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PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

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CAPTION: BOARD OF COUNTY COMMISSIONERS, WABAUNSEE
COUNTY, KANSAS, Petitioners v. KEEN A. UMBEHR
CASE NO: No. 94-1654
PLACE: Washington, D.C.
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1 PROCEEDINGS

2 (11:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 94-1654, The Board of County Commissioners
5 of Wabaunsee County, Kansas, v. Keen Umbehr.

6 Mr. Patterson, you may proceed whenever you're
7 ready.

8 ORAL ARGUMENT OF DONALD PATTERSON

9 ON BEHALF OF THE PETITIONER

10 MR. PATTERSON: Mr. Chief Justice, and may it
11 please the Court:

12 This is a First Amendment case. It involves the
13 interest and the responsibility of local government in
14 making the decisions in the course of governing and in the
15 course of delivering government services that have an
16 economic impact on contractors. It also involves the
17 interest of a contractor who engages in what I will refer
18 to as protected activity, activity protected by the First
19 Amendment, and for convenience I'd like to refer to that
20 as a local contractor, if I may.

21 QUESTION: Mr. Patterson, it's not a case
22 involving any issue of political patronage, is it?

23 MR. PATTERSON: No, it is not. We can rule that
24 out. This is not a patronage case. In fact, I think you
25 could almost say it's the opposite.

1 QUESTION: It's a free speech case --

2 MR. PATTERSON: Exactly.

3 QUESTION: In the context of an independent
4 contractor.

5 MR. PATTERSON: Exactly.

6 QUESTION: With the county.

7 MR. PATTERSON: That's exactly what it is.

8 QUESTION: I thought our patronage cases were
9 decided as free speech cases under the First Amendment.
10 What were they decided under if it wasn't under that
11 provision?

12 MR. PATTERSON: I think they were. The question
13 I was asked was whether or not this was a patronage case,
14 and it's not. It is a free speech case.

15 QUESTION: Well, I understand that the free
16 speech in question was not free speech regarding partisan
17 politics, but why would that make any difference? How
18 would you distinguish the patronage cases? They're
19 decided as First Amendment cases.

20 MR. PATTERSON: They are a form of First
21 Amendment case, and probably not. They are First
22 Amendment cases --

23 QUESTION: So you think we could hold for you in
24 this case, but in a later case where the contractor says,
25 I don't like Republicans, we -- and I'm going to vote

1 Democratic, we could allow that contract to be denied,
2 because after all, the speech in this case is partisan
3 political speech and it's okay to discriminate against
4 that.

5 MR. PATTERSON: It depends upon how the contour
6 of the First Amendment right is defined in terms of the
7 language of the First Amendment, which uses the word,
8 abridging.

9 QUESTION: Well --

10 MR. PATTERSON: To me, it comes right down to
11 that.

12 QUESTION: One way to distinguish the cases like
13 Elrod and Rutan from this case, certainly, is to say that
14 on the other side of the ledger in the political patronage
15 cases, if I may refer to them as that, there was the
16 interest in political organization and that sort of a
17 thing that apparently is not present here.

18 MR. PATTERSON: It is not, and I believe that
19 probably is the answer to the question over here, to
20 Justice Scalia's question.

21 This doesn't involve a question of party
22 loyalty, anybody's political philosophy. It doesn't. The
23 First Amendment rights that were exercised were on other
24 subjects, that's all.

25 Now, I think that the balance of these interests

1 is required by the fact that government, local government
2 in particular, in the course of making government
3 decisions and delivering government services, requires
4 them to make decisions that have an economic impact on
5 contractors and potential contractors.

6 When the contractor who exercises First
7 Amendment rights is adversely affected by a decision that
8 gives him the potential of saying, foul, you have harmed
9 me, and it is retaliatory against me, how is that conflict
10 to be resolved?

11 We suggest that the term of bridging really has
12 two different components. One, of course, is the interest
13 of government. To what extent, and how is its ability to
14 perform the functions that is expected of it by the people
15 who voted them there to continue if they have to live
16 under the threat of intent determination, motive
17 determination litigation, and the question is, can it?

18 The second component, I think, is the end result
19 of government action on the person who exercises his First
20 Amendment rights. Is it an abridgement if he is left in a
21 position that is no different and equal to the position of
22 his comparators in similar situations?

23 QUESTION: Now, you have acknowledged in your
24 response to the Chief Justice that this is to some extent
25 a balancing question. It's not an absolute right. Where

1 you have in patronage cases, you say, a greater interest
2 on the part of government, you may not apply the same rule
3 you're urging on us here, and you may allow the
4 discrimination on a partisan basis, right?

5 MR. PATTERSON: All right. The core question is
6 the same. It's the ability --

7 QUESTION: But you balance to some extent.

8 MR. PATTERSON: Yes, you do. You do.

9 QUESTION: Well, why don't you balance on the
10 other end as well? You assert that this case is just like
11 a Federal employee, just like a government employee
12 case --

13 MR. PATTERSON: No --

14 QUESTION: -- and that, you know, similar
15 rules -- is having the Government contract as important as
16 having a Government job?

17 MR. PATTERSON: The core interest of government
18 is essentially the same, the ability to continue its
19 services. The mechanics by which that are achieved I
20 think are different because of the different legal
21 relationship and the different economic relationship
22 between contractors and Government and employees and the
23 Government.

24 QUESTION: Well, I'm not talking about the
25 Government interest. I'm talking about the interest of

1 the person asserting the First Amendment right. What he's
2 being deprived of in one set of cases is employment by the
3 Government, which is livelihood, which is bread on the
4 table.

5 MR. PATTERSON: Okay.

6 QUESTION: Isn't that somewhat -- isn't that a
7 much greater interest than being deprived of a contract
8 with the Government?

9 MR. PATTERSON: It is, and in -- that's
10 particularly true in this case.

11 QUESTION: Well, why is it? Why is a -- for
12 example, wouldn't it just have to say, it depends? I
13 mean, why -- a temporary employee, somebody who is
14 provisionally hired for 6 months at a government summer
15 camp I take it is protected in that 6-month job by the
16 First Amendment.

17 MR. PATTERSON: It could be.

18 QUESTION: While McDonnell-Douglas, which
19 employs 400,000 people -- I'm making that up, obviously,
20 but their lifeblood depending on this contract, I take it
21 under your theory you have to concede that the First
22 Amendment would apply to what the 4-month employee at the
23 summer camp, there provisionally, might happen to say, but
24 on your theory it wouldn't apply to all of McDonnell-
25 Douglas, on which the entire economy of Southern

1 California depends, so I mean, how can we say that one in
2 principle is more important than the other?

3 MR. PATTERSON: Well, I think that it's a
4 question of degree, and I believe this Court has
5 previously said that degrees --

6 QUESTION: But, remember, the Court has talked
7 about the First Amendment applying to protect probationary
8 employees.

9 MR. PATTERSON: Yes, that's right.

10 QUESTION: People who don't have permanent jobs.

11 MR. PATTERSON: I --

12 QUESTION: Who are there just for a moment.

13 MR. PATTERSON: I'm about to address that. I
14 think the issue is whether or not he has been harmed as
15 compared with other equally situated comparators.

16 The employee who is shut out, or not given the
17 job for which he applies, sure, he's harmed, as compared
18 with other employees, but in this case, what happened?

19 This contractor -- and you have to go back into
20 the facts of the case. This was essentially a contract
21 between Mr. Umbehr and six cities, that's all. Under this
22 contract he hauled no trash for the county. The county
23 paid him nothing.

24 QUESTION: But you're arguing for a rule, I take
25 it, that applies to all contractors, or are you saying

1 that there are just certain contractors that are free of
2 the First Amendment --

3 MR. PATTERSON: No. My point is that in this
4 second component of abridgement, the contractor has to be
5 left in a position that is less than the position of his
6 silent comparators, and in this case he was not. His
7 basic complaint was that the playing field on which he had
8 to compete with other contractors for the same business
9 was leveled.

10 QUESTION: I thought this was a -- not a
11 rebidding of the contract, I thought it was a continuation
12 of the contract, and what your clients did was to cancel
13 it.

14 MR. PATTERSON: No. That -- those were not the
15 facts, Your Honor.

16 QUESTION: They did not exercise their option
17 not to renew --

18 MR. PATTERSON: They --

19 QUESTION: If they had done nothing would the
20 contract have continued --

21 MR. PATTERSON: They terminated it.

22 QUESTION: If they had done nothing, would the
23 contract have continued?

24 MR. PATTERSON: Yes, it would have.

25 QUESTION: Okay.

1 MR. PATTERSON: It would have.

2 QUESTION: So this wasn't a mere matter of, as I
3 think you were saying to Justice Breyer, of leaving this
4 contractor in the position that he would have been in
5 relation to other intending contractors, if your clients
6 had done nothing. It was, in fact, a considerable
7 readjustment of the contractor's position.

8 MR. PATTERSON: It was, because what the
9 readjustment that occurred was that he lost his
10 competitive edge that he had over other equally situated
11 contractors.

12 QUESTION: May I go to a different question?
13 You alluded a moment ago to the Government interest. In
14 the case of the Government's interest when dealing with an
15 employee, in the kind of obvious case, one is concerned
16 about the capacity of the Government to continue to
17 function administratively within government offices when
18 someone is disruptively criticizing.

19 What is the Government interest here? How,
20 specifically in this case, was the county rendered at a
21 disadvantage in doing whatever it did in relation to trash
22 merely by the fact that this contractor was saying
23 critical things about them in relation to trash at open
24 meetings and all sorts of things. Why were they rendered
25 less able to function?

1 MR. PATTERSON: The specific answer to your
2 question is that it had nothing to do with hauling trash,
3 because under this contract Mr. Umbehr hauled no county
4 trash and the county paid him nothing --

5 QUESTION: Well, regardless of whose trash he
6 was hauling, how was the county rendered less able to
7 function in doing the things that it did by virtue of this
8 criticism?

9 In other words, I'm saying how do you create a
10 parallel between this situation and Pickering, if you're
11 going to argue for a balancing test?

12 MR. PATTERSON: It impaired their ability to
13 terminate what they perceived was a contractual
14 relationship that was no longer needed. It took up a lot
15 of the county's time. They received no benefit from it.

16 QUESTION: Well, are we just arguing about facts
17 in this case? In other words, the county is simply
18 saying, we didn't terminate the contract because of all
19 the nasty things he was saying, we terminated the contract
20 because we didn't need a contract any more.

21 MR. PATTERSON: No. That gets into the issue of
22 motive determination, which admittedly is a fact issue in
23 the event this is ever --

24 QUESTION: Okay, so if that's not what the case
25 is about, let's assume that the speech was at least in

1 some respect a factor in the county's decision.

2 MR. PATTERSON: For here we assume that.

3 QUESTION: How did the remarks that he made make
4 it difficult for the county to function?

5 MR. PATTERSON: If the county made the decision
6 that the service they were providing -- that is, getting
7 Mr. Umbehr and the six cities together on a contract was
8 no longer needed, the question is whether or not the First
9 Amendment empowers the contractor who uses his First
10 Amendment rights, to continue that practice even though
11 it's not --

12 QUESTION: No, the question is, how does it make
13 it hard for the county to function? What's the county's
14 interest?

15 MR. PATTERSON: Okay, it makes it harder for the
16 county to function because of the threat and expense of
17 motive determination --

18 QUESTION: In other words, you're saying there
19 should be no recognition of a First Amendment right
20 because First Amendment litigation is difficult and
21 troublesome?

22 MR. PATTERSON: No, I think that would be
23 begging the question. I think it's a question --

24 QUESTION: I do, too, but I --

25 (Laughter)

1 QUESTION: May I just ask you this, is it your
2 view that because First Amendment litigation is expensive
3 for the county, they have to prove their motive was
4 something other than retaliation for the speech, but what
5 if they wanted to have a policy that would remove the fact
6 issue and they just published an announced policy, we will
7 not do business with any trash haulers who criticize
8 members of the county board?

9 If they were very candid about their feelings,
10 we don't want to do business with people who criticize us,
11 would that be permissible?

12 MR. PATTERSON: I think that would come very
13 close to a prior restraint, and my answer to that would be
14 probably not.

15 QUESTION: Well then, the difference between
16 that case and this one is just one that you have to try
17 out the facts to find out what the real motive is in this
18 case, and the one I hypothesized, we all know what the
19 motive is.

20 MR. PATTERSON: Well --

21 QUESTION: But see, they've alleged the motive
22 similar to the one I describe.

23 MR. PATTERSON: That's true.

24 QUESTION: And it seems to me on a motion to
25 dismiss we have to assume those allegations are true, so

1 I'm not sure there's a distinction between my case and
2 this one.

3 MR. PATTERSON: Well, I think the difference is
4 this. I think it's a question of how the contours of the
5 First Amendment right are going to be defined in terms of
6 that word, abridging. Now, that's the First Amendment
7 word.

8 QUESTION: Mr. Patterson, the answer that you
9 just gave, it seems to me inconsistent with what you said
10 earlier about the level playing field, because if the
11 Government had this policy that applied equally to all
12 contractors, if you're going to be consistent with the
13 position you were taking, wouldn't you have to say, well,
14 that's okay, because they're all being treated the same?

15 MR. PATTERSON: I think that's a different
16 issue. That's -- that goes to the component of abridging
17 that deals with the interest of the contractor. My point
18 there simply was that --

19 QUESTION: But if this contractor isn't harmed
20 in your view then no other question is relevant.

21 MR. PATTERSON: Well, except that they -- that
22 is another question. If the contractor is not harmed,
23 it's our contention that he has --

24 QUESTION: Then he wouldn't be harmed whether
25 the Government does it up front by saying, don't talk if

1 you want a government contract, or wait until the contract
2 is underway.

3 MR. PATTERSON: No, I think that crosses up the
4 facts of the case. What was occurring was --

5 QUESTION: But that's my concern. Are we
6 talking about the facts of this case, in which I might say
7 contractors come in all sizes and shapes, some are very
8 much like employees, some are very distant from employees.
9 I thought that you were drawing a contractor line, and you
10 were drawing a line between employees --

11 MR. PATTERSON: I am.

12 QUESTION: -- and contractors.

13 MR. PATTERSON: I am. I think --

14 QUESTION: Well, Mr. Patterson, suppose it were
15 an employee of the county who wanted to assert free speech
16 rights and be critical of how the county used county
17 equipment for private purposes or something, now, in that
18 situation as well, the county would be faced with the
19 threat and expense of litigation, would it not, same
20 burden on the county as you assert here.

21 MR. PATTERSON: That's true. I think --

22 QUESTION: And so what result in the employees'
23 situation? Do we protect the employees' speech on matters
24 of public interest?

25 MR. PATTERSON: Well, you do under Pickering, of

1 course.

2 QUESTION: Yes. But you say it has to be
3 different for every independent contractor.

4 MR. PATTERSON: I think the difference lies in
5 the fact that the spectra of government decisions that can
6 impact contractors adversely is much greater and much more
7 numerous than it is in dealing with an employee, and
8 secondly, I think the --

9 QUESTION: I don't understand what you're
10 saying.

11 MR. PATTERSON: Well --

12 QUESTION: We're dealing here with a contract
13 termination.

14 MR. PATTERSON: Okay. With -- in the employment
15 situation, the employee speaks out on some subject of
16 concern but how, in effect, does that impact the employer?
17 Sure, he may have to defend one lawsuit, but does he --

18 QUESTION: Well, you can say the same here about
19 the independent contractor. Sure, you may have to defend
20 one lawsuit.

21 MR. PATTERSON: No. I think that the likelihood
22 and the number of lawsuits with which they are threatened
23 is much more numerous if the right of free speech is so
24 defined, and the contour is so defined.

25 For example, in this case, should the contractor

1 be empowered by his threat to perpetuate a service that is
2 perceived as no longer needed?

3 QUESTION: Well, you had an agreement that said
4 it was terminable by either party at will.

5 MR. PATTERSON: All right -- no. No, not quite
6 at will, 60 days' notice prior --

7 QUESTION: On 60 days' notice.

8 MR. PATTERSON: Sixty days' notice prior to
9 April 7 in any given year.

10 QUESTION: Right.

11 MR. PATTERSON: Yes, that's right.

12 QUESTION: That's not impaired, is it?

13 MR. PATTERSON: No, that was -- well, it was,
14 yes, because that's exactly what they did.

15 QUESTION: Only because the county didn't
16 provide the proper notice.

17 MR. PATTERSON: Well, that was --

18 QUESTION: I mean, on any given year, if the
19 county had applied -- had followed the procedure in the
20 contract for giving notice, it could have done so, could
21 it not?

22 MR. PATTERSON: That's exactly what it did in
23 1991, and that's what brought about the suit.

24 QUESTION: Mr. Patterson, the opinion of the
25 Tenth Circuit on page 10a of the petition for writ of

1 certiorari says, speaking of the contractor, he claims
2 monetary injury from the termination of the contract, and
3 there's no dispute that such injury is fairly traceable to
4 defendant's actions in terminating the contract. It's
5 fairly alleged, an injury caused by defendants.
6 Accordingly Mr. Umbehr has standing.

7 Now, we take those facts as found by the Tenth
8 Circuit. We're not going to go back and examine them.

9 MR. PATTERSON: Well, I -- we know why he lost
10 the other city. He was underbid by another contractor,
11 who was silent.

12 The question is --

13 QUESTION: Well --

14 MR. PATTERSON: -- does the First Amendment
15 empower him to be free of that competition?

16 QUESTION: Well, you're saying, then, the real
17 reason for his termination was not his speech but some
18 Mount Healthy type of reason, a totally independent basis,
19 but that's not what this case is here for.

20 MR. PATTERSON: Well, as I perceive it, the
21 question here is how and to what extent the contour of
22 First Amendment right really is on the part of a
23 contractor in dealing with government with which he
24 seeks -- with which he seeks to contract.

25 Now, the question really is whether or not the

1 contractor, who by speaking out on matters of public
2 concern, can define his own benefit for which, if he is
3 denied, he has the right to go to Government and say, pay
4 me my demand or pay my damages, take your choice.

5 QUESTION: Well, but the contractor, the
6 governmental agency always has the right -- perhaps it has
7 to be pursued through litigation -- of saying, we are not
8 dismissing him, we're not discontinuing him because of his
9 speech, we're discontinuing him because of unsatisfactory
10 performance, or failure to perform.

11 MR. PATTERSON: All right. That would be a
12 reason. That would be a reason, and what we suggest is
13 that the Government in making decisions should be free of
14 that kind of threat of motive determination litigation if
15 there is objectively legitimate government reason for
16 making the decision they made. Now, that's --

17 QUESTION: Why doesn't that argument apply to
18 any decision that the Government might make with respect
19 to any citizen on any subject?

20 Why should there be -- in effect, on that
21 argument, why should we conclude that there would be no
22 right, in effect, to criticize the Government, that the
23 Government would be able to take retaliatory action so
24 long as it had an objective basis for taking the original
25 action that the individual criticized?

1 MR. PATTERSON: Well, there again, I think --

2 QUESTION: Why doesn't your argument in effect
3 sort of read the First Amendment sort of --

4 MR. PATTERSON: Well --

5 QUESTION: -- out of the system?

6 MR. PATTERSON: I think it's a question of
7 whether or not the contour of the First Amendment right of
8 the ordinary citizen who has no contractual right with the
9 Government is the same as the contour of the First
10 Amendment right of the contractor who does wish to do
11 business with the Government.

12 QUESTION: Well, if you want to draw a
13 distinction between the citizen and the contractor, you've
14 got to start at least by identifying an interest on the
15 part of the Government which would justify, at least
16 arguably justify drawing that distinction, and the only
17 interest that I've heard in the course of this argument is
18 an interest in avoiding litigation.

19 Is there any other government interest, when the
20 Government is dealing with an independent contractor, and
21 I'm assuming in my question that it's not an independent
22 contractor who in effect is performing an employee's
23 function with an employee's relationship in fact, I'm
24 talking about a real independent contractor like this one,
25 is there any government interest other than avoiding

1 litigation which is the basis, in your view, for
2 distinguishing contractors and employees and citizens?

3 MR. PATTERSON: Yes. I think there are a number
4 of decisions that ought to be shielded from that kind of
5 interference. For example, the decision of whether or not
6 to continue a service that they perceive is no longer
7 needed. A decision to no longer perform this service by a
8 contractor, but do it by employees.

9 QUESTION: Yes, but could I just ask you this:
10 supposing you have three contractors, one of whom makes a
11 lot of speeches, like this gentlemen.

12 MR. PATTERSON: All right.

13 QUESTION: Another is an Irish Catholic, and a
14 third one is a Negro.

15 MR. PATTERSON: All right.

16 QUESTION: Each one of them says he was
17 terminated because -- for a racial reason, or a religious
18 reason, or a free speech reason. Each one of them raises
19 the question of proving motive. Why should there be a
20 difference in your duty to have to prove motive if you
21 have an independent reason or you don't in the three
22 difference cases?

23 MR. PATTERSON: Well, I think you'd have to
24 inquire why were they terminated? It's a question of
25 whether or not there was --

1 QUESTION: And they allege because I was a
2 member of a religion that the members of the board don't
3 like, or a member of a race they don't like, or a member
4 of somebody who speaks out against them. Why is there a
5 difference between the three in evaluating the burden on
6 the board to explain it had a legitimate reason rather
7 than one of these impermissible reasons?

8 MR. PATTERSON: Well, I don't think there is any
9 difference, as long as there is a legitimate, objectively
10 legitimate government reason for doing whatever they did.

11 QUESTION: And if there is not an objective
12 government reason, but the only reason anybody can figure
13 out is a bad reason in the three cases I put, wouldn't you
14 treat them all alike?

15 MR. PATTERSON: In that context yes, you
16 probably would, but you've got to assume the absence of a
17 legitimate, or an objectively legitimate government reason
18 for doing what they did. They did it solely because of an
19 impermissible reason, yes.

20 QUESTION: And that's what the plaintiff has
21 alleged, and says he's undertaken the task of proving
22 that. If he can't prove it, he loses.

23 MR. PATTERSON: All right. My question, or my
24 contention, or our contention is that there is -- there
25 ought to be some kind of an interest on the part of

1 government to perform its functions that to a degree is
2 free and clear of this kind of threat.

3 QUESTION: I think an argument can be made, and
4 feel free to differ, that the Government's interest in the
5 contract situation is not as strong as the Government's
6 interest in the employee situation.

7 If you have an employee in the district
8 attorney's office that goes public saying, you know,
9 things are really balled up here, or something like that,
10 it really can impair the efficiency and operation of that
11 office as well as its reputation, but it seems to me if
12 you have an independent contractor saying things are wrong
13 with the -- no one attributes those remarks to the agency
14 itself. It's much more of an adversary situation, and
15 perhaps the county doesn't have the same interest in
16 wanting to present a united front among its employees.

17 MR. PATTERSON: Oh, I think the threat to
18 government is different in a contractor situation than it
19 is in an employee situation, and you hit upon the exact
20 difference, and that is, the employee can at least create
21 the appearance of speaking on behalf of the Government
22 that employs him. That isn't true of the contractor, but
23 on the other hand --

24 QUESTION: Then all the more reason for the
25 Government to tolerate that speech because it doesn't

1 affect them.

2 MR. PATTERSON: Well, again, I would disagree.

3 QUESTION: Well, how does it affect them other
4 than making them feel bad and subjecting them to a
5 heightened scrutiny by people who say, gosh, these
6 criticisms may be true? How is the Government otherwise
7 affected?

8 MR. PATTERSON: The expense of litigation
9 impairs their ability to make an objective decision of
10 what's best for the voters.

11 QUESTION: In other words, they might have to
12 litigate.

13 MR. PATTERSON: That's right.

14 QUESTION: But that's the same whether it's race
15 discrimination, as Justice Stevens pointed out -- in every
16 one of those cases the Government says we did it for a
17 good reason, the complaint alleges you did it for a bad
18 reason, and if you have conceded, I believe, that if it's
19 race discrimination, sex discrimination --

20 MR. PATTERSON: They're all prohibited, that's
21 true.

22 QUESTION: Yes, but speech discrimination isn't?

23 MR. PATTERSON: Well, I --

24 QUESTION: That seemed to be the position you're
25 taking.

1 MR. PATTERSON: Of course it is, and I would go
2 right back to the word of bridging. It's a question of
3 how the contour of that right is to be defined. I suspect
4 that's why we're here.

5 QUESTION: Well, Mr. Patterson, this case has
6 been remanded for trial, I assume.

7 MR. PATTERSON: It was remanded for
8 reconsideration under Pickering, if I recall the exact
9 language.

10 QUESTION: To apply a Pickering balance type
11 test --

12 MR. PATTERSON: Yes, that's right.

13 QUESTION: -- and the county can offer its so-
14 called Mount Healthy defense saying we would have
15 terminated the contract anyway --

16 MR. PATTERSON: That's right.

17 QUESTION: -- for other reasons, so that's open
18 on remand.

19 MR. PATTERSON: That -- had we not been here,
20 that's where we would be.

21 QUESTION: And what's the matter with that?

22 MR. PATTERSON: I think that the differences
23 between contractors and employers, both the economic
24 difference and the legal difference, requires a different
25 kind of a contour drawing of what those interests between

1 government and the contractor are. For example --

2 QUESTION: Mr. Patterson --

3 QUESTION: Well, what test should be employed,
4 then, if it isn't a Pickering balance test?

5 MR. PATTERSON: Well, it is a balancing test,
6 but I think the factors that must be considered are
7 different. The reason is that a contractor is usually in
8 a position, a bargaining position with his superior. He
9 can negotiate in the contract some of his own protections.

10 Secondly, government controls only the result
11 with the contractor. The Government cannot control what
12 the employees do or the means of accomplishment. They can
13 control only the result. But that also brings into
14 question whether or not the contractor can compel a
15 continuation of a result that the Government officials no
16 longer want.

17 QUESTION: Mr. Patterson, I confess not to
18 understand what proposition you're defending here. Are
19 you prepared to defend the proposition that if the
20 Government has no reason for terminating this contract
21 except -- no reason at all, except the individual's
22 criticism of Government operations, that that termination
23 is nonetheless lawful, and --

24 MR. PATTERSON: No. That's not what I'm saying
25 at all.

1 QUESTION: You are not defending that.

2 MR. PATTERSON: No.

3 QUESTION: That's what I thought this whole case
4 was about.

5 MR. PATTERSON: I'm sorry. That's not what I'm
6 defending at all.

7 QUESTION: Goodness, I don't know what it's --

8 MR. PATTERSON: No. The point I am defending --

9 QUESTION: If the Government has another reason,
10 well, I mean, that's no problem at all. I don't think
11 anybody's arguing that if the Government has another
12 reason to fire him, to terminate, that it wouldn't be
13 okay.

14 MR. PATTERSON: Our contention is --

15 QUESTION: To say, you know, I have a good
16 reason to terminate, and I'm also glad to terminate it
17 because he said some bad things about me. There's nothing
18 wrong with that.

19 (Laughter.)

20 MR. PATTERSON: The question -- the question is
21 whether or not, if government does have a legitimate,
22 objectively legitimate reason for terminating a
23 contractual relationship, should they be afraid to do it.

24 QUESTION: Thank you, Mr. Patterson.

25 Mr. Van Kirk.

1 ORAL ARGUMENT OF ROBERT A. VAN KIRK

2 ON BEHALF OF THE RESPONDENT

3 MR. VAN KIRK: Mr. Chief Justice, and may it
4 please the Court:

5 This case is about whether the First Amendment
6 protects independent contractors from retaliation based
7 solely on the expression of viewpoints dissenting from
8 those of the Government officials in power. It is in
9 essence about whether independent contractors forfeit
10 their right to engage in public debate and to criticize
11 Government officials when they contract with governmental
12 entities.

13 The petitioners have raised a host of
14 contentions in their briefs. I'd like to focus on what I
15 think are the three central questions presented by this
16 litigation. First, a consistent line of cases from this
17 Court, spanning over 40 years, clearly support the Tenth
18 Circuit's conclusion that there is no blanket exception to
19 the First Amendment for independent contractors, and that
20 they, like all citizens, are entitled to protection under
21 the First Amendment from official retaliation for their
22 speech.

23 Second, because the Government's interest in
24 regulating the speech of independent contractors is so
25 narrow and limited, their speech should be subject to a

1 heightened form --

2 QUESTION: May I just interrupt? What is the
3 principal case that you rely on for your first point?

4 MR. VAN KIRK: On the first point there actually
5 is no principal case, it is a entire string of
6 unconstitutional condition cases that this Court --

7 QUESTION: But name one involving a government
8 contractor.

9 MR. VAN KIRK: Lefkowitz v. Turley, Your Honor,
10 in which in the Fifth Amendment context this Court
11 recognized that the Government could not ask the
12 independent contractor to forfeit their right against
13 self-incrimination as a --

14 QUESTION: Do you have a case involving a
15 government contractor and the First Amendment --

16 MR. VAN KIRK: There --

17 QUESTION: -- in this wide range that you
18 describe so categorically?

19 (Laughter.)

20 MR. VAN KIRK: It depends on if you view the
21 employment cases involving contracts as independent
22 contractors.

23 QUESTION: Do you have one involving --

24 MR. VAN KIRK: No. No, Your Honor.

25 QUESTION: -- an independent contractor?

1 MR. VAN KIRK: The answer --

2 QUESTION: Nice try, though.

3 (Laughter.)

4 QUESTION: I gather the answer is no.

5 MR. VAN KIRK: The answer is no in this specific
6 context, so what it is, it is the application of well-
7 established principles to the unconstitutional condition
8 doctrine to an actual situation that is marginally
9 different than the situations that this Court has
10 encountered previously.

11 QUESTION: Is it necessary for us to talk about
12 unconstitutional conditions? Why isn't this just a State
13 effort to censor speech, and void for that reason, and why
14 do we have to talk about unconstitutional conditions?

15 MR. VAN KIRK: I think because the contractual
16 relationship is what is being terminated, and the Court --
17 there is some question in the Court's jurisprudence about
18 how to address the public employment cases and whether or
19 not that is use of the employment as punishment for speech
20 and viewpoint discrimination.

21 QUESTION: Well, doesn't Roth v. The Board of
22 Regents at least form a springboard for your argument?

23 MR. VAN KIRK: I think so. There are a number
24 of -- each of the Court's employment cases do refer to
25 this use of the job benefit as a condition being placed on

1 individuals' speech, so it is talked about in the context
2 of unconstitutional issues.

3 QUESTION: Well, the Government does not have an
4 interest in censoring or suppressing any ideas except in
5 very, very narrow circumstances, and why isn't that
6 dispositive of this case?

7 MR. VAN KIRK: I think that is as well, Your
8 Honor. I don't know that the two theories are necessarily
9 dissimilar. There are situations in which the Government,
10 in its different capacities, does have an interest in
11 regulating speech. We don't see any in this case.

12 QUESTION: Mr. Van Kirks, if I'm a government
13 contracting officer for some county, and the person, one
14 of the bidders for the contract comes in, and he curses me
15 out, he says, you're a blankety-blank-blank blank, you
16 know, and -- very offensively, and the guy goes off, and I
17 say, boy, I'm darned if I'm going to give the contract to
18 him, that's unconstitutional, you're telling me.

19 MR. VAN KIRK: It -- what we have --

20 QUESTION: It's unconstitutional.

21 MR. VAN KIRK: What we have suggested is that
22 the Court --

23 QUESTION: I mean, is the Constitution really
24 that silly?

25 MR. VAN KIRK: What we have suggested, the Court

1 need not in this case address whether or not there is a
2 similar private speech issue. The speech in this case,
3 and I think petitioners acknowledge, is on core matters of
4 public concern. In that situation, the Court may wish to,
5 if it is presented with a situation like that, adopt a
6 similar restriction as involving the public employment
7 context --

8 QUESTION: Just on core matters of public
9 concern, I see.

10 MR. VAN KIRK: We recognize that this case is on
11 core matters of public concern.

12 QUESTION: So if he said, you know, I -- you are
13 a disgrace to the public service, you're the worst
14 contracting officer I've ever dealt with, and you ought to
15 be impeached, that -- then we have a different situation.
16 He just has to be careful how he curses me out, is that
17 it?

18 (Laughter.)

19 MR. VAN KIRK: It does -- the analysis does
20 depend on whether or not we are -- at least as is
21 articulated in the employment context, on whether or not
22 the Court is dealing --

23 QUESTION: If he said the same thing to the
24 commissioners in private after the meeting it would be a
25 different case?

1 MR. VAN KIRK: No, it would not, Your Honor, as
2 Givhan suggests, that --

3 QUESTION: Yes.

4 MR. VAN KIRK: -- private speech is equally as
5 protected.

6 I think Justice Scalia's point goes to whether
7 or not simply a complaint about the manner in which the
8 contract is being administered, or complaints about the
9 nature of the contractual relationship itself, whether
10 that would anidate a person --

11 QUESTION: Well, but it's always a lawsuit. You
12 say in your brief that it's no big deal, there's not going
13 to be a whole lot of litigation, after all the Federal --
14 it's either you or the Government says, you know, there
15 hasn't been a whole lot of litigation against the Federal
16 Government and it points to these wonderful Federal
17 Government contractual regulations.

18 You expect every municipality and county in the
19 country to have ASPA regulations? Have you ever looked at
20 the Government's contracting regulations?

21 MR. VAN KIRK: I have not take the time to
22 peruse --

23 QUESTION: No. They are a maze, and it takes a
24 very good lawyer to negotiate his way through it, and if
25 that's the proof that we are not going to unleash a mass

1 of litigation that's unmanageable, it's not a very good
2 demonstration.

3 MR. VAN KIRK: No. I think what is a good
4 demonstration, however, Your Honor, is the fact that these
5 claims are currently available, as we suggest, in a number
6 of circuits, and there still is not a flood of litigation,
7 and I think what actually occurs, independent contractors
8 generally are afraid of antagonizing what is not only the
9 sovereign but their business partners, and as a result
10 there is some limitation on their willingness to bring
11 suit.

12 QUESTION: Let me --

13 QUESTION: Some chilling.

14 MR. VAN KIRK: There is some chilling.

15 QUESTION: Or self-censorship, perhaps.

16 MR. VAN KIRK: Yes, I think that's very true.

17 QUESTION: You mean sales executives don't
18 normally go into the contracting officer and call him all
19 sorts of bad names? No?

20 (Laughter.)

21 MR. VAN KIRK: They typically attempt to avoid
22 that, Your Honor.

23 QUESTION: Well now, in dealing with claims of
24 this kind, should the courts apply a Pickering-type
25 balance such as we would if it were a government employee?

1 MR. VAN KIRK: We think not a Pickering-type
2 balance because it does not -- it underprotects speech in
3 this particular context. Each of this Court's --

4 QUESTION: Well, not necessarily. We're living
5 in an age where government is trying to do more and more
6 government functions by way of private contracting, and
7 nonetheless perform services that government traditionally
8 performs, and when they contract with private people to
9 perform those services, why shouldn't the interest be very
10 much like that of an employee?

11 MR. VAN KIRK: I think that that's true, in
12 those situations where we're dealing with independent
13 contractors that are essentially the equivalent of an
14 employee, there is no reason --

15 QUESTION: And I suppose in connection with
16 trash-hauling we might think that that was a traditional
17 public function.

18 MR. VAN KIRK: I would suggest there is a
19 difference between traditional public function and the
20 degree to which an employee or an individual is
21 incorporated within the Government's own operations, the
22 degree of interference that their speech may cause.
23 There's some nexus or connection between the speech and
24 the potential disruption.

25 Here, we have a very thin, narrow line affecting

1 the contractor --

2 QUESTION: Yes, but if somebody comes around and
3 picks up my trash at home, I'm going to assume it's some
4 kind of government service being provided, so government
5 might have a real reason to treat even a private
6 contractor in that context like an employee.

7 MR. VAN KIRK: I think that the Government has
8 some interest in considering the speech of independent
9 contractors. It has a much less interest, in response to
10 your question about whether Pickering provides the
11 appropriate analysis, in situations like this.

12 QUESTION: What if the public contractor, or the
13 hired contractor hauling trash in Justice O'Connor's
14 example says, you know, to every person he hauls trash
15 from, vote Republican, or vote Socialist, or something
16 like that, and the county says, we just don't want our
17 trash haulers to go around making political campaigns.
18 You keep your mouth shut on that subject. Can they do
19 that?

20 MR. VAN KIRK: I think they would have
21 difficulty making that -- putting that restriction on the
22 contractor. As long as the contractor is not viewed -- I
23 mean, in this case, for example, Mr. Umbehrr's trucks
24 clearly say, Solid Waste Systems, on the side of them.
25 The individual may know that government has hired the

1 contractor, but it's not going to impute the speech to the
2 Government. It's not going to view the individual as
3 speaking on behalf of the Government.

4 Now, the Government may say, you're slowing
5 down, you're not going fast enough in picking up trash.
6 We don't care what it is that you do on your own time, we
7 want you to finish this schedule.

8 QUESTION: You're saying, then, I think, that
9 when the independent contractor is not functionally like
10 an employee in the office that the only real issue is
11 whether the contractor is performing the contract or not.

12 MR. VAN KIRK: Yes, that's absolutely correct,
13 Your Honor.

14 QUESTION: And if it's not, they can fire him
15 for nonperformance, and if he is, that's the end of the
16 issue.

17 MR. VAN KIRK: Precisely.

18 QUESTION: So if I'm a municipality and I want
19 to hire private guards, let's say, for housing projects or
20 something like that, and I have several applicants, one of
21 whom is a reputable, goo-goo organization, unimpeachable
22 people, the other one of which is an acknowledged racist
23 organization which preaches racism, I have to, as the
24 Government official, say, well, it's a government
25 contract. I cannot favor one view over the other.

1 Whoever comes in with the lowest -- lower bid --

2 MR. VAN KIRK: It depends on whether or not you
3 are -- the individuals are --

4 QUESTION: They're not going to be racist in
5 their job.

6 MR. VAN KIRK: They're not --

7 QUESTION: They're both going to do the same
8 job.

9 MR. VAN KIRK: Yes, I think that that's correct,
10 Your Honor.

11 QUESTION: I have to do that.

12 MR. VAN KIRK: Yes.

13 Now, if you're -- let me pose a different --

14 QUESTION: I think that's extraordinary. Can't
15 the Government favor some ideas over other ideas, and when
16 it gives away money, can't it give away money, for
17 example, to organizations during a time of war that are
18 supporting the war effort --

19 MR. VAN KIRK: When the Government --

20 QUESTION: -- and not give away money to
21 organizations that are impeding the war effort?

22 MR. VAN KIRK: When the Government is speaking,
23 in fact hiring others to speak on its behalf, it does have
24 far greater rights to control speech.

25 If it's hiring a racial sensitivity trainer, and

1 it has the same applicants that you describe, somebody
2 with no racial bias and an individual who, in fact, is
3 well-known in the community as being racially intolerant,
4 they, in that situation, can say, even if the racially --
5 excuse me, the racially intolerant individual promises to
6 adhere to the text of the script that they provide, they
7 can say, we're sorry, we are attempting to communicate a
8 message of tolerance. Your notoriety in the community is
9 simply too great, because we, as the Government, are the
10 speaker.

11 There's a difference between when the Government
12 is itself endorsing a message, attempting to communicate a
13 message --

14 QUESTION: But so long as it's not doing that,
15 it has to allow its funds to be used to subsidize even the
16 most obnoxious ideas.

17 MR. VAN KIRK: Even speech it abhors, Your
18 Honor.

19 QUESTION: How --

20 QUESTION: Isn't there a difference, Mr. Van
21 Kirk, between the Government's initial decision to hire
22 someone and the Government's decision to terminate? Might
23 not there be different levels of scrutiny applied to one
24 as to the other?

25 MR. VAN KIRK: This Court has suggested in

1 various contexts, Wygant being one of them, that there may
2 be a difference in the equal protection context, and
3 certainly that's the case here. We believe we have the
4 strongest interest.

5 I am not sure that the Government has any more
6 compelling interest in regulating speech when it is
7 considering --

8 QUESTION: What about --

9 MR. VAN KIRK: -- bids as opposed to terminating
10 an existing contractor. I think it's a stronger case, but
11 I don't think it's constitutionally dispositive.

12 QUESTION: What do you say about Mr. Patterson's
13 interest that he raised? I mean, as I took what he was
14 saying, he was saying, all right, concede for the sake of
15 argument that the First Amendment applies. The
16 interesting question is the shape of that First Amendment
17 right, and what I thought he was trying to raise, which
18 sounded logical anyway, is think of the \$400 billion or so
19 being spent by State and Federal Governments on different
20 kinds of contracts with people.

21 Many of these people are large firms. They
22 employ thousands or hundreds of people. They have large
23 groups of lawyers. They are very, very interested in
24 maintaining the Government moneys. Each of the thousands
25 of people who work for Government employment contractor X

1 speak every day. They spend all day speaking.

2 Now, if suddenly there are rights to bring 1983
3 actions for which you get attorney's fees every time a
4 Government is contracted, and that's a very large right,
5 and depends on what any of these 400,000 might be saying,
6 and somebody might say, I'm going to vote Republican, I
7 urge you to do the same, I'm going to vote Democrat, I
8 urge you to do the same, all of which leads to a case
9 being brought under 1983 by the paid lawyers who will get
10 their attorney's fees, which makes it very, very difficult
11 for the Government to operate its contract operation,
12 indeed, it will lead the Government to remove all
13 discretion from contracting officers and operate on the
14 basis of how many bricks you have, or how many -- so it's
15 totally objective, et cetera.

16 That's the kind of thing that he's worried
17 about, and I don't think that's an illogical thing to be
18 worried about, and that doesn't exist in the employee
19 cases, and it doesn't exist in the race cases, and it
20 doesn't exist in the sex cases to the same degree. I'm
21 trying to put his argument, and that's what I'm very
22 interested in, myself, that either you or the Solicitor
23 General at some point respond to that.

24 MR. VAN KIRK: Certainly, Your Honor.

25 This Court has never suggested that that type of

1 interest, that the potential for abuse, is enough to
2 completely destroy --

3 QUESTION: Well, I'm suggesting it because I
4 want to hear the response. That is to say, what for the
5 sake of argument -- that sounds to me what is a very
6 strong governmental interest the way he put it, and I
7 don't think that the First Amendment is ignorant or
8 unaware of the way in which these principles work out in
9 reality.

10 The Government has to be able to function, and
11 all that's built into Pickering, and I'm trying to get a
12 rather -- I've been at some length because I -- it's a
13 serious question, I think, and I --

14 MR. VAN KIRK: Pickering is concerned, and all
15 of this Court's First Amendment jurisprudence is concerned
16 with the Government's ability to function, and to
17 demonstrate interests when it has interests, but the
18 interests have to be in regulating speech, not in some
19 generalized concern about abuse.

20 I'm not familiar with any Court -- with any
21 opinion from this Court, nor have I seen it cited in the
22 petitioner's brief, that would suggest that it is a
23 cognizable part of the constitutional analysis to consider
24 whether or not there are too many people who may be -- may
25 have a --

1 QUESTION: Why don't you see our rule on
2 Shelley. You really think we don't take into account
3 that? I mean, I don't think we'd write the opinion that
4 way, but do you really think courts are oblivious to the
5 real life consequences of rulings that they make? Are you
6 really saying that's --

7 QUESTION: I'm not -- I'm not --

8 QUESTION: -- an irrelevancy in this case?

9 MR. VAN KIRK: I do not think that -- I'm sorry,
10 Your Honor.

11 QUESTION: I didn't express myself well if I
12 meant to go on just numbers. I'm trying to draw a little
13 picture of what he's talking about when he says
14 administrative problems that interfere with the practical
15 administration of the contracting system.

16 MR. VAN KIRK: Your --

17 That's the kind of thing he's thinking about,
18 and that's what might lead to a Connick standard, or a
19 Pickering standard, and -- or some other standard, and
20 it's that kind of problem that I'd like to see addressed.
21 This isn't an employment case. That doesn't mean it's
22 easier than an employment case.

23 MR. VAN KIRK: It does suggest, with all
24 respect, Your Honor, that in the employment context what
25 the Court recognized in fashioning Pickering and Connick

1 was the Government's interest in regulating speech when
2 speech is disruptive, not the possibility that hundreds of
3 thousands of Federal and State employees may bring
4 frivolous claims.

5 They may, but what we have always done in our
6 system is leave that to the trier of fact, and that's what
7 I understand the petitioners to be attempting to avoid, is
8 to allow a trier of fact to determine whether or not their
9 motivation in this case --

10 QUESTION: Mr. Van Kirk, one thing I wanted to
11 get your answer on, Government contractors do come in all
12 sizes and shapes. Some are very close to employees, some
13 are distant. Maybe some are really akin to policymakers.
14 We have at least that system in place. Why are you
15 suggesting that we should go beyond that when there's no
16 uniformity in what Government contractors are?

17 MR. VAN KIRK: In terms -- I am suggesting an
18 approach that takes into account what functional position
19 the independent contractor is in in any particular
20 circumstance, and what I'm also suggesting is that
21 viewpoint-based discrimination, as Justice Kennedy has
22 pointed out, the constitutional baseline for that type of
23 effort to punish disfavored views is strict scrutiny, and
24 there has to be some Government interest sufficient to
25 move us away from that baseline.

1 QUESTION: Is there a policymaker category for
2 Government contractors the way there is for employees?

3 MR. VAN KIRK: I concede that in that situation
4 where the Government says, we need to be able to rely on a
5 confidential relationship with this independent contractor
6 in the same way that we do with an employee, that that may
7 be perfectly permissible for in that situation the Court
8 to --

9 QUESTION: How about matters of public concern,
10 as distinguished from ordinary gripe and grouching?

11 MR. VAN KIRK: Again, we don't believe this case
12 presents occasion to address that, but it does -- the
13 Court's opinions suggest that that type of issue would
14 present a situation that is not of constitutional
15 magnitude.

16 If it is simply a personal dispute with the
17 contracting agency about the terms of the contract, rather
18 than something that the general public might be concerned
19 about, the Court may wish to indicate that the same
20 concerns that animated Pickering to exclude speech on
21 matters of purely private concern is also excluded, but
22 not addressing that situation.

23 QUESTION: Why isn't the contractor matter of
24 public concern? That is --

25 MR. VAN KIRK: I'm sorry, Your Honor.

1 QUESTION: Why isn't the contract with a public
2 entity, the terms of that contract a matter of public
3 concern? I would think it is.

4 MR. VAN KIRK: In addressing this situation in
5 the courts of appeals under Pickering, plaintiffs often
6 attempt to say anything that has to do with the
7 Government, Government function is a matter of public
8 concern. It's typically an unsuccessful argument. It is
9 available to them --

10 QUESTION: Should it be? Why? Just --

11 MR. VAN KIRK: Because --

12 QUESTION: Because it would cause too much
13 litigation? But you've rejected that argument.

14 MR. VAN KIRK: I have suggested that in terms of
15 addressing general First Amendment jurisprudence that that
16 ought not to be the rule for an entire class of
17 individuals, that you would not wipe out First Amendment
18 protection for core matters of public concern based on
19 considerations of administrative efficiency.

20 QUESTION: What are core -- core -- okay, core
21 matters of public concern, which wouldn't include whether
22 the terms of a very expensive contract that the county had
23 entered into are being abided by or not?

24 MR. VAN KIRK: They may, Your Honor. Each
25 situation is going to involve --

1 QUESTION: It may involve contract terms, then.

2 MR. VAN KIRK: It may -- there is a balancing
3 that goes on here, there's no question.

4 QUESTION: We'll have to litigate it, I guess,
5 to figure out for sure.

6 MR. VAN KIRK: But that's the central question
7 that's presented, is do we even get to that point?

8 QUESTION: Well, counsel, suppose that a
9 municipality owned a number of garbage trucks, that it
10 owned and it used to operate with its own employees. It
11 then switches. It wants independent contractors to come
12 in and run the trucks. Can it tell these independent
13 contractors, since you're using our trucks, we do not want
14 you to discuss matters of public concern or politics, just
15 pick up the garbage, and that's it?

16 MR. VAN KIRK: No, it may not, Your Honor. To
17 the same extent they may not make that --

18 QUESTION: Even though it has given to these
19 contractors substantial government assets to use in order
20 to circulate throughout the community?

21 MR. VAN KIRK: That essentially would swallow
22 the unconstitutional conditions doctrine, Your Honor. It
23 would suggest as long as we are providing you with some
24 benefit, here the trash contracts, we can dictate what you
25 say, and that's, I would suggest is inconsistent with the

1 approach this Court has taken.

2 QUESTION: Thank you, Mr. Van Kirk.

3 Ms. Brinkmann, we'll hear from you now.

4 ORAL ARGUMENT OF BETH S. BRINKMANN

5 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

6 SUPPORTING THE RESPONDENT

7 MS. BRINKMANN: Mr. Chief Justice, and may it
8 please the Court:

9 I'd like to first address a number of
10 administrative problems that Justice Breyer asked about.
11 I think it's important to focus on that question on the
12 other side of the issue here, and that's the First
13 Amendment speech that's at issue here.

14 This is speech that lies at the core of the
15 First Amendment. It's speech on matters of public
16 concern, and often contractors are in a unique position to
17 have information and to have an informed opinion about
18 government functioning because of their relationship with
19 the Government. The Court recognized that --

20 QUESTION: But aren't they also in a unique
21 position in the hypothetical that I gave, and like Justice
22 Scalia's hypothetical with the contract guards? Aren't
23 they in a unique position, based upon their contract with
24 the Government, their use of Government assets and
25 Government payments, to have access to the community which

1 other people do not have? Why does the Government have to
2 subsidize that?

3 MS. BRINKMANN: Well, Your Honor, we believe
4 that content neutral time, place, and manner restrictions
5 could certainly be placed on employees. That's not a
6 problem whatsoever. When --

7 QUESTION: Suppose they say, we don't want you
8 discussing any matters of public concern because you have
9 a special privilege, going in to homes, that we are giving
10 you, and we do not want you to exercise that on our
11 behalf?

12 MS. BRINKMANN: Your Honor, we believe that the
13 Government certainly would have a right to terminate a
14 contract if that provision was necessary to the effective
15 performance of the contract.

16 QUESTION: No, I will stipulate that out of the
17 hypothetical.

18 MS. BRINKMANN: If it was content-based, we
19 don't believe that that is the kind of action that the
20 Government can take.

21 QUESTION: What if the Government -- and I think
22 this is the direction Justice Kennedy was going in. What
23 if the Government says, look, people who are having their
24 garbage picked up do not want to have to listen to
25 political harangues from you. Don't talk about politics

1 while you're picking up the garbage. Is that a First
2 Amendment violation?

3 MS. BRINKMANN: Your Honor, we think that the
4 Government has the right to put terms in the contract that
5 are necessary to its effective performance.

6 QUESTION: That's not an answer to Justice
7 Souter's question.

8 QUESTION: Yes, how about that term? Don't talk
9 politics to homeowners when you're picking up their
10 garbage. Violation?

11 MS. BRINKMANN: We believe that because of the
12 content-based nature of it there would have to be some
13 kind of stronger Government interest.

14 QUESTION: What's content-based about that?
15 Just don't talk any kind of politics.

16 MS. BRINKMANN: I guess it's how you define
17 politics, Your Honor. If it permitted neighborhood
18 gossiping or other kind of speech that could have that
19 same effect and excluded political speech, that would be a
20 content-based restriction.

21 QUESTION: But in any case, that is for the --
22 even if -- let's add another term to the contract. Don't
23 talk to them about politics when you're picking up the
24 garbage, but when you're on your own time, say anything
25 you want to. Publish in the press, write letters, hire

1 loudspeakers, sandwich boards, everything. Still a
2 violation?

3 MS. BRINKMANN: If it were limited to one topic
4 we think that would raise problems of content-based
5 regulation.

6 QUESTION: Suppose it would limit --

7 QUESTION: And if there is no restriction on the
8 speech, then as between the Boy Scouts and the KKK the
9 Government can't discriminate between the two, right?

10 MS. BRINKMANN: Your Honor --

11 QUESTION: Assuming it's making no speech
12 restrictions, the Government can't say we'd rather have
13 the Boy Scouts do it?

14 MS. BRINKMANN: I think that it really depends
15 on the contract we're talking about, Your Honor.

16 QUESTION: It's a contract to pick up garbage,
17 and we know that there's going to be a lot of political
18 discussion, okay.

19 QUESTION: They're different garbage men than I
20 have.

21 QUESTION: Yes.

22 MS. BRINKMANN: Yes, Your Honor, unless there's
23 a --

24 QUESTION: That's what you're saying. The
25 Government cannot possibly use its authority, its

1 contracting authority to foster any policies or ideas that
2 it thinks are desirable.

3 MS. BRINKMANN: If the contract is to
4 communicate the Government's speech, certainly, and if --

5
6 QUESTION: No, the contract isn't that. It's a
7 contract, let's say, to make a movie about the Army or
8 something like that, and it cannot decline to give that
9 movie contract to a pornographic film-maker.

10 MS. BRINKMANN: No. The Government's interest
11 is in the performance --

12 QUESTION: Right.

13 MS. BRINKMANN: -- of the contract, and that
14 interest is what's central to determining what analysis
15 should be applied in these cases.

16 QUESTION: A good argument for restricting the
17 scope of Government.

18 MS. BRINKMANN: Well, Your Honor, we believe
19 that the Government's interest in the performance of a
20 contract can effectively be protected by the Government
21 being free to take any action when the Government can
22 establish that it materially and directly impairs the
23 performance of the contract.

24 QUESTION: But you can win this case, or your
25 side can win this case on a much narrower ground, can't

1 it, because we're not talking -- as I understand it, we're
2 not talking here about the contractor's speech in the
3 course of performance, we're talking about the
4 contractor's speech, as it were, on the contractor's own
5 time.

6 MS. BRINKMANN: That's correct.

7 QUESTION: And you can leave some of these
8 difficult questions for another day and still, in theory,
9 prevail, leaving them open, can't you?

10 MS. BRINKMANN: That's correct, Your Honor, and
11 I also think that on those questions --

12 QUESTION: So the rule would be that what the
13 contractor does on his own time is protected so long as it
14 does not, in fact, impede the performance of the contract,
15 is that -- would that be the rule that you would argue
16 for?

17 MS. BRINKMANN: We would agree with that, Your
18 Honor. We think it --

19 QUESTION: Like pornographic film-making, or
20 burning crosses, right, so long as that doesn't interfere
21 with the picking up of the garbage or the making of film?

22 MS. BRINKMANN: Your Honor, there may be
23 situations, for example, I think in -- yes, I guess is the
24 answer to that question, with that hypothetical.

25 I think it's important to focus, though, Your

1 Honor, these are very context-specific cases. Pickering
2 has recognized that and hasn't set down a blanket, easy
3 test to apply. It looks at the context of each case, and
4 we think that that is comparable in this situation.

5 QUESTION: So you think the Pickering rule
6 applies to this -- to independent contractors?

7 MS. BRINKMANN: No. We don't think that the
8 deference that is given the Government's interest as an
9 employer that underlies Pickering applies here.

10 QUESTION: Well, that's an extraordinary
11 argument for the Government to be making. Certainly the
12 Federal Government is going to be getting the same
13 deference as a county commission, and it seems to me
14 extraordinary for the Federal Government to come in and
15 say, we don't think we get much deference under the
16 Constitution.

17 MS. BRINKMANN: Your Honor, we -- the Federal
18 Government has no interest in having contractor speech
19 attributed to it.

20 As you pointed out earlier, one of the
21 differences in the Government interests between the
22 employee situation and the contractor situation is whether
23 the speaker's speech is attributed to the Government. The
24 Government doesn't have any interest in policing
25 contractors' speech and having it attributed to it. It's

1 a very different situation with the employment context,
2 where the Government has the interest that Pickering
3 recognized.

4 QUESTION: Well, when I think of all the
5 contracts the Government must have, the Federal
6 Government, I can't imagine that some situation wouldn't
7 arise where there's going to be some issue like this, and
8 you're saying, in effect, we want the most stringent rule
9 possible to be invoked against the Government, and here
10 you are a Government attorney.

11 MS. BRINKMANN: I should restate my position,
12 Your Honor. We think when the relationship in the
13 contracting situation is equivalent to an employment
14 context, Pickering should apply.

15 QUESTION: Well, let's suppose a government
16 contract to provide security guard services in a public
17 housing project, do you think the Government can discharge
18 the contractor because the people are members of the
19 Nation of Islam, for that reason?

20 MS. BRINKMANN: Your Honor, I think that would
21 be a matter of proof whether or not that fact --

22 QUESTION: What test do we employ? Do we use a
23 Pickering balance test?

24 MS. BRINKMANN: I think that the plaintiff would
25 have to prove that their speech on matters of public

1 concern was a substantial motivating factor in the
2 Government's action, where the Government could establish
3 as a matter of fact that that speech materially and
4 directly impaired the performance of the contract.

5 In that particular situation, if it was in the
6 context where residents of that housing authority did not
7 believe that the security guards would prevent them, it
8 somehow impaired a trust relationship between security
9 guards and the --

10 QUESTION: What test are we employing here, a
11 Pickering balance test, is that what you're arguing for?

12 MS. BRINKMANN: It's a balancing test of the
13 interest between the Government and the speaker, but I --

14 QUESTION: A Pickering-type test?

15 MS. BRINKMANN: It's not Pickering in the sense,
16 Your Honor, that the inherent interest underlying
17 Pickering, the Government's interest in coworker
18 relationship, in supervisory discipline, and in the
19 functioning of a work place where they're all Government
20 employees there, that is a weight that is given a lot of
21 deference in Pickering.

22 I normally think that when people are talking
23 about Pickering balancing, that's always in the scale, and
24 that would not be in the balance when we talk in terms of
25 Government contractors.

1 QUESTION: Sometimes it would.

2 MS. BRINKMANN: It would be --

3 QUESTION: That's -- my problem with your
4 position is, you seem to be arguing for a case-by-case
5 position. You're not arguing for something higher than
6 Pickering in every case, but in some cases. Is that -- am
7 I correct in understanding your position?

8 MS. BRINKMANN: Yes, Your Honor. I think it's
9 because Pickering was motivated by the fact that the
10 interest of the Government as employer is consistent in
11 the employee relationship category.

12 QUESTION: So the courts have a framework that
13 they know they can deal with, but you're saying there
14 can't be any such for the Government contractor. It has
15 to be one case at a time.

16 MS. BRINKMANN: That there are certain
17 situations like respondents here. There's just none of
18 the factors that were present in Pickering. There was no
19 day-to-day supervision. There was no relationship with
20 the supervisor.

21 QUESTION: So, if I may ask, in a case like this
22 case, if I understand you, you're really not arguing that
23 there should be a balancing test. You're saying the test
24 should be, can they perform the contract and still say
25 these things? If the answer is yes, they cannot be

1 penalized. If the answer is no, they can be.

2 MS. BRINKMANN: Your Honor, we submit that's
3 what underlies Pickering. What justifies Government
4 action under Pickering is the impairment of the
5 functioning of the Government, of the work place, and
6 that's the same interest in this case, but it's --

7 CHIEF JUSTICE REHNQUIST: Thank you,
8 Ms. Brinkmann. I think you've answered the question.

9 MS. BRINKMANN: Thank you, Your Honor.

10 CHIEF JUSTICE REHNQUIST: The case is submitted.

11 (Whereupon, at 12:02 p.m., the case in the
12 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

BOARD OF COUNTY COMMISSIONERS, WABAUNSEE COUNTY, KANSAS,
Petitioners v. KEEN A. UMBEHR

CASE NO.: 94-1654

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)