value" or "social offensiveness" as being sufficient reasons to allow the government employer to override the off-duty employee's interest in speaking freely. The Court then proceeded to examine the speech's actual effects on the efficiency of the government as opposed to "concerns." The Court was highly persuaded by the fact that a significant delay had existed between the time of the speech and the date of discipline and found that, during this delay, no real disruptions had occurred.[1]

While the Court in *Waters* expressed the narrow application of its ruling, it later applied the same balancing test analysis in the case of *Tindall v. Montgomery County*

1. A similar delay existed in this case. More than two months passed between the time of Petitioner's Facebook post and the date of the hearing on the charges brought by Respondents. Petitioner's Principal Chad Stone and Assistant Principal Jason Clark both testified that the post had not impaired or diminished Petitioner's ability to function professionally nor had it affected her ability to perform her duties as a teacher. They also testified that, during that two-month delay, the post did not directly cause any actual problems at the school other than having one mother request a removal of her child from Petitioner's class which was described only as an "indirect" problem.

Comm., et al., 32 F.3d 1535 (11th Cir., 1994). In *Tindall*, the Court was again dealing with a public employee who testified against her superior in an off-duty setting. Again, the Court required the government employer to show actual versus merely speculative or anticipated disruptions in the operation of the government service. Finding there were no actual disruptions, the Court struck the balance in favor of the employee.

Speculative concerns of potential racial disharmony had also been rejected by the Eleventh Circuit long before Petitioner's post. In *Belyeu v. Coosa County Board of Education*, 998 F.2d 925 (11th Cir., 1993), a teacher was constructively discharged for comments she made in a speech at a PTA meeting which the school board felt "had the potential to undermine the delicately balanced racial atmosphere that existed at Central High." *Belyeu*, supra. at 928. Again, employing an actual versus speculative disruption analysis, the Court found there to be no evidence that the speech actually caused racial disharmony and denied the government employer the protection of sovereign immunity. In so doing, the Court stated in strong and unequivocal terms:

> The free speech clause is "intended to remove governmental restraints from the arena of public discussion." Cohen v. California, 403 U.S. 15, 24, 91 S.Ct. 1780, 1788, 29 L.Ed.2d 284 (1971). It is a guarantee to individuals of their personal right "to make their thoughts public and put them before the community." Curtis Publishing Co. v. Butts, 388 U.S. 130, 149, 87 S.Ct. 1975, 1988, 18 L.Ed.2d 1094 (1967). Where the public statements of a teacher "are neither shown nor can be presumed to have in

> any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally.... the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." Pickering, 391 U.S. at 572-73, 88 S.Ct. at 1737. *Belyeu*, supra. at 930.

This was the law of the Eleventh Circuit as it was clearly defined by 1994. When Respondents made the decision to discipline Petitioner on the sole basis of her Facebook post, they were on notice that mere speculation or concern for potential problems and the isolated responses of one mother and one teacher were insufficient "disruptions" to warrant their infringement on Petitioner's First Amendment rights.

In a case involving employees on-duty and/or speaking about a matter of public importance related to their work, the Eleventh Circuit had clearly established three distinct methods by which the aggrieved employee could show the government had fair warning of the illegality of their conduct:

> *First*, the plaintiffs may show that a materially similar case has already been decided. *Second*, the plaintiffs can point to a broader, clearly established principle that should control the novel facts of the situation. *Finally*, the conduct involved in the case may so obviously violate the constitution that prior case law is unnecessary. Under controlling law, the plaintiffs must

> carry their burden by looking to the law as interpreted at the time by the United States Supreme Court, the Eleventh Circuit, or the [relevant State Supreme Court]. *Gaines v. Wardynski*, 871 F.3d 1203 (11th Cir., 2017) (citing) *Terrell v. Smith*, 668 F.3d 1244, 1255–56 (11th Cir. 2012) (citations, quotation marks, and alterations omitted); *id.* at 1256–58 (discussing the three methods in detail); *Vinyard v. Wilson*, 311 F.3d 1340, 1350–53 (11th Cir. 2002) (same).

Applying the sequential *Pickering* test, the trial court had no problem finding the facts of this case materially similar to the facts of *Pickering* itself and concluded that the law was clearly established so as to deny Respondents the protection of sovereign immunity.

The Georgia Court of Appeals based their opinion on the absence of any materially similar case but did not discuss whether a broader, clearly established principle should control the novel facts of the case nor whether the case may so obviously violate the constitution that prior case law is unnecessary.[2] Appendix B. The Supreme Court of Georgia simply denied certiorari. However, the concurring Justices, while also not identifying any materially similar case, had no difficulty in seeing the facts of the case as demonstrating a violation of Petitioner's First Amendment rights. While the concurring Justices did not specifically apply the second or third methods

2. The Georgia Court of Appeals, for example, never addressed the evidentiary sufficiency of the trial court's application of the *Pickering* balancing test nor did they even determine whether or not the alleged disruptions that they saw in the operation of the school were such that justified the Respondents' intrusion into Petitioner's constitutional rights.

discussed in *Gaines*, it is clearly implicit in their reasoning that they found the facts of this case to be controlled by a broader, clearly defined principle or, even more likely, that this case involved an obvious violation of the constitution. Appendix A.

III. THIS COURT SHOULD ADOPT THE THREE METHODS RECOGNIZED BY THE ELEVENTH CIRCUIT AND REQUIRE AN ANALYSIS OF ALL THREE METHODS BY THE LOWER COURTS WHEN DETERMINING WHETHER THE LAW WAS CLEARLY ESTABLISHED FOR PURPOSES OF IMMUNITY FROM LIABILITY UNDER 42 U.S.C. SECTION 1983.

While this Court has recognized cases as either "obvious cases" of constitutional violation or not,[3] it has never succinctly stated that lower courts must, under *Pickering* and its progeny, include this consideration in determining whether or not the law was clearly established at the time of the alleged constitutional violation. Moreover, there do not appear to be any cases wherein this Court has recognized an analysis of whether there existed a broader, controlling principle that should control the facts of the case.

In the case at hand, it is clear that neither appellate court understood the applicability of either the second or third methodologies recognized by the Eleventh Circuit in *Gaines*, supra. It would be pure speculation to determine what the Georgia Court of Appeals would have done with the second or third methodologies. However, the thoughts

3. See, *Hope v. Pelzer*, supra. for one extreme and *White v. Pauley*, supra. as the other.

of the three concurring Justices of the Supreme Court of Georgia strongly suggest that the Court as a whole may well have determined that this case presents either a broader, controlling principle or an obvious case of constitutional violation, even in light of the alleged absence of any materially similar case.

Petitioner respectfully submits that, if this Court will direct all lower courts to address all three methods of determining whether the law is "clearly established," the result will be to eliminate many cases that come to the higher appellate courts under the "case-by-case" approach. In this case, it seems logical to conclude that the Supreme Court of Georgia saw an obvious violation of Petitioner's First Amendment rights; even in the alleged absence of any materially similar case to guide them to that conclusion. Why the Court did not articulate whether that violation was so obvious as to create "clearly established" law is hard to understand. If this Court will mandate that all lower courts address all three methodologies, there would no longer be any uncertainty as to the completeness of the lower courts' reasoning.

IV. REVIEW IS WARRANTED IN THIS CASE TO GIVE THIS HONORABLE COURT THE OPPORTUNITY TO ADDRESS THE QUESTION OF WHETHER THE *PICKERING* ANALYSIS IS EVEN APPLICABLE TO OFF-DUTY EMPLOYEES SPEAKING TO MATTERS OF PUBLIC CONCERN THAT ARE UNRELATED OR ONLY TANGENTIALLY RELATED TO THEIR WORK.

The concurring Justices of the Supreme Court of Georgia undeniably question whether or not *Pickering* and

its progeny should even be applicable to off-duty employees who speak to matters of public concern unrelated to their work. Naturally, Petitioner would benefit greatly if the *Pickering* analysis were not applicable in this case and Petitioner's speech was treated as speech from an ordinary citizen.

Some legal scholars argue that *Pickering* and its progeny are completely inapplicable in the context of off-duty employees speaking about non-work-related matters of public concern.[4] However, Petitioner would have to concede that an absolute protection of speech by public employees such as teachers would potentially leave government employers unreasonably exposed to liability. For example, if a teacher engaged in sexually explicit expression as this Court was faced with in *San Diego v. Roe*, supra. but was careful to not connect that expression to their employment, the government employer might still have reason to question the fitness of that employee's ability to professionally perform their work with students.[5]

To date, this Court has only articulated a rather vague modification of the *Pickering* analysis to require something "far stronger than mere speculation" in the

4. See, for example, Paul M. Secunda, *Blogging While (Publicly) Employed: Some First Amendment Interpretations*, 47 U. LOUISVILLE L. REV. 679 at 688 (2009).

5. In making this concession, Petitioner does not challenge in this case the Respondents' right to question the effect of her post. However, having determined that Petitioner had not engaged in any acts of immorality, insubordination or willful neglect of duties and having seen only "ripple" effect results on the administration of public education at their school, the Respondents should have concluded that Petitioner's post could not lawfully be used as the sole reason for discipline.

context of government employers' rights to intrude upon the constitutional rights of off-duty employees speaking to matters of public concern that are unrelated to their employment. See, *NTEU* and *San Diego v. Roe,* supra.

Petitioner respectfully submits that, if a public employee is off-duty and is speaking to matters of public interest that are not directly (as opposed to tangentially) connected to the employee's work, then the Court should give the speech presumptive constitutional protection that can only be overcome if the government can demonstrate a substantial nexus to either the employee's ability to perform their duties or the entity's ability to perform its government functions. In this context, "substantial nexus" should be defined as imposing the highest level of constitutional scrutiny. The burden, of course, would be upon the government employer to demonstrate such a substantial nexus.[6]

If this Honorable Court should adopt this suggested standard for off-duty employee cases, Petitioner respectfully submits that such a standard would strike balance between protecting the off-duty employee's right to speak as any other ordinary citizen with the interest of the government in protecting its ability to efficiently carry out its functions.

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6. In making this suggestion, Petitioner gives full credit to author Mary Rose Papendrea in her article Social Media, Public School, Teachers, and the First Amendment, 90 N.C. L. Rev. 1597 (2012) for initiating this concept.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court of the United States grant review of this matter and take the action requested by Petitioner.

Respectfully submitted,

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APPENDIX

APPENDIX A — DECISION OF THE SUPREME COURT OF GEORGIA, DATED JUNE 4, 2018

SUPREME COURT OF GEORGIA

S18C0437.

TUCKER,

V.

ATWATER *et al.*

ORDER OF THE COURT

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

PETERSON, Justice, concurring.

This is a case about just how far the First Amendment bends in allowing government to punish its employees for the viewpoints they communicate in their private lives. I am doubtful that it allowed the punishment imposed here. But the petitioner cannot prevail on the claims she actually brought even if her right to free speech was violated, and so I concur in the denial of the writ of certiorari.

Kelly Tucker, a public school teacher in Tift County, engaged in a written debate on Facebook regarding the

Black Lives Matter movement. The exchange became heated and racially charged; after another participant addressed her with an epithet, Tucker posted a lengthy message dismissive of the movement and derogatory of "thugs." See *Atwater v. Tucker*, 343 Ga. App. 301, 302-303 (807 SE2d 56) (2017). This message was plainly about a topic of public concern, with no obvious link to her employment in public education. In this procedural posture (reversal of the denial of summary judgment), we assume that Tucker posted the message on her own time and on her own computer, and without referencing her employment.

Nevertheless, people viewing the debate who disagreed with the viewpoint she expressed discovered she was a teacher and complained to a local elected official, Tucker's principal, and the local school superintendent. The school administration determined that the message Tucker posted was offensive and decided to punish her. They eventually suspended her for five days and required her to participate in diversity training. Tucker did not avail herself of her right of administrative appeal; instead, she filed a lawsuit against the superintendent and the school board chair alleging claims under 42 USC § 1983 for violation of her First Amendment rights.

The Court of Appeals held that the school officials were entitled to qualified immunity because they did not violate any clearly established law. I agree that there does not appear to be any clearly established law in this jurisdiction that the school officials violated. Indeed, Tucker doesn't cite a single case to that effect from

this Court, the Eleventh Circuit, or the United States Supreme Court, which are the only courts that can clearly establish law for this jurisdiction, and I haven't found any. Accordingly, the school officials are entitled to qualified immunity, and I concur in the denial of the writ of certiorari. Nevertheless, I write separately to express my grave concerns that the school officials may well have violated Tucker's First Amendment rights.

The Court of Appeals observed that the familiar balancing test derived from *Pickering v. Board of Education*, 391 U. S. 563 (88 SCt 1731, 20 LE2d 811) (1968), would apply to First Amendment claims by government employees like Tucker.[1] And the court repeated common language from Pickering and its progeny about balancing the employee's interest in speaking against the government employer's interest in not having its employees' speech disrupt government's efficient functioning. But it's not obvious to me that the *Pickering* balancing test applies to public employee speech cases when the employee speaks on his or her own time about matters unrelated to his or her employment; or, at least, it's not obvious that the balancing test applies normally to potential disruption caused by public reaction to the employee speaker's viewpoint. Indeed, in other contexts, we'd dismissively label such disruption a heckler's veto and proudly disregard it. See *Forsyth County v. Nationalist Movement*, 505 U. S. 123,

1. The Court of Appeals also cited *Garcetti v. Ceballos*, 547 U. S. 410 (126 SCt 1951, 164 LE2d 689) (2006), but that case has no application whatsoever; it's about the government's ability to control speech by its employees when they are speaking on the government's behalf.

134-135 (112 SCt 2395, 120 LE2d 101) (1992) ("Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.").[2]

All but one of the decisions of the United States Supreme Court applying the *Pickering* balancing test has involved speech by a public employee either during the work day or in a manner or about a topic that implicated their employment. See *Lane v. Franks*, 134 S. Ct. 2369, 2380-2381 (189 LE2d 312) (2014); *Waters v. Churchill*, 511 U. S. 661, 679-681 (114 SCt 1878, 128 LE2d 686) (1994) (plurality); *Rankin v. McPherson*, 483 U. S. 378, 388-391 (107 SCt 2891, 97 LE2d 315) (1987); *Connick v. Myers*, 461 U. S. 138, 149-154 (103 SCt 1684, 75 LEd2d 708) (1983). Cf. *Tenn. Secondary School Athletic Assn. v. Brentwood Academy*, 551 U. S. 291, 299-300 (127 SCt 2489, 168 LEd2d 166) (2007) (referencing *Pickering* test in context of athletic

2. Assuming *Pickering* did apply ordinarily, the Court of Appeals still made a significant error in its opinion (that nevertheless doesn't affect the outcome). Citing the Supreme Court's recent decision in *Heffernan v. City of Paterson*, 136 S. Ct. 1412 (194 LE2d 508) (2016), the court held that Tucker bore the burden of proving that the defendants acted with an improper motive. *Atwater*, 343 Ga. App. at 308-309 (1). But *Heffernan* was not a *Pickering* case; the Supreme Court has elsewhere made clear that once the speech at issue has been shown to be on a matter of public concern, the government has the burden to show that suppression was legitimate under the *Pickering* balancing test. See *Rankin v. McPherson*, 483 U. S. 378, 388 (107 SCt 2891, 97 LE2d 315) (1987) (in case brought under 42 USC § 1983, "[t]he State bears a burden of justifying the discharge on legitimate grounds" in the application of the *Pickering* balancing test).

association's sanction of private school for recruiting violations); *Bd. of County Commrs. v. Umbehr*, 518 U. S. 668, 678 (116 SCt 2342, 135 LE2d 843) (1996) (affirming decision to remand for *Pickering* balancing in case involving speech by independent contractor). In contrast, in the one case not necessarily involving such speech, the Court gave the back of the hand to concerns of potential disruption caused by objections to viewpoints of employee speakers. See *United States v. Nat. Treasury Employees Union*, 513 U. S. 454, 466-477 (115 S Ct 1003, 130 LE2d 964) (1995) ("The speculative benefits the honoraria ban may provide the Government are not sufficient to justify this crudely crafted burden on respondents' freedom to engage in expressive activities."). The Supreme Court has since characterized *NTEU* as representing a distinct "line of cases" under which speech of government employees "on their own time on topics unrelated to their employment" is protected "absent some governmental justification far stronger than mere speculation in regulating it." *City of San Diego v. Roe*, 543 U. S. 77, 80 (125 SCt 521, 160 LE2d 410) (2004) (punctuation omitted). This has raised a significant question as to how *Pickering* applies to speech by public employees that neither implicates employment nor occurs during the work day. See Randy J. Kozel, *Free Speech and Parity: A Theory of Public Employee Rights*, 53 Wm. & Mary L. Rev. 1985, 2035-2039 (2012) ("What is not entirely clear is how the First Amendment treats speech that bears no connection, physical or conceptual, to the speaker's employment."); Mary-Rose Papandrea, *The Free Speech Rights of Off-Duty Government Employees*, 2010 BYU L. Rev. 2117, 2130-2135 ("The Court's cases leave unclear what sort of First Amendment protection

attaches to expressive activities of off-duty public employees. Specifically, it is unclear whether all such speech must involve a matter of public concern to receive any First Amendment protection at all and whether the degree to which the expression is related to work affects the strength of any such protection."). I do not propose an answer to that significant question here — I simply note that it exists, and that the existence of such a question should counsel government employers to act with considerably more caution in such cases than the Court of Appeals' opinion would suggest.[3]

American courts have long been jealous guardians of the right to free speech. And at the core of the First Amendment's protection of speech is a firm command that government must not engage in viewpoint discrimination. Indeed, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Ed. v. Barnette*, 319 U. S. 624, 642 (63 SCt 1178, 87

3. I also note that Tucker has raised no claim under the Georgia Constitution's Speech Clause, which is textually different from the First Amendment. See Ga. Const. Art. I, Sec. I, Para. V ("No law shall be passed to curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish sentiments on all subjects but shall be responsible for the abuse of that liberty."). We have interpreted the Georgia Speech Clause's identically worded predecessor as more protective of speech than the First Amendment in at least one context. See *K. Gordon Murray Productions, Inc. v. Floyd*, 217 Ga. 784, 790-793 (125 SE2d 207) (1962) (holding prior restraint of movies valid under United States Constitution but invalid under Georgia Constitution).

LE 1628) (1943). Tucker's Facebook screed does not strike me as possessing any redeeming social value. But the First Amendment does not turn on whether a judge or society as a whole believes a particular viewpoint is worth sharing. Indeed, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U. S. 397, 414 (109 SCt 2533, 105 LE2d 342) (1989); see also *Snyder v. Phelps*, 562 U. S. 443, 458 (131 SCt 1207, 179 LE2d 172) (2011). This "bedrock principle" is difficult to reconcile with allowing government to punish its employees for viewpoints they communicate wholly unrelated to their employment.

Government employers clearly have authority to control their employees in the course of their employment. But it is something else entirely to hold that government employers can punish their employees based on viewpoints expressed in private speech, as the school officials did here. It is far from obvious that the precedent of the Supreme Court requires us to allow such a thing.[4]

I am authorized to state that Chief Justice Hines and Justice Blackwell join in this concurrence.

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4. We don't reach that question here because the absence of clearly established law entitles the school officials to qualified immunity. But there's no reason why the next such case should face the same problem. Indeed, had Tucker simply administratively appealed her discipline, she could have asserted her First Amendment arguments without any question of qualified immunity arising.

APPENDIX B — DECISION OF THE COURT OF APPEALS OF GEORGIA, DATED OCTOBER 24, 2017

IN THE COURT OF APPEALS OF GEORGIA

A17A0722

ATWATER *et al.*,

v.

TUCKER.

October 24, 2017, Decided

MERCIER, Judge.

Kelly H. Tucker (a middle school teacher) filed a complaint for damages pursuant to 42 USC § 1983 against Patrick Atwater, Jr. (the Superintendent of Tift County Public Schools), and Kim Rutland (the Chairperson of the Tift County Board of Education) alleging that they violated her constitutional right to free speech by suspending her for five days and requiring her to attend diversity training after she posted a particular comment on a social media website.[1] Atwater and Rutland filed a "Motion for Judgment on the Pleadings or in the Alternative Motion to Dismiss with Prejudice" asserting, *inter alia*, that they were entitled to official and sovereign immunity. The trial court considered the pleadings, arguments, affidavits and transcript of the suspension hearing and, expressly

1. Tucker also asserted claims against other defendants, but those claims are not relevant to this appeal.

treating the motion as one for summary judgment, denied the motion. We granted Atwater's and Rutland's application for interlocutory appeal. For the reasons that follow, we reverse the judgment of the trial court.

"[B]ecause the trial court considered matters outside the pleadings, the motion [for judgment on the pleadings] was converted to one for summary judgment." *Sims v. First Acceptance Ins. Co. of Ga.*, 322 Ga. App. 361, 363 (3) (a) (745 SE2d 306) (2013) (citation and punctuation omitted). "[S]ummary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." *Navy Fed. Credit Union v. McCrea*, 337 Ga. App. 103, 105 (786 SE2d 707) (2016) (citation and punctuation omitted). "On appeal from the grant of summary judgment, we construe the evidence most favorably towards the nonmoving party, who is given the benefit of all reasonable doubts and possible inferences." *Nguyen v. Southwestern Emergency Physicians, P.C.*, 298 Ga. 75, 82 (3) (779 SE2d 334) (2015).

So construed, the evidence shows the following. During the 2014-2015 school year, Tucker was employed as a middle school teacher in the Tift County Public School System; the school system was managed by the Tift County Board of Education ("the Board"). On December 6, 2014, a Christmas parade was held in Tifton, Georgia, at which demonstrators displayed signs that read "Black Lives Matter," in what was "commonly known as a 'Ferguson protest.'" A local radio show host posted a question on Facebook regarding the appropriateness of the demonstration. Tucker posted a comment in response to the question, then engaged in a "posting dialogue" with another person. As part of that dialogue, Tucker posted

the following public comment on Facebook, which comment precipitated the underlying disciplinary proceeding:

> It's turned into a race matter. What about the thugs that beat the father in his vehicle because he didn't slow down. What about the thugs that shot the college baseball player because they were bored. The list can go on and on. If the dude hadn't have stolen [sic], he would be alive. I think the signs should read, TAKE THE HOOD OFF YOUR HEAD, AND PULL UP YOUR DANG PANTS, AND QUIT IMPREGNATING EVERYBODY. I'm tired of paying for these sorry *&^ thugs … I would much rather my hard earned money that the government takes go to people who need it, such as abusive [sic] adults and children, not to mention the animals they beat and fight too. … That's all I'm saying … [.]

Tucker's comment (the "post") "went viral," and many people in the community saw, shared, forwarded, and discussed the post. On about December 8, 2014, several individuals contacted Atwater to express concern about Tucker's post, including a Board member, a high school student, and a county commissioner. The commissioner expressed her concern and her constituents' concern that "a teacher … would post such a message." Later that month, several other individuals contacted Atwater and expressed their concerns about the post; some parents requested that their children be removed from Tucker's class; and several teachers and administrators at the school where Tucker taught lodged complaints with the school principal regarding the post.

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In January 2015, Atwater issued a letter to Tucker notifying her that he was recommending to the Board that she be suspended for ten days and receive diversity training because of the post, and notifying her that a hearing would be held on the matter. Atwater wrote that Tucker had posted "an offensive message … which went viral." Atwater wrote that "[t]hese stereotypes [in the post] … are highly offensive to the African American community, and to members of our community as a whole"; that Atwater received complaints about the post from several of Tucker's colleagues, members of the community, former students, and parents; that her message "is very disturbing to [her] African American colleagues, students, and [her] students' parents and is disruptive to the educational environment at [the school]"; that Tucker's posting of the comment demonstrated "a lack of professional judgment" and "an inappropriate attitude toward" her students; that Tucker violated Board policies and Standard 10 of the Georgia Code of Ethics for Educators;[2] and that disciplinary charges were being brought pursuant to OCGA § 20-2-940.[3]

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2. Standard 10 provides: "An educator shall demonstrate conduct that follows generally recognized professional standards and preserves the dignity and integrity of the teaching profession. Unethical conduct includes but is not limited to any conduct that impairs and or diminishes the certificate holder's ability to function professionally in his or her employment position or behavior or conduct that is detrimental to the health, welfare, discipline, or morals of students." The Code was in the Employee Handbook for the Tifton County Public School System; Tucker had received a copy.

3. OCGA § 20-2-940 (a) sets forth grounds for terminating or suspending teachers' employment contracts. Grounds

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The Board held a hearing at which Tucker and various school administrators, teachers, and parents testified. See OCGA § 20-2-1160 (a) (regarding the authority of county boards of education to conduct hearings). The testimony included the following: witnesses interpreted the post as referring to and "stereotyping" or unfairly characterizing African-American males; a parent requested to have her child removed from Tucker's class; several people brought copies of the post to the assistant principal and sought to involve him in the matter; a teacher at the school complained to the principal and said that, in light of the post, it would be difficult for her to continue to work with Tucker; the principal stated that 30 percent of the students at the school were African-American, and opined that the post would cause problems with the student disciplinary processes (as parents would have grounds to argue that Tucker was disciplining some students based upon their race); Atwater opined that the post disrupted operations by deteriorating the community's trust in the school system; several witnesses testified that they were concerned that, based on the views expressed in the post, Tucker would treat students differently based upon race; when asked if the post had any effect on the school, the assistant principal replied, "[n]ot directly. … But, indirectly, it has," referred to the student class change and added that the post had the "potential" to cause problems.

In its decision, the Board found that the post showed a "clear lack of judgment on the part of a public school teacher presently teaching African American students," that it created a "toxic atmosphere at the school," and

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enumerated include: (2) insubordination, (3) wilful neglect of duties, (4) immorality, and (8) any other good and sufficient cause.

that it "had the effect of undermining the trust" that students, their parents, and Tucker's colleagues had in her ability to effectively teach and mentor the students. The Board found "good and sufficient cause" to suspend Tucker for five days and to require her to participate in diversity training.

Tucker filed the underlying complaint against Atwater, in his individual capacity and his official capacity as school superintendent, and Rutland, in her individual capacity and her official capacity as Board chairperson, seeking redress under 42 USC § 1983 for alleged violations of her right to free speech.[4] The trial court denied Atwater's and Rutland's motion for judgment on the pleadings or to dismiss, finding that they were not entitled to immunity and that Tucker had made a proper First Amendment challenge.

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4. 42 USC § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State … , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

A plaintiff in a § 1983 action must show (1) "that he has been deprived of a right secured by the constitution and laws of the United States, and [(2) that] the defendant acted under color of state law." *Poss v. Moreland*, 253 Ga. 730, 731 (324 SE2d 456) (1985) (punctuation omitted).

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1. Atwater and Rutland contend that they are entitled to official immunity because their actions did not violate any clearly established law. We agree.

"The doctrine of official immunity, also known as qualified immunity, offers public officers and employees limited protection from suit in their personal capacity." *Cameron v. Lang*, 274 Ga. 122, 123 (1) (549 SE2d 341) (2001) (Footnote omited). Official immunity "gives government officials performing discretionary functions complete protection from individual claims brought pursuant to 42 USC § 1983, if their conduct does not violate *clearly established* statutory or constitutional rights of which a reasonable person would have known." *Kline v. KDB, Inc.*, 295 Ga. App. 789, 793 (2) (673 SE2d 516) (2009) (citation and punctuation omitted; emphasis supplied); *Bd. of Commrs. of Effingham County v. Farmer*, 228 Ga. App. 819, 824 (2) (493 SE2d 21) (1997). "Therefore, in order to succeed, the plaintiff in a civil rights [§ 1983] action has the burden of proving that a reasonable public official could not have believed that his or her actions were lawful in light of clearly established law." *Bd. of Commrs. of Effingham County*, supra at 823-824 (2).

"The test for determining whether a defendant is protected from suit by the doctrine of qualified immunity is the objective reasonableness of the defendant's conduct as measured by reference to clearly established law in this regard a reasonably competent public official should know the established law governing his conduct." *Gardner v. Rogers*, 224 Ga. App. 165, 167 (1) (480 SE2d 217) (1996) (citation and punctuation omitted). "For the law to be

clearly established to the point that qualified immunity does not apply, the law must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that 'what he is doing' violates federal law." *Bd. of Commrs. of Effingham County*, supra at 824 (2). Stated another way, "[u]nless a government agent's act is so obviously wrong … that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing, the government actor has immunity from suit." *Maxwell v. Mayor & Aldermen of the City of Savannah*, 226 Ga. App. 705, 707 (1) (487 SE2d 478) (1997) (citation and punctuation omitted). "*In all but the most exceptional cases*, qualified immunity protects government officials performing discretionary functions from the burdens of civil trials and from liability for damages." *Bd. of Commrs. of Effingham County*, supra at 823 (2) (citation and punctuation omitted; emphasis supplied). The issue of immunity is a question of law and is reviewed *de novo*. *Pearce v. Tucker*, 299 Ga. 224, 227 (787 SE2d 749) (2016).

> Although the law is well-established that the [S]tate may not demote or discharge a public employee in retaliation for speech protected under the [F]irst [A]mendment, a public employee's right to freedom of speech is not absolute. In *Pickering* [*v. Bd. of Ed.*, 391 U. S. 563 (88 SCt 1731, 20 LE2d 811) (1968)], the landmark case concerning a public employee's [F]irst [A]mendment rights, the Supreme Court held that a public employee's interests

> are limited by the [S]tate's need to preserve efficient governmental functions. The [S]tate has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the employee as a citizen, in commenting upon matters of public concern and the interest of the [S]tate, as an employer, in promoting the efficiency of the public services it performs through its employees.

Dept. of Corrections v. Derry, 235 Ga. App. 622, 625 (3) (a) (510 SE2d 832) (1998) (Footnote, citations and punctuation omitted); see *Stewart v. Baldwin County Bd. of Ed.*, 908 F2d 1499, 1505 (II) (A) (11th Cir. 1990); *Bryson v. City of Waycross*, 888 F2d 1562, 1565 (V) (A) (11th Cir. 1989).

In applying *Pickering*,

> [a] four-stage analysis has evolved. First, the court must determine if the employee's speech may be fairly characterized as constituting speech on a matter of public concern. Second, if the speech addresses a matter of public concern, *the court must then conduct a balancing test in which it weighs the First Amendment interests of the employee against the interest of the [S]tate, as an employer, in promoting the efficiency of the public services*

> *it performs through its employees*. Third, if the employee's claim survives the balancing test, the fact-finder must determine whether the employee's speech played a substantial part in the government's decision to discharge the employee. Finally, if the fact-finder determines that the employee's speech played a substantial part in the employee's discharge, the [S]tate must prove by a preponderance of the evidence that it would have discharged the employee even in the absence of the speech.

Derry, supra (Footnote, and punctuation omitted; emphasis supplied).

Assuming that Tucker made her post as a citizen and the post was a comment on a matter of public concern, the courts must "balance … the interests of [Tucker], as a citizen, in commenting upon matters of public concern and the interest of the [government] as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U. S. at 568 (II). In striking this balance, the courts consider whether the employee's speech impairs the ability of superiors to discipline subordinates, affects harmony among co-workers, impairs working relationships for which loyalty and confidence are necessary, or interferes with the operation of the government entity. *Rankin v. McPherson*, 483 U. S. 378, 388 (II) (B) (107 SCt 2891, 97 LE2d 315) (1987).

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Government employers are permitted to take action against employees who engage in speech that "may unreasonably disrupt the efficient conduct of government operation[s]." *Tindal v. Montgomery County Comm.*, 32 F3d 1535, 1540 (III) (A) (1) (11th Cir. 1994). It has been recognized that where "close working relationships are essential to fulfilling public responsibilities, a wide degree of deference [is given] to the employer's judgment[.]" *Connick v. Myers*, 461 U. S. 138, 151-152 (II) (C) (103 SCt 1684, 75 LE2d 708) (1983).

In this case, Atwater and Rutland brought the disciplinary proceeding against Tucker for alleged violations of OCGA § 20-2-940 (a) (which permits the suspension of a teacher for specified reasons, including "good and sufficient cause") and Standard 10 (which sets forth standards for professional conduct for educators), asserting that her posting of the comment was disruptive to the school environment in which she taught and detailing the grounds for the disciplinary action. OCGA § 20-2-940 sets out the notice and procedural requirements for such disciplinary action, and there is no claim that the required procedures were not followed.

Here, there was evidence, recounted above, that Tucker's post interfered with the operation of the middle school where she taught. Although Tucker asserts that "there is no evidence that there was any *actual* disruption of the educational environment as the result of Appellee's posts," only "concern[s]" that the post could be disruptive, that assertion is belied by record evidence that the post

did in fact affect the operations of the school.[5] Moreover, a government has discretion to restrict an employee's speech "that has *some potential* to affect the entity's operations." *Garcetti v. Ceballos*, 547 U. S. 410, 418 (II) (126 SCt 1951, 164 LE2d 689) (2006) (emphasis supplied).

As the Court acknowledged in *Garcetti*, "conducting these inquiries sometimes has proved difficult." *Garcetti*, supra. "This is the necessary product of 'the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors … to furnish grounds for [disciplinary action]." *Id*. (citation and punctuation omitted). The instant case presents one of an "enormous variety of fact situations," requiring a difficult inquiry, and there is no "bright-line" standard that would have put a reasonable employer on notice of a constitutional violation under these facts. See generally *Bd. of Commrs. of Effingham*

5. Notably, the assertion in Tucker's brief that "both administrators who testified for the Appellants at the Board hearing testified that there was absolutely no interruption of school operations" materially misstates the administrators' testimony shown on the record pages she has cited.

We also note that Tucker's brief includes the following statement: "In fact, to this date, no student at Eighth Street Middle School has even voiced an objection to Appellee's posts; perhaps because they, too, are tired of dealing with thugs of all races who walk around with hoods over their heads, sagging pants and who commit random acts of violence." Tucker provides no citations to the record to support this statement. See Court of Appeals Rule 25; *Leone v. Green Tree Servicing*, 311 Ga. App. 702, 704 (1) (716 SE2d 720) (2011).

County, supra at 824 (2). Tucker has pointed to no authority that put Atwater and Rutland on such notice under the circumstances presented in this case. Tucker bore the burden of proving an improper employer motive, but she has not met that burden. See *Heffernan v. City of Paterson, N. J.*, ___ U. S. ___ (II) (136 SCt 1412, 1419, 194 LE2d 508) (2016).

Atwater and Rutland did not violate any clearly established law of which a reasonable person would have known. See *Harlow v. Fitzgerald*, 457 U. S. 800, 818 (IV) (B) (102 SCt 2727, 73 LE2d 396) (1982); see also *Maxwell*, supra; *Dartland v. Metropolitan Dade County*, 866 F2d 1321, 1322 (11th Cir. 1989). Because "pre-existing law [does not] dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that [taking disciplinary action against Tucker for her post] violates [the First Amendment] in the circumstances," the trial court erred in ruling that Atwater and Rutland were not entitled to official immunity. See *Bd. of Commrs. of Effingham County*, supra at 824 (2) (emphasis and citation omitted).

2. Atwater and Rutland were also entitled to judgment as a matter of law to the extent Tucker asserted claims against them in their official capacities.

> A local government such as the []county may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or

> custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983. This rule also applies to local government officials sued in their official capacities.

Schroeder v. DeKalb County, 341 Ga. App. 748, 754 (5) (b) (802 SE2d 277) (2017). Tucker did not allege facts that showed a government policy or custom of permitting a constitutional violation. See id. at 754-755 (5) (b) ("To establish the county's official policy [permitting a particular constitutional violation], [plaintiff] must identify either (1) an officially promulgated county policy or (2) an unofficial custom or practice of the county shown through the repeated acts of a final policymaker for the county.")

Because Atwater and Rutland were entitled to judgment as a matter of law, the trial court erred by denying their motion. See *Harper v. Patterson*, 270 Ga. App. 437, 440 (2) (606 SE2d 887) (2004).

Judgment reversed. Barnes, P. J., concurs. McMillian, J., concurs in judgment only.

APPENDIX C — ORDERS OF THE SUPERIOR COURT OF TIFT COUNTY, DATED MAY 31, 2016

IN THE SUPERIOR COURT OF TIFT COUNTY

Civil File Action No. 2016-CV-016

KELLY H. TUCKER,

Plaintiff,

vs.

PATRICK ATWATER, JR., IN HIS INDIVIDUAL CAPACITY AND HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF TIFT COUNTY PUBLIC SCHOOLS, AND KIM RUTLAND, IN HER INDIVIDUAL CAPACITY AND HER OFFICIAL CAPACITY AS CHAIRPERSON OF THE TIFT COUNTY BOARD OF EDUCATION,

Defendants.

ORDER ON DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS OR IN THE ALTERNATIVE TO DISMISS THE COMPLAINT WITH PREJUDICE

In that the complaint *sub judice* is an allegation of a violation of Plaintiff's First Amendment rights under the Constitution of the United States, and is brought pursuant to 42 U.S.C. § 1983, the Defendants are not entitled to the immunity protections afforded by *Ga. Const.* Art. I, § II,

Para IX. Furthermore, there is no requirement in a § 1983 action that a Plaintiff exhaust her administrative remedies before pursuing the attendant remedies afforded under the Code[1], nor is the conduct of the named Defendants privileged or protected from a §1983 action by virtue of the Public Duty exemptions afforded by O.C.G.A. § 51-5-7.

Defendants cannot reasonably sustain an argument for qualified (official) immunity. They cannot maintain that a First Amendment violation would not be "a clearly established ... constitutional right(s) which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *James v. City of Douglas, Georgia*, 941 F.2d 1539 (11th Cir. 1991).

In addressing their challenge to the First Amendment claim on Page 19 of their brief in support of the instant Motion, Defendants' appear to have made a four-pronged analysis out of whole cloth. Nowhere in *Pickering v. Bd. of Ed.*, 391 U.S. 563 (1968), can this Court find such a cookbook approach to an evaluation of this claim. Nevertheless, assuming, *arguendo,* that such is the case, and accepting Defendant's assertion that the first two questions are questions of law (Defendants' Brief, P. 19), this Court finds as follows:

1) Plaintiff's speech did, indeed, involve matters of public concern, to-wit:

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1. *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496 (1982).

a) the public appearance and propriety of dress of today's youth;

b) the undesirability of indiscriminate sexual activity;

3) the disproportionate tax burden imposed on taxpaying citizens by unsupported births;

and,

4) the ongoing social dilemma caused by actual or perceived disparity in the treatment of different races by law enforcement.

2) Plaintiff's speech, according to the evidence before the Court, caused, at worst, a ripple in the administration of the public education in Tift County, Georgia, and therefore outweighed the government's interest in imposing a penalty against her.

3) Plaintiff's speech played not only a "substantial part" in the government's decision as to a suspension of her employment and other sanctions, but was the *sole* cause of the suppression of her First Amendment rights.

4) This Court can find no relevance (nor logic) in this proposed fourth prong of the Pickering decision. Obviously, the Post in question was the *sine qua non* of the government action, so the proper answer to this unintelligible query would have to be "No, the employer would have taken NO action but for the speech."

In conclusion, this Court adopts, with editorial adaptation to the facts before it, the words of the late Mr. Justice Marshall in Pickering:

"What we do have before us is a case in which a teacher has made ... public statements upon issues then currently the subject of public attention ... which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of (her) daily duties in the classroom or to have interfered with the operation of the school generally." *Pickering*, *supra,* at 572-3.

Accordingly, Defendant's above-styled Motion is hereby DENIED.

ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This Court finds that the Motion, as currently pled, is insufficient as a matter of law in every particular argued in opposition thereto and, accordingly, said Motion is hereby DENIED.

SO ORDERED, this the 31st day of May, 2016.

/s/_____
Loring A. Gray, Jr.
Senior Judge
Sitting by Designation