No. 18-282

In The Supreme Court of the United States

KELLY H. TUCKER,

Petitioner,

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,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Georgia

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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COME NOW, PATRICK ATWATER, JR. ("Atwater"), named in the Complaint below in his individual capacity and his official capacity as Superintendent of Tift County Public Schools, and KIM RUTLAND ("Rutland"), named in the Complaint below in her individual capacity and official capacity as Chairperson of the Tift County Board of Education, Respondents in the above-styled action and Defendants in the action below (hereinafter referred to collectively as "Defendants" or "Respondents"), and file this, their Response to Application for Writ of Certiorari, showing the Court as follows:

INTRODUCTION

Pursuant to Rule 10 of this Honorable Court, "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion," and will be granted "only for compelling reasons." Sup. Ct. R. 10. This Court has also provided guidance as to the character of the reasons the Court considers for granting a petition. The Petition which Petitioner has brought before this Court does not fit the character of a case which this Court should consider. More specifically, the present case does not stem from a United States Court of Appeals decision, nor is the case one where a state court of last resort has decided an important federal question. In fact, Petitioner's appeal to this Honorable Court follows the Georgia Supreme Court's decision to itself pass on Petitioner's claims. Finally, the Petition before this Court does not involve a state court decision on an important

question of federal law that has not been previously decided by this Court, or that conflicts with relevant decisions by this Court. Quite to the contrary, the decision being appealed rests upon the holdings of relevant decisions from this Court. For these reasons, and those stated more fully below, Respondents respectfully ask this Court to deny Petitioner's Petition for Writ of Certiorari.

OBJECTION TO QUESTIONS PRESENTED AND MISSTATEMENTS BY PETITIONER

Pursuant to Rule 15 of this Honorable Court, Respondents object to Petitioner's questions presented. Petitioner raises, for the first time in this litigation, that this Court's decision in *Pickering* is inapplicable to Petitioner because she was "off-duty" at the time that she made her statements. (*See* Petitioner's Brief, p. i-ii). Petitioner also argues, for the first time, that a distinction should be made between off-duty and on-duty employees in the First Amendment context. Petitioner seems to ignore the actual issue decided below, which was that Respondents were entitled to sovereign, qualified immunity because their actions did not violate any clearly established law. Both the Georgia Court of Appeals in deciding in favor of Respondents, and the Georgia Supreme Court in denying Petitioner's Petition for Writ of Certiorari, acknowledged that Petitioner failed to come forth with any case that would show that the law was "clearly established" such that Respondents would lose their right to immunity.

Petitioner is asking this Court to *change the law* and apply it retroactively to Respondents so as to strip them of their immunity.

Also for the first time, Petitioner argues that the Eleventh Circuit's methodology for determining whether a government official is entitled to qualified immunity in the First Amendment context should have been applied to this case. Petitioner states in her brief that "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 is perplexing that Petitioner would argue that the Georgia Court of Appeals did not understand the applicability of the case when the case was never brought to its attention. In fact, Petitioner likely first saw the case when Justice Nels Peterson of the Georgia Supreme Court mentioned it in his concurrence to that court's denial of Petitioner's Petition for Writ of Certiorari. However, as discussed more fully below, the *Gaines* case supports the decisions of the appellate bodies below because, "[i]f reasonable people can differ on the lawfulness of a government official's actions despite existing case law, he did not have fair warning and is entitled to qualified immunity." *Gaines v. Wardynski*, 871 F.3d 1203, 1210 (11th Cir. 2017).

Further, pursuant to Rule 15, Respondents point out to this Court misstatements made by the Petitioner. First, Petitioner continually alludes to a "decision" by the Georgia Supreme Court that Respondents violated Petitioner's First Amendment rights. However, in actuality, the Georgia Supreme Court denied

Petitioner's Petition for Writ of Certiorari. (*See* P.'s Br., Appendix A, p. 1a). All nine of the justices of the Georgia Supreme Court concurred in the decision. One justice wrote an opinion to accompany his concurrence, and two other justices authorized him to state that they signed on to his concurrence. In that concurring opinion, Justice Peterson opined that Respondents *may* have violated Petitioner's First Amendment rights, but that the law was not so clearly established at the time as to put them on notice that their actions would violate her rights. (*See* P.'s Br., App. A, p. 2a-3a). Though Justice Peterson questioned whether a distinction should be made for statements made while off-duty, he acknowledged that none of the *Pickering* progeny addresses the issue.

Petitioner also states in her brief that the Court of Appeals "conceded that Petitioner was speaking as a citizen and that her speech addressed a matter of public concern." (P.'s Br., p. 7). The Court of Appeals did not concede this point, and neither have Respondents who steadfastly maintain that Petitioner's comments were a matter of personal opinion, not a matter of public concern. The Court of Appeals did not address the issue, but instead skipped to the third prong of the *Pickering* balancing test, stating, "[a]ssuming 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] . . . and the interests of the [government] as an employer. . . .' " (*See* P.'s Br., App. B, p. 17a).

The Petitioner stunningly claims that "there was not even a dispute in the lower courts as to whether Respondents violated Petitioner's constitutional rights." (Petition, p. 10). In reality, the Court of Appeals found that "there was evidence, recounted above, that Tucker's post interfered with the operation of the middle school where she taught." (P.'s Br., App. B, p. 18a). This type of material misstatement by the Petitioner is a running theme throughout this litigation, where the Court of Appeals actually chastised the Petitioner for materially misstating the testimony in the record in trying to support her argument that there was no disruption of the educational environment. (P.'s Br., App. B, p. 19a, FN 5). Based on the discussion of the facts of this case, the Georgia Court of Appeals concluded that the Respondents' actions were lawful under *Pickering*. Accordingly, that court correctly held that the Respondents "did not violate any clearly established law of which a reasonable person would have known." (P.'s Br., App. B, p. 20a).

STATEMENT OF THE CASE

The instant action arises out of a disciplinary action resulting in a five-day suspension of a teacher for race-based, personal comments she posted on Facebook negatively stereotyping African American males. The post prompted complaints from parents, teachers and at least one student. As a result of the Petitioner's comments, one parent requested that her child be removed from the teacher's classroom.

During the 2014-15 school year, Petitioner was employed by the Tift County Board of Education as a teacher in the Tift County School District. (R:16, ¶ 13). On February 4, 2015, the Tift County Board of Education voted to suspend Petitioner for five days from service for posting her personal, race-based remarks on Facebook, which the Board determined negatively stereotyped African American males. (R:79-87).

The remarks made by Petitioner were posted on December 6, 2014, on the public Facebook page of a local radio personality, who was calling for comment as to the appropriateness of protesters holding signs that read, "Black Lives Matter" at the local Christmas parade. (R: Hearing Transcript[1] ("T.") p. 79)). The original post by the television personality had a photograph of African American protesters holding a sign that reads, "Black Lives Matter." (R: T. p. 80, Exhibit 8). Petitioner posted a comment that stated "all lives matter" in response, which sparked an argument between Petitioner and an African American female. (R: T. p. 459-60). The African American female purportedly called Petitioner stupid and eventually responded to Petitioner by saying, "Bitch, you're white. It's a race matter. You don't know what you're talking about." (R: T. 462).

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[1] The BOE rendered its decision to suspend Petitioner after a full evidentiary hearing. The transcript of the hearing is attached to Defendants' Answer as Exhibit "B." In the record, Exhibit "B" appears only as the first page of the hearing transcript (R:79); however, the transcript in its entirety (pages 1-529 and 26 exhibits) is included in the back of the record. As a result, references to the transcript will be referred to as "T.", followed by the page or exhibit of the transcript.

Petitioner "lost it" (R: T. p. 462) at that point and posted the following comment directed toward the other woman:

> 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 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 . . . [.]

(R:73) (Emphasis in the original) (hereinafter referenced as "Post" or "Posting").[2]

Petitioner's Facebook profile from which she posted the comment included her first and last name as well as her photograph. (R:73). Petitioner was easily identifiable as a teacher, as one commenter even remarked, "interesting comment coming from a teacher." (R: T. Exhibit 13). Petitioner concedes that in making this Post, she was angry and emotional because the

[2] Though the Petitioner purports to quote the Post in her Petition for Certiorari, the language is different from the language found by the Court of Appeals. *Compare* P. Br., p. 3; P. Br., App. B, p. 10a.

African American female called her "bitch." (R: T. pp. 458-64). Although her Post was visible to the public at large, it was directed at the person who insulted her. (R:130, ¶¶ 9 and 10; T. pp. 458-64).

Petitioner's remarks were viewed and shared by many persons in the Tift County community. Atwater received the Post on December 8, 2014, from Melissa Hughes Chevers, Tift County Commissioner. (R: T. p. 20). Atwater was also contacted by the vice-chairman of the Tift County Board of Education, John Smith, an African American, who stated that he had been receiving calls from his constituents who were offended by or who otherwise objected to Petitioner's Post. (R: T. p. 20).

After Atwater received complaints from three teachers, two parents, two county officials, one administrator and one student alleging that Petitioner had committed an act which may violate the Code of Ethics for Educators, Atwater opened an investigation (*See* R: T. p. 25), and following the completion of the investigation, Atwater brought formal charges against Petitioner pursuant to the Fair Dismissal Act, O.C.G.A. § 20-2-940, *et seq.* (*See* R: T. p. 19, and Exhibit 1).

On January 14, 2015, Petitioner was notified that, as a result of the Post and subsequent disruption to the school system, she was being charged with immorality, insubordination, willful neglect of duties, and other good and sufficient cause pursuant to O.C.G.A. § 20-2-940(a)(2)(3)(4)(8), and that she had breached Standard

10 of the Code of Professional Conduct.[3] (*See* R: T. Exhibit 1). A formal hearing was held before the Board in accordance with Georgia law on February 2, 2015. At the hearing, Rutland and five other Board members sat as a tribunal as provided by O.C.G.A. §§ 20-2-940 and 20-2-1160 and heard evidence from both Atwater and Petitioner. (R: 47-61).

During the hearing, Atwater called eleven witnesses, including the teachers, parents, and one student who had lodged complaints against Petitioner as a result of her Post. (R: T. pp 1-530). Atwater's witnesses included fellow Eighth Street Middle School ("ESMS") teachers Shakina Maddie, Colondra Copland and Carol Stroud; parents Kristi Litman, Jamie Turner and Dr. Lashonda Flanders; Tift County student, Delvin McRay; Commissioner Melissa Hughes Chevers; ESMS Assistant Principal Jason Clark; and, ESMS Principal, Dr. Chad Stone. (*See* T. pp. 1-529, *generally*). All witnesses who testified on behalf of the school district expressed some level of shock, disappointment or offense to Petitioner's Post. (*See* R: T. pp. 76, 82, 84,

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[3] Standard 10 states:

> 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.

127-28, 161, 164, 184, 189, 205, 283, 288). All witnesses also testified that they believed Petitioner's comments negatively stereotyped African American males. (*See* R: T. pp. 76, 82, 127-28, 161, 203, 284-85, 321). Ms. Litman testified that she had lost trust in Petitioner as a result of the comments and requested that her son, who is African American, be removed from Petitioner's classroom. (R: T. p. 283). Delvin McRay and Commissioner Hughes Chevers both testified that they questioned whether Petitioner would treat African American males fairly in her classroom given the views she expressed. (R: T. pp. 205, 237). Dr. Stone testified that after he became aware of Petitioner's comments, he was concerned that the African American students at ESMS, which make up approximately 30 percent of the student population at the school, would believe the Post was directed at them. (R: T. pp. 346-47). Dr. Stone further testified that a situation such as this, wherein teachers are compelled to come forward with their concerns, causes a disruption. (R: T. p. 350).

After hearing all of the evidence and witnesses presented, the Board found that grounds existed to impose disciplinary action against Petitioner pursuant to O.C.G.A. § 20-2-940, not for her comment that "all lives matter," but for the personal and derogatory statements she directed toward the African American female who angered her. (R: 79-87). The Board voted to suspend Petitioner from employment without pay for five days and to require her to attend diversity

training.[4] (R:86). Petitioner was notified of her opportunity to appeal the BOE's decision to the State Board of Education, which she did not do, but instead filed a lawsuit in state court nearly a year later.[5] (R: 91-93).

On January 13, 2016, Petitioner filed her Complaint against Melissa Hughes Chevers, Tift County Commissioner; Patrick Atwater, Jr.; Kim Rutland; and the Tift County Board of Education ("BOE") (R:10-19) alleging violations of her right to free speech, and asserting a claim for damages pursuant to 42 U.S.C. Section 1983. (R:16, ¶ 15; and 17, ¶ 18). Atwater, Rutland and the BOE filed their Answer on February 12, 2016, denying Petitioner's claims and alleging several defenses, including certain immunity defenses, and filed a Motion for Judgment on the Pleadings, or in the Alternative Motion to Dismiss with Prejudice[6] (hereinafter, "Motion"). (R:31-40; 44-46). Petitioner replied with a Brief in Opposition to Defendants' Motion. (R:146-90). Respondents filed their reply brief on April 11, 2016. (R:222-61). On May 31, 2016, the trial court denied Respondents' Motion. (R:300-2). Respondents filed an Application for Interlocutory Appeal on June 17, 2016. The Court of Appeals granted the Application and the parties submitted briefs on December 19, 2016,

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[4] Petitioner did not attend the diversity training as directed, and has since voluntarily left the employment of the Tift County Board of Education.

[5] Petitioner has never alleged any substantive or procedural due process violation in the hearing process under the Fair Dismissal Act, O.C.G.A. 20-2-940, *et seq*.

[6] Petitioner dropped her claims against the BOE and Melissa Hughes Chevers after Respondents filed their Motion.

and January 2, 2017. The Court of Appeals rendered its decision on October 24, 2017, reversing the trial court's decision. The Court of Appeals held that the trial court erred when it denied Respondents' Motion because there was evidence that the Petitioner's comments interfered with the operation of the middle school where she taught and neither Atwater nor Rutland violated clearly established law when disciplining the Petitioner for those comments. (*See* P.'s Br., App. B, p. 18a-20a).

REASONS FOR DENYING CERTIORARI

A. The Petitioner's Own Cases Support The Decision By The Georgia Court of Appeals.

The Petitioner cites to this Court's holding in *White v. Pauly* to support her position that the Respondents were not entitled to qualified immunity. (*See* P.'s Br., p. 9; *White v. Pauly*, 137 S. Ct. 548 (2017)). However, this Court in *White* emphasized that qualified immunity cannot be defeated by defining "clearly established law" at a "high level of generality." *Id.* at 551.

> Qualified immunity attaches when an official's conduct "'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" While this Court's case law "'do[es] not require a case directly on point'" for a right to be clearly established, "'existing precedent must have placed the statutory or

> constitutional question beyond debate.'" In other words, immunity protects "'all but the plainly incompetent or those who knowingly violate the law.'" . . . Today, it is again necessary to reiterate the longstanding principle that "clearly established law" should not be defined "at a high level of generality." As this Court explained decades ago, the clearly established law must be "particularized" to the facts of the case. Otherwise, "[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights."

Id. at 551-52 (2017) (internal citations omitted). In *White*, this Court reversed a denial of qualified immunity, finding that "Officer White did not violate clearly established law." *Id.* at 552.

In this case, the Georgia Court of Appeals found that the factual record of this case demonstrated that the Petitioner's Post actually interfered with the operation of the middle school where she taught. (P.'s Br., App. B, p. 18a). The Georgia Supreme Court, in denying certiorari, did not disturb this finding. (P.'s Br., App. A, *generally*).

Based on those facts, the Court of Appeals concluded that the Respondents did not violate any clearly established law of which a reasonable person would have known. (P.'s Br., App. B, p. 20a). The Georgia Supreme Court did not disturb this finding, either. (P.'s Br., App. A, *generally*). Even in the concurrence, Justice

Peterson agreed that no clearly established law exists such that the Respondents' immunity may be stripped:

> 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.

(P.'s Br., App. A, p. 2a). This is exactly the type of analysis this Court articulated in *White*, albeit in the context of the Fourth Amendment: "The panel majority misunderstood the 'clearly established' analysis: It failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment." *White*, 137 S. Ct. at 552.

Here, a panel of the Georgia Court of Appeals and the entire Georgia Supreme Court all agree on one thing: there is no clearly established law that suggests that the Respondents acted unlawfully in disciplining the Petitioner based on the facts of this case.

Given this one conclusion that everyone agrees on, the proper result is that this case must now be laid to rest. "The Court has found this necessary both because qualified immunity is important to '"society as a whole,"', and because as '"an immunity from suit,"'

qualified immunity ' "is effectively lost if a case is erroneously permitted to go to trial," '[.]" *Id.* at 551. This alone is sufficient grounds to deny certiorari.

B. Petitioner's Constitutional Arguments Are Not Supported By The Facts Or The Law.

The Petitioner's arguments rest on a mish-mash of ignoring the facts of the case in some instances and misstating the law in others. The majority of her Petition is based on what can only be described as a blatant disregard for the factual record. The Petitioner claims that "[i]ndeed, there was not even a dispute in the lower courts as to whether Respondents violated Petitioner's constitutional rights." (P.'s, Br., p. 10). If this were remotely close to an accurate statement, there might be some good faith basis for this Petition. Unfortunately, it is wholly unsupported by even a casual review of the record and the Court of Appeals' decision. The Court of Appeals explicitly stated that

> government employers are permitted to take action against employees who engage in speech that "may unreasonably disrupt the efficient conduct of government operation[s]" . . . [and] . . . there was evidence . . . that Tucker's post interfered with the operation of the middle school where she taught.

(P.'s Br., App. B, p. 18a). It strains credulity (and common sense) to morph that holding into a claim that there was no dispute that the Petitioner's rights were violated.

If nothing else, Petitioner's brief is consistent in that it continues to ignore this basic holding of the Georgia Court of Appeals. She argues that, despite the fact that the Court of Appeals found evidence of actual interference with the operation of the middle school where she taught, the decision was based on "concern" or "mere speculation." (P.'s Br., p. 11). Here again, the Petitioner simply ignores large chunks of the Court's opinion:

> Although Tucker asserts that "there is no evidence that there was any *actual* disruption of the education 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* . . . [FN5] 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.

(P.'s Br., App. B., p. 18a-19a) (emphasis added). Strangely, in her Petition, she herself even acknowledges that the fallout from her Post was more than "mere speculation" because she admits that "one mother . . . requested removal of her child from Petitioner's class and one teacher . . . stated that she might have problems working with the Petitioner." (P.'s Br., p. 11). While this is a gross understatement of the evidence in the record, it still underscores the point: this

is not a case that involves "mere speculation," but rather of concrete and particularized harm as demonstrated by the evidence, and as found by the Georgia Court of Appeals.

The factual record is important, and it is clear why the Petitioner so willfully ignores it: her entire Petition is based on a line of cases that require something more than "mere speculation" in order for the government to take action against an employee for speech. She cites to cases such as *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 471, 115 S. Ct. 1003, 1015, 130 L. Ed. 2d 964 (1995); *City of San Diego, Cal. v. Roe*, 543 U.S. 77, 81, 125 S. Ct. 521, 524, 160 L. Ed. 2d 410 (2004); *Belyeu v. Coosa County Board of Education*, 998 F.2d 925 (11th Cir., 1993); and *Tindall v. Montgomery County Comm., et al.*, 32 F.3d 1535 (11th Cir., 1994). None of these cases really speak to the factual scenario here, where the Court of Appeals found that the evidence supported an actual interference with the operation of the school due to the Petitioner's speech.

Notably, even if the Petitioner were successful at wishing away the facts, she has still misstated and misapplied the relevant law. Petitioner argues that off-duty comments require a higher threshold for regulation, citing to *NTEU* and *Roe*. However, this Court itself in *Roe* rejected a broad application of *NTEU* to facts similar to the case at bar.

> The Court of Appeals' reliance on NTEU was seriously misplaced. Although Roe's activities took place outside the workplace and

> purported to be about subjects not related to his employment, the SDPD demonstrated legitimate and substantial interests of its own that were compromised by his speech . . . The authorities that instead control, and which are considered below, are this Court's decisions in *Pickering* . . . *Connick* . . . and the decisions which follow them.

Roe, 543 U.S. at 81-82 (internal citations omitted). Throughout this litigation, the Petitioner herself (at least until this Petition) had urged that the case was controlled by *Pickering* and its progeny. R. *ibid*.

The Petitioner's arguments about *Waters* are similarly misplaced. The Court in *Waters* applied the same *Pickering* balancing test as applied by the Georgia Court of Appeals in this case; the difference being, of course, that the evidentiary record in *Waters* did not support the government's purported interest in restricting speech.

> We conclude that the department's interests do not outweigh those of Waters, and that his speech was constitutionally protected. We must emphasize, however, the narrowness of our decision. On one side, we have an off-duty police officer who was merely bellyaching about his job over drinks. On the other hand, we have a police department whose asserted interests in suppressing the speech do not fully withstand scrutiny. *Because we do not think that the department has made a showing of actual harm or a reasonable likelihood of harm to its efficiency, discipline, or*

> *harmony*, we believe that the first amendment protects this example of "the American tradition of making passing allusion to the vicissitudes of the boss."

Waters v. Chaffin, 684 F.2d 833, 840 (11th Cir. 1982) (emphasis added). To the contrary of Petitioner's claims, the *Waters* court clearly did not hold that actual harm was required:

> We think this approach [of requiring a showing of actual harm] fails to protect the government's interest in the efficient delivery of police services. . . . Consequently, we conclude that a reasonable likelihood of harm generally is also enough to support full consideration of the police department's asserted interests in restricting its employees' speech.

Id. at 839. Though, here again, the case before the Court today is one of actual harm, not "mere speculation" or even "a reasonable likelihood of harm." While the Petitioner is attempting to tear down the straw man of "mere speculation," the cases she has cited do not even really support that attack.

In short, the Petitioner's position is an odd mixture of misstated law and distortions of the factual record. None of which, however, support the relief the Petitioner has requested. The Petition should be denied.

C. A Basic Application Of *Pickering* Supports The Georgia Court Of Appeals Decision.

As discussed herein, despite a concurring opinion showing that the Georgia Supreme Court considered the issues in this matter, that Court did not grant certiorari. The final decision on this matter comes from the Georgia Court of Appeals, which properly held that the Petitioner's comments caused a disruption to the operations of the school where she worked (permitting the Respondents to take action against her) and that they were entitled to immunity against her claims because they violated no clearly established law. In so holding, the Georgia Court of Appeals based its decision on this Court's First Amendment jurisprudence, particularly *Pickering*, as urged by the Petitioner below.

Georgia follows this Court's test relating to First Amendment rights for public employees found in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). *See Jones v. Bd. of Regents of Univ. Sys. of Georgia*, 262 Ga. App. 75, 78, 585 S.E.2d 138, 142 (2003). To state a claim for retaliation in violation of the First Amendment, as a government employee, the Petitioner must show that her speech was constitutionally protected. *Duke v. Hamil*, 997 F. Supp. 2d 1291, 1299 (N.D. Ga. 2014). Whether Petitioner has made this showing is governed by the four-part *Pickering* analysis.

> 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 state, 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 state must prove by a preponderance of the evidence that it would have discharged the employee even in the absence of the speech.

Department of Corrections v. Derry, 235 Ga. App. 622, 625(3)(a) (1998); *see also Stewart v. Baldwin Co. Bd. of Educ.*, 908 F.2d 1499, 1505 (11th Cir. 1990); *Bryson v. City of Waycross*, 888 F.2d 1562, 1565(V)(A) (11th Cir. 1989).

In the matter below, the second prong of the analysis was determinative:[7] whether Petitioner's interest in speaking outweighed the government's

[7] Although Respondents argued below that Petitioner's speech was neither made as a private citizen, nor on a matter of public concern, the Court of Appeals did not make a determination as to the first prong of the balancing test. The Court assumed that Petitioner made her post as a citizen and the post was a matter of public concern, and moved to the second prong of the balancing test. (*See* P.'s Br., App. B, p. 17a). Respondents do not waive this argument and maintain that Petitioner's comments did not constitute a matter of public concern.

legitimate interest in efficient public service. *See Duke*, *supra*, 997 F. Supp. 2d at 1299 (N.D. Ga. 2014); *Derry*, 235 Ga. App. at 625 (1998). This prong was wholly dispositive in the Respondents' favor given the substantial interest that a school district possesses in maintaining trust within its community, teachers, students, and parents. Under *Pickering*, courts must "balance between the interests of the [employee] as a citizen, in commenting upon matters of public concern and the interests 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. In striking this balance courts consider whether the employee's speech impairs the ability of superiors to discipline subordinates, affects harmony among coworkers, 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 (1987). While we have a finding of actual disruption in this case, this Court has previously held that even the potential for disruption is sufficient.

> [a] government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has *some potential* to affect the entity's operations.

Garcetti v. Ceballos, 547 U.S. 410, 418 (2006) (*emphasis added*). This is echoed in the case law cited by the Petitioner. Government employers are permitted to "take action against employees who engage in speech

that *may* unreasonably disrupt the efficient conduct of government operations." *Tindal v. Montgomery County Comm'n*, 32 F.3d 1535, 1540 (11th Cir. 1994) (*emphasis supplied*). Once a potential for disruption exists, a governmental employer does not need "to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships manifest[ed] before taking action." *Connick v. Myers*, 461 U.S. 138, 152 (1983). This is especially true in the context of public education where "close working relationships are essential to fulfilling public responsibilities," and, therefore, "a wide degree of deference [is given] to the employer's judgment." *Id.* at 151-52. Such deference to the government's assessment of potential harms to its operations is appropriate when the employer has conducted an objectively reasonable inquiry into the facts, and has arrived at a good faith conclusion as to those facts. *Waters v. Churchill*, 511 U.S. 661, 676-77 (1993).

Though a "petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings," the Georgia Court of Appeals' finding of actual disruption is supported by the factual record. *See* S. Ct. R. 10. Petitioner's remarks impacted her own classroom when Kristie Litman specifically requested to have her African American son removed from Petitioner's class. (R: T. p. 283). This impact spread to the school itself when, for example, Mr. Clark, Assistant Principal, testified that Ms. Maddie brought the Post to him the following Monday at school. (R: T. p. 318). Mr. Clark also gave testimony about how widespread the Post had gone and how many different people had

involved him. (R: T. p. 323). Petitioner's remarks additionally compromised relationships with colleagues, as reflected by the testimony of Carol Stroud, a fellow teacher at ESMS, who complained to Dr. Stone and stated that in light of the comments and opinions expressed by Petitioner, it would be difficult for her to continue to work with Petitioner. (R: T. p. 164).

Beyond the actual disruptions experienced up to that point, Dr. Stone testified that the comments made by Petitioner had the potential to cause problems with the school's student disciplinary processes. (R: T. p. 354). Dr. Stone averred that the comments made by Petitioner would give parents grounds to argue that their students were being disciplined based upon their race rather than their conduct, showing that 30 percent of his students are African American. (R: T. p. 346-47, 354). Atwater testified that the operations were disrupted as a result of Petitioner's comments by deteriorating the trust in the District by the minority communities it serves. (R: T. p. 31-32). Finally, several witnesses testified about their concerns that Petitioner would treat male African American students differently based upon the views she expressed. (R: T. 204, 237-38).

In short, the Court of Appeals correctly concluded that the facts demonstrated the actual disruptiveness, let alone the *potential disruptiveness*, of Petitioner's speech. *See Garcetti*, 547 U.S. at 418 (2006). It is clear that the Court of Appeals did not err in its view of the evidentiary record or in its application of this high Court's prior holdings in *Pickering* and its progeny. The

issue presented to this Court by Petitioner does not constitute a novel issue that this Court has not previously decided, nor does it constitute a state's highest Court's misapplication of this Court's precedent. As a result, Petitioner's Petition must be denied.

D. Petitioner Fails To Show That Respondents Violated Clearly Established Law.

The Court of Appeals correctly determined that Respondents are entitled to qualified immunity as to Petitioner's First Amendment claims because their actions did not violate any clearly established law. This Court has consistently held that "[g]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "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." (Citations omitted.) *Maxwell v. Mayor & Alderman of the City of Savannah*, 226 Ga. App. 705, 707-08 (1997). Thus, "[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." *Id*. at 707.

Rather than any sort of "bright-line" analysis, the determination of whether a given disciplinary action violates a public employee's rights under the First Amendment depends on application of the four-part *Pickering* balancing test, discussed above. *Derry*, 235 Ga. App. at 625. As such, even had the Court of Appeals erred in its analysis of Petitioner's First Amendment claim under *Pickering* – which it did not – Atwater and Rutland would nevertheless still be entitled to judgment as a matter of law on the grounds of qualified immunity:

> Because *Pickering* requires a balancing of competing interests on a case-by-case basis, . . . only in the rarest of cases will reasonable government officials truly know that the termination or discipline of a public employee violated clearly established federal rights. When no bright-line standard puts the reasonable public employer on notice of a constitutional violation, the employer is entitled to immunity except in the extraordinary case where *Pickering* balancing would lead to the inevitable conclusion that the act taken against the employee was unlawful. (Citations omitted.)

Hansen v. Soldenwagner, 19 F.3d 573, 575-76 (11th Cir. 1994). Both the Georgia Court of Appeals and the Georgia Supreme Court agreed that no clearly established law existed to put the Respondents on notice of the alleged illegality of their actions, and the fact that the Court of Appeals found that they acted properly and

the Supreme Court did not take the matter up on certiorari certainly supports this finding.

Thus, "broad legal truisms," such as the Superior Court's holding that public employees' First Amendment rights are clearly established, simply have no place in the qualified immunity analysis. In most instances, the facts and circumstances of a given case are so material to the alleged violation at issue that only rarely can it be said that a reasonable government official could not have believed that the action taken was lawful. *See Effingham County v. Farmer*, 228 Ga. App. 819, 823-24 (1997).

The facts of *Dartland*, wherein the Eleventh Circuit Court of Appeals determined that the individual defendants working in their official capacity did not violate clearly established law, are very similar to this case. In that case, Walter Dartland made comments that were rude and insulting about the county manager, to the local paper. *Dartland v. Metropolitan Dade County*, 866 F.2d 1321 (1989). Dartland was subsequently fired by the county manager after the comments were published. *Id*. As required by *Pickering*, the Court weighed the county manager's need to maintain loyalty, discipline and good working relationships among those he supervises, and determined that, under the circumstances presented, a reasonable county manager could have believed that firing Dartland would not violate the First Amendment. *Id*. As such, the Court found that the county manager was entitled to qualified immunity because his actions, as alleged, did not violate clearly established law. *Id*.

The facts of *Duke v. Hamil*, *supra*, also provide useful guidance. Rex Duke was a police officer at the Clayton State University Police Department. *Duke*, 997 F. Supp. 2d at 1293 (2014). Duke posted an image of a Confederate flag with the phrase, "It's time for the second revolution," on Facebook shortly after the 2012 presidential election. *Id*. Although Duke's post remained visible for only an hour, during that time it was shared with a news media source which subsequently ran an evening news story regarding the post. *Id*. As a result of the post, Duke was demoted and received a significant decrease in pay. *Id*. After Duke sued, alleging a violation of the First Amendment, the Court determined that the defendants had not violated Duke's rights because, under *Pickering*, the interest of the police department outweighed Duke's interest in engaging in the speech in question. *Id*. at 1303. Nonetheless, the Court still reviewed the qualified immunity defense and determined, in light of the police department's "heightened interests in providing efficient public service" and the various other factors relevant to the *Pickering* balancing test, the outcome did not so evidently favor Duke that the defendants would have been expected to know that a demotion, under the circumstances presented, would result in a constitutional violation. *Id*.

The facts and circumstances of the present case are on point with the facts in *Dartland* and *Duke*. Petitioner, a teacher in a school with a population of 30 percent African American students, posted derogatory comments towards African Americans on a public

Facebook page viewed by parents, students, other teachers and school administrators, and others members of the community, resulting in Respondents' receipt of multiple complaints, the removal of an African American child from Petitioner's classroom, and a statement from a co-worker that she likely would not be able to continue working with the Petitioner. Faced with these circumstances, Atwater exercised his discretionary authority as superintendent to investigate the matter and, based on his findings, to commence disciplinary proceedings. Thereafter, upon consideration of the additional facts developed through an evidentiary hearing, Rutland exercised her discretionary authority to vote in favor of suspending Petitioner for five days and requiring that she participate in diversity training. (*See* R: 12, ¶7; 15, ¶12).

Like the individual defendants in *Duke* and the other cases described above, Atwater and Rutland have an "interest in providing efficient public service"; namely, an education to children of all races free of even the slightest hint of racial bias, animus, or even insensitivity. They have an interest in ensuring that the individuals they employ and rely upon refrain from conduct tending to cause the community to question their commitment in this regard. And they have an interest in taking prompt and effective steps to preserve or restore public trust and confidence – which are essential to the success of the public service they provide – by addressing such conduct when it occurs.

Petitioner points to, and relies heavily on, *Gaines* in her brief for the proposition that the Georgia courts

did not apply the correct methodologies to her case. In *Gaines* the Eleventh Circuit reiterated its earlier ruling that a plaintiff may show that a government official had fair warning that his actions violated her rights in three ways: 1) a materially similar case; 2) a broader, clearly established principle that should control the novel facts of the situation; or 3) by showing that the conduct involved in the case may so obviously violate the Constitution that prior case law is unnecessary. *See Id.* at 1208. The second and third methodologies are known as "obvious clarity cases" and cases do not often arise under them. *Id*. at 1209.

The *Gaines* court went on to say that, "[i]f reasonable people can differ on the lawfulness of a government official's actions despite existing case law, he did not have fair warning and is entitled to qualified immunity." *Id*. at 1210. The Court of Appeals certainly felt that, based on the record, the Respondents acted lawfully. However, at a minimum, the Respondents can show that reasonable people can differ as to the lawfulness of the actions taken. The Superior Court determined in this case that Petitioner's First Amendment rights were violated and that *Pickering* itself clearly established the law to put Respondents on notice. Three justices of the Georgia Court of Appeals determined that Respondents' actions did not violate clearly established law and therefore they were entitled to qualified immunity. The Georgia Supreme Court declined to take up the issue, and Justice Peterson, along with Chief Justice Harris Hines and Justice Keith Blackwell, all concurred in the decision and specifically

stated that no clearly established law existed to put Respondents on notice that their actions would violate Petitioner's First Amendment rights. Thirteen Georgia judges and justices – as "reasonable minds" all – differed as to the legality of the Respondents' actions, and therefore, under *Gaines*, the materially similar case analysis applies. Petitioner, throughout all of this litigation, has failed to show any case that would have put Respondents on notice that their actions would violate the law.

In view of the foregoing, it simply cannot be said that *no* school superintendent in Atwater's shoes or that *no* school board member in Rutland's shoes could reasonably believe that taking disciplinary and other corrective action in this situation would violate the First Amendment. Accordingly, 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 and other corrective action against Petitioner for her Facebook Post] violates [the First Amendment] in the circumstances," *Farmer*, 228 Ga. App. at 824, the Georgia Court of Appeals correctly reversed the Superior Court in finding that Atwater and Rutland were entitled to qualified immunity.

Since Petitioner cannot produce a single case to support her own argument that the Court of Appeals erred in its analysis or conclusion, her Petition must be denied.

CONCLUSION

For the reasons stated above, the Court of Appeals decision is consistent with the law as dictated by this Court and therefore the Petition must be denied.

Respectfully submitted this 28th day of September, 2018.

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