FILED
United States Court of Appeals
Tenth Circuit

June 27, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ALESSANDRA NICOLE ROGERS,

Plaintiff - Appellant,

v.

STANTON RIGGS; CLAY CORN; DINA HOLCOMB; DANIEL ORNELAS; SUSAN GOLDSTROM, in their official and individual capacities; CHAVES COUNTY,

Defendants - Appellees.

No. 22-2106

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D.C. No. 2:21-CV-00445-SWS-KHR)

Heather Burke, Burke Law, Santa Fe, New Mexico, for Plaintiff-Appellant.

Jonlyn M. Martinez, Law Office of Jonlyn M. Martinez, LLC, Albuquerque, New Mexico, for Defendants-Appellees.

Before **TYMKOVICH**, **BACHARACH**, and **PHILLIPS**, Circuit Judges.

BACHARACH, Circuit Judge.

This appeal involves a public employee's claim of retaliation for something that she wrote. Liability would exist only if the writing

concerned a matter that was public rather than private. The district court regarded the employee's concern as private, and we agree.

1. The plaintiff quits her job and sues.

The plaintiff, Ms. Alessandra Nicole Rogers, worked for Chaves County in its jail. Several years into her employment, Ms. Rogers drafted a petition that criticized treatment of employees in the jail. The petition was signed by 45 current and former jail employees and was submitted to the county commissioners.

Roughly a month after the petition was submitted, county employees searched the jail. During the search, employees found illegal drugs and weapons in a bag under Ms. Rogers' desk. Ms. Rogers admitted that the bag was hers and that it contained the drugs and weapons.

The county put Ms. Rogers on paid administrative leave. When the period of administrative leave ended, the county denied Ms. Rogers' request for a promotion and imposed an unpaid five-day suspension. Ms. Rogers later quit.

2. The district court grants summary judgment to the county and jail officials.

Ms. Rogers attributed the search to retaliation for her role in drafting the petition, claiming that the retaliation violated the First Amendment. But the district court granted summary judgment to the defendants. The court reasoned that even if the defendants had retaliated for Ms. Rogers'

role in drafting the petition, liability wouldn't exist because the petition hadn't involved a public concern. The presence of a public concern constitutes a matter of law for the court, not a factual matter for the jury. *Knopf v. Williams*, 884 F.3d 939, 945 (10th Cir. 2018).

3. We apply the summary-judgment standard.

We conduct de novo review based on the same standard that applied in district court. *SEC v. GenAudio Inc.,* 32 F.4th 902, 920 (10th Cir. 2022). Under this standard, the district court must view the evidence and draw all justifiable inferences favorably to Ms. Rogers. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The district court could grant summary judgment to the defendants only in the absence of a genuine dispute of material fact. *See* Fed. R. Civ. P. 56(a).

4. The petition did not contain speech creating a public concern.

For liability, Ms. Rogers needed to show that the petition involved a matter of public concern. *Knopf*, 884 F.3d at 944.[1] We conclude that Ms. Rogers failed to make that showing.

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[1] Ms. Rogers' claim is subject to a test known as the *Garcetti/Pickering test*. *Knopf v. Williams*, 884 F.3d 939, 945 (10th Cir. 2018); *see Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006); *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968). Under this test, the existence of a public concern wouldn't trigger liability unless

- Ms. Rogers had drafted the petition outside her official duties,

We narrowly interpret the term "public concern." *Leverington v. City of Colo. Springs*, 643 F.3d 719, 727 (10th Cir. 2011) (quoting *Flanagan v. Munger*, 890 F.2d 1557, 1563 (10th Cir. 1989)). A public concern exists when the content addresses a topic "of interest to the community." *Id.* (quoting *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1205 (10th Cir. 2007)). So it's rarely enough when the speech relates "to internal personnel disputes and working conditions." *Morris v. City of Colo. Springs*, 666 F.3d 654, 661 (10th Cir. 2012) (quoting *David v. City & Cnty. of Denver*, 101 F.3d 1344, 1355 (10th Cir. 1996)).

The petition addressed complaints by current and former employees, stating:

> I am or have been employed at CCDC.
>
> I have witnessed wrong-doing, harassment, bullying and favoritism by supervisors and administration.
>
> I am fearful to report what I have witnessed due to retaliation from administration and/or their family.

- Ms. Rogers' interest in free speech had outweighed the county's interests as the employer,
- the protected speech had been a motivating factor in the adverse employment action, and
- the defendants would have made a different decision without the protected conduct.

See Knopf, 884 F.3d at 945. Because the petition didn't involve a matter of public concern, we need not analyze these additional requirements for liability.

> I believe what is happening to Sgt. Morales is an act of retaliation.
>
> I come to work angry or stressed because of how things are ran.
>
> I believe I have been retaliated against in some way.
>
> I don't believe administration has our best interests at heart.
>
> I feel I have not received proper training.
>
> By signing this I have acknowledged that I have been affected by at least one of these issues and expect protection from retaliation.

Appellant's App'x vol. 1, at 92–93. To determine whether these complaints involved a matter of public concern, we consider the content, form, and context. *Connick v. Myers*, 461 U.S. 138, 147–48 (1983).

A. The content involved employee grievances.

The content involved employee grievances, which wouldn't ordinarily trigger a public concern. *See Connick v. Myers*, 461 U.S. 138, 154 (1983). For example, the Supreme Court considered a similar document in *Connick v. Myers*, 461 U.S. 138 (1983). There an employee had circulated a questionnaire to coworkers, asking about office morale, procedures, and practices. *Id.* at 141, 155. The Supreme Court concluded that the questionnaire had "touched upon matters of public concern in only a most limited sense." *Id.* at 154. Because the questionnaire constituted "an employee grievance concerning internal office policy," the Court concluded that the content would not generally create a public concern.

Id.;[2] *see also id.* at 148 (concluding that a public concern didn't arise from "questions pertaining to the confidence and trust that [the plaintiff's] coworkers possess in various supervisors, the level of office morale, and the need for a grievance committee").

Ms. Rogers' petition similarly focused on grievances that she and others had experienced as employees.[3] For example, the petition expressed jail employees' frustration about

- how they felt at work ("I come to work angry or stressed because of how things are ran"),
- how they felt about their relationships with management ("I don't believe [the] administration has our best interests at heart"), and
- how they were bullied.

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[2] The Supreme Court did find a public concern in a question involving pressure to support particular candidates. *Connick*, 461 U.S. at 149.

[3] In district court, the defendants admitted "that the Plaintiff's 'petition' contained complaints concerning the management of the Chaves County Detention Center." Appellant's App'x vol. 1, at 139. Ms. Rogers argues that this admission amounted to a concession that the petition involved constitutionally protected speech. We disagree. In making that admission, the defendants acknowledged the content of the petition—not its character as protected speech.

Ms. Rogers also argues that the district court erred by failing to include the defendants' admission in the summary-judgment order. But the district court had no need to cite the admission because it didn't acknowledge a public concern.

Appellant's App'x vol. 1, at 92. These expressions of frustration didn't involve a matter of public concern. *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1205 (10th Cir. 2007).

The petition also complained of favoritism: "I have witnessed . . . favoritism by supervisors and administration." Appellant's App'x vol. 1, at 92. This complaint didn't involve a matter of public concern. *See Brammer-Hoelter*, 492 F.3d at 1206 (stating that a reference to a supervisor's favoritism is "clearly" not a matter of public concern); *McEvoy v. Shoemaker*, 882 F.2d 463, 466–67 (10th Cir. 1989) (concluding that a complaint about favoritism did not involve a matter of public concern).

Ms. Rogers argues that the petition went beyond employee grievances by complaining about

- "wrong-doing" and "harassment,"
- fears about "report[ing]" incidents because of "retaliation from administration," and
- actual retaliation against Sergeant Morales and each signer.

Appellant's App'x vol. 1, at 92. We reject this argument because the petition was too vague.

Speech disclosing "illegal conduct by government officials is inherently a matter of public concern." *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1206 (10th Cir. 2007). So a public concern

usually exists when the speech exposes racial discrimination, harassment, or corruption in a public workplace. *See Connick v. Myers*, 461 U.S. 138, 148 n.8 (1983) (racial discrimination); *Wulf v. City of Wichita*, 883 F.2d 842, 860 (10th Cir. 1989) (harassment); *Conaway v. Smith*, 853 F.2d 789, 796 (10th Cir. 1998) (corruption). But the petition did not include discussions of racial discrimination, harassment, or corruption.

Granted, the petition vaguely referred to favoritism, bullying, wrongdoing, harassment, and retaliation.[4] Appellant's App'x vol. 1, at 92. But a public concern exists only when the speech contains enough specificity to help the public evaluate governmental conduct. *Moore v. City of Wynnewood*, 57 F.3d 924, 932 (10th Cir. 1995). To determine whether the speech is specific enough to help the public, we look beyond the subject matter to focus on "what is *actually said*." *Leverington v. City of Colo. Springs*, 643 F.3d 719, 727 (10th Cir. 2011) (emphasis in original) (quoting *Flanagan v. Munger*, 890 F.2d 1557, 1563 (10th Cir. 1989)).

Based on what was actually said, the public would have lacked any context for the references to favoritism, bullying, wrongdoing, harassment, and retaliation. For example, the petition stated that "what [was]

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[4] Ms. Rogers appears to argue that the terms *retaliation* and *discrimination* are interchangeable. Appellant's Opening Br. at 28–29. But retaliation and discrimination are legally distinct concepts; and the petition mentioned only retaliation, not discrimination. Appellant's App'x vol. 1, at 92.

happening to Sgt. Morales [was] an act of retaliation." But the petition didn't explain what was happening. So the public couldn't have known

- who Sergeant Morales was,
- what had prompted the alleged retaliation,
- who had engaged in the retaliation, or
- what had happened to Sergeant Morales.

The same was true of the other references to favoritism, bullying, retaliation, wrongdoing, and harassment[5]: Because the petition provided no specifics beyond these general terms, the public would have lacked any meaningful way to evaluate the government's conduct.

Ms. Rogers points to the petition's reference to inadequate training: "I feel I have not received proper training." Appellant's App'x vol. 1, at 92. Based on this reference, Ms. Rogers argues that inadequate training jeopardized safety for employees and inmates alike.

A public concern could arise if the inadequate training had involved safety measures. *See Lee v. Nicholl*, 197 F.3d 1291, 1296 (10th Cir. 1999) (stating that the First Amendment protects speech alleging a danger to public safety). But the potential impact on public safety depended on what

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[5] Ms. Rogers admits that these references are "somewhat vaguely written." Appellant's Opening Br. at 26.

the inadequacies were. For example, inadequate training on ministerial tasks (like clocking in and out) likely wouldn't affect public safety.

The petition's reference to inadequate training was too vague to raise an issue of public safety because the petition provided no meaningful information about the alleged inadequacies. For example, the petition didn't say what the inadequately trained employees did at the jail or what was wrong with the training. Without meaningful information about the alleged inadequacies in training, we don't regard the single reference to training as a matter of public concern. *See Alves v. Bd. of Regents of the Univ. Sys. of Georgia*, 804 F.3d 1149, 1165–68 (11th Cir. 2015) (concluding that speech involving the proper treatment of mental health issues was too vague to create a public concern even though the subject itself was "a matter worthy of a public forum"); *Singer v. Ferro*, 711 F.3d 334, 340–41 (2d Cir. 2013) (concluding that the speech was too vague to create a public concern even though the subject involved governmental corruption, which was "plainly a potential topic of public concern").

B. The context and form didn't render the speech a matter of public concern.

We must consider not only the content of the petition, but also the context and form. *See* p. 5, above. When considering the context and form of the petition, we must determine whether the "employee's *primary* purpose was to raise a matter of public concern." *Singh v. Cordle*, 936 F.3d

1022, 1035 (10th Cir. 2019) (emphasis in original); *see also Lee v. Nicholl*, 197 F.3d 1291, 1295 (10th Cir. 1999) (concluding that the inquiry into form and context "requires analysis of the subjective intentions of the speaker"). When an individual's interest as an employee predominates over an interest as a member of the public, the concern is private rather than public. *McEvoy v. Shoemaker*, 882 F.2d 463, 466 (10th Cir. 1989).

Ms. Rogers argues that the context helps explain the petition's references to retaliation, harassment, and wrongdoing. For example, Ms. Rogers points to

- the fact that 45 individuals signed the petition,
- the submission of the petition to elected officials outside the jail's internal chain of command,
- the assault and harassment of an employee,
- the support for other employees' complaints about jail management,
- the past efforts of jail employees to follow internal procedures to address the problems listed in the petition,
- the existence of internal reports showing sexual harassment and fear of retaliation,
- the racism of jail employees, and
- the imposition of discipline against the employees who circulated the petition.

The existence of many signers doesn't create a public concern because the petition itself involved only workplace grievances. In fact,

Ms. Rogers acknowledges that the signers were "employees attesting to or supporting the *workplace condition* complaints of [the petition]." Appellant's Opening Br. at 25–26 (emphasis added).

Ms. Rogers also argues that because some of the people who signed the petition were not jail employees, the petition necessarily dealt with matters of public concern. But Ms. Rogers admits that every signer was a current or former jail employee who supported her "workplace condition complaints." *Id.*; *see id.* at 9 ("Appellant wrote a petition which was circulated and signed by 45 current and former employees."); *see also* Appellant's App'x vol. 1, at 92–93 (statement in the petition that all of the signers were current or past employees at the jail). So all of the signers shared an interest in the jail's workplace.[6]

Ms. Rogers points not only to the many signers, but also to the submission of the petition to the county commissioners. Granted, the forum for an employee's speech may bear on the existence of a public concern. *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 398 (2011). For example, when an employee submits a petition to an employer through an

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[6] The petition also stated that the signers "expect protection from retaliation." Appellant's App'x vol. 1, at 92. Ms. Rogers argues that this statement shows that the signers believed that they were engaged in protected speech. Appellant's Opening Br. at 18–19. But Ms. Rogers doesn't explain how that belief could trigger a public concern.

internal grievance procedure, the petitioner is not ordinarily seeking to communicate beyond the employment context. *Id.*

But submission of a petition to county commissioners does not automatically create a matter of public concern. We addressed a similar issue in *McEvoy v. Shoemaker*, where we concluded that a letter to the city council didn't involve a matter of public concern. 882 F.2d 463, 466 (10th Cir. 1989). We reasoned that

- the employee's main purpose had been to air workplace frustrations rather than to disclose governmental misconduct and

- the submission of the letter to city council had not automatically created a public concern.

Id.

The same is true here. We have elsewhere determined that the petition's content, form, and context did not trigger a public concern. Submission to the county commissioners, without more, didn't change the petition's content, form, or context.[7]

Finally, Ms. Rogers points to evidence that jail officials engaged in racism and sexism. This evidence doesn't bear on the meaning of the

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[7] Ms. Rogers argues that someone else circulated the petition among jail staff, and the county agrees. In turn, Ms. Rogers suggests that the petition couldn't involve a personal grievance because the signers wouldn't have known who had written the petition. But the identity of the author didn't matter; regardless of who the author was, the petition addressed only workplace grievances. *See* Part 4(A), above.

petition. Ms. Rogers disagrees, pointing to *Penry v. Federal Home Loan Bank of Topeka*, 155 F.3d 1257, 1263 (10th Cir. 1998). But *Penry* held that the Court could consider extrinsic evidence in evaluating a sex-discrimination claim under Title VII. *Id. Penry* doesn't support the use of extrinsic evidence to turn vague speech about employee complaints into a public concern.

* * *

Considering the content, form, and context, we conclude that the petition addressed only internal workplace grievances—not matters of public concern.

5. Ms. Rogers was not prejudiced from a lack of notice.

Ms. Rogers also argues that the district court shouldn't have addressed the issue of public concern. Ms. Rogers points out that in the summary-judgment motion, the defendants hadn't questioned the existence of a public concern[8] and the district court addressed the issue sua sponte.

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[8] In moving for summary judgment, the defendants cited the *Garcetti/Pickering test*, but didn't question the existence of a public concern. Appellant's App'x vol. 1, at 80. Given the defendants' failure to challenge the existence of a public concern, Ms. Rogers argues forfeiture. For this argument, however, she relies on opinions applying the doctrine of forfeiture to appellants, not appellees. Appellant's Opening Br. at 21 (citing *United States v. Garcia*, 936 F.3d 1128, 1131 (10th Cir. 2019) and *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 721 (10th Cir. 1993)). Unlike an appellant, an appellee can ordinarily "defend the judgment won below on any ground supported by the record." *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1254 n.33 (10th Cir. 2011) (quoting *S. Utah*

When a district court rules sua sponte on an issue involving summary judgment, we ordinarily require notice and an opportunity to respond. *Safeway Stores 46 Inc. v. WY Plaza LC*, 65 F.4th 474, 481 (10th Cir. 2023). The court didn't provide this notice or opportunity to Ms. Rogers.

But the court "could forgo formal notice" if Ms. Rogers "had already been 'on notice that [she] had to come forward with all of [her] evidence.'" *Id.* (quoting *Kannady v. City of Kiowa*, 590 F.3d 1161, 1170 (10th Cir. 2010)). And we don't reverse on this basis if the lack of notice didn't prejudice the losing party. *Kannady*, 590 F.3d at 1170. "A party is procedurally prejudiced if it is surprised by the district court's action and that surprise results in the party's failure to present evidence in support of its position." *Id.* (quoting *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 139 (2d Cir. 2000)).

Ms. Rogers hasn't shown prejudice. She had notice that liability for retaliation could exist only if the petition involved a matter of public concern. Given that notice, Ms. Rogers urged a public concern when responding to the defendants' motion for summary judgment. Appellant's App'x vol. 1, at 110–11.

Wilderness All. v. Bureau of Land Mgmt., 425 F.3d 735, 745 n.2 (10th Cir. 2005)). So we can consider the defendants' arguments even though the district court raised the issue sua sponte.

Before the district court ruled on the summary-judgment motion, Ms. Rogers had provided the court with the relevant evidence: the petition itself. *See Kannady v. City of Kiowa*, 590 F.3d 1161, 1171 (10th Cir. 2010) (concluding that no prejudice existed when the non-movant had furnished all of the relevant evidence). Ms. Rogers didn't point to any other speech that could underlie her retaliation claim. *See Bridgeway Corp. v. Citibank*, 201 F.3d 134, 140 (2d Cir. 2000) ("[I]f . . . the party had no additional evidence to bring, it cannot plausibly argue that it was prejudiced by the lack of notice.").

Ms. Rogers argues that the defendants violated their discovery obligations by failing to furnish evidence that could have shown a public concern.[9] But Ms. Rogers doesn't explain or support that suggestion.

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[9] In making this argument, Ms. Rogers submitted screenshots of emails between county employees. Parties cannot build a new record on appeal. *See United States v. Kennedy*, 225 F.3d 1187, 1191 (10th Cir. 2000). So we don't consider Ms. Rogers' new evidence.

Ms. Rogers also points out that the defendants did not cross appeal. But a cross appeal is needed only when an appellee seeks to enlarge the judgment. *See June v. Union Carbide Corp.*, 577 F.3d 1234, 1248 n.8 (10th Cir. 2009); *see also Standard Inv. Chartered, Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 560 F.3d 118, 126 (2d Cir. 2009) ("An appellee may not seek to enlarge its rights under a judgment on appeal without taking a cross-appeal."). Here, though, the defendants are seeking to affirm the award of summary judgment, not to enlarge the judgment. So the defendants didn't need to cross appeal. *See Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1254 n.33 (10th Cir. 2011) ("We have jurisdiction . . . , even without a cross-appeal, because an appellee is generally permitted to 'defend the judgment won below on any ground supported by the record without filing

Without any explanation or support, we conclude that the alleged discovery violations wouldn't have prejudiced Ms. Rogers.

Ms. Rogers alleges that she sought discovery of documents that would show targeting of Sergeant Morales with racial slurs.[10] But the petition didn't allege racism. So other evidence of racial discrimination wouldn't affect the meaning of the petition.

In her reply brief, Ms. Rogers adds that

- the defendants should have furnished additional evidence about the imposition of "discipline" on Ms. Rogers and
- this evidence would have shown a retaliatory motive.

Appellant's Reply Br. at 16–33. But whatever the defendants' motivation was, it wouldn't affect the vagueness of the petition; and the reply brief was too late for new arguments involving discovery violations.[11] *Hill v. Kemp*, 478 F.3d 1236, 1250–51 (10th Cir. 2007).

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a cross appeal.'" (quoting *S. Utah Wilderness All. v. Bureau of Land Mgmt.*, 425 F.3d 735, 745 n.2 (10th Cir. 2005))).

[10] Ms. Rogers also mentions that the defendants failed to file a certificate of service. But she doesn't say how the certificate would bear on the outcome. An appellant's failure to sufficiently develop an argument constitutes a waiver. *Iliev v. Holder*, 613 F.3d 1019, 1026 n.4 (10th Cir. 2010). So we don't consider the failure to file a certificate of service.

[11] For this argument, Ms. Rogers tries to "incorporate[] the fact[s] and arguments from her response and surreply" in district court. Appellant's Reply Br. at 17. But a party cannot incorporate briefs filed in district court. *Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 623–24 (10th Cir. 1998). So we do not consider these arguments.

Because the summary-judgment record contained everything needed to characterize the concern as public or private, the court didn't err by addressing the issue sua sponte. *See Artistic Ent., Inc. v. City of Warner Robins*, 331 F.3d 1196, 1202 (11th Cir. 2003) (per curiam) ("[W]here a legal issue has been fully developed, and the evidentiary record is complete, summary judgment is entirely appropriate even if no formal notice has been provided."); *Gibson v. Mayor & Council of City of Wilmington*, 355 F.3d 215, 224 (3d Cir. 2004) (concluding that a sua sponte award of summary judgment was proper when there was "a fully developed record, [a] lack of prejudice, [and] a decision based on a purely legal issue").

6. The district court didn't misapply the standard for summary judgment.

Ms. Rogers also argues that the district court failed to view the material facts in her favor. But she acknowledges that the issue of a public concern is purely legal. The content and form of the petition are undisputed, and the context doesn't turn the private or vague content into a matter of public concern. *See* Part 4(B), above. So the ruling on summary judgment didn't turn on a factual dispute.

7. Conclusion

The retaliation claim fails as a matter of law because

- the petition didn't involve a matter of public concern and

- the district court didn't prejudice Ms. Rogers by addressing the issue sua sponte.

We thus affirm the award of summary judgment to the defendants.

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RE: 22-2106, Rogers v. Riggs, et al
Dist/Ag docket: 2:21-CV-00445-SWS-KHR

Dear Counsel:

Enclosed is a copy of the opinion of the court issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R. 35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

CMW/klp