

APPEARANCES CONTINUED

FOR THE PLAINTIFF:

JONATHAN CRUMLY, SR.
TAYLOR, ENGLISH, DUMA, LLP
ATLANTA, GEORGIA 30339

GARLAND HUNT
HUNT & ASSOCIATES
ALPHARETTA, GEORGIA 30005

FOR THE DEFENDANT:

DAVID GEVERTZ, KATHRYN HINTON &
HANNAH JARRELLS
BAKER, DONELSON, BERMAN, ET AL.
ATLANTA, GEORGIA 30326

1 (IN ATLANTA, FULTON COUNTY, GEORGIA, NOVEMBER 17, 2017, IN
2 OPEN COURT.)

3 THE COURT: OKAY. GOOD MORNING. YOU MAY BE SEATED.
4 OKAY. WE ARE HERE THIS MORNING IN CIVIL ACTION 15-CV-477,
5 KELVIN COCHRAN VS. CITY OF ATLANTA, GEORGIA, ET AL.

6 AND IF COUNSEL WOULD INTRODUCE THEMSELVES FOR THE RECORD,
7 PLEASE.

8 MR. THERIOT: GOOD MORNING, YOUR HONOR. KEVIN THERIOT
9 FOR THE PLAINTIFF. AND I HAVE CO-COUNSEL KEN CONNELLY, JEANA
10 HALLOCK, GARLAND HUNT, AND JONATHAN CRUMLY.

11 THE COURT: OKAY. GOOD MORNING.

12 MR. GEVERTZ: GOOD MORNING, YOUR HONOR. DAVID GEVERTZ
13 FOR THE DEFENDANTS. I'M JOINED BY MY COLLEAGUES, KATHRYN HINTON
14 AND HANNAH JARRELLS.

15 THE COURT: OKAY. GOOD MORNING.

16 BEFORE WE START WITH TODAY'S MOTION HEARING, WHAT I WANTED
17 TO DO BRIEFLY IS JUST EXPLAIN A LITTLE BIT ABOUT WHAT WE'RE
18 DOING HERE TODAY BECAUSE I THINK THERE ARE MANY INDIVIDUALS THAT
19 MIGHT NOT BE FAMILIAR WITH WHERE WE ARE IN THE CASE AND WHAT THE
20 PURPOSE IS OF TODAY'S HEARING. AND I THINK IT WOULD BE A LITTLE
21 BIT CONFUSING TO YOU IF YOU JUST KIND OF JUMPED INTO IT BY JUST
22 LISTENING TO WHAT WE'RE DOING HERE TODAY. BUT WHAT THIS HEARING
23 IS ABOUT IS BOTH PARTIES HAVE FILED MOTIONS FOR SUMMARY
24 JUDGMENT. AND WHAT THAT MEANS IS BOTH PARTIES CONTEND THAT EVEN
25 IF YOU TAKE THE FACTS IN THE LIGHT MOST FAVORABLE TO THE OTHER

1 PARTY, THAT AS A LEGAL MATTER THEY SHOULD WIN. SO BOTH SIDES
2 ARE SAYING THAT THEY DON'T NECESSARILY NEED A JURY TRIAL TO
3 DECIDE DISPUTED ISSUES OF FACTS BECAUSE THERE ARE THE IMPORTANT
4 FACTS, THE MATERIAL FACTS, ARE AGREED UPON, AND THE COURT CAN
5 ISSUE A RULING BASED UPON THE LAW. BUT AS YOU MIGHT IMAGINE,
6 BOTH SIDES HAVE VERY DIFFERENT INTERPRETATIONS OF WHAT THE LAW
7 IS. SO TODAY IS A CHANCE FOR BOTH SIDES TO PRESENT ARGUMENT AS
8 TO THEIR VERSION OF WHAT THE LAW IS, THEIR APPLICATION OF THE
9 FACTS TO THE LAW, AND, VERY IMPORTANTLY, I GET A CHANCE TO ASK
10 QUESTIONS OF ALL OF THEM TO MAKE SURE THAT I UNDERSTAND THEIR
11 ARGUMENTS AND I'VE GOT A GOOD UNDERSTANDING OF THE LAW AS THEY
12 PRESENT IT TO ME.

13 NOW, THROUGHOUT THIS I'LL BE ASKING A LOT OF QUESTIONS TO
14 BOTH SIDES. A LOT OF THE QUESTIONS WILL SEEM VERY TECHNICAL IN
15 NATURE. THERE'S TWO SUPREME COURT CASES WE'RE GOING TO BE
16 TALKING ABOUT A LOT, ONE'S CALLED PICKERING AND ONE IS CALLED
17 N.T.E.U. AND WE'LL BE THROWING THOSE TERMS AROUND A LOT, BUT
18 THOSE ARE TWO SUPREME COURT CASES THAT DEAL WITH THE ISSUES THAT
19 ARE IN FRONT OF US TODAY. AND YOU MAY BE A LITTLE CONFUSED
20 BECAUSE A LOT OF TIMES THE LAWYERS WILL BE DOING LESS OF A KIND
21 OF A NARRATIVE ARGUMENT AND MORE RESPONDING TO QUESTIONS, BUT
22 THAT'S BECAUSE I HAVE GOTTEN PAPER FROM BOTH PARTIES THAT, IF I
23 PRINTED IT OUT, WOULD PROBABLY BE THIS TALL. AND I'VE GONE
24 THROUGH THAT AND READ THAT. SO THAT'S WHERE KIND OF THE MORE
25 COHESIVE ANALYSIS OF THIS IS IN THAT PAPERWORK. TODAY IS A DAY

1 MORE FOR QUESTIONS AND ASKING EACH SIDE ABOUT EACH OTHERS'
2 ARGUMENTS. SO AS I ASK QUESTIONS, I REALLY DO WANT YOU NOT TO
3 READ TOO MUCH INTO THE QUESTIONS THEMSELVES BECAUSE A LOT OF
4 TIMES I'M TESTING THEORIES, I'M TRYING TO SEE HOW THEY'LL
5 RESPOND TO THE OTHER SIDE'S ARGUMENT. AND IT'S NOT SUPPOSED TO
6 BE ME TELEGRAPHING TO ANYONE ABOUT WHAT I'M GOING TO DO BECAUSE,
7 I WILL TELL YOU, I DON'T KNOW WHAT I'M GOING TO DO. THAT'S WHY
8 I'M HAVING AN ORAL ARGUMENT SO I CAN LISTEN TO THE PARTIES AND
9 MAKE A DECISION. SO THERE WON'T LIKELY BE A DECISION AFTER
10 TODAY'S ORAL ARGUMENT, AND THAT'S BECAUSE THESE ISSUES ARE
11 EXTREMELY COMPLEX.

12 WHAT I WANT TO DO IS, AFTER I HEAR FROM THE PARTIES, I WANT
13 TO GO BACK, LOOK AT THE LAW AGAIN, LOOK AT THE WRITTEN
14 SUBMISSIONS, AND THEN I'LL WRITE PROBABLY A LENGTHY ANALYSIS OF
15 ALL THESE ISSUES THAT WILL BE PUBLICLY AVAILABLE FOR YOU ALL TO
16 READ. I'LL ALSO ENCOURAGE YOU, IF YOU ARE INTERESTED IN MORE
17 DETAIL ABOUT WHAT GOES ON TODAY, ALL THE BRIEFS THAT THE PARTIES
18 HAVE FILED AND THE EVIDENCE THAT THEY'RE RELYING ON IS ALL ON
19 THE PUBLIC DOCKET. SO YOU CAN GO ON-LINE, ON PACER AND PULL UP
20 THIS INFORMATION AND READ ANY OF THIS THAT YOU WOULD LIKE TO SEE
21 IN MORE DETAIL.

22 SO, WITH THAT BACKGROUND, WHAT I'LL DO IS HEAR FROM THE
23 CITY AND MAYOR REED FIRST SINCE THEY FILED THE FIRST MOTION,
24 THEN I'LL ALLOW PLAINTIFFS TO RESPOND, AND THEN WE'LL HEAR
25 REBUTTAL. AND I'LL SAY THIS TO YOU AS WELL. I PROBABLY WILL

1 HAVE A LOT OF QUESTIONS. YOU KNOW THAT FROM THE MOTION TO
2 DISMISS HEARING THAT WE HAD. AND I'M LOOKING FORWARD TO HEARING
3 YOUR RESPONSES TO THOSE. SO, WITH THAT, WE CAN GO FORWARD WITH
4 THE ARGUMENT. THANK YOU.

5 MR. GEVERTZ: THANK YOU, YOUR HONOR. BEFORE WE BEGIN,
6 IS THERE ANY PARTICULAR PORTION THAT YOU WANTED US TO START
7 WITH? I KNOW THAT YOU HAD SENT AN E-MAIL WITH A PARTICULAR
8 ISSUE, WHICH MY COLLEAGUE, MS. HINTON, HAS BRIEFED AND PREPARED.
9 IF YOU WANTED TO START WITH THAT, OR JUST A GENERAL PRESENTATION
10 WAS THE WAY YOU'D PREFER TO BEGIN?

11 THE COURT: WELL, AS YOU MIGHT IMAGINE, I DO HAVE A
12 LOT OF QUESTIONS, BUT I THINK THE BEST THING TO DO IS TO GO
13 THROUGH YOUR ARGUMENT, AND I'LL JUST ASK THEM AS WE GO. I DON'T
14 THINK IT'S NECESSARY TO SPEND A LOT OF TIME ON THE FACTS. THEY
15 ACTUALLY ARE NOT VERY DISPUTED REALLY AS WE SIT HERE TODAY, AND
16 I THINK I'VE GOT A GOOD UNDERSTANDING OF THEM. SO CERTAINLY
17 IT'S IMPORTANT TO TALK ABOUT THE FACTS WHEN YOU WEAVE THEM INTO
18 THE LEGAL STANDARDS, BUT IN TERMS OF DOING A COMPREHENSIVE
19 FACTUAL SECTION, I DON'T THINK THAT THAT WOULD BE A GREAT USE OF
20 YOUR TIME RATHER THAN JUST KIND OF JUMPING INTO THE ACTUAL
21 ARGUMENTS.

22 MR. GEVERTZ: THANK YOU, YOUR HONOR.

23 THE COURT: YOU'RE WELCOME.

24 MR. GEVERTZ: YOUR HONOR, AGAIN, MY NAME IS DAVID
25 GEVERTZ. I'M JOINED BY MY COLLEAGUES, KATHRYN HINTON AND HANNAH

1 JARRELLS, WHO REPRESENT THE DEFENDANTS IN THIS CASE. WE THINK
2 THAT THE MOST IMPORTANT CASE WITH RESPECT TO THE LEGAL ANALYSIS
3 FOR THE COURT TO BE WEIGHING IS THE RECENT ELEVENTH CIRCUIT
4 CASE, SNIPES CASE, WHICH WE FILED A SUPPLEMENT -- A NOTICE OF
5 SUPPLEMENTAL AUTHORITY FOR. IT CAME OUT IN AUGUST OF THIS YEAR.
6 IT HAD FACTS THAT WERE SIMILAR. AND BECAUSE THE FIRST TOPIC I
7 WAS GOING TO BE DISCUSSING IS THE CLAIM OF RETALIATION UNDER THE
8 FIRST AMENDMENT, THAT CASE WOULD APPEAR TO BE PARTICULARLY
9 APROPO.

10 AS THE COURT MAY BE AWARE, THAT INVOLVED A LAW ENFORCEMENT
11 OFFICER AT A LOWER LEVEL THAN THE CHIEF OF ATLANTA FIRE RESCUE,
12 MR. COCHRAN, WHO WAS DISMISSED AFTER SENDING WHAT WAS
13 INTERPRETED TO BE INFLAMMATORY FACEBOOK AND TEXT MESSAGES
14 REGARDING THE TRAVON MARTIN SHOOTING. THOSE TEXTS, JUST AS IN
15 THIS CASE WITH RESPECT TO THE BOOK, WERE DISSEMINATED TO
16 CO-WORKERS, INCLUDING AT LEAST ONE SUBORDINATE. ONE OF THOSE
17 CO-WORKERS FOUND THAT PROBLEMATIC, BROUGHT IT UP THE CHAIN JUST
18 LIKE IN THIS CASE, AND THE PLAINTIFF WAS PROMPTLY TERMINATED.
19 WE THINK THAT SNIPES IS AN IMPORTANT, IF NOT DETERMINATIVE, CASE
20 FOR A COUPLE OF REASONS, AND THEY ALL DOVETAIL, IN OUR VIEW,
21 WITH THE FACTS THAT ARE PERTINENT IN THIS CASE.

22 FIRST, THERE WAS SUBSTANTIAL DEFERENCE PAID EXPLICITLY BY
23 THE ELEVENTH CIRCUIT TO THE FACT THAT PUBLIC EMPLOYERS, WHEN
24 THEY DISCIPLINE AN EMPLOYEE, THAT THE IMPACT AS TO HOW THAT
25 EMPLOYEE'S SPEECH WOULD BE FELT AND INTERPRETED AND REVERBERATED

1 THROUGHOUT THE WORKPLACE WAS PARTICULARLY IMPORTANT WHEN
2 ANALYZING A RETALIATION CLAIM. IN THAT CASE THERE WAS ALSO A
3 QUESTION AND AN ARGUMENT, SIMILAR TO THE ONE HERE, AS TO WHETHER
4 OR NOT ACTUAL DISRUPTION HAD TO BREAK OUT IN ORDER FOR THE
5 EMPLOYER TO BE ABLE TO TAKE ACTION. AND THERE, IN SNIPES, THE
6 ELEVENTH CIRCUIT CITED A PRIOR PRECEDENT AND REAFFIRMED THE
7 NOTION THAT DISRUPTION NEED NOT BREAK OUT. INSTEAD, WHAT THE
8 COURT WAS CONCERNED ABOUT AND WHAT THE EMPLOYER OUGHT TO BE
9 CONCERNED ABOUT WAS THE POTENTIAL FOR DISRUPTION. HERE IN THIS
10 CASE THERE ACTUALLY WAS A MODEST RECORD OF RETALIATION,
11 NOTWITHSTANDING THE CITY AND THE MAYOR'S PROMPT DECISION TO
12 SUSPEND AND LATER TERMINATE THE PLAINTIFF. THE TITLE VII
13 INVESTIGATION UNDERTAKEN BY THE LEGAL DEPARTMENT OF THE CITY HAD
14 ALREADY SHOWN AN ERODING OF TRUST IN THE CHIEF'S ABILITY TO LEAD
15 THAT DEPARTMENT. IN THAT CASE THAT WAS ONE OF THE FACTORS THAT
16 THE MAYOR CITED IN HIS DEPOSITION AS A REASON FOR REACHING THE
17 TERMINATION DECISION.

18 ADDITIONALLY, WE THINK THAT SNIPES IS IMPORTANT BECAUSE,
19 JUST AS THE EMPLOYER IN THAT CASE, WHICH WAS A BEACH PATROL
20 ORGANIZATION, WAS A PROTECTOR OF THE PUBLIC, AS IS ATLANTA FIRE
21 RESCUE, IT WAS ALSO AN EMPLOYER. AND THEY HAD A SPECIFIC, IF
22 NOT MANDATE, A GOAL TOWARDS RECRUITING PEOPLE FROM THE DIVERSE
23 SECTORS OF THE POPULATION, AND THERE WAS CONCERN THAT THE
24 INFLAMMATORY COMMENTS WOULD INHIBIT IF NOT AFFIRMATIVELY PREVENT
25 THE EMPLOYMENT OR RECRUITING OR RETENTION OF THOSE INDIVIDUALS.

1 HERE, THE CITY, AS YOU KNOW, CONTENDS THAT THE -- THAT
2 MR. COCHRAN'S COMMENTARY WITH RESPECT TO WHITE SWATHS OF
3 INDIVIDUALS, NOT MERELY THE L.G.B.T. COMMUNITY, ALTHOUGH THAT'S
4 RECEIVED A LOT OF ATTENTION IN THE BRIEFING, BUT ALSO ALL
5 NON-CHRISTIANS, INDEED NOT ONLY NON-CHRISTIANS, BUT EVEN
6 CHRISTIANS WHO WERE NOT SAVED CHRISTIANS, AS WELL AS INDIVIDUALS
7 WHO ENGAGED IN PREMARITAL SEX OUTSIDE -- OR EXTRA MARITAL SEX
8 OUTSIDE THE CONFINES OF MARRIAGE, ALL OF THOSE WERE CONCERNS
9 THAT THE ELEVENTH CIRCUIT EXPLICITLY NOTED THAT THE ENTITY HELD
10 AS AN EMPLOYER, IN ADDITION TO AN ENTITY THAT WAS RESPONSIBLE
11 FOR SAFEGUARDING THE PUBLIC'S INTEREST.

12 THE COURT: NOW, COUNSEL FOR THE PLAINTIFF RELIES MORE
13 ON AN ANALYSIS THAT LOOKS AT WHAT WAS OCCURRING AT THE TIME THE
14 DECISION WAS MADE TO SUSPEND THE PLAINTIFF. SO THEY LOOK LESS
15 AT THE AFTERMATH OF WHAT HAPPENED WHICH WAS IN SOME ASPECTS
16 GENERATED BY THE DECISION TO SUSPEND THE PLAINTIFF. SO WHAT IS
17 YOUR SUPPORT FOR LOOKING AT THIS WIDER TIME PERIOD AND NOT JUST
18 FOCUSING ON THE TIME WHEN THE BOOK WAS PUBLISHED AND UP TO THE
19 POINT WHEN IT WAS KIND OF MORE PUBLICIZED?

20 MR. GEVERTZ: WELL, A COUPLE OF REASONS. FIRST, WITH
21 RESPECT TO WHEN THE BOOK WAS PUBLISHED, WE HAVE THE UNUSUAL
22 DYNAMIC THAT NO ONE WITHIN THE CITY OR THE PUBLIC AT LARGE
23 APPEARED TO KNOW THAT THE BOOK HAD BEEN PUBLISHED. SO THERE'S
24 ABOUT A YEAR WHERE THE ENTIRE SPEECH LAYS DORMANT, WHICH IS A
25 UNIQUE FACT UNLIKE A LOT OF THE FACTS IN THE VARIOUS CASES THAT

1 THE SIDES BRIEFED. I THINK YOU'RE RIGHT THAT THE PLAINTIFF PAYS
2 A LOT OF ATTENTION TO THE IMMEDIATE PRE-SUSPENSION ISSUE. AND
3 YET WHEN YOU READ THE COMPLAINT, IT'S A TERMINATION COMPLAINT.
4 BUT WE'RE PREPARED TO LOOK AT BOTH. WITH RESPECT TO THE
5 DISRUPTION OR POTENTIAL DISRUPTION IMMEDIATELY -- IMMEDIATELY
6 PRIOR TO THE SUSPENSION DECISION, WE HAVE THE FACT THAT THERE
7 WAS AT LEAST ENOUGH DISRUPTION WITHIN THE RANKS THAT IT WAS A
8 FIREFIGHTER WHO BROUGHT HIS CONCERN UP TO THE CITY COMMISSION,
9 UP THROUGH THE H.R. DEPARTMENT, AND UP INTO THE MAYOR'S OFFICE.
10 THAT CONCERN WAS ULTIMATELY SOMETHING THAT LED TO A TITLE VII
11 INVESTIGATION, AND, ADDITIONALLY, THERE WAS SOME PRE-SUSPENSION
12 PUBLICITY THAT HAD ALREADY BEEN GENERATED AT THE TIME OF THE
13 DECISION TO SUSPEND. SO WE BELIEVE THAT BOTH THE FACT THAT
14 THERE WAS A FIREFIGHTER WHO WAS CONCERNED ENOUGH TO INITIATE
15 CONCERNS AND THE FACT THAT IT KEPT BEING ESCALATED DEMONSTRATES
16 SUFFICIENCY OF A REASON TO BELIEVE THAT THERE WAS ALREADY THE
17 GERM OF A PROBLEM. I ALSO DON'T THINK IT'S TOO MUCH OF A
18 STRETCH TO CONCLUDE THAT IN THIS CITY AT THAT PERIOD OF TIME
19 WHERE THE TOPIC OF MARRIAGE AMONG GAYS AND LESBIANS AND PEOPLE
20 WITHIN THE L.G.B.T. COMMUNITY WAS A HOT ISSUE. IT'S VERY
21 SIMILAR IN THAT RESPECT TO THE SNIPES CASE.

22 THE COURT: NOW, ONE THING THAT'S DIFFERENT WITH THIS
23 CASE THAN WITH THE SNIPES CASE IS THAT THE SPEECH ISSUE,
24 CERTAINLY THE PLAINTIFF ALLEGED CONCERNS RELIGION. AND THE
25 PICKERING TEST THAT I HAVE TO APPLY IS A BALANCING TEST. AND I

1 SEE A LOT IN TERMS OF YOUR BRIEF AS TO KIND OF THESE GENERAL
2 IDEAS OF DISRUPTION THAT THIS CAUSED, BUT WHAT I HAVE TO DO IN
3 APPLYING THE PICKERING TEST IS HAVE TO TAKE SPECIFIC FACTS AND
4 WEIGH THEM ON BOTH SIDES. AND WHEN I'M DOING A WEIGHING
5 ANALYSIS, DOESN'T THE FACT THAT THE SPEECH CONCERNED RELIGIOUS
6 EXPRESSION WEIGH MORE HEAVILY IN THIS PARTICULAR ANALYSIS? AND,
7 IF YOU COULD, THE BRIEF, I THINK, IS MISSING A LITTLE BIT IN
8 TERMS OF KIND OF THE FACTUAL WEIGHING OF THESE DIFFERENT
9 INTERESTS, SO IF YOU COULD ADDRESS THAT POINT.

10 MR. GEVERTZ: WELL, I THINK THAT THAT ACTUALLY LEADS
11 ME TO MY SECOND POINT, WHICH WAS IF YOU LOOK AT THE
12 PRE-TERMINATION BEHAVIOR, IT WAS EXTRAORDINARILY DISRUPTIVE BOTH
13 EXTERNALLY AND INTERNALLY. WE SEE THAT WITHIN THE COMMUNITY --
14 AND THIS WAS NOT MERELY A REACTION TO THE DECISION TO SUSPEND,
15 AS ONE MIGHT SUGGEST, THIS WAS AFFIRMATIVELY EGGED ON AND
16 ENDORSED BY THE PLAINTIFF. 17,000 E-MAILS THAT GO TO THE MAYOR,
17 HOME PHONE CALLS TO HIM AND HIS FAMILY WITH RACIALLY DEROGATORY
18 AND OTHER THREATENING REMARKS THAT ARE PART OF THE RECORD. I
19 THINK THAT THOSE ARE FACTS THAT TRANSCEND THE QUESTION OF
20 WHETHER OR NOT THE SPEECH IS PURELY RELIGIOUS OR NOT. BUT WITH
21 RESPECT TO THE RELIGIOUS NATURE OF THE SPEECH, WHAT STRUCK ME
22 AND WHAT WE POINTED OUT IN THE BRIEFING IS THAT WE DON'T BELIEVE
23 THAT THERE IS ENOUGH CANDOR ABOUT WHAT EXACTLY WAS SAID UNDER
24 THE RUBRIC OF RELIGION. THIS WAS AN -- A COMPARISON, AN
25 EXPLICIT COMPARISON OF INDIVIDUALS WHO ARE GAY, WHO HAVE SEX

1 OUTSIDE THE MARRIAGE, AND INDEED ALL NON-CHRISTIANS, TO
2 MURDERERS, RAPISTS, PEDOPHILES, AND PEOPLE WHO ENGAGE IN
3 BESTIALITY. AND, FURTHER, THE BOOK GOES ON TO SAY, AND YOU
4 CAN'T MAKE A DISTINCTION BETWEEN OR AMONG THEM. AND THEN I
5 BELIEVE MOST DISCONCERTING FROM THE CITY'S PERSPECTIVE WITH
6 RESPECT TO SOMEONE WHO'S IN CHARGE OF NOT MERELY FIRE AND
7 RESCUE, BUT HOMELAND SECURITY AND EMERGENCY RESPONSE, THE
8 EXPLICIT STATEMENT THAT THERE IS -- THAT THERE SHOULD BE
9 CELEBRATION WHEN THESE INDIVIDUALS WHO ARE NAKED, THE ONES I
10 JUST DESCRIBED, PERISH.

11 THE COURT: BUT MY GOAL HERE AND WHAT I HAVE TO DO IS
12 TO DO THIS WEIGHING AND THIS BALANCING, SO I HAVE TO, AT THIS
13 POINT, ASSUME THAT THERE IS NO FACTUAL DISPUTE. AND BECAUSE
14 YOU'RE ASKING FOR SUMMARY JUDGMENT, I DO HAVE TO VIEW THE FACTS
15 IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF WHO DOES SAY THAT
16 THESE ARE VERY IMPORTANT TENETS OF HIS RELIGIOUS EXPRESSION,
17 WHICH FIRST QUESTION IS, HOW CAN I FIND THAT THEY'RE NOT ON
18 SUMMARY JUDGMENT BECAUSE YOU'RE SAYING THIS ISN'T HIS RELIGIOUS
19 BELIEF, THAT IT'S SOMETHING ELSE, AND HE SAYS THAT IT IS? BUT
20 THE SECOND PART IS, AGAIN, THIS IS KIND OF A WEIGHING, SO I KNOW
21 IT'S NOT YOUR BURDEN TO BRING UP THE POINTS THAT HE WANTS TO
22 WEIGH, BUT IT'S MINE TO WEIGH THEM, SO I WANT TO MAKE SURE THAT
23 YOU ADDRESS EXACTLY WHAT IT IS THAT HE SAYS THAT I SHOULD WEIGH
24 BECAUSE THAT'S ULTIMATELY WHAT I'M GOING TO BE LOOKING AT.

25 MR. GEVERTZ: TO BE CLEAR, THE CITY DOES NOT CHALLENGE

1 THE SINCERITY OR THE RELIGIOUS NATURE OF THE COMMENTARY THAT
2 MR. COCHRAN MAKES. WE DO ADVANCE TWO ARGUMENTS, HOWEVER. THE
3 FIRST IS THAT THE DECISION TO SUSPEND AND THEN TERMINATE WERE
4 NOT BASED ON THE VIEWPOINTS.

5 THE COURT: WE'RE NOT THERE RIGHT NOW, THOUGH.

6 MR. GEVERTZ: OKAY.

7 THE COURT: I'M TALKING ABOUT THE OTHER FACTOR. WE'RE
8 WEIGHING NOW. WE'RE LOOKING AT THE EMPLOYEE'S FREE SPEECH
9 INTEREST AND WHETHER THAT OUTWEIGHS THE EMPLOYER'S INTEREST IN
10 EFFECTED AND AN EFFICIENT FULFILLMENT OF RESPONSIBILITIES.

11 MR. GEVERTZ: WELL, I THINK, THEN, WITH RESPECT TO
12 PICKERING, OUR VIEW, AS EXPLAINED AT SUMMARY JUDGMENT, IS THAT
13 THIS IS A QUESTION OF LAW, AND THAT GIVEN THE FACT THAT THE HIGH
14 PROFILE NATURE OF HIS POSITION, GIVEN THE RESPONSIBILITIES --

15 THE COURT: WELL, I GUESS WHAT I'M ASKING ABOUT, YOU
16 SAID THAT THE FACT THAT THIS ISN'T REALLY RELIGION, THAT THE
17 BOOK CONCERNED THINGS THAT WEREN'T RELIGION, IS SOMETHING THAT
18 I'M GOING TO TAKE INTO ACCOUNT. HOW DO I TAKE THAT INTO ACCOUNT
19 IN THIS BALANCING? BECAUSE I HAVE SOME CONCERN THAT IT'S NOT MY
20 ROLE AT THIS STAGE OF THE LITIGATION TO SAY, WHEN I'M LOOKING AT
21 HIS FREE SPEECH INTEREST, TO SAY, WELL, THIS IS NOT PART OF HIS
22 RELIGION, THIS ISN'T SOMETHING THAT SHOULD BE WEIGHED AS HIS
23 RELIGIOUS EXPRESSION, BECAUSE HE SAYS IT IS. SO YOU SAY THAT I
24 SHOULD LOOK AT THESE PIECES AND SAY, WELL, THIS ISN'T RELIGION
25 BECAUSE THIS IS MORE HATE SPEECH. BUT HOW DOES THAT FIT INTO

1 THIS FRAMEWORK?

2 MR. GEVERTZ: I GUESS MY BEST RESPONSE, YOUR HONOR, IS
3 THAT WHILE WE DON'T QUESTION THE SINCERITY OF THE RELIGION, WE
4 DO -- WE BELIEVE THAT THE COURT OUGHT TO VIEW IT AS SPEECH THAT
5 COMES FROM AN EMPLOYER AND AS IT AFFECTS THE MORALE AND THE
6 LARGER COMMUNITY.

7 THE COURT: SO AND I GUESS WHAT I'M DOING IS I'M
8 STEPPING THROUGH THIS PICKERING TEST.

9 MR. GEVERTZ: YEAH.

10 THE COURT: SO I'M LOOKING AT ALL THESE FACTORS. AND
11 ONE ISSUE I HAD WITH SOMEWHAT FROM BOTH BRIEFS IS THAT I THINK
12 SOMETIMES PEOPLE WANTED TO TALK MORE IN GENERAL EXPRESSIONS OF
13 KIND OF POLICY AND WHAT IS RIGHT AND WRONG, WHICH IS NOT
14 ENTIRELY WHAT I'M DOING. I'M PUTTING THINGS IN A STANDARD AND A
15 FRAMEWORK.

16 MR. GEVERTZ: MM-HUM.

17 THE COURT: SO WHAT I HAVE TO DO IS LOOK AT THE
18 EMPLOYEE'S FREE SPEECH INTEREST AND LOOKING TO SEE WHETHER OR
19 NOT THAT OUTWEIGHS THE EMPLOYER'S INTEREST. SO WHEN I LOOK AT
20 THE EMPLOYEE'S INTEREST AND I WEIGH THAT, THE EMPLOYEE SAYS THAT
21 THEY HAVE A STRONGLY-HELD RELIGIOUS CONVICTION, AND THAT'S ONE
22 OF THE INTERESTS THAT I SHOULD WEIGH AGAINST WHAT THE GOVERNMENT
23 HAS SAID. AND IN RESPONSE YOU SEEM TO ARGUE THAT IT WASN'T
24 REALLY RELIGIOUS EXPRESSION, OR SOMETHING IN THAT NATURE. AND I
25 DON'T KNOW HOW THAT FITS WITHIN WHAT I'M ANALYZING.

1 MR. GEVERTZ: I GUESS WE TRY TO RESPOND TO THAT
2 ARGUMENT IN TWO WAYS. THE FIRST IS THAT WE CITE THE MCMULLEN
3 CASE, THE ELEVENTH CIRCUIT CASE THAT ALSO DEALS WITH SOMEONE WHO
4 IS A -- IN THE SHERIFF'S OFFICE. AND THAT SPEECH WAS TREATED AS
5 HATE SPEECH THAT RECEIVED NO PROTECTION WHATSOEVER. AND THERE
6 WE THINK THAT THERE IS A FAIRLY CLOSE ANALOGY IN THAT ELEVENTH
7 CIRCUIT CASE FROM THE CLERICAL EMPLOYEE, SIGNIFICANTLY LOWER
8 LEVEL THAN MR. COCHRAN, ENDORSING VIEWS OF THE K.K.K. SO WE
9 THINK THAT THERE IS A PRECEDENT WITHIN THE ELEVENTH CIRCUIT TO
10 TAKE SOMETHING THAT OCCURS OUTSIDE OF THE WORKPLACE IN A
11 PUBLIC -- REPEATED PUBLIC SETTING AND ANALOGIZE THAT TO THE SORT
12 OF HATE SPEECH THAT THE ELEVENTH CIRCUIT HAS ALREADY FOUND IS
13 NOT ENTITLED TO ANY SORT OF PROTECTION AT ALL, EVEN LESS THAN
14 GOING THROUGH PICKERING.

15 THE COURT: WELL, I GUESS MY PROBLEM IS, IS HOW ON
16 SUMMARY JUDGMENT, WHEN I'M BASICALLY ASSUMING THE FACTS MOST
17 FAVORABLE TO THE PLAINTIFF, DO I ASSUME THAT WHAT HE SAYS IS HIS
18 RELIGION IS HATE SPEECH?

19 MR. GEVERTZ: WELL, I BELIEVE THAT THE MCMULLEN CASE
20 WAS ALSO AFFIRMED ON SUMMARY JUDGMENT.

21 THE COURT: BUT THERE WASN'T A RELIGIOUS EXPRESSION
22 COMPONENT OF THE SPEECH AT ISSUE IN THAT CASE; CORRECT?

23 MR. GEVERTZ: NONE THAT IS EVIDENT FROM THE OPINION.
24 I -- YES, YOU'RE RIGHT, YOUR HONOR.

25 THE COURT: AND WHAT I'M ASKING ABOUT, HOW DOES THAT

1 CHANGE THIS ANALYSIS, OR WHAT DO WE DO WITH THAT PORTION IN THIS
2 WEIGHING? BECAUSE, AGAIN, I'M VERY CLEAR TO SOME EXTENT ON HOW
3 THE CITY SAYS THAT ITS INTERESTS ARE. SO THEY --

4 MR. GEVERTZ: I GET IT.

5 THE COURT: AND WHAT I'M GOING TO DO IS I'M GOING TO
6 PUT THIS TOGETHER AND SAY, OKAY, THE PLAINTIFF SAYS THEIR
7 INTERESTS ARE SOMETHING DIFFERENT. HOW DO I WEIGH THAT? AND
8 THAT'S WHAT I'M MAKING SURE THAT I HAVE YOUR RESPONSE ON BECAUSE
9 I DON'T KNOW THAT YOUR BRIEF REALLY ADDRESSED HOW I SHOULD WEIGH
10 WHAT THEY SAY IS THE THIS RELIGIOUS EXPRESSION VERSUS -- I
11 UNDERSTAND YOUR SIDE OF THE SCALE.

12 MR. GEVERTZ: I THINK I NOW FULLY GRASP YOUR -- THE
13 QUESTION THAT YOU'RE ASKING ME. AND I THINK OUR ARGUMENT IS TWO
14 TRACK. NUMBER ONE IS IT'S NOT RELIGIOUS, WHICH I WILL ADDRESS
15 IMMEDIATELY. AND THE SECOND IS EVEN IF IT'S RELIGIOUS, THERE
16 ARE ALL THE PICKERING BALANCE REASONS THAT THE COURT OUGHT TO
17 RULE IN OUR FAVOR. WITH RESPECT TO THE FACT OF HOW DO YOU DEAL
18 WITH THE RELIGION, I THINK OUR POSITION IS, YOUR HONOR, WE DON'T
19 THINK IT MATTERS. WE DON'T THINK THAT IT CHANGES THE ANALYSIS
20 THAT SOMEONE IS EXPRESSING A RELIGIOUS OPINION AS TO OPPOSED TO
21 AN OPINION THAT IS ALSO PROTECTED UNDER THE FIRST AMENDMENT. I
22 THINK WE SEE THAT THERE ARE TOO MANY OF THESE CONTEMPORARY
23 ISSUES, INCLUDING THE ONE IN THE LUMPKIN CASE WHICH IS FROM THE
24 ETHICS BOARD CIRCUIT WHICH ALSO DEALS WITH TALKING ABOUT HOW
25 HOMOSEXUALITY IS A SIN. AND SO I DON'T RECALL IF THAT CASE GOT

1 INTO WHETHER OR NOT THERE WAS A RELIGIOUS BEDROCK TO THAT
2 CONCERN, BUT I'M NOT SURE THAT THE COURT'S -- THE
3 COURTS (VERBATIM) OF APPEAL WHO WE HAVE CITED, INCLUDING THE
4 NINTH CIRCUIT, TEND TO GET HUNG UP ON WHETHER OR NOT THE
5 QUESTION OF RELIGIOUS SPEECH IS ENTITLED TO A DIFFERENT FORUM OF
6 ANALYSIS OR A DIFFERENT LEVEL OF SCRUTINY --

7 THE COURT: WELL, NOT ONLY IS IT A DIFFERENT FORUM,
8 UNDERSTAND I HAVE TO WEIGH WHAT IS THE PLAINTIFF'S INTEREST IN
9 THE SPEECH. AND I WOULD THINK THAT IN DOING THAT -- NOT GIVING
10 HIM THE HIGHER STANDARD, BUT JUST FACTUALLY LOOKING AT WHAT
11 WE'RE DEALING WITH HERE. WHEN I LOOK AT WHAT THEIR INTEREST IS
12 IN HAVING THEIR SPEECH, WHY DOESN'T RELIGIOUS SPEECH HAVE A
13 HIGHER INTEREST THAN HATE SPEECH BASED ON FACTUAL APPLYING THE
14 PICKERING TEST?

15 MR. GEVERTZ: BECAUSE I THINK THAT IT -- I DON'T WANT
16 TO SAY IT'S A DISTINCTION WITHOUT A DIFFERENCE, BUT I WOULD SAY
17 THAT TOO MANY OF THE CASES WHERE THEY CONCLUDE THAT THE SPEECH
18 ISN'T SUBJECT TO PROTECTION AT ALL CAN EASILY BE TRACED BACK TO
19 OR CLOAKED IN A WORLD VIEW WHICH CAN OFTEN IN TURN BE TRACED
20 BACK TO RELIGION. AND SO JUST, AGAIN, TO BORROW MOMENTARILY
21 FROM THE LUMPKIN CASE IN THE NINTH CIRCUIT, YOU CAN BE TALKING
22 ABOUT HOMOSEXUALITY, YOU CAN BE TALKING IN THE MCMULLEN CASE
23 ABOUT YOUR VIEWS AS A K.K.K. MEMBER, WHICH IS A QUASI SUPPOSEDLY
24 RELIGIOUSLY-BASED ORGANIZATION, AT LEAST IT HAS RELIGIOUS
25 EXCLUSIONARY TESTS TO IT. YOU CAN BE TALKING ABOUT THOSE SORTS

1 OF THINGS, AND I THINK THEY VERY QUICKLY GET CLOAKED IN OR
2 WRAPPED UP IN A WORLD VIEW THAT CAN BE RELIGIOUS. AND SO I
3 GUESS MY RESPONSE TO YOUR -- TO YOUR QUESTION IS I DON'T THINK
4 THAT THE COURTS TEND TO BREAK IT OUT, TREAT IT DIFFERENTLY,
5 INCREASE THE LEVEL OF SCRUTINY OR EVEN GIVE MUCH ATTENTION --

6 THE COURT: I THINK WE'RE TALKING ABOUT DIFFERENT
7 THINGS. BECAUSE I HAVE TO DO -- I HAVE TO APPLY THE PICKERING
8 TEST. SO I'M NOT TALKING ABOUT GENERAL EXPRESSIONS OF LAW AND
9 STANDARDS AND APPLYING A DIFFERENT LEVEL OF SCRUTINY. I AM JUST
10 TAKING THE FACTS IN THIS RECORD THAT ARE UNDISPUTED AND WEIGHING
11 THEM ON A BALANCING. SO I'VE GOT THIS BALANCING THAT I HAVE TO
12 DO. I PUT THE MAYOR'S AND THE CITY'S INTEREST AND DISRUPTION IN
13 THE WORKPLACE AND TITLE VII AND ALL THAT, I PUT THAT ON ONE SIDE
14 OF THE SCALE AND LOOK AT IT. ON THE OTHER SCALE I FACTUALLY PUT
15 ON IT WHAT THE PLAINTIFFS HAVE SAID ARE THEIR INTERESTS BECAUSE
16 I'M DOING A BALANCING. I'M LOOKING WHETHER THE EMPLOYEE'S FREE
17 SPEECH INTEREST OUTWEIGH THE EMPLOYER'S INTEREST, SO I'M
18 BALANCING THAT. SO I'M ASKING YOU WHEN I MAKE THAT BALANCE, WHY
19 SHOULD YOU WIN? WHY IS WHAT THE CITY'S SAYING MORE IMPORTANT
20 AND HAVE AN INTEREST THAT OUTWEIGH WHAT MR. COCHRAN IS SAYING
21 WHEN HE IS SAYING THAT THIS IS A VERY IMPORTANT INTEREST OF HIS
22 OWN? SO I WANT YOU TO HELP ME WITH THAT FACTUAL APPLICATION OF
23 WHAT WE'RE DOING HERE IN THIS CASE, NOT GENERALLY TALK ABOUT THE
24 LAWS. I HAVE TO SPECIFICALLY APPLY THESE FACTS ON THE SCALE.

25 MR. GEVERTZ: AND YOU WANT ME TO PAY -- YOU WANT ME TO

1 ADDRESS SQUARELY HIS -- WHAT HE CONTENDS ARE HIS STRENGTHS OR
2 WHAT THE CITY CONTENDS ARE ITS --

3 THE COURT: WELL, BOTH, BECAUSE YOUR JOB AT PERSUADING
4 ME IS TO EXPLAIN WHY WHAT HE SAYS IS WRONG.

5 MR. GEVERTZ: WELL, SO I WOULD BEGIN WITH OUR
6 STRENGTHS, THEN. AS WE POINTED OUT AND AS YOU JUST ALLUDED TO,
7 WE HAVE RESPONSIBILITIES AS EMPLOYER, WE HAVE RESPONSIBILITIES
8 AS A PUBLIC SERVICE, IN FACT, A PUBLIC EMERGENCY SERVICE ENTITY.
9 WE HAVE ADDITIONAL CONCERNS ABOUT TITLE VII LIABILITY GIVEN THE
10 CLOSE NEXIS OF THESE ACTIVITIES TO THE WORKPLACE, AND WE HAVE
11 THE FACT THAT A SPECIFIC DIRECTIVE DURING THE COURSE OF THE
12 INVESTIGATION NOT TO ATTEMPT TO DRAW ADDITIONAL ATTENTION WHILE
13 AN INVESTIGATION IS UNDER -- IS UNDERGOING TO THE FACT WAS NOT
14 ONLY DISOBEYED, IT WAS AFFIRMATIVELY DISOBEYED. IT WAS
15 EXPLICITLY DISOBEYED. AGAINST THAT WE HAVE MR. COCHRAN'S
16 INTEREST IN BEING ABLE TO SPEAK ABOUT HIS PERSONAL VIEWS. AND
17 THE CITY DOESN'T GENERALLY HAVE A PROBLEM WITH THAT. HAD
18 MR. COCHRAN ABIDED BY THE TWO PORTIONS OF THE CITY CODE, WHICH
19 ARE AT THE HEART OF THIS CASE, BY HAVING A --

20 THE COURT: THAT'S A DIFFERENT PART OF THE ARGUMENT,
21 THOUGH. WHAT I'M DOING IS I'M OUTWEIGHING HIS SPEECH VERSUS --

22 MR. GEVERTZ: I GUESS WHERE I WAS HEADED WITH THAT
23 MORE DIRECTLY, YOUR HONOR, IS IT'S OUR BELIEF THAT HAD HE ABIDED
24 BY THAT, THE SPEECH WOULD HAVE BEEN FINE, BUT HIS REFERENCE TO
25 HIS STATUS AS A CHIEF OF A FIRE DEPARTMENT WHO WAS APPLYING HIS

1 RELIGIOUS OUTLOOK INTO THE WORKPLACE WOULD HAVE BEEN STRIPPED
2 OUT. THAT SPEECH MINUS THE REPEATED REFERENCE TO HIS STATUS AND
3 HOW HE RAN HIS DEPARTMENT WOULD NOT BE CHALLENGED. WE WOULD NOT
4 HAVE THAT CASE.

5 THE COURT: SO YOU'RE CONCEDING THAT THE ONLY ISSUE
6 HERE IS THAT HE REFERRED TO HIMSELF AS A FIREFIGHTER IN THE
7 BOOK, THAT THE SPEECH ITSELF WASN'T DISRUPTIVE?

8 MR. GEVERTZ: NO, YOUR HONOR. I'M NOT CONCEDING THAT,
9 BUT WHAT I'M SAYING IS WE NEVER WOULD HAVE GOTTEN ON THIS PATH.
10 THE CITY WAS DEPRIVED OF THE OPPORTUNITY TO TAKE UP THAT
11 QUESTION, DOES THE CHIEF -- NOT REFERENCING HIS EMPLOYMENT, NOT
12 TALKING ABOUT THE FACT THAT THIS IS THE WAY HE DOES THINGS, BUT
13 PUBLISHES THIS BOOK, DOES HE HAVE THAT RIGHT TO THEN DO THAT
14 WITHOUT ANY REPERCUSSIONS IN EMPLOYMENT. AND THE CITY'S
15 POSITION, AT LEAST THROUGH THE DEPOSITIONS OF THE COMMISSIONER
16 OF HUMAN RESOURCES AND OF THE MAYOR, WAS THAT WASN'T PUT BEFORE
17 US. WE WOULDN'T HAVE HAD A PROBLEM WITH IT. WE DON'T HAVE A
18 PROBLEM WITH THE CONTENT. WE HAVE A PROBLEM --

19 THE COURT: WELL, I THINK THAT'S A REALLY BIG PROBLEM
20 FOR YOU IN THE TESTS THAT I'M APPLYING BECAUSE TO ME ONE OF YOUR
21 STRONGEST ARGUMENTS WAS THAT WHEN I LOOK AT WEIGHING WHAT THE
22 CITY'S INTEREST WAS IN DISRUPTION IN THE WORKPLACE VERSUS THE
23 PERSON'S RIGHT TO SAY THAT, THEN POTENTIALLY THE CITY'S WOULD
24 OUTWEIGH THAT. BUT IF YOU'RE SAYING THE ONLY THING THAT THE
25 CITY HAD A PROBLEM WITH IS THAT HE DIDN'T GO THROUGH THE PROCESS

1 AND HE PUT HIS TITLE ON THAT, THEN THAT REALLY TAKES AWAY FROM
2 THE STRENGTH OF YOUR ARGUMENT ON THIS BALANCING.

3 MR. GEVERTZ: I GUESS I SEE IT A LITTLE BIT
4 DIFFERENTLY. WE GOT ON THIS PATH AND THE INITIAL SUSPENSION
5 OCCURRED ON THE GROUNDS THAT THIS WAS DISSEMINATED IN THE
6 WORKPLACE. THAT WAS A BIG PROBLEM. SPEECH WITH A BOOK THAT IS
7 NOT BEING HANDED OUT TO SUBORDINATES, INCLUDING A SUBORDINATE
8 DURING OR AT THE TAIL END OF THEIR PERFORMANCE EVALUATION, IS A
9 BIG PROBLEM. SPEECH THAT IS --

10 THE COURT: BUT THAT'S NOT THE STANDARD.

11 MR. GEVERTZ: WELL, IT'S PART OF THE PICKERING BALANCE
12 TEST, AS WE UNDERSTAND IT, YOUR HONOR, THAT WE OUGHT TO BE
13 LOOKING AT THE IMPACT INTERNALLY AS AN EMPLOYER.

14 THE COURT: BUT I THINK IT'S THE IMPACT OF THE SPEECH,
15 NOT THE IMPACT OF THE FAILURE TO COMPLY WITH THE CITY'S
16 CONFLICT-OF-INTEREST PROGRAM.

17 MR. GEVERTZ: YES. WHAT I PERHAPS INARTFULLY AM
18 TRYING TO EXPLAIN IS THAT WE GOT DOWN THIS PATH BECAUSE OF A
19 COUPLE OF FACTORS AT THE VERY BEGINNING. ONE OF THOSE FACTORS
20 WAS THAT NO PERMISSION, APPROVAL, OR EVEN NOTIFICATION OF THE
21 SPEECH OCCURRED. BUT THE OTHER PROBLEMS THAT WERE EVIDENT FROM
22 THE VERY BEGINNING, WITHIN 48 HOURS OF THE TIME THAT THE SPEECH
23 WAS DISCOVERED WAS THAT THIS WAS OCCURRING IN THE WORKPLACE,
24 ABOUT THE WORKPLACE TO AT LEAST ONE INDIVIDUAL WHO HAD A REAL
25 PROBLEM WITH IT IN THE WORKPLACE, NOT ONLY BEING DISSEMINATED BY

1 HIS BOSS, BUT BEING DISSEMINATED DURING A PERFORMANCE
2 EVALUATION. THAT WAS ONE OF THE SEVERAL GROUNDS THAT THE MAYOR
3 ENDED UP IMPLEMENTING A 30-DAY SUSPENSION. SO IF I'M ASKED AND
4 I STEP BACK AND ASK THE QUESTION, WHERE'S THE CHIEF'S STRENGTHS
5 IN HIS ABILITY TO BOTH HOLD AND ARTICULATE A RELIGIOUS
6 PERSPECTIVE? OUR ANSWER IS THAT HE HAS THOSE RIGHTS UNDER THE
7 FIRST AMENDMENT, BUT WHEN HE STEPS IN THE DOOR OF HIS WORKPLACE,
8 BEGINS DISSEMINATING IT UNSOLICITED TO SEVERAL OF HIS
9 SUBORDINATES, INCLUDING ONE IN A PERFORMANCE EVALUATION, THAT
10 THAT'S WHERE THE BALANCE BEGINS TO SHIFT. WHEN WE ALSO HAVE
11 PORTIONS OF THE CODE THAT ARE NOT ABIDED BY, THE BALANCE
12 CONTINUES TO SHIFT. WHEN WE ALSO HAVE CONCERNS ABOUT THE FACT
13 THAT HE IS SENDING THIS OUT FOR SALE AND THAT THERE'S A
14 COMMERCIAL ASPECT TO THIS, AS OPPOSED TO MERELY DISSEMINATING
15 THINGS BECAUSE THIS IS A SINCERELY HELD BELIEF, THAT THIS IS
16 SOLD AT A PROFIT, THAT THAT ALSO BEGINS TO TILT THE BALANCE IN
17 THE CITY'S FAVOR. SO ALL OF THOSE, I BELIEVE, WERE IMPORTANT
18 FACTORS THAT MITIGATE AGAINST WHAT IN ISOLATION WOULD BE
19 MR. COCHRAN'S RIGHT TO BOTH HOLD AND ESPOUSE CERTAIN VIEWS. HE
20 TOOK IT WELL PAST THAT. HE BROUGHT IT IN THE DOORS OF HIS PLACE
21 OF EMPLOYMENT. IT IS ENDORSED AS THE CHIEF AND THE WAY HE RUNS
22 THE DEPARTMENT. IT'S BEING DISSEMINATED AT PERFORMANCE
23 EVALUATIONS. THOSE ARE THE FACTORS THAT INITIALLY IN THE
24 PRELIMINARY INVESTIGATION TIPPED IT TOWARDS A SUSPENSION. WHAT
25 THEN TIPS IT AT THE TERMINATION STAGE? AMONG OTHER THINGS, THE

1 TITLE VII INVESTIGATION, WHICH CONCLUDES THAT THIS WASN'T JUST
2 ONE PERSON WHO WAS CONCERNED ABOUT IT, THIS WAS AN EROSION OF
3 CONFIDENCE IN HIS ABILITY TO LEAD FAIRLY BY THE RANK AND FILE OF
4 THE PEOPLE WITHIN HIS DEPARTMENT, COUPLED WITH THE FACT THAT HE
5 IS DOING -- AND WE SAY THIS REPEATEDLY, AND I HATE TO DO IT A
6 THIRD TIME -- I CAN'T IMAGINE A MORE SINGULAR EFFORT TO
7 UNDERMINE YOUR ABILITY TO RETURN TO THE JOB THAN THE CONDUCT
8 THAT MR. COCHRAN ACKNOWLEDGES HE WAS ENGAGED IN. HE HELPED TO
9 ORCHESTRATE AND CERTAINLY ENDORSED A P.R. CAMPAIGN DIRECTED AT
10 HIS BOSS DEMANDING PUBLICLY THAT HIS BOSS APOLOGIZE TO HIM AND
11 REPEATEDLY SAYING, I'M BEING PERSECUTED BECAUSE OF MY RELIGIOUS
12 BELIEFS. AND THAT TIPS THE BALANCE EVEN FURTHER.

13 WE CAN'T FIND ANY COURT OF APPEALS OR DISTRICT COURT
14 OPINION WHERE AN EMPLOYEE HAS ENGAGED IN SUCH OVERT EFFORTS TO
15 UNDERMINE THE INSTRUCTION THAT THEY WERE PUT UNDER. IN SHORT,
16 THERE WAS NO EFFORT, NO INTEREST, NO DESIRE IN RETURNING TO THAT
17 POSITION. HE BLEW IT UP ON THE WAY OUT THE DOOR. AND WE DON'T
18 THINK THAT THAT'S SOMETHING THAT THE COURT OUGHT IGNORE AT THE
19 SUMMARY JUDGMENT STAGE BECAUSE IT'S UNDISPUTED. THESE ARE
20 MR. COCHRAN'S OWN E-MAILS. THESE ARE MR. COCHRAN'S OWN
21 TESTIMONY. I HOPE THAT ANSWERED THAT ASPECT OF YOUR QUESTION.

22 THE COURT: I THINK, BUT IT'S GOING TO BE MUCH MORE
23 POWERFUL FOR YOUR ARGUMENT IF YOU PUT THE FACTS WITH THE LAW
24 THAT I'M APPLYING SPECIFICALLY BECAUSE I THINK THAT YOU'RE
25 MAKING SOME MORE GENERAL ARGUMENTS, BUT YOU'RE NOT PUTTING THEM

1 INTO THE TEST THAT I'M APPLYING. SO JUST --

2 MR. GEVERTZ: SO WITH RESPECT TO PICKERING?

3 THE COURT: RIGHT. I MEAN, THAT'S WHAT I'M DOING.

4 THE SUPREME COURT HAS SAID THAT PICKERING IS WHAT APPLIES, AND

5 THAT'S WHAT I DO. I APPLY THE SUPREME COURT TEST. SO I

6 UNDERSTAND THAT THERE ARE ALL THESE REASONS WHY THE CITY

7 CONTENDS WHAT IS WRONG, BUT IN A FREE SPEECH CASE I HAVE TO STEP

8 THROUGH THIS VERY SPECIFIC ANALYSIS. I CAN'T GO WITH THIS,

9 GENERALLY THIS IS GOOD CONDUCT OR BAD CONDUCT OR WHAT I FEEL

10 SHOULD HAVE HAPPENED OR ANYTHING LIKE THAT. I HAVE TO

11 SPECIFICALLY TAKE THESE FACTORS THAT DIFFERENT PARTIES HAVE THE

12 BURDEN OF PROOF ON AND I HAVE TO GO THROUGH THIS ANALYSIS. SO

13 THE MORE WE STICK TO THAT SCRIPT, THE MORE HELPFUL THE

14 ARGUMENT'S GOING TO BE. SO I'M NOT SAYING YOU NEED TO GO BACK

15 OVER EVERYTHING. I THINK I UNDERSTAND YOUR ARGUMENT.

16 MR. GEVERTZ: I WON'T.

17 THE COURT: BUT THAT'S REALLY WHERE I AM, IS LOOKING

18 AT THE VERY SPECIFIC STANDARDS I HAVE TO APPLY.

19 MR. GEVERTZ: WELL, SO THAT'S WHY I BEGIN WITH THE

20 SNIPES CASE BECAUSE WE THINK THAT THAT'S AS FACTUALLY SIMILAR AS

21 IT GETS, BUT THERE ARE OTHER CASES.

22 THE COURT: RIGHT. NO. I UNDERSTAND THAT.

23 MR. GEVERTZ: OKAY.

24 THE COURT: WHAT I WAS MORE INTERESTED IN IS THE

25 SPECIFIC FACTS OF THIS CASE. AND OBVIOUSLY ALL THESE CASES ARE

1 DIFFERENT, AND I WANTED YOU TO DO THE BALANCING TEST UNDER
2 PICKERING FOR THIS CASE AND EXPLAIN TO ME HOW THIS ALL FIT
3 WITHIN THERE. THAT'S WHAT I WAS ASKING YOU TO DO.

4 MR. GEVERTZ: SURE.

5 THE COURT: SO, BUT I THINK WE'VE SPENT ENOUGH TIME ON
6 THAT, SO WE CAN MOVE ON TO ANOTHER AREA.

7 MR. GEVERTZ: ALL RIGHT. IF WE MOVE BEYOND THE
8 RETALIATION CLAIM, THE OTHER TOPICS THAT I WAS GOING TO TAKE UP,
9 AND THEN MS. HINTON HAS SEVERAL OF THE OTHER CAUSES OF ACTION.
10 SO I'M HAPPY TO CUT MY PRESENTATION SHORT, BY WE HAVE THIS WHOLE
11 TOPIC OF WHETHER OR NOT THIS IS A PRIOR RESTRAINT ON TRADE --
12 EXCUSE ME -- A PRIOR RESTRAINT ON SPEECH. AND, CANDIDLY, THE
13 CHALLENGES SEEMS TO BE BOTH AS IT'S WRITTEN AND AS IT'S APPLIED,
14 AND WE'RE BAFFLED AS THE -- AS ITS APPLIED CHALLENGE, BECAUSE IT
15 WAS NOT APPLIED. AND, IN FACT, THERE IS NO RECORD EVIDENCE NOT
16 ONLY THAT MR. COCHRAN FAILED TO ABIDE BY EITHER OF THESE
17 SECTIONS, EVEN THOUGH HE HAS REPEATEDLY IN THE PAST AS THE CHIEF
18 IMPLEMENTED THEM, BUT ALSO THERE'S NO RECORD EVIDENCE WHATSOEVER
19 OF THIS -- OF EITHER OF THESE CODE PROVISIONS BEING APPLIED IN
20 ANY DISCRIMINATE, UNFAIR, OR CHALLENGED MANNER. SO WE SET ASIDE
21 THE APPLIED PIECE AND WE FOCUS ON HOW THEY'RE WRITTEN. WE HAVE
22 TWO PORTIONS OF THE CITY CODE WHICH --

23 THE COURT: AND BEFORE WE GET INTO THE CODE, I HAVE
24 SOME CONCERNS THAT YOU APPLIED THE WRONG STANDARD IN YOUR BRIEF
25 FOR EVALUATING THE PRIOR RESTRAINT BECAUSE YOUR BRIEF DEALS

1 WITH -- LET'S SEE WHAT IT SAYS. IT SAYS THAT I SHOULD LOOK TO
2 SEE IF IT'S REASONABLY TAILORED. AND THERE'S A REASONABLE
3 STANDARD THAT YOUR BRIEF APPLIES. AND THAT'S NOT HOW I READ THE
4 CASE LAW. WHEN I READ THIS N.T.E.U. CASE THAT IS REALLY QUITE
5 ON POINT -- IT'S A SUPREME COURT CASE DEALING WITH OUTSIDE
6 EMPLOYMENT FOR GOVERNMENT EMPLOYEES -- I READ THAT THE STANDARD
7 IS MUCH HIGHER THAN A REASONABLE STANDARD. IN FACT, WHEN I LOOK
8 AT THE ACTUAL LANGUAGE OF THE CASE, BECAUSE IT'S A PRIOR
9 RESTRAINT, THE GOVERNMENT HAS TO MEET A MUCH HIGHER BURDEN THAN
10 THIS REASONABLE STANDARD. AND THEN ON TOP OF THAT YOU'RE ASKING
11 FOR SUMMARY JUDGMENT, AND WE'VE GOT THIS REASONABLY TAILORED
12 STANDARD IN HERE, BUT IT'S ALSO, AGAIN, WE HAVE TO DO A
13 BALANCING TEST WHERE THINGS ARE BALANCED A LITTLE BIT DIFFERENT.
14 AND I DON'T SEE THAT BALANCING TEST EVER APPLIED IN YOUR BRIEF.

15 SO I GUESS THE FIRST QUESTION IS WHY IS IT THIS REASONABLY
16 TAILORED, WHY ISN'T IT THIS LANGUAGE FROM THIS N.T.E.U. CASE?
17 AND, SECOND, HOW CAN I GRANT SUMMARY JUDGMENT IN YOUR FAVOR IF
18 YOU HAVE NOT APPLIED THE TEST?

19 MR. GEVERTZ: WELL, WE DON'T THINK THAT THE N.T.E.U.
20 CASE IS APPROPRIATE HERE BECAUSE THAT WAS FOCUSED ON HONORARIA
21 FOR SPEECHES. IT WAS SPECIFICALLY TAKING AIM AT SPEECHES.
22 THESE PORTIONS OF THE CODE TAKE AIM AT OUTSIDE EMPLOYMENT, NOT
23 MERELY SPEECH. AND FOR THAT REASON THESE AFFECT PEOPLE WHO
24 DON'T DO ANYTHING AT ALL. THERE'S A -- I THINK THAT IN THE CASE
25 THAT WE HAD PREVIOUSLY BROUGHT TO THE COURT'S ATTENTION, THIS IS

1 CLOSER TO CHALLENGES WHERE SOMEONE CAN BE PRIVATELY ENGAGED IN
2 OUTSIDE EMPLOYMENT --

3 THE COURT: AND WHAT CASE IS THAT YOU'RE TALKING
4 ABOUT? BECAUSE THE WEAVER CASE APPLIES THE N.T.E.U. STANDARD,
5 BUT -- SO THE OTHER CASES YOU CITED ALL APPLIED THE N.T.E.U.
6 STANDARD.

7 MR. GEVERTZ: THEY ARE THE CASES THAT STILL DEAL WITH
8 SPEECH. IN THIS CASE THE ORDINANCES NOT ONLY DON'T CARE ABOUT
9 SPEECH, BUT AFFIRMATIVELY HAVE AN EXCEPTION TO ONE-TIME SPEAKING
10 ENGAGEMENTS OR CONFERENCES OR THINGS OF THAT NATURE. THESE ARE
11 NOT, UNLIKE N.T.E.U., STATUTES THAT ARE FOCUSED ON EXPRESSION.

12 THE COURT: OKAY. WELL, THE CASES THAT YOU CITED IN
13 YOUR BRIEF, AT LEAST THE ONES I LOOKED AT, ALL CITE TO N.T.E.U.
14 AS THE STANDARD. SO IF WE'RE NOT USING N.T.E.U., WHAT STANDARD
15 ARE WE USING? WHERE DOES YOUR STANDARD COME FROM?

16 MR. GEVERTZ: I THINK WE'RE LOOKING AT THE NARROWLY
17 TAILORED TYPE OF STANDARD WHERE WE TALK ABOUT -- FOR EXAMPLE, WE
18 TALK ABOUT THE SITUATION IN -- I'M LOOKING FOR A POST N.T.E.U.
19 CASE. AND I BELIEVE WE'RE TALKING ABOUT SOMETHING THAT IS
20 SIMILAR TO THE GIBSON CASE THAT'S ABOUT THE ABILITY TO PRACTICE
21 LAW, UNLIKE A CASE -- AND THAT'S A 2009 CASE FROM THE
22 NINTH CIRCUIT. WE'RE LOOKING AT THE WILLIAMS CASE ALSO OUT OF
23 THE DISTRICT -- THE D.C. CIRCUIT.

24 THE COURT: WELL, I WILL TELL YOU THAT, ABSENT LAW
25 FROM THE ELEVENTH CIRCUIT ON THIS POINT, IT'S GOING TO BE HARDER

1 TO GET ME AWAY FROM A SUPREME COURT CASE THAT I THINK IS ON
2 POINT AND GO WITH THE NINTH CIRCUIT CASE WHEN I DON'T FIND THAT
3 THIS FACT -- I MEAN, I DON'T READ N.T.E.U. AS BEING SPECIFIC TO
4 THIS HONORARIA ISSUE. I READ IT MORE GENERALLY ON PRIOR
5 RESTRAINTS ON EMPLOYEE'S SPEECH BECAUSE I THINK THAT'S THE
6 CONTEXT TO ME IN WHICH IT'S WRITTEN. BECAUSE WHAT THEY'RE
7 TALKING ABOUT IS, OKAY, IT'S DIFFERENT IF YOU'RE AN EMPLOYER,
8 EMPLOYEE. YOUR RIGHTS ARE CHANGED. PRIOR RESTRAINTS CERTAINLY
9 ARE SOMETHING THAT CAN BE ALLOWED. I UNDERSTAND THAT. BUT, AT
10 THE SAME TIME, BECAUSE YOU'RE BLOCKING SOMEONE FROM SPEAKING AT
11 THE VERY OUTSET, THEN THE GOVERNMENT HAS A HIGHER BURDEN TO MEET
12 TO STOP SOMEONE FROM SPEAKING. BECAUSE IN THESE OTHER CASES
13 THAT APPLY THE PURE PICKERING ANALYSIS, THE PERSON IS ALLOWED TO
14 SPEAK. IN THIS CASE THEY'RE PREVENTING SPEECH. SO I READ THIS
15 AS PICKERING BECOMES MORE INTENSE IN TERMS OF THE GOVERNMENT'S
16 BURDEN AND THAT IT'S BECAUSE OF PRIOR RESTRAINTS PERIOD, NOT
17 PRIOR RESTRAINTS FOR HONORARIA.

18 MR. GEVERTZ: WHERE I BELIEVE THAT THE COURT APPEARED
19 TO BE -- THE SUPREME COURT APPEARED TO BE MOST FOCUSED ON SPEECH
20 WAS IN ITS ANALYSIS AROUND PAGE, IT LOOKS LIKE, 473 OF ITS
21 OPINION WHERE IT DISCUSSES THE FACT -- AND I'LL VERY BRIEFLY
22 REFERENCE IT -- THAT THERE WAS A CONCERN, THAT JUDGES OR
23 HIGH-RANKING OFFICIALS IN THE EXECUTIVE BRANCH MIGHT GIVE OFF AN
24 APPEARANCE OF IMPROPER INFLUENCE BECAUSE OF THE SPEAKING THAT
25 THEY DO, AND IN PARTICULAR A FEDERAL EMPLOYEE SUCH AS A

1 SUPERVISOR OR MECHANICS AT THE MINT MIGHT IMPAIR EFFICIENCY AND
2 MORALE BY USING POLITICAL CRITERIA TO JUDGE THE PERFORMANCE OF
3 HIS OR HER STAFF, BUT ONE CAN ENVISION SCANT HARM OR APPEARANCE
4 OF HARM RESULTING FROM THE SAME EMPLOYEE'S ACCEPTANCE OF PAY TO
5 LECTURE ON THE QUAKER RELIGION OR TO WRITE DANCE REVIEWS.

6 SO I THINK WE SEE THAT AS, AS ARE MANY OF THE APPELLATE
7 COURT CASES, WHERE THERE ARE OUTRIGHT BANS ON SPEECH. THESE
8 AREN'T OUTRIGHT BANS AND THEY'RE NOT AIMED AT SPEECH. AND I
9 THINK THAT THOSE ARE THE TWO REASONS THAT WE HAVE A DISTINCTION
10 BETWEEN N.T.E.U. AND THIS CASE. THESE ARE NOT OUTRIGHT BANS.
11 THESE ARE -- TELL US EITHER IF YOU'RE A HIGH -- A SMALL CADRE OF
12 HIGH-RANKING OFFICIALS SO THAT WE WOULD NOT BE POLITICALLY
13 EMBARRASSED, AND TELL US ON THE BROADER GROUP SUCH THAT WE CAN
14 ENSURE THAT THERE'S NOT A CONFLICT OF INTEREST. BUT IT'S A TELL
15 US, NOT A BAN. AND SIMILARLY WE THINK IT'S IMPORTANT BECAUSE IN
16 THE CASES THAT THE PLAINTIFF CITES, INCLUDING THE N.T.E.U. CASE,
17 THESE ARE ORDINANCES OR STATUTES THAT ARE GEARED TOWARDS
18 SPEAKING AS OPPOSED TO THE ACT OF SIMPLY BEING EMPLOYED. AND
19 THAT'S WHAT THE CITY'S INTEREST HAS BEEN.

20 THE COURT: BUT IT SEEMS LIKE THIS ACT BY ITS FACE
21 DOES DEAL WITH SPEAKING BECAUSE IT SPECIFICALLY SAYS THAT
22 NORMALLY IT WOULD APPLY TO SPEAKING ENGAGEMENTS FOR WHICH THERE
23 ARE HONORARIA, BUT IT CARVES OUT AN EXCEPTION AND SAYS THAT
24 ONE-TIME SPEAKING EVENTS ARE OKAY, WHICH MEANS TO ME THAT IF ONE
25 TIME ARE ONLY OKAY, THEN TWO TIMES ARE NOT, AND THAT IT WOULD

1 APPLY TO SPEAKING --

2 MR. GEVERTZ: WELL, I --

3 THE COURT: -- AND THEN THE ISSUES THAT YOU COVERED
4 WOULD COME IN WHEN I'M LOOKING AT THE BALANCING TEST AND I'M
5 LOOKING AT THE GOVERNMENT'S INTEREST AND KIND OF WHEN YOU APPLY
6 THE N.T.E.U. TEST, IT DOES TAKE INTO ACCOUNT THE HARMS, THIS
7 REGULATION WILL ALLEVIATE THOSE HARMS, AND IT GOES INTO A LOT
8 MORE DETAIL THAT ENCAPSULATES WHAT YOU ARE ARGUING. BUT I THINK
9 IT'S HARD TO SAY THAT THE CITY'S ORDINANCE WOULD NOT APPLY TO A
10 SPEECH-FOR-PAY OR A LIST OF SPEAKING ENGAGEMENTS.

11 MR. GEVERTZ: YOU KNOW, SO I'D LIKE TO BREAK UP THE
12 TWO PORTIONS OF THE CODE BECAUSE I DO THINK THAT THEY'RE
13 DIFFERENT. WHEN WE LOOK AT THE PORTION THAT APPLIES TO
14 EVERYONE, THERE ARE SEVEN CRITERIA, AND I THINK IT'S PRETTY
15 CLEAR FROM WHAT THEY DISCUSS. THEY TALK ABOUT WE DON'T WANT YOU
16 USING RECORDS OR EQUIPMENT THAT BELONG TO THE CITY IN YOUR
17 OUTSIDE EMPLOYMENT. WE DON'T WANT THIS TO OCCUR DURING REGULAR
18 WORK HOURS. WE DON'T WANT YOU TO BE PAID FOR DOING THE SAME
19 SORT OF STUFF WE PAY YOU TO DO. THAT'S FAR FROM BEING CONCERNED
20 ABOUT SPEECH.

21 THE COURT: BUT HERE, HERE WE'RE CLEARLY DEALING WITH
22 SPEECH BECAUSE THE CITY IS ATTEMPTING TO USE THIS ORDINANCE TO
23 SAY THAT MR. COCHRAN WAS NOT ALLOWED TO PUBLISH HIS BOOK WITHOUT
24 PRIOR APPROVAL. SO AT LEAST WHAT WE'RE DEALING WITH HERE -- AND
25 I KNOW THIS IS A GENERAL CHALLENGE OF THE STATUTE THAT WE'RE

1 TALKING ABOUT AT THIS MOMENT, BUT CERTAINLY THE CITY WAS
2 APPLYING THIS TO SOMETHING THAT'S CONSIDERED SPEECH IN THIS
3 CASE.

4 MR. GEVERTZ: SPEECH FOR MONEY. AND I THINK THAT
5 THAT'S AN IMPORTANT DIFFERENCE THAT ALSO BRINGS IT OUTSIDE --

6 THE COURT: BUT RIGHT NOW WE'RE TALKING ABOUT
7 N.T.E.U., BUT N.T.E.U. HAD TO DEAL WITH SPEECH FOR MONEY.

8 MR. GEVERTZ: YES.

9 THE COURT: THAT'S WHAT THAT CASE WAS ABOUT. BUT
10 YOU'RE SAYING THAT THE N.T.E.U. DOESN'T APPLY BECAUSE THIS CASE
11 REALLY ISN'T ABOUT SPEECH, IT'S ABOUT OUTSIDE EMPLOYMENT.

12 MR. GEVERTZ: CORRECT.

13 THE COURT: BUT YOU'RE USING IT TO BLOCK SPEECH HERE.

14 MR. GEVERTZ: IT IS BEING APPLIED TO THE -- TO NOT --
15 THE SPEECH. IF THE SAME SPEECH HAD -- AGAIN, I'VE GOT TO COME
16 BACK TO THE DISTINCTION BETWEEN THE TWO -- THE TWO ORDINANCES.
17 IF WE'RE LOOKING AT THE CONFLICT OF INTEREST ISSUE, IT IS, IN
18 THIS CASE, THE PUBLICATION AND SALE OF A BOOK. IT IS NOT THE
19 SORT OF SINGLE SPEECH OR OTHER CONFERENCE ATTENDANCE. THERE WAS
20 AN EFFORT TO TRY TO EXCEPT THE SORT OF SPEECH THAT WOULD BE OF
21 GENERAL CONCERN IN N.T.E.U. AND OTHERWISE. BUT WITH RESPECT TO
22 PAYING MONEY FOR THE SPEECH, I GUESS I COME BACK TO THE FACT
23 THAT N.T.E.U. IS, AS APPLIED, NOT FACIALLY NEUTRAL TO WHAT SORT
24 OF BEHAVIOR YOU'RE INVOLVED IN. IT WAS SOLELY ABOUT SPEAKING.
25 THIS ONE HAPPENED TO CAPTURE A BOOK. AND I THINK THAT THAT'S AN

1 IMPORTANT DISTINCTION BETWEEN THE TWO.

2 THE COURT: OKAY. WITH RESPECT TO THE OTHER CODE
3 ORDINANCE, N.T.E.U. IS ACTUALLY QUITE HELPFUL TO THE CITY
4 BECAUSE IN THE PORTION I JUST READ, THE COURT SEEMED TO DRAW A
5 DISTINCTION BETWEEN AN HONORARIA BAN FOR CONGRESS PEOPLE AND
6 JUDGES, WHICH IT SEEMED TO APPLY IN THE PORTION I JUST READ,
7 THERE MIGHT BE A VALID CONCERN. IN N.T.E.U., THE EXPLICIT
8 BLANKET BAN WAS APPLIED TO EVERYONE. THAT'S NOT WHAT THE OTHER
9 CODE PROVISION DID. THAT IS SPECIFICALLY LIMITED TO INDIVIDUALS
10 WHO ARE COMMISSIONERS AND DEPUTY COMMISSIONERS AND DEPARTMENT
11 HEADS -- I'M READING FROM SECTION 2820(D). AND SO WE THINK THAT
12 N.T.E.U., HAD THERE BEEN DIFFERENT FACTS, WOULD HAVE FOLLOWED
13 WHAT IT INTIMATES AND FOUND THAT THERE WAS A MORE LOCALIZED
14 EFFORT TO FOCUS ON THAT SORT OF POTENTIAL OR APPEARANCE OF UNDUE
15 INFLUENCE, AND FOR THAT REASON WE THINK N.T.E.U. IS USEFUL WITH
16 RESPECT TO THAT PORTION OF THE CODE.

17 THE COURT: BUT SINCE YOU DIDN'T ARGUE IT IN YOUR
18 BRIEF, I CAN'T USE IT TO GRANT SUMMARY JUDGMENT IN YOUR FAVOR;
19 IS THAT CORRECT?

20 MR. GEVERTZ: NO, I DON'T BELIEVE THAT THAT'S CORRECT.
21 I DO BELIEVE THAT WHAT WE ARGUE IS THAT THIS IS A VERY
22 DIFFERENT -- THAT WE ARGUE THAT THIS IS ABOUT TAILORED TO THE
23 GOVERNMENT'S INTEREST, NARROWLY TAILORED. WE REPEATEDLY MADE
24 THAT ARGUMENT. BUT IF THE COURT DISAGREES --

25 THE COURT: WELL, THE ARGUMENT YOU KEEP USING IS

1 REASONABLY TAILORED, WHICH IS NOT REALLY THE SAME AS NARROWLY
2 TAILORED, AT LEAST MY READING OF IT. I MEAN, REASONABLY IS A
3 LOWER STANDARD THAT YOU WOULD HAVE TO MAKE THAN A NARROW
4 TAILORED STANDARD.

5 MR. GEVERTZ: I UNDERSTOOD REASONABLY TO BE PUTTING IT
6 INTO THE CONTEXT OF THE SITUATION THE SAME WAY THAT NARROWLY
7 DID.

8 THE COURT: OKAY.

9 MR. GEVERTZ: WE MAY NOT HAVE APPRECIATED THAT
10 DIFFERENCE.

11 THE COURT: SO YOU'RE SAYING, JUST TO MAKE SURE I'M
12 CLEAR, THAT WHEN I'M EVALUATING THE PRIOR RESTRAINT ANALYSIS,
13 I'M NOT TO USE N.T.E.U. INSTEAD, I'M TO TAKE THAT NINTH CIRCUIT
14 CASE AND USE A REASONABLY TAILORED STANDARD FROM THAT?

15 MR. GEVERTZ: WHAT WE ARE SAYING IS THAT YOU CAN USE
16 EITHER STANDARD. WE BELIEVE THAT THE NARROW OR REASONABLY
17 TAILORED STANDARD IS THE APPROPRIATE STANDARD BECAUSE N.T.E.U.
18 ISN'T (VERBATIM) FOCUSED ON SPEAKING AND THAT THIS IS AN
19 INHERENTLY DIFFERENT STATUTE, BUT THAT EVEN IF YOU USE THE
20 N.T.E.U. STANDARD, AS THE PLAINTIFF URGES, THAT IT STILL
21 SURVIVES BECAUSE THIS IS CONCEPTUALLY DIFFERENT AND BECAUSE THE
22 PORTION THAT DEALS WITH -- THAT N.T.E.U. WAS ABOUT PRIOR
23 RESTRAINTS, THIS IS NOT A RESTRAINT. THIS IS A REQUEST TO
24 INFORM, AND THAT'S DIFFERENT. THERE WAS NO APPELLATE PROCESS.
25 THERE WAS NO GRIEVANCE PROCESS. THERE'S NO OPPORTUNITY TO BE

1 HEARD IN N.T.E.U. HERE, THERE'S AN ENTIRE ETHICS BOARD HEADED
2 UP BY AN ETHICS COMMISSIONER DESIGNED TO SCREEN TO ENSURE THAT
3 THE SPEECH COULD OCCUR PROVIDED THAT IT DIDN'T CREATE A CONFLICT
4 OF INTEREST. I THINK FOR THAT REASON N.T.E.U. DOESN'T APPLY.
5 THAT WAS A BAN. BUT EVEN IF N.T.E.U. DOES APPLY, AS I POINTED
6 OUT, IT SEEMED TO BE A VERY DIFFERENT FACTUAL SCENARIO BECAUSE
7 IT WAS AIMED AT EVERY EMPLOYEE AND THAT THIS, AT LEAST ONE OF
8 THE TWO CODE SECTIONS, IS DEALING WITH PEOPLE WHO ARE GOING TO
9 CAUSE YOU POLITICAL EMBARRASSMENT, PEOPLE WHO ARE ACTUALLY IN A
10 POLICY-MAKING DECISION CONTEXT.

11 THE COURT: SO IS IT THE CITY'S POSITION THAT IF THE
12 BOARD OF ETHICS PROVISION -- WELL, I GUESS LOOKING AT IT
13 DIFFERENTLY, WHAT IS YOUR POSITION AS IT RELATES TO WHAT WOULD
14 HAVE HAPPENED IF THE BOARD OF ETHICS WOULD NOT HAVE APPROVED
15 THIS? WOULD HE HAVE BEEN ALLOWED TO PUBLISH HIS BOOK OR NOT?

16 MR. GEVERTZ: YOU'RE ASKING ME A QUESTION THAT I DON'T
17 BELIEVE WOULD HAVE OCCURRED.

18 THE COURT: WELL, THERE HAS TO BE A REASON FOR HAVING
19 A PROCESS.

20 MR. GEVERTZ: CORRECT.

21 THE COURT: SO THERE'S GOT TO BE A SITUATION IN WHICH
22 THE CITY WOULD NOT HAVE APPROVED SOME SORT OF PUBLICATION. WHAT
23 HAPPENS IF YOU DON'T -- I MEAN, WHAT WOULD HAVE HAPPENED?

24 MR. GEVERTZ: WELL, HERE I BELIEVE -- AND I'M NOT
25 TRYING TO SIDESTEP YOUR QUESTION, BUT HERE I BELIEVE THAT THE

1 BOOK WOULD HAVE BEEN ALLOWED TO PROCEED AND THE TESTIMONY. IT'S
2 NOT MY MERE SPECULATION. THE BOOK WOULD HAVE BEEN ALLOWED TO
3 HAVE BEEN PUBLISHED, BUT IT COULDN'T HAVE BEEN DISSEMINATED IN
4 THE WORKPLACE. AND REFERENCE TO HIS STATUS AS THE CURRENT
5 A.F.R.D. CHIEF AND REFERENCE TO HIS STATEMENT THAT THIS IS THE
6 WAY HE RUNS HIS ORGANIZATION WOULD HAVE BEEN REQUESTED TO BE
7 REMOVED.

8 THE COURT: OKAY. I THINK THAT DOES UNDERCUT YOUR
9 OTHER ARGUMENTS THAT THE INFORMATION CONVEYED CAUSED SUCH A
10 DISRUPTION IN THE WORKPLACE THAT THE BOOK SHOULDN'T HAVE BEEN --
11 I MEAN, THERE'S ONE ARGUMENT THAT WHEN YOU MAKE IT EARLIER
12 THAT'S IN THE RETALIATION CONTEXT WHERE YOU SAY THAT THE
13 INFORMATION CONTAINED IN THE BOOK IS HATE SPEECH AND IT'S SO
14 DEROGATORY THAT THAT WAS A REALLY BIG PROBLEM, BUT THAT SEEMS A
15 LITTLE INCONSISTENT TO SAYING, BUT WE WOULD HAVE HAD NO PROBLEM
16 WITH THE BOOK AT ALL IF IT WOULDN'T HAVE BEEN DISTRIBUTED AT
17 WORK AND HE WOULDN'T HAVE SAID FIREFIGHTER BECAUSE IF IT WAS
18 STILL ON THE NIGHTLY NEWS AND EVERYBODY WAS SAYING THAT, WHY
19 WOULDN'T THAT STILL HAVE BEEN DISRUPTIVE ENOUGH THAT THAT
20 WOULDN'T HAVE RESULTED IN HIS FIRING?

21 MR. GEVERTZ: I DON'T THINK THAT THEY ARE -- THAT IT
22 UNDERCUTS THE ARGUMENT. I THINK WE ADVANCE BOTH ARGUMENTS, THAT
23 FIRST AND FOREMOST THIS WASN'T SPEECH THAT'S ENTITLED TO
24 PROTECTION, BUT EVEN IF IT IS AND YOU ENGAGE IN THE PICKERING
25 TEST, THAT THESE ARE THE REASONS IT FLUNKS. I'M HAVING TO

1 SPECULATE AS TO WHAT WOULD HAPPEN IF THE BOOK WAS PUBLISHED, HE
2 HAD GONE THROUGH THE PROCESS, AND THOSE PORTIONS WHICH WERE
3 EXPLICITLY STATED AS THE REASONS FOR HIS TERMINATION -- FOR HIS
4 SUSPENSION WOULD HAVE BEEN ABIDED BY. I DON'T THINK THERE WOULD
5 HAVE BEEN A SUSPENSION. I THINK IT WOULD HAVE BEEN A VERY
6 POLITICALLY TUMULTUOUS SITUATION, BUT ULTIMATELY THE CITY
7 REPEATEDLY, ITS REPRESENTATIVES TESTIFIED THAT THOSE WERE THE
8 REASONS, IT WAS THE TITLE VII CONCERNS, IT WAS THE NEED TO HAVE
9 AN INVESTIGATION AND THEN SUSPEND HIM. AND THE REASON FOR THE
10 TERMINATION -- AND I DO THINK THAT THEY ARE DIFFERENT -- IS
11 BECAUSE THAT WAS AN OUT-AND-OUT EFFORT TO SUBMARINE YOUR BOSS
12 AND POLITICALLY EMBARRASS HIM.

13 THE COURT: OKAY. THANK YOU.

14 MR. GEVERTZ: OKAY. I'D LIKE -- I DON'T WANT TO SKIP
15 OVER ANY OF THE QUESTIONS THAT THE COURT MAY HAVE WITH RESPECT
16 TO THE FREEDOM TO ASSOCIATE, AND SO I'D LIKE TO BRIEFLY ADDRESS
17 THOSE BEFORE --

18 THE COURT: CERTAINLY. I JUST WASN'T SURE HOW YOU'RE
19 SPLITTING YOUR ARGUMENTS, BUT, YES, PLEASE DO.

20 MR. GEVERTZ: YES. IT WAS SOMEWHAT HALF (VERBATIM)
21 HAZARD.

22 THE COURT: YES.

23 MR. GEVERTZ: WITH RESPECT TO THE FREEDOM TO
24 ASSOCIATE, WE JUST DON'T SEE THE BASIS FOR THE ARGUMENT.

25 MR. COCHRAN UNDERTOOK THIS ACTIVITY AS AN INDIVIDUAL. IT WAS

1 NOT FINANCED BY, IT WAS NOT DONE IN CONCERT WITH, IT WAS NOT
2 DONE AT THE DIRECTION OF, IT WAS NOT DONE WITH THE ENCOURAGEMENT
3 OF ANYONE OTHER THAN HIMSELF. THE PROFITS WENT BACK TO HIM, AS
4 THE RECORD REFLECTS.

5 FURTHER, IT WAS COMMERCIAL ACTIVITY, AND THAT SORT OF
6 ENGAGEMENT TYPICALLY RECEIVES A LESSER LEVEL OF PROTECTION. AND
7 SO FOR THOSE REASONS, FRANKLY, WE DON'T SEE THE ASSOCIATIONAL
8 CLAIM AT ALL. YOUR HONOR, IF I MAY HAND THIS OVER TO MS. HINTON
9 FOR THE REMAINDER OF THE QUESTIONS.

10 THE COURT: CERTAINLY. THANK YOU.

11 MR. GEVERTZ: THANK YOU.

12 MS. HINTON: GOOD MORNING, YOUR HONOR.

13 THE COURT: GOOD MORNING.

14 MS. HINTON: I'M GOING TO ADDRESS THE VIEWPOINT
15 DISCRIMINATION CLAIM FIRST, AND I'D LIKE TO TAKE UP THE QUESTION
16 THAT YOU HAD POSED TO THE PARTIES EARLIER THIS WEEK, WHICH WAS
17 ESSENTIALLY CAN THE PLAINTIFF MOUNT BOTH A VIEWPOINT
18 DISCRIMINATION CLAIM THAT IS SEPARATE AND DISTINCT FROM HIS
19 FIRST AMENDMENT RETALIATION CLAIM. AFTER SOME RESEARCH, THE
20 DEFENDANTS PROPOSE THAT THE ANSWER TO THAT QUESTION IS NO. WE
21 BELIEVE THAT BOTH CLAIMS ARE GOVERNED BY PICKERING, AS YOUR
22 QUESTION SUGGESTED, AND THAT IF PLAINTIFF CANNOT SATISFY THE
23 FIRST TWO REQUIREMENTS OF THE PICKERING BALANCING TEST WITH
24 RESPECT TO HIS RETALIATION CLAIM, THAT HIS VIEWPOINT
25 DISCRIMINATION CLAIM WILL FALL AS WELL. WE BELIEVE THIS BECAUSE

1 THE SUPREME COURT HAS MADE VERY CLEAR THAT THE FIRST -- FIRST
2 AMENDMENT CLAIMS THAT IMPLICATE THE GOVERNMENT AND ITS ROLE AS
3 AN EMPLOYER AS OPPOSED TO ITS ROLE AS A SOVEREIGN WITH RESPECT
4 TO THE PUBLIC MUST BE TREATED DIFFERENTLY THAN THE SOVEREIGN
5 ROLE.

6 ONE CASE THAT IS PARTICULARLY INSTRUCTIVE IS WATERS VS.
7 CHURCHILL. THIS IS A SUPREME COURT CASE. THE CITE IS 511 U.S.
8 661. THERE THE COURT EXAMINED THE PRINCIPLES THAT UNDERLIE
9 PICKERING AND WHY IT IS APPLIED TO THE EMPLOYMENT CONTEXT.
10 THERE, THE COURT EXPANDED ON THE PRINCIPLE AND SAID THAT
11 CONSTITUTIONAL REVIEW OF GOVERNMENT EMPLOYMENT DECISIONS MUST
12 REST ON DIFFERENT PRINCIPLES THAN REVIEW OF SPEECH RESTRAINTS
13 IMPOSED BY THE GOVERNMENT AS SOVEREIGN. THEY WENT ON TO EXPLAIN
14 THAT THIS IS BECAUSE THE EXTRA POWER THE GOVERNMENT HAS COMES
15 FROM THE NATURE OF ITS MISSION AS AN EMPLOYER. GOVERNMENT
16 AGENCIES ARE CHARGED BY LAW WITH DOING PARTICULAR TASKS.
17 AGENCIES HIRE EMPLOYEES TO DO THOSE TASKS AS EFFECTIVELY AND
18 EFFICIENTLY AS POSSIBLE. WHEN SOMEONE WHO IS PAID A SALARY SO
19 THAT SHE WILL CONTRIBUTE TO AN AGENCY'S EFFECTIVE OPERATION
20 BEGINS TO DO OR SAY THINGS THAT DETRACT FROM THE AGENCY'S
21 EFFECTIVE OPERATION, THE GOVERNMENT EMPLOYER MUST HAVE SOME
22 POWER TO RESTRAIN THEM.

23 AND SO, THEREFORE, THE COURT WENT ON TO EXPLAIN THAT THE
24 KEY TO FIRST AMENDMENT ANALYSIS IN THIS PARTICULAR AREA OF THE
25 LAW AND THE EMPLOYMENT, ADVERSE EMPLOYMENT ACTION CONTEXT, THE

1 GOVERNMENT'S INTEREST IN ACHIEVING ITS GOALS AS EFFECTIVELY AND
2 EFFICIENTLY AS POSSIBLE IS ELEVATED FROM A RELATIVELY
3 SUBORDINATE INTEREST WHEN IT ACTS AS SOVEREIGN TO A SIGNIFICANT
4 ONE WHEN IT ACTS AS EMPLOYER. AND SO, THEREFORE, THAT IS THE
5 ENTIRE POINT OF PICKERING.

6 SO ALTHOUGH THE ELEVENTH CIRCUIT, AS YOU MAY HAVE POINTED
7 OUT BY YOUR QUESTION, HAS NOT REALLY CLEARLY ARTICULATED THIS,
8 THERE ARE OTHER COURTS OF APPEAL THAT HAVE MADE CLEAR THAT THIS
9 MEANS THAT ANY CLAIM ALLEGING THAT A GOVERNMENTAL ENTITY'S
10 ADVERSE EMPLOYMENT ACTION UNCONSTITUTIONALLY VIOLATED THE FIRST
11 AMENDMENT RIGHTS OF ONE OF ITS EMPLOYEES, REGARDLESS OF THE
12 SPECIFIC CLAIM, MUST TAKE INTO ACCOUNT THE GOVERNMENT'S UNIQUE
13 INTEREST AS AN EMPLOYER AND APPLY PICKERING. SO TWO OF THE
14 CASES THAT I'D LIKE TO POINT YOUR ATTENTION TO ARE BERRY VS.
15 DEPARTMENT OF SOCIAL SERVICES. THAT'S A NINTH CIRCUIT CASE.
16 THE CITE IS 447 F.3D 642. AND, THERE, THE COURT SPECIFICALLY
17 APPLIED PICKERING TO A VIEWPOINT DISCRIMINATION CLAIM, AS WELL
18 AS A FREE SPEECH RETALIATION FREE EXERCISE OF RELIGION AND FREE
19 EXERCISE OF RELIGION CLAIM. THAT CASE INVOLVED A DISCIPLINE
20 THAT IT HAD SAID IT IMPOSED ON THE PLAINTIFF BY A PUBLIC
21 EMPLOYER FOR DISPLAYING RELIGIOUS ITEMS IN THE WORKPLACE. AND
22 THE PLAINTIFF ATTEMPTED TO ARGUE THAT THEY SHOULD HAVE SOME KIND
23 OF HIGHER LEVEL OF SCRUTINY APPLIED. AND THE COURT SAID, NO, WE
24 MUST CONCLUDE THAT THE PICKERING BALANCING TEST APPROACH APPLIES
25 REGARDLESS OF THE REASON AN EMPLOYEE BELIEVES HIS OR HER SPEECH

1 IS CONSTITUTIONALLY PROTECTED.

2 ANOTHER COURT CASE COMES OUT OF THE SECOND CIRCUIT, AND
3 THAT IS KNIGHT VS. CONNECTICUT DEPARTMENT OF PUBLIC HEALTH, 275
4 F.3D 156. AND, THERE, THE PLAINTIFF TRIED TO ARGUE THAT A
5 STRICT SCRUTINY STANDARD SHOULD APPLY TO HIS FIRST AMENDMENT
6 CLAIMS BECAUSE HE WAS BRINGING BOTH A HYBRID FREE EXERCISE CLAIM
7 AND FREE SPEECH CLAIM. THE FACTS WERE -- KIND OF IMPLICATED
8 BOTH INTERESTS UNDER THE FIRST AMENDMENT. THERE, THE SECOND
9 CIRCUIT CLEARLY HELD THAT IN BOTH SITUATIONS THE EMPLOYER'S
10 INTEREST REMAINS THE SAME AND IS ENTITLED TO THE SAME WEIGHT IN
11 THE CONSTITUTIONAL BALANCE, SO IT APPLIED PICKERING. HERE,
12 PLAINTIFF'S VIEWPOINT DISCRIMINATION CLAIM IS PREMISED ON THE
13 ALLEGATION THAT THE CITY TERMINATED HIM BECAUSE OF HIS VIEWS ON
14 SAME-SEX MARRIAGE AND HOMOSEXUAL CONDUCT. THIS CLAIM,
15 THEREFORE, REQUIRES THE COURT TO DETERMINE WHETHER THE CITY
16 PROPERLY DISCHARGED HIM FOR ENGAGING IN THAT TYPE OF SPEECH. IT
17 CLEARLY IMPLICATES THE CITY'S ROLE AS HIS EMPLOYER, AND,
18 THEREFORE, WE BELIEVE THAT PICKERING SHOULD APPLY.

19 THE COURT: AND IN TERMS OF THAT, TOO, I DIDN'T HAVE
20 ANY QUESTIONS FOR WHAT YOU SAID RIGHT THEN BECAUSE THAT WAS
21 CONSISTENT WITH KIND OF WHAT I HAD LAID OUT IN THE QUESTION THAT
22 I SAID. BUT WHEN I HEAR FROM MR. THERIOT ON THAT, I MAY NEED
23 YOU TO RESPOND TO A POINT THAT HE MAKES BECAUSE I HAVEN'T HEARD
24 FROM HIM ON HIS SIDE OF IT. IT'S HARDER TO KNOW WHAT QUESTIONS
25 TO ASK YOU ABOUT THAT AT THIS POINT.

1 MS. HINTON: OF COURSE. SO THEN GOING BACK TO IT,
2 OBVIOUSLY OUR FIRST ARGUMENT ON THIS CLAIM IS THAT, TO THE
3 EXTENT THAT THE FIRST AMENDMENT RETALIATION CLAIM FAILS FOR ALL
4 THOSE SAME REASONS, HIS VIEWPOINT DISCRIMINATION CLAIM MUST FAIL
5 AS WELL.

6 ADDITIONALLY, WE ALSO BELIEVE THAT HIS VIEWPOINT
7 DISCRIMINATION FAILS BECAUSE EVEN IF HE COULD GET PAST THE FIRST
8 TWO ELEMENTS OF THE PICKERING BALANCING TEST, HE STILL NEEDS TO
9 MEET -- NEED TO MEET THAT THIRD ONE, WHICH IS THAT HIS VIEWPOINT
10 ON SAME-SEX MARRIAGE WAS A SUBSTANTIAL OR MOTIVATING FACTOR FOR
11 HIS TERMINATION. WELL, AS I THINK WE'VE MADE CLEAR IN THE
12 BRIEFING, IT WAS NOT HIS VIEWPOINT ON SAME-SEX MARRIAGE OR
13 HOMOSEXUAL CONDUCT THAT LED TO HIS SUSPENSION OR TERMINATION.

14 THE COURT: WHY IS IT NOT A QUESTION OF FACT? BECAUSE
15 THAT IS ONE AREA WHERE IT'S NOT NECESSARILY A LEGAL -- AND IN
16 THE PICKERING TEST THERE ARE SOME FACTORS THAT ARE LEGAL
17 DECISIONS THAT I MAKE AND SOME ARE MORE FACTUAL DETERMINATIONS.
18 AND THE REASON FOR HIM BEING FIRED, AT LEAST THE WAY I SEE IT,
19 IS MORE FACTUALLY TIED UP. AND IT DOES SEEM TO BE AN AREA WHERE
20 BOTH PARTIES SAY IT ISN'T DISPUTED, BUT THEY SAY THAT THEY'RE
21 ENTIRELY DIFFERENT REASONS. SO WHY ISN'T THAT A QUESTION OF
22 FACT?

23 MS. HINTON: I THINK YOU'RE RIGHT ACTUALLY, YOUR
24 HONOR, THAT THE FIRST TWO ELEMENTS OF PICKERING ARE A QUESTION
25 OF LAW FOR THE COURT TO DECIDE, AND THE THIRD ONE IS A QUESTION

1 OF FACT GENERALLY. HOWEVER, WE BELIEVE THAT THE FACTS IN THIS
2 CASE ARE SO UNDISPUTED THAT A REASONABLE JUROR LOOKING AT THEM
3 WOULD OBVIOUSLY CONCLUDE THAT HIS VIEWPOINT WAS NOT THE CAUSE OF
4 HIS TERMINATION. SO WE BELIEVE THAT THE COURT STILL HAS A
5 DISCRETION TO RULE ON THAT POINT.

6 THE COURT: SO IF MR. COCHRAN HAD WRITTEN A BOOK ABOUT
7 GOLF, YOU STILL THINK THE SAME RESULT WOULD HAVE HAPPENED?

8 MS. HINTON: THAT'S A GOOD QUESTION. I BELIEVE THAT
9 HAD HE NOT FOLLOWED THE ETHICS PROVISIONS AND HE WENT OUT AND
10 PUBLISHED A BOOK ABOUT GOLF FOR WHICH HE EARNED INCOME, THEN,
11 YES, HE WOULD HAVE RECEIVED DISCIPLINE. CAN I SAY THAT IT WOULD
12 HAVE LED TO A 30-DAY SUSPENSION WHILE A TITLE VII INVESTIGATION
13 PROCEEDED? THAT, I DON'T KNOW, BUT I CAN SAY THAT THERE
14 CERTAINLY WOULD HAVE BEEN DISCIPLINE IMPOSED.

15 THE COURT: DOES IT MATTER THAT WHAT THE -- WHEN I'M
16 LOOKING AT WHAT WAS -- I THINK IT'S THE SUBSTANTIAL MOTIVATING
17 FACTOR, I THINK, IS THE STANDARD. BUT WHATEVER IT IS, I'LL HAVE
18 IT RIGHT. WHEN WE'RE LOOKING AT THE SUBSTANTIAL MOTIVATING
19 FACTOR, THE FACT THAT WHAT THE CONTENT OF THE SPEECH WAS MAY
20 HAVE CONTRIBUTED TO WHAT THE ACTUAL PUNISHMENT WAS, NOT THAT
21 THERE WAS PUNISHMENT, BUT WHAT IT WAS, HOW DOES THAT RELATE TO
22 THE SUBSTANTIAL MOTIVATING FACTOR PIECE?

23 MS. HINTON: WELL, I THINK THAT IT WAS NOT NECESSARILY
24 THE CONTENT THAT CAUSED THE PUNISHMENT. I THINK THAT THE
25 CONTENT RAISED THE TITLE VII CONCERNS THAT DID LEAD TO THE NEED

1 FOR AN INVESTIGATION AND ULTIMATELY THE FINDING THAT THE -- HIS
2 SUBORDINATES HAD LOST TRUST IN HIM, WHICH THAT ULTIMATELY WAS
3 THE REASON FOR THE TERMINATION. SO I AGREE IT'S A GRAY AREA AND
4 THERE'S A FINE LINE, BUT WE DO BELIEVE THAT THE CONTENT ITSELF
5 WAS NOT THE ULTIMATE REASON FOR THE ADVERSE EMPLOYMENT ACTIONS
6 HERE.

7 GOING -- JUST JUMPING BACK INTO WHY WE BELIEVE IT'S CLEAR
8 THAT HIS VIEWPOINT WAS NOT THE REASON FOR THE TERMINATION OR
9 SUSPENSION, WE ALSO POINT OUT IN THE BRIEFING THAT THE PLAINTIFF
10 HAS NOT IDENTIFIED ANY OTHER INDIVIDUAL WHO ESPOUSED VIEWS
11 OPPOSITE TO HIM THAT ENGAGED IN SIMILAR BEHAVIOR AS A DEPARTMENT
12 HEAD OR A SIMILAR LEVEL OFFICIAL AND WAS TREATED ANY
13 DIFFERENTLY. I BELIEVE THAT THE PLAINTIFF DOES MAKE REFERENCE
14 TO THE CREATION OF THE POSITION OF THE L.G.B.T. LIAISON TO THE
15 MAYOR, ROBIN SHAHAR, AND SAYS THAT THAT IS SOMEHOW EVIDENCE THAT
16 THE CITY OPPOSED HIS OWN VIEWPOINT AND THAT THAT IS WHY THEY
17 TOOK THE STEPS THEY DID WITH RESPECT TO HIM. HOWEVER, I THINK
18 THAT THAT ANALOGY IS COMPLETELY IRRELEVANT AND UNHELPFUL HERE
19 BECAUSE MS. SHAHAR DID NOT ENGAGE IN ANY OF THE CONDUCT THAT
20 MR. COCHRAN ENGAGED IN. AND SO ANY OF THE CITY'S ACTIONS WITH
21 RESPECT TO HER HAVE NO BEARING ON WHAT WENT INTO ITS DECISIONS
22 WITH RESPECT TO THE PLAINTIFF.

23 YOUR HONOR, I'M GOING TO MOVE ON TO THE FREE EXERCISE OF
24 RELIGION CLAIM UNLESS YOU HAVE ANY OTHER QUESTIONS ABOUT
25 VIEWPOINT.

1 THE COURT: NOT RIGHT NOW. THANK YOU.

2 MS. HINTON: OKAY. MOVING ON TO THAT CLAIM, THIS IS
3 THE THIRD CAUSE OF ACTION IN THE COMPLAINT WHICH IS BOTH THE
4 FREE EXERCISE OF RELIGION CLAIM AND A NO RELIGIOUS TEST CLAUSE
5 CLAIM FROM HOW WE INTERPRET IT. THE CLAIM APPEARS TO BE THAT
6 THE PRE-APPROVAL REQUIREMENTS CREATED AN UNCONSTITUTIONAL
7 RELIGIOUS TEST FOR CITY EMPLOYMENT EXCLUDING THOSE WHO HOLD AND
8 PROFESS HISTORICAL CHRISTIAN BELIEFS ABOUT MARRIAGE AND
9 SEXUALITY. THAT IS HIS CLAIM. NOW, FIRST AND FOREMOST I WANT
10 TO POINT OUT THAT, IN THE PLAINTIFF'S BRIEFING, IT APPEARS THAT
11 TO SOME EXTENT HE MAY BE ARGUING THAT THE TERMINATION OR
12 SUSPENSION OF HIM FOR THE EXERCISE OF HIS RELIGIOUS BELIEFS IS
13 IN SOME WAY THE BASIS OF THIS CLAIM. TO THE EXTENT THAT THAT IS
14 AT ALL THE BASIS OF THIS CLAIM, WE WOULD ARGUE THAT PICKERING
15 AGAIN SHOULD APPLY. IF YOU LOOK AT THOSE CASES THAT I CITED
16 EARLIER, THE SAME ANALYSIS GOES INTO THAT. SO IF THERE'S AN
17 ADVERSE EMPLOYMENT ACTION THAT IS THE BASIS OF THIS PARTICULAR
18 CLAIM, THEN, AGAIN, PICKERING APPLIES. AND WE BELIEVE THAT HIS
19 CLAIM WILL FAIL FOR THE SAME REASON THE FIRST AMENDMENT
20 RETALIATION CLAIM WILL FAIL.

21 SECONDARILY, THOUGH, TO THE EXTENT THAT PLAINTIFF'S CLAIM
22 RELATES TO APPLICATION OF THE PRE-APPROVAL ORDINANCES, TO ARGUE
23 THAT THE APPLICATION OF THOSE ORDINANCES SOMEHOW INHIBITED HIS
24 FREE EXERCISE OF RELIGION, AGAIN, THOSE -- THAT CLAIM FAILS.
25 THE GENERAL STANDARD HERE IS THAT THE PLAINTIFF MUST SHOW THAT

1 THE CITY, BY IMPOSING THOSE ORDINANCES IMPERMISSIBLY, BURDENED
2 ONE OF HIS SINCERELY HELD RELIGIOUS BELIEFS.

3 NOW, PLAINTIFF APPEARS TO IMPLICATE HIS SINCERELY HELD
4 RELIGIOUS BELIEF THAT HE MUST BELIEVE, PROFESS AND TEACH OTHERS
5 ABOUT HISTORICAL CHRISTIAN TEACHINGS REGARDING THE ONE MAN, ONE
6 WOMAN NATURE OF MARRIAGE AND THE SIMPLENESS OF SEXUAL CONDUCT
7 OUTSIDE OF THAT UNION. THAT'S FROM THE COMPLAINT. WELL, HERE
8 WE SIMPLY CAN'T SEE HOW THE PRE-APPROVAL REQUIREMENTS INTERFERE
9 WITH PLAINTIFF'S ABILITY TO DO THAT. THEY ONLY REQUIRE HIM TO
10 OBTAIN APPROVAL TO ENGAGE IN OUTSIDE EMPLOYMENT FOR PAY. AGAIN,
11 PLAINTIFF PROVIDES NO EXPLANATION FOR HOW SUCH PRE-APPROVAL
12 REQUIREMENTS COULD POSSIBLY INTERFERE WITH HIS ABILITY TO
13 EXPRESS HIS BELIEFS.

14 ADDITIONALLY, AS MR. GEVERTZ MENTIONED, THERE IS
15 NO EVIDENCE THAT HAD HE FOLLOWED THE PRE-APPROVAL REQUIREMENTS,
16 THAT HE WOULD NOT HAVE BEEN ALLOWED TO PUBLISH A BOOK THAT
17 CONTAINED THE VIEWS THAT HIS BOOK CONTAINED. WE SIMPLY DON'T
18 KNOW. ADDITIONALLY OF IMPORT, IS THAT PLAINTIFF ADMITTED DURING
19 HIS DEPOSITION THAT THE PRE-APPROVAL REQUIREMENTS WHICH HE WAS
20 CERTAINLY FAMILIAR WITH BECAUSE HE ENFORCED THEM, HAD NO BEARING
21 ON HIS ABILITY TO BELIEVE, PROFESS OR TEACH WHATEVER HE CHOOSES.
22 SO, THEREFORE, WE SIMPLY DON'T SEE A CLAIM HERE. EXCUSE ME ONE
23 SECOND.

24 FINALLY, WITH RESPECT TO HIS RELIGIOUS TEST CLAIM,
25 PLAINTIFF CLAIMS THAT THE ORDINANCES IMPOSE AN UNLAWFUL

1 RELIGIOUS TEST ON CITY EMPLOYEES. AGAIN, THIS IS NOT THE CASE.
2 THE PREVAILING STANDARD IN THIS AREA IS THAT IF A LAW IS NEUTRAL
3 AND GENERALLY APPLICABLE, IT NEED NOT BE JUSTIFIED BY A
4 COMPELLING GOVERNMENT INTEREST EVEN IF THE LAW HAS THE
5 INCIDENTAL EFFECT OF BURDENING A POTENTIAL RELIGIOUS PRACTICE.
6 IN THOSE CASES THE LAW NEEDS ONLY A RATIONAL BASIS TO PASS
7 CONSTITUTIONAL MUSTER.

8 WELL, HERE, THE PRE-APPROVAL REQUIREMENTS ARE CERTAINLY
9 NEUTRAL. TO BE NEUTRAL, A LAW IS NEUTRAL UNLESS THE OBJECT OF
10 THAT LAW IS TO INFRINGE UPON OR RESTRICT PRACTICES BECAUSE OF
11 THEIR RELIGIOUS MOTIVATION. WELL, HERE THERE'S NO WAY THAT THE
12 PRE-APPROVAL ARGUMENT -- ORDINANCES TARGET RELIGIOUS BELIEFS OR
13 RELIGIOUS SPEECH. THEY ARE CLEARLY AIMED SOLELY AT OUTSIDE
14 EMPLOYMENT FOR REMUNERATION.

15 ADDITIONALLY, THEY ARE GENERALLY APPLICABLE. A LAW IS
16 GENERALLY APPLICABLE IF IT DOES NOT IN A SELECTIVE MANNER IMPOSE
17 BURDENS ONLY ON CONDUCT MOTIVATED BY A RELIGIOUS BELIEF. WELL,
18 HERE BOTH ORDINANCES, THE FIRST SECTION 114-436, APPLIES TO ALL
19 EMPLOYEES, AND THE OTHER ONE APPLIES TO ALL HIGH LEVEL CITY
20 EMPLOYEES, AGAIN, NO REGARD FOR WHETHER OUTSIDE EMPLOYMENT WITH
21 RESPECT TO THOSE EMPLOYEES HAS ANY RELIGIOUS ASPECT. SO, AGAIN,
22 WE BELIEVE THAT THIS IS A -- BOTH ORDINANCES ARE NEUTRAL AND
23 GENERALLY APPLICABLE AND THAT, THEREFORE, THEY ONLY NEED TO BE
24 SUPPORTED BY A RATIONAL BASIS.

25 I'M SORRY. I HAVE A COLD.

1 THE COURT: LISTEN. I DON'T WANT YOU TO THINK THAT
2 I'M NOT GIVING YOU THE SAME QUALITY OF QUESTIONS THAT I GAVE
3 MR. GEVERTZ, BUT I DO UNDERSTAND THESE ARGUMENTS BETTER FROM
4 YOUR BRIEFING --

5 MS. HINTON: YES.

6 THE COURT: -- APOLOGIES TO YOU. I DON'T HAVE AS MANY
7 QUESTIONS IN THESE PARTICULAR AREAS.

8 MS. HINTON: THAT'S FINE.

9 THE COURT: I THINK THAT THE BRIEFING WAS A LOT MORE
10 CLEAR, AT LEAST IN TERMS OF MY READING OF IT IN THESE PARTICULAR
11 AREAS.

12 MS. HINTON: UNDERSTOOD. AND SO, THEREFORE, THERE IS
13 A RATIONAL BASIS WHICH WE PRESENT IN OUR BRIEFING, WHICH IS
14 THAT, YOU KNOW, WE NEED TO AVOID THE APPEARANCE OR ACTUAL
15 CONFLICTS OF INTEREST WITH PUBLIC EMPLOYEES. THE COURT -- I
16 MEAN, THE GOVERNMENT CLEARLY HAS A LEGITIMATE INTEREST IN
17 MAINTAINING THE PUBLIC'S CONFIDENCE IN THE INTEGRITY OF THE
18 PUBLIC'S SERVICE. BY CONTRAST, THE UNCONSTITUTIONAL STATUTE --
19 I'M SORRY --

20 THE COURT: THAT'S OKAY.

21 MS. HINTON: -- THE UNCONSTITUTIONAL STATUTE THAT
22 PLAINTIFF (VERBATIM) CITES, THE CHURCH OF LUKUMI BABALU, IS FAR
23 IN CONTRAST TO THE STATUTES HERE. IN THAT ONE, THAT VERY
24 SPECIFICALLY PROHIBITED THE ANIMAL SACRIFICE AND IT CLEARLY
25 TARGETED PRACTITIONERS OF THE SANTA RIA (PHONETIC) RELIGION.

1 THAT INTENT WAS ACTUALLY EXPRESSLY WRITTEN INTO THOSE
2 ORDINANCES. SO, THEREFORE, WE DON'T BELIEVE THAT THAT HAS ANY
3 PRECEDENTIAL VALUE HERE AND SHOULD BE DISREGARDED.

4 FINALLY, I CAN MOVE ON TO THE DUE PROCESS CLAIM VERY
5 QUICKLY.

6 THE COURT: OKAY. VERY QUICKLY BECAUSE I DO THINK I
7 UNDERSTAND THE ARGUMENT THAT THE CITY CHARTER ITSELF ALLOWS --
8 CLASSIFIES AT LEAST YOUR ARGUMENT BEING THAT THE CITY CHARTER
9 CLASSIFIES HIM AS AN AT-WILL EMPLOYEE SUCH THAT THE DUE PROCESS
10 REQUIREMENTS DON'T SPECIFICALLY APPLY TO HIM.

11 MS. HINTON: THAT'S CORRECT, YES, THAT THE CITY
12 CHARTER CONTROLS. TO THE EXTENT THERE ARE CONTRADICTORY
13 PROVISIONS ELSEWHERE IN THE CODE, THOSE DO NOT OVERRULE THE CITY
14 CHARTER PER STATE LAW. THAT'S IT.

15 THE COURT: THANK YOU.

16 MS. HINTON: THANK YOU.

17 THE COURT: WHY DON'T WE DO THIS. BEFORE I HEAR FROM
18 YOU, MR. THERIOT, JUST BECAUSE WE'VE BEEN GOING ABOUT AN HOUR
19 AND 15 MINUTES, AND YOURS MAY BE LENGTHY, WE'LL SEE, WHY DON'T
20 WE JUST TAKE A VERY FIVE MINUTES, NOT A FIVE MINUTES THAT'S TEN
21 MINUTES, FOR EVERYONE HERE. SO GET BACK IN YOUR PLACES VERY
22 QUICKLY, BUT THAT WILL GIVE THE PEOPLE THAT ARE OUTSIDE A CHANCE
23 TO GET SEATED AS WELL. SO WE'LL JUST TAKE FIVE MINUTES. WE'LL
24 BE BACK HERE BY THAT CLOCK AT 10:20 AND THEN WE CAN PROCEED.

25 (RECESS TAKEN.)

1 THE COURT: OKAY. YOU MAY BE SEATED.

2 AND, MR. THERIOT, BEFORE YOU PROCEED, I JUST WANTED TO TELL
3 YOU THAT, IN TERMS OF HOW YOU WANT TO SPEND YOUR TIME, AND TO
4 SOME EXTENT IT'S UP TO YOU SUBJECT TO ALL THE QUESTIONS I MAY
5 ASK, I DO THINK THAT YOUR RETALIATION AND PRIOR RESTRAINT
6 ARGUMENTS MAY BE THE BETTER ARGUMENTS THAT YOU HAVE. YOUR
7 ADDITIONAL ARGUMENTS, SUCH AS THE FREE ASSOCIATION AND THE
8 VIEWPOINT DISCRIMINATION SEPARATE FROM THE RETALIATION, I'M NOT
9 SEEING AS WELL AS I AM THOSE OTHER CLAIMS. SO YOU CAN EITHER
10 KIND OF EDUCATE ME ON THOSE, OR SPEND MORE TIME EXPLAINING WHY
11 YOU'RE RIGHT ON THE OTHERS. IT'S KIND OF A LITTLE BIT UP TO
12 YOU, BUT I WANTED TO GIVE YOU THAT KIND OF STARTING POINT.

13 MR. THERIOT: WELL, WITH YOUR HONOR'S PERMISSION AND
14 MAY IT PLEASE THE COURT, I CAN JUST START WITH THE PICKERING
15 RETALIATION CLAIM --

16 THE COURT: OKAY.

17 MR. THERIOT: -- SINCE YOU HAD A LOT OF QUESTIONS
18 ABOUT THAT AND JUST GO THROUGH THAT BALANCING TEST.

19 THE COURT: OKAY. THANK YOU.

20 MR. THERIOT: SO I THINK PROBABLY THE MOST IMPORTANT
21 THING IS THAT IT'S BEEN CONCEDED THAT THIS IS A MATTER OF PUBLIC
22 CONCERN, AND NOT ONLY THAT, THEY'VE CONCEDED IN THE STATEMENT OF
23 FACTS THAT THIS -- THESE ARE RELIGIOUS BELIEFS THAT ARE
24 TRADITIONALLY ASSOCIATED WITH CHRISTIAN BELIEFS. SO THERE'S NO
25 QUESTION THESE ARE RELIGIOUS BELIEFS THAT ARE ARTICULATED IN THE

1 BOOK, AND MY COLLEAGUES KIND OF EQUIVOCATED ON THAT A LITTLE
2 BIT, BUT THAT'S IN THE STATEMENT OF FACTS AND IT'S BEEN
3 CONCEDED. SO BECAUSE OF THAT, I MEAN, BECAUSE OF THESE ARE, AS
4 YOUR HONOR ALLUDED TO, MATTERS OF SUBSTANTIAL PUBLIC CONCERN,
5 THERE'S ACTUALLY A THUMB ON THE SCALE IN FAVOR OF THE CHIEF WHEN
6 WE DO THE SECOND PART OF THE ANALYSIS, THE PICKERING TEST, AND
7 THE WEIGHING. SO WE'VE GOT CLEARLY SUBSTANTIALLY PROTECTED
8 PUBLIC INTEREST SPEECH, AND THE QUESTION IS WHETHER THEIR
9 INTEREST IN EFFICIENCY AND AVOIDING DISRUPTION OUTWEIGHS THAT.
10 AND THE FACTS AS WE SEE THEM AND THE UNDISPUTED FACTS INDICATE
11 THAT IT DOES NOT. AND LET'S START WITH EFFICIENCY.

12 IT'S UNDISPUTED THAT THE FIRE DEPARTMENT, AS OF
13 NOVEMBER 1ST OF 2014, JUST THREE WEEKS BEFORE HE WAS SUSPENDED,
14 WAS RUNNING BETTER THAN IT EVER HAD, HAD A CLASS ONE PUBLIC
15 PROTECTION RATING FOR THE FIRST TIME EVER, WHICH DEMONSTRATED AN
16 EXCEPTIONAL, EXTRAORDINARY ABILITY TO RESPOND TO FIRES. THERE
17 WAS -- THERE WAS NO INDICATION -- AS A MATTER OF FACT, THAT HAD
18 BEEN GOING ON FOR SOME TIME. WHEN HE WAS AWARDED FIRE CHIEF OF
19 THE YEAR IN 2012, THE MAYOR SAID THERE'S BEEN A MARKED
20 IMPROVEMENT IN RESPONSE TIMES AND STAFFING. AND WHEN YOU
21 DON'T -- AND SO CLEARLY THE BOOK WHICH HAD BEEN -- I HAVE TO
22 DISAGREE WITH MY COLLEAGUE ON THE FACTS. THE BOOK WAS NOT IN --
23 JUST DORMANT. THE BOOK, IT'S UNDISPUTED, WAS DISTRIBUTED TO
24 SOME CO-WORKERS BEGINNING IN JANUARY OF 2014, TEN PEOPLE WHO HAD
25 REQUESTED IT. THERE WERE THREE ALSO THAT HE GAVE TO THAT HAD

1 SIMILAR RELIGIOUS CONVICTIONS. SO THE BOOK HAD BEEN IN THE
2 WORKPLACE FOR 11 MONTHS, TEN TO 11 MONTHS, AND THERE HAD BEEN NO
3 DISRUPTION, NO COMPLAINTS, NO ISSUES WHATSOEVER. THE FIRST
4 ISSUE CAME UP WHEN FIRE CHIEF WESSELS DIDN'T COMPLAIN, HE
5 ACTUALLY EXPRESSED A CONCERN TO, NOT THE H.R. DIRECTOR, BUT TO
6 THE HEAD OF THE UNION. AND THE HEAD OF THE UNION SPOKE TO
7 COUNCILMAN WAN, AND THEN COUNCILMAN WAN TALKED TO THE H.R.
8 DIRECTOR. THAT WAS THE ONLY HINT OF ANY CONCERN AT ALL AND UP
9 UNTIL -- AND IT'S UNDISPUTED -- UP UNTIL HE WAS SUSPENDED
10 ON NOVEMBER 24TH OF --

11 THE COURT: NOW, I'LL DISAGREE WITH THAT A LITTLE BIT
12 IN THAT I DO THINK THAT THE RECORD DOES SHOW WHAT YOU SAID
13 CORRECTLY, THAT UP UNTIL THIS ISSUE THERE'S NOTHING IN THE
14 RECORD THAT SUGGESTS THAT THE PLAINTIFF WAS ANYTHING OTHER THAN
15 GOOD AT HIS JOB, AND I AGREE WITH THAT. BUT I DO THINK THAT
16 THERE IS SOME SUPPORT FOR THE COMMENT THAT IT WAS KIND OF IN
17 MORE DORMANT FORM BECAUSE IT'S A LITTLE BIT DIFFERENT BECAUSE
18 IT'S NOT A SPEECH THAT'S JUST MADE TO PEOPLE THAT HEAR IT
19 INSTANTLY. IT DOES APPEAR THAT THIS WAS SPEECH THAT KIND OF
20 CAME OUT IN DIFFERENT DEGREES AT DIFFERENT TIMES. AND CERTAINLY
21 DURING THE TIME PERIOD AFTER IT WAS PUBLISHED, THERE WERE A ONLY
22 FEW PEOPLE IN THE RECORD THAT I CAN SEE THAT WERE ACTUALLY AWARE
23 OF THE ACTUAL CONTENTS OF THE BOOK. AND I SEE YOU WANTING TO
24 MEASURE THE DISRUPTION AS TO WHAT WAS HAPPENING AT THIS VERY
25 INITIAL TIME, BUT THIS ELEVENTH CIRCUIT PRECEDENT AND THIS KIND

1 OF PROBABILITY DISRUPTION, I SEE THAT ALLOWING ME TO LOOK AT THE
2 GREATER SITUATION THAT OCCURRED AFTER THIS BECAME PUBLICIZED.
3 WHY DO WE JUST PIN IT IN AT THIS EARLY STAGE?

4 MR. THERIOT: WE DO NOT. YOU'RE CORRECT. YOU LOOK AT
5 THE WHOLE THING. HOWEVER, WHAT WE DO IS -- I THINK WE HAVE AT
6 LEAST TEN MONTHS OF A HISTORY WHERE PEOPLE WERE AWARE OF IT,
7 EVEN THOUGH IT WASN'T EVERYBODY. THERE WERE SOME PEOPLE THAT
8 WERE AWARE OF IT AND IT DIDN'T CAUSE ANY DISRUPTION. THAT'S
9 UNDISPUTED. SO WE'VE GOT A HISTORY. AS THE ELEVENTH CIRCUIT
10 HELD IN WATERS VS. CHAFFIN, A NINE-MONTH DIFFERENCE BETWEEN WHEN
11 THE SPEECH WAS ENGAGED IN AND WHEN THEY PUNISHED HIM INDICATED
12 THAT THERE WASN'T ANY DISRUPTION. SO IT'S A FACTOR TO WEIGH
13 INTO THE FACT THAT THERE WAS NO DISRUPTION. AND THEN EVEN AFTER
14 IT BECAME MORE WELL-KNOWN, THERE'S NO INDICATION THAT THERE WAS
15 ANY DISRUPTION IN THE DEPARTMENT ITSELF. THE ONLY THING THAT
16 THEY LOOK TO AS PROOF OF THAT IS THE INVESTIGATIVE REPORT. AND
17 THERE ARE SOME SERIOUS CONCERNS ABOUT THAT, AND, FIRST OF ALL,
18 BECAUSE THE INVESTIGATIVE REPORT IN THAT PART OF THAT THEY LOOK
19 TO IS VAGUE. IT SAYS THAT THE ALLEGATIONS ARE IS THERE WAS
20 CONSISTENT SENTIMENT, THE FIREFIGHTERS WERE APPALLED, THERE WAS
21 GENERAL AGREEMENT, AND TRUST WAS ERODED. THEY DON'T CITE ANY
22 PERSON WHO SAID THAT.

23 THE COURT: BUT WE DON'T NECESSARILY ONLY LOOK AT THE
24 SPECIFICS OF THIS INVESTIGATION. WE LOOK AT THIS KIND OF
25 PROBABILITY OF DISRUPTION. AND I CAN SEE HOW THE FACT THAT SOME

1 OF THESE COMMENTS COULD POTENTIALLY BE USED AS EVIDENCE AGAINST
2 THE CITY IN A TITLE VII CASE COULD BE EVIDENCE OF THIS
3 PROBABILITY OF DISRUPTION. SO WHY ISN'T THE FACT THAT THESE
4 COMMENTS COULD BE IMPORTANT IN A TITLE VII CASE NOT SOMETHING
5 THAT SHOULD BE PUT ON THE CITY'S SIDE OF THE SCALE?

6 MR. THERIOT: BECAUSE THE FACTS INDICATE THAT THERE
7 NEVER WAS ANY DISCRIMINATION, AND THE INVESTIGATION PROVED THAT.
8 AND, AS A MATTER OF FACT, THE ONLY TESTIMONY IN THE RECORD BY
9 ANY EMPLOYEE IS BY MR. BORDERS AND BY MS. WARD, BOTH OF WHOM
10 SAID THAT THEY COULD CONTINUE TO WORK FOR THE CHIEF. MS. WARD
11 IS THE ONLY ONE WHO WORKED DIRECTLY FOR HIM AND SAID, HE WOULD
12 NEVER TREAT ANYBODY DIFFERENTLY. HE'S THE BEST PERSON I EVER
13 WORKED FOR. INCIDENTALY, SHE DID NOT SHARE HIS RELIGIOUS
14 BELIEFS. SO THE PROBLEM THAT THEY HAVE IS NOT THAT THERE COULD
15 BE DISRUPTION, BUT THAT -- THERE HAS TO BE A REASONABLE CONCERN
16 THAT THERE WOULD BE DISRUPTION. AND THE CASES THAT FIND THAT
17 THERE IS INVARIABLY SAY THAT THERE WAS SOME SORT OF TENSION,
18 THERE WAS SOME DISCUSSION, THERE WAS A THREAT OF VIOLENCE, THE
19 MOSS CASE --

20 THE COURT: WELL, THE PROBLEM IN THIS CASE IS THAT
21 THIS DIDN'T GET A CHANCE TO PLAY OUT NECESSARILY BECAUSE THE
22 SUSPENSION HAPPENED KIND OF RIGHT WHEN THIS STARTED REALLY
23 BUBBLING FORWARD. AND WHAT I CAN SEE FROM THE CITY'S STANDPOINT
24 IS THAT, OKAY, YOU HAVE SOMEONE THAT WORKS FOR THE FIRE
25 DEPARTMENT, THEY'RE CALLED IN FOR A PERFORMANCE REVIEW, THEY'RE

1 SITTING THERE WITH THEIR BOSS AND THEY KNOW THAT HE'S HAD SOME
2 VIEWS. I THINK SOME OF IT -- I THINK THERE IS SOME STATEMENT
3 THAT THERE WAS A CELEBRATION OF THE DEATHS OF PEOPLE THAT HAD
4 HOMOSEXUAL BELIEFS. SO WHEN YOU'RE GOING INTO A PERFORMANCE
5 REVIEW, YOU KNOW YOUR BOSS HAS WRITTEN THAT GOD WILL CELEBRATE
6 WHEN YOU DIE, WHY ISN'T THAT POTENTIALLY, YOU KNOW, WHEN YOU
7 LOOK AT THIS PROBABILITY OF DISRUPTION? I KNOW IT DIDN'T HAPPEN
8 IN THE PAST, BUT WHY ISN'T THAT GOING TO POTENTIALLY CAUSE
9 DISRUPTION IF SOMEONE WAS GAY, IF THEY HAD A NEGATIVE
10 PERFORMANCE EVALUATION, AND THEY'RE SITTING THERE KNOWING
11 SOMEONE HAS SAID THAT GOD WILL CELEBRATE WHEN THEY DIE? WHY
12 ISN'T THAT DISRUPTIVE?

13 MR. THERIOT: WELL, FIRST OF ALL, HE DIDN'T SAY THAT.
14 THAT'S A DISPUTED FACT.

15 THE COURT: WELL, I HAVE THE QUOTE. LET ME SEE.
16 LET'S SEE WHERE IT IS. THE QUOTE WAS, SAY, FOR EXAMPLE, IN YOUR
17 BOOK YOU WRITE THAT WHEN THE NAKED PERISH, THEY ARE SHOUTING,
18 WHICH I THINK THAT MEANS THERE'S JOY IN CELEBRATION. AND THEN I
19 THINK IT'S -- WELL, I THINK THAT -- I DON'T HAVE IT ALL
20 HIGHLIGHTED, BUT I DID HAVE IN THERE THAT WHEN THE NAKED PERISH,
21 THERE IS JOY IN CELEBRATION, AND THAT THAT'S GOD IS JOYOUS WHEN
22 THE NAKED -- AND THE NAKED ARE THOSE THAT ARE GAY?

23 MR. THERIOT: NO.

24 THE COURT: OKAY.

25 MR. THERIOT: THAT'S NOT WHAT THE BOOK SAYS.

1 THE COURT: OKAY.

2 MR. THERIOT: THE BOOK SAYS THAT BOTH CHRISTIANS AND
3 NON-CHRISTIANS CAN BE NAKED AND/OR CAN BE CLOTHED.

4 THE COURT: OH, I'M SORRY. WELL, I AGREE THAT OTHER
5 PEOPLE CAN BE, THAT GOD CAN CELEBRATE WHEN OTHER PEOPLE DIE,
6 TOO, BUT I THINK THAT HE SAYS THAT -- I MEAN, WE DON'T NEED TO
7 ARGUE ABOUT THIS. IT SAYS WHAT IT SAYS, BUT I THOUGHT THAT HE
8 SAID THAT GOD WILL CELEBRATE WHEN THE NAKED DIE, AND THE NAKED
9 IS BROADLY DEFINED TO INCLUDE DIFFERENT CLASSES OF PEOPLE WHICH
10 DOES INCLUDE PEOPLE THAT ARE GAY.

11 MR. THERIOT: IT INCLUDES -- SHOULD THE -- WHAT THE
12 BOOK SAYS IS THAT EVERYONE STRUGGLES WITH THE LIST OF SINS THAT
13 ARE LISTED ON PAGE 83 AND 84 OF THE BOOK.

14 THE COURT: RIGHT.

15 MR. THERIOT: THERE'S 17 OF THEM, AND THAT EVERYBODY'S
16 IN THE SAME BOAT.

17 THE COURT: RIGHT. AND IF YOU MEET THIS CRITERIA,
18 THEN YOU ARE NAKED.

19 MR. THERIOT: AND CHIEF COCHRAN SAID THAT INCLUDES
20 HIMSELF.

21 THE COURT: RIGHT. I UNDERSTAND THAT, BUT I'M SAYING
22 WE CAN ARGUE ABOUT WHAT THE BOOK SAYS LATER, BUT WHY WOULD
23 SOMEONE WHO ISN'T IN THE CLASS OF PEOPLE THAT CHIEF COCHRAN SAYS
24 THAT GOD WILL REJOICE WHEN THEY DIE, WHY WOULDN'T THEY BE
25 UNCOMFORTABLE IN A PERFORMANCE EVALUATION?

1 MR. THERIOT: WELL, BECAUSE, FIRST OF ALL, THE BOOK
2 READ IN CONTEXT DOESN'T SAY THAT. IT DOESN'T SAY THAT -- IT
3 DOESN'T SINGLE OUT ANYBODY AND IT TREATS EVERYBODY AS -- THAT WE
4 ALL HAVE THINGS THAT WE STRUGGLE WITH. IT'S OBVIOUSLY WRITTEN
5 TO MEN AND SPECIFICALLY FOR MEN AND CHRISTIAN MEN. AND SO IT'S
6 NOT ATTEMPTING TO SPEAK TO ANYBODY ELSE BUT THOSE INDIVIDUALS.
7 THAT'S WHY IT WAS ONLY DISTRIBUTED TO CHRISTIAN MEN WHO HAD
8 EITHER REQUESTED A COPY OR HAD SHARED THEIR FAITH THEMSELVES
9 LIKE CHIEF WESSELS DID WITH CHIEF COCHRAN.

10 THE COURT: SO YOUR POSITION IS THAT THERE'S NOTHING
11 IN THIS BOOK THAT WOULD MAKE SOMEONE WHO WAS GAY UNCOMFORTABLE
12 ABOUT HAVING A PERFORMANCE EVALUATION GIVEN WHAT'S WRITTEN IN
13 HERE?

14 MR. THERIOT: NOT ANYMORE THAN IT WOULD MAKE ANYONE
15 ELSE UNCOMFORTABLE, INCLUDING ME AND INCLUDING ANYONE ELSE WHO
16 STRUGGLES ON A DAY-TO-DAY BASIS WITH LIVING A LIFE IN
17 CONFORMANCE WITH -- WITH MORAL STANDARDS. SO THAT'S THE POINT,
18 IS THAT HE TREATS -- HE'S JUST ATTEMPTING TO ALLOW CHRISTIAN MEN
19 TO ENCOURAGE THEM TO BE BETTER FATHERS AND BETTER -- AND BETTER
20 HUSBANDS, AND HE'S SAYING THAT IF YOU LOOK AT THE BIBLE, THIS IS
21 ONE WAY OF DOING THAT AND THAT WE ALL STRUGGLE WITH THESE
22 THINGS. AND IF YOU CAN GET PAST THAT, THEN YOU WILL BE IN A
23 BETTER POSITION.

24 THE COURT: BUT HE DOES SAY THAT PEOPLE THAT ENGAGE IN
25 SAME-SEX AND SAME-SEX MARRIAGE, HE EQUATES THAT WITH VIAL,

1 VULGAR AND INAPPROPRIATE WAYS WHICH DEFILE THEIR BODY, TEMPLE
2 AND DISHONOR GOD.

3 MR. THERIOT: WELL, HE DEFINITELY TAKES A POSITION
4 AGAINST SAME-SEX MARRIAGE ABSOLUTELY.

5 THE COURT: WELL, I GUESS MY QUESTION, MAYBE I'LL
6 REPHRASE IT DIFFERENTLY, WHY WOULD IT NOT BE DISRUPTIVE FOR
7 SOMEONE THAT'S IN A SAME-SEX MARRIAGE TO HAVE A PERFORMANCE
8 EVALUATION FROM SOMEONE THAT HAS PUBLICLY STATED THE VIEWS I
9 JUST READ? WHY WOULD THAT NOT BE POTENTIALLY DISRUPTIVE?

10 MR. THERIOT: BECAUSE THE -- BECAUSE THE HISTORY AND
11 THE RECORD INDICATES THAT HE HAD NEVER -- AND AS A MATTER OF
12 FACT, THEIR OWN INVESTIGATION INDICATED THAT HE HAD NEVER USED
13 HIS VIEWS TO DISCRIMINATE AGAINST ANYONE EITHER IN AN EMPLOYEE
14 EVALUATION, IN A PERFORMANCE EVALUATION, OR ANY SORT OF
15 DISCRIMINATION WHATSOEVER, NOT ONLY IN THIS PARTICULAR INSTANCE,
16 BUT EVER. AND SO --

17 THE COURT: I THINK THE PROBLEM I'M HAVING WITH THAT
18 ARGUMENT, AND I'M NOT SAYING THAT IT'S INCORRECT, I'M JUST
19 SAYING THAT THERE IS COUNTER TO THAT, THAT IS THAT WAS IN THE
20 PAST WHEN THEY DIDN'T HAVE THE KNOWLEDGE OF WHAT WAS IN THE
21 BOOK. AND WHY WOULDN'T IT POSSIBLY BE DISRUPTIVE FOR THE CITY,
22 IF YOU HAD SOMEONE THAT WAS IN A SAME-SEX MARRIAGE, THEY WERE
23 FIRED OR DEMOTED OR DIDN'T RECEIVE A PROMOTION, AND THEN THEY
24 WOULD COME AND SAY, WELL, THAT HAPPENED BECAUSE THE PERSON
25 MAKING THAT DECISION HOLDS THESE BELIEFS, AND THAT WOULDN'T GET

1 THE CITY IN AT LEAST A DISRUPTIVE OR POSSIBLE LAWSUIT IN THE
2 FUTURE? BECAUSE I DO THINK I CAN LOOK AT THE PROBABILITY OF
3 FUTURE DISRUPTION, NOT JUST TO WHAT HAPPENED IN THE PAST,
4 ALTHOUGH WHAT HAPPENED IN THE PAST CAN BE EVIDENCE OF WHAT WILL
5 HAPPEN IN THE FUTURE, I CAN ALSO LOOK AT MORE HYPOTHETICALLY THE
6 SITUATIONS WHICH MIGHT ARISE NOW THAT THIS INFORMATION IS OUT IN
7 THE PUBLIC.

8 MR. THERIOT: AND CERTAINLY YOU CAN LOOK AT THOSE
9 THINGS, YOUR HONOR, BUT I THINK IT'S IMPORTANT TO NOTE THAT
10 THOSE HAVE TO BE WEIGHED IN VIEW OF THE HISTORY OF THE FACT THAT
11 CHIEF COCHRAN HAD NOT DONE THAT. AND THE ONLY TESTIMONY IN THE
12 RECORD IS -- BY EMPLOYEES IS THAT HE NEVER HAD AND HE WOULDN'T
13 DO THAT. SO THE -- ON THIS RECORD THERE'S NO INDICATION THAT
14 THAT WOULD HAVE OCCURRED OR COULD HAVE OCCURRED AND THAT THEIR
15 FEAR OF THAT WAS REASONABLE. THAT'S THE KEY. THE FEAR HAS TO
16 BE REASONABLE IN ORDER FOR IT TO JUSTIFY RESTRICT -- PUNISHING
17 HIM FOR HIS SPEECH. AND THEY DID PUNISH HIM BOTH BY SUSPENDING
18 HIM. THEY DIDN'T JUST SUSPEND HIM TO DO AN INVESTIGATION, THEY
19 SUSPENDED HIM WITHOUT PAY.

20 THE COURT: WHAT ABOUT THE ARGUMENT THAT AS PART OF
21 WEIGHING AND LOOKING AT THE BALANCING TEST, THAT IT GOES AGAINST
22 YOUR CLIENT, THE FACT THAT HE FELT COMPELLED TO DISTRIBUTE IT IN
23 THE WORKPLACE AND HAND IT OUT TO HIS SUBORDINATES, THAT IT MIGHT
24 HAVE BEEN KIND OF A PURE EXPRESSION OF HIS SPEECH IF HE JUST
25 KEPT IT KIND OF IN HIS OWN KIND OF REALM, THAT HE'S THE ONE THAT

1 PUT IT INTO THE WORKPLACE BY BRINGING IT TO WORK?

2 MR. THERIOT: WELL, I THINK IT'S IMPORTANT TO REMEMBER
3 THAT HE -- THAT TEN OF THE PEOPLE THAT HE GAVE A COPY TO HAD
4 REQUESTED A COPY OF IT. THREE OF THEM WERE PEOPLE THAT HE HAD
5 DISCUSSED HIS FAITH WITH BEFORE AND HE KNEW HAD THE SIMILAR
6 FAITH. SO HE DIDN'T JUST DISTRIBUTE IT WIDELY, AND HE ONLY
7 DISTRIBUTED IT TO PEOPLE THAT HE THOUGHT HAD SIMILAR BELIEFS.
8 AND, AS A MATTER OF FACT, THE ONLY INDICATION IS THAT ONE
9 PERSON, POSSIBLY WESSELS, INDICATED THAT HE WAS CONCERNED ABOUT
10 IT, BUT HE NEVER SAID THAT HE WAS HARASSED, NEVER SAID THAT HE
11 FELT LIKE THAT HE WAS GOING TO BE TREATED DIFFERENTLY. THERE'S
12 NO INDICATION IN THIS RECORD THAT HE SAID ANY OF THOSE THINGS.

13 THE COURT: WELL, HE IS A CABINET MEMBER. AND I KNOW
14 THAT A LOT OF YOUR ARGUMENT TIES TO PEOPLE THAT KNOW HIM AND HOW
15 HE PERFORMED IN THE PAST AND WHAT A GOOD FIRE CHIEF THAT HE WAS
16 AND HOW HE DIDN'T DISCRIMINATE AGAINST PEOPLE THAT HE WORKED
17 WITH, BUT WE ALSO HAVE AN ISSUE THAT THE CITY HAS TO TAKE NOTICE
18 OF, AND THAT'S PUBLIC PERCEPTION. AND YOU'VE GOT SOMEONE THAT'S
19 IN THE CABINET AND HAS A VERY HIGH POSITION. AND THE PUBLIC IS
20 NOT GOING TO KNOW WHO HE IS. THEY'RE JUST GOING TO SEE WHAT IT
21 IS THAT HE'S WRITTEN. AND WHY IS THAT NOT AN IMPORTANT INTEREST
22 FOR THE CITY TO HAVE SOMEONE AS BEING HELD OUT IN THE BOOK AS
23 THE FIRE CHIEF WHO IS ESPOUSING THESE BELIEFS, AND IT DOESN'T
24 SAY IN THIS BOOK, BUT HE HAS NEVER EVER DONE ANYTHING WRONG IN
25 THE WORKPLACE? THEY JUST SEE THIS ONE PICTURE. WHY ISN'T THAT

1 SOMETHING THE CITY CAN COMBAT BY ITS ACTIONS?

2 MR. THERIOT: WELL, THE TENTH CIRCUIT IN THE FLANAGAN
3 CASE AND BERGER CASE IN THE -- IN THE FOURTH CIRCUIT BOTH SAID
4 THAT FEAR OF PUBLIC REACTION ISN'T ENOUGH TO JUSTIFY A
5 RESTRICTION ON --

6 THE COURT: BUT PROBABILITY OF DISRUPTION IS. SO
7 THERE'S A FINE LINE BETWEEN THOSE TWO.

8 MR. THERIOT: AND THE ONLY FACTS IN THE RECORD ARE
9 THAT AT LEAST THE PEOPLE WHO RESPONDED TO THE MAYOR'S SPEECH
10 THAT WAS CRITICAL OF CHIEF COCHRAN ON THE DAY THAT HE WAS
11 FIRED -- ON THE DATE HE WAS SUSPENDED IN THE FACEBOOK POST WAS
12 80 PERCENT IN FAVOR OF CHIEF COCHRAN. SO THERE'S NO LARGE
13 PUBLIC OUTCRY SAYING, I CAN'T BELIEVE THIS IS WHAT HE SAID. THE
14 ONLY FACTS IN THE RECORD ARE THAT MOST OF THE PEOPLE SAID THAT
15 THEY WERE CONCERNED ABOUT THE MAYOR CRITICIZING HIM AND
16 SUSPENDING HIM WITHOUT PAY. SO ON THIS RECORD THERE'S NO
17 INDICATION THAT THAT WOULD HAPPEN. THE COURTS HAVE HELD THAT
18 THERE'S -- THAT'S NOT ENOUGH. AND EVEN IF YOU TAKE INTO ACCOUNT
19 THE SNIPES CASE THAT THE DEFENDANTS RELY UPON, THAT WAS A
20 SITUATION WHERE THERE IS A LOT OF TENSION IN THE NEIGHBORING
21 COUNTY AROUND THE TRAVON MARTIN CASE WHERE ZIMMERMAN WAS JUST
22 HELD TO BE NOT GUILTY FOR MURDERING HIM AND A POLICE OFFICER
23 WHERE THERE WAS ALWAYS -- ALREADY A PROBLEM WITH THE PUBLIC'S
24 PERCEPTION OF THAT POLICE FORCE, TWEETS OR TEXTS SPECIFICALLY
25 ABOUT THAT. THE CONTEXT HERE IS COMPLETELY OPPOSITE OF THAT.

1 WE HAVE, AS WE'VE INDICATED, A PUBLIC PERCEPTION THAT THE FIRE
2 DEPARTMENT IS RUNNING BETTER THAN IT EVER HAD AND BETTER THAN --
3 MORE THAN JUST EXCEPT 60 OTHER MUNICIPALITIES IN THE COUNTRY.
4 SO THE CONTEXT OF THAT IS NOT ENOUGH TO WEIGH AGAINST --

5 THE COURT: BUT I DON'T BELIEVE THAT THE PUBLIC
6 PERCEPTION WAS THAT KIND OF MONOLITHIC IN ITS PERCEPTION AFTER
7 THIS BECAME PUBLIC. IT DOES SEEM THAT THERE WAS CERTAINLY A LOT
8 OF OUTCRY AGAINST THIS BOOK AT THAT POINT IN TIME. I AGREE WITH
9 YOU BEFORE THIS BECAME PUBLIC, I THINK THAT THE RECORD DOES
10 SUPPORT YOUR FINDING THAT PEOPLE WOULD HAVE NOT EVEN SAID
11 ANYTHING BUT NICE THINGS ABOUT CHIEF COCHRAN. BUT THE CLIMATE,
12 IT'S A LITTLE STRANGE IN THAT -- AND I AGREE WITH YOU IN THE
13 SNIPES CASE THE COMMENTS CAME OUT WHEN THIS CLIMATE WAS ALREADY
14 THERE, BUT IN THIS CASE THE BOOK ALMOST CAUSED MORE OF THAT
15 CLIMATE. AND WHY IS THAT STILL NOT SOMETHING THAT I -- THE BOOK
16 CAUSED THE CLIMATE TO SOME EXTENT, BUT I STILL THINK THAT'S
17 SOMETHING THAT I CAN TAKE INTO CONSIDERATION, THAT IT WAS KIND
18 OF A BIG POLITICAL CLIMATE AT THE TIME, THAT THAT'S SOMETHING
19 THAT CAN BE CONSIDERED EVEN THOUGH THE TIMING IS A LITTLE
20 BACKWARD.

21 MR. THERIOT: YOUR HONOR, YOU CERTAINLY CAN TAKE
22 CONSIDERATION OF IT, BUT I DON'T THINK IT'S ENTITLED TO MUCH
23 WEIGHT FOR A COUPLE REASONS. NUMBER ONE, THE ONLY EVIDENCE IN
24 THE RECORD IS THAT 80 PERCENT OF PEOPLE WHO RESPONDED WERE
25 OPPOSED TO THE MAYOR'S CRITICISM OF THE CHIEF AND DIDN'T --

1 WEREN'T UPSET ABOUT WHAT THE CHIEF SAID. AND IN SNIPES THERE
2 WAS ACTUALLY SPECIFIC TESTIMONY IN THE RECORD SAYING, HEY, IF
3 THEY HAD NOT FIRED HIM, THERE WOULD HAVE BEEN -- THERE WOULD
4 HAVE BEEN A BIG DEAL, THERE WOULD HAVE BEEN A LOT OF DISRUPTION.
5 THERE'S NO TESTIMONY IN THIS RECORD SAYING THAT AT ALL. IT'S
6 JUST SPECULATION ON BEHALF OF THE CITY. AND WE'RE SAYING
7 BECAUSE THAT SPECULATION IS PURE SPECULATION AND NOT BASED UPON
8 ANY RECORD OF FACTS, THAT IT CARRIES VERY LITTLE WEIGHT AT ALL
9 WHEN YOU DO THE WEIGHING ANALYSIS.

10 THE COURT: BUT YOUR 80 PERCENT ASSUMES THAT THERE'S A
11 20 PERCENT, AND A LOT OF THESE LAWS ARE -- AND A LOT OF WHAT WE
12 DO AS A COURT IS TO PROTECT MINORITY RIGHTS AND THOSE THAT DON'T
13 COMPOSE THE GREATER OF THE WHOLE. AND THE FACT THAT THERE WAS
14 POTENTIALLY 20 PERCENT OF THE GOVERNMENT THAT WAS VERY UPSET
15 ABOUT WHAT HAD HAPPENED, WHY IS THAT NOT PART OF KIND OF THE
16 CITY'S BURDEN ON THAT PROBABILITY OF DISRUPTION? BECAUSE THAT'S
17 STILL A LOT OF PEOPLE WHEN YOU TAKE A POPULATION OF A CITY AS
18 LARGE AS ATLANTA.

19 MR. THERIOT: WELL, IT'S 20 PERCENT OF THE E-MAILS
20 THAT THE MAYOR RECEIVED, IS WHAT THAT NUMBER'S BASED UPON. SO
21 HE DIDN'T RECEIVE E-MAILS FROM EVERYBODY IN THE CITY OF ATLANTA.
22 AND EXACTLY WHO THOSE WERE FROM AND WHETHER THEY EVEN -- EVEN
23 FROM ANYBODY FROM ATLANTA OR GEORGIA, AND IT'S UNCLEAR.
24 HOWEVER, THEY HAVEN'T PUT FORTH ANY EVIDENCE IN THE RECORD LIKE
25 YOU HAD IN THE SNIPES CASE INDICATING THAT THERE WAS ACTUAL

1 CONCERN BY THE PUBLIC. THERE WAS JUST SPECULATION THAT THERE
2 MIGHT BE. AND, AS A MATTER OF FACT, IT'S IMPORTANT TO NOTE THAT
3 THE ONLY REAL EVIDENCE THEY HAVE IS THE INVESTIGATIVE REPORT
4 THAT THERE MIGHT BE A PROBLEM. AND AS WE'VE SAID, NOT ONLY IS
5 THAT -- DOES THAT HAVE HEARSAY PROBLEMS, BUT IT'S CONTRADICTORY
6 TO THE SWORN TESTIMONY THAT IS BEFORE THE COURT. THE MAYOR
7 TESTIFIED THAT HE WAS UNAWARE OF ANY SITUATION WHERE CHIEF
8 COCHRAN WAS UNABLE TO CHECK HIS PREJUDICES AT THE DOOR. THE
9 C.O.O., MR. GEISLER, WHO WAS CHIEF COCHRAN'S DIRECT BOSS, SAID
10 THAT HE WASN'T AWARE OF ANY SITUATION WHERE CHIEF COCHRAN'S
11 TRUST, THE TRUST IN CHIEF COCHRAN WAS UNDERMINED. BOTH OF THOSE
12 TESTIFIED TO THOSE -- TO THOSE FACTS IN THEIR DEPOSITION. SO
13 THE PROBLEM IS THE PRIMARY PIECE OF EVIDENCE THAT THEY RELY UPON
14 AS BEING PROBLEMATIC IS SIMPLY NOT RELIABLE. AND THEY HAVEN'T
15 PROVIDED ANY OTHER TESTIMONY OR EVIDENCE OTHER THAN, AS I SAID
16 BEFORE, THE TWO EMPLOYEES OF THE FIRE DEPARTMENT WHO SAID THEY
17 WOULD BE FINE WORKING WITH THE CHIEF.

18 SO ALL IN ALL IT JUST SEEMS TO ME THAT THE WEIGHING THE
19 BALANCES WHEN YOU PUT THE THUMB ON THE SCALE IN FAVOR OF THE
20 CHIEF BECAUSE OF THIS IS A SUBSTANTIAL MATTER OF PUBLIC CONCERN,
21 AND WE HAVE NOT ONLY NO INDICATION OF DISRUPTION, BUT ALSO NO
22 REASONABLE APPREHENSION OF DISRUPTION BASED UPON ANY KIND OF
23 RECORD OF FACTS THAT THE BALANCE SHOULD BE WEIGHED IN FAVOR OF
24 CHIEF COCHRAN ON THE FIRST -- THE FIRST -- THE SECOND FACTOR IN
25 THE -- IN THE PICKERING ANALYSIS.

1 NOW, IT'S -- I THINK THE THIRD FACTOR, THE SUBSTANTIAL
2 ROLE, IS MUCH -- IS OBVIOUSLY MUCH MORE CLEAR, AS YOUR HONOR
3 POINTED OUT. THAT'S A FACTUAL DETERMINATION. BUT IT IS
4 UNDISPUTED THAT THE CONTENTS OF THE BOOK PLAYED A ROLE. IN
5 FACT, THEY CONCEDE THAT IN THEIR BRIEFING, THAT THE CONTENTS OF
6 THE BOOK WERE CONSIDERED. AND THEY DO QUALIFY, BUT THEY SAID,
7 WELL, IT WAS CONSIDERED BECAUSE OF THE TITLE VII IMPLICATIONS.
8 BUT EVEN AFTER THE INVESTIGATION, THE MAYOR SAID IN HIS
9 JANUARY 6TH PRESS CONFERENCE AFTER CHIEF COCHRAN WAS FIRED, HE
10 SAID THAT THE CONTENT OF THE BOOK WAS INFLAMMATORY. HE
11 MENTIONED THE CONTENT OF THE BOOK SEVERAL TIMES.

12 THE COURT: BUT THAT'S NOT THE SAME AS CONCEDING IT'S
13 A SUBSTANTIAL PART. I MEAN, THERE IS A CONCESSION THAT THERE
14 IS -- I MEAN, THAT IT'S NOT MADE IN A VACUUM, BUT I AM CONCERNED
15 THAT THERE IS A QUESTION OF FACT AS TO THE SUBSTANTIAL PART
16 ANALYSIS BECAUSE I DO HAVE SUCH CONTRARY KIND OF POSITIONS HERE
17 THAT WHAT WE WERE REALLY MAD ABOUT IS NOT THE BOOK, IT'S THE
18 FAILURE TO ABIDE BY THE INSTRUCTIONS, IT'S THE FAILURE TO COMPLY
19 WITH THE CITY'S POLICY, IT WAS THE BEHAVIOR THAT OCCURRED AFTER
20 THE SUSPENSION. CERTAINLY HE WAS SUSPENDED WITHOUT PAY, BUT
21 BECAUSE OF THE VIOLATION OF KIND OF THIS MUNICIPAL STATUTE, BUT
22 AT THE SAME TIME THEY WERE SAYING THAT MAYBE IF HE JUST WOULDN'T
23 HAVE GIVEN ALL THOSE PRESS CONFERENCES, HE STILL COULD HAVE HAD
24 A PLACE BACK IN THERE. SO WHY IS THAT NOT A BIG ALL FACTUAL
25 DISPUTE BETWEEN THE PARTIES?

1 MR. THERIOT: WELL, IT CERTAINLY, AT MINIMUM, IS A
2 FACTUAL DISPUTE. WE JUST -- OUR POSITION IS BASED UPON THE
3 UNDISPUTED EVIDENCE THAT THE OTHER SIDE HAS ADMITTED TO. IT'S
4 GOING TO BE VERY DIFFICULT FOR A JURY TO FIND THAT IT DIDN'T
5 PLAY A SUBSTANTIAL ROLE. THE MAYOR SAID FROM THE BEGINNING THAT
6 THE CONTENTS OF THE BOOK DO NOT REFLECT THE VIEWS OF THIS
7 ADMINISTRATION. I PROFOUNDLY DISAGREE WITH THE SENTIMENTS
8 EXPRESSED IN THE PAPERBACK. MATERIAL IN CHIEF COCHRAN'S BOOK IS
9 NOT REPRESENTATIVE OF MY PERSONAL BELIEFS AND INCONSISTENT WITH
10 THE ADMINISTRATION'S WORK.

11 IT WAS CLEAR IN THAT NOVEMBER 24TH FACEBOOK POST THAT IT
12 WAS THE CONTENT THAT WAS THE PRIMARY THING. IT NEVER MENTIONED
13 ACTUALLY FAILURE TO ABIDE BY ANY POLICY, FAILURE TO GET A
14 PERMISSION. AND SO AT LEAST INITIALLY THERE WAS NO INDICATION
15 THAT THOSE OTHER FACTORS WERE EVEN APPLICABLE, AND CERTAINLY
16 THEY COULDN'T HAVE BEEN. SO IT'S CLEAR THAT THE PICKERING
17 ANALYSIS WEIGHS DECIDEDLY IN FAVOR OF CHIEF COCHRAN AND THAT
18 SPEECH PLAYED A SUBSTANTIAL ROLE, ESPECIALLY WHEN THEY SUSPENDED
19 HIM WITHOUT PAY AT THE VERY BEGINNING. AND THE ONLY DIFFERENCE
20 BETWEEN THE TERMINATION WHICH TOOK PLACE AFTER THE 30-DAY
21 SUSPENSION IS THEY SAY, WELL, TRUST WAS UNDERMINED BECAUSE OF
22 THE INVESTIGATIVE REPORT. WE'VE ALREADY SPOKEN ABOUT HOW THE
23 FACT THAT THAT IS UNRELIABLE AND FLIES IN THE FACE OF THE SWORN
24 TESTIMONY AND IS IN AND OF ITSELF -- IS AND OF ITSELF HEARSAY
25 EVIDENCE THAT SHOULDN'T BE COUNTED BY THE COURT.

1 AND, THEN, SECONDLY, THERE IS -- THEY SAY THAT ONE OF THE
2 REASONS WHY THEY DECIDED TO TERMINATE HIM IS BECAUSE HE VIOLATED
3 THE INSTRUCTION THAT HE SHOULDN'T SPEAK AT ALL WHILE HE WAS
4 SUSPENDED. AND, OF COURSE, THIS --

5 THE COURT: WHY IS THE REPORT HEARSAY AND NOT EVIDENCE
6 OF MOTIVE?

7 MR. THERIOT: THE -- BECAUSE IF -- BECAUSE WHAT
8 THEY'RE SAYING IS WHAT -- IT'S AN INDICATION IS (VERBATIM) THAT
9 HE REASONABLY RELIED ON THE REPORT, BUT HE COULDN'T HAVE
10 REASONABLY RELIED ON THE REPORT IF IT WASN'T TRUE. SO THE
11 TRUE -- SO THE REPORT IS DEFINITELY SUBMITTED FOR THE TRUTH, AND
12 IF IT'S SUBMITTED FOR THE TRUTH, THEN IT'S INADMISSIBLE HEARSAY
13 AND THEY SHOULD HAVE PUT ON PEOPLE TO TESTIFY THAT, OH, YEAH, I
14 SAID THAT -- OR I DETERMINED THAT MY TRUST IS ERODED IN THAT
15 THERE IS GENERAL -- THEY CAN'T JUST MAKE THESE VAGUE ALLEGATIONS
16 AND HAVE THAT SUFFICIENT TO OUTWEIGH --

17 THE COURT: BUT IF YOU'RE LOOKING AT WHY PEOPLE DO A
18 CERTAIN THING, WHY CAN'T THEY -- I MEAN, THERE'S AN EXCEPTION
19 FOR THE HEARSAY RULE BASED ON THINGS THAT AREN'T USED FOR THE
20 TRUTH OF THE MATTER BUT TO EXPLAIN ACTIONS AND MOTIVES --

21 MR. THERIOT: CERTAINLY.

22 THE COURT: -- AND REASON BEHIND IT. IT SEEMS LIKE
23 THAT WOULD FIT WITHIN THAT PARTICULAR EXCEPTION.

24 MR. THERIOT: I DON'T THINK IT DOES BECAUSE IF IT'S --
25 IF IT WASN'T TRUE AND IT GOES AGAINST WHAT THE MAYOR TESTIFIED,

1 THAT HE WASN'T AWARE OF ANY SITUATION AND THE C.O.O. WASN'T
2 AWARE OF ANY SITUATION --

3 THE COURT: I CAN SEE THAT FOR THE SUSPENSION, BUT
4 WHEN MAYOR REED MADE THE FINAL DECISION TO FIRE CHIEF COCHRAN,
5 WHY WASN'T HE ENTITLED TO RELY ON THAT TITLE VII STUDY AS PART
6 OF NOTICE AND HIS PART OF THAT? WHY WOULD THAT BE HEARSAY AS TO
7 MAYOR REED FOR THAT FINAL DECISION?

8 MR. THERIOT: WELL, IT'S HEARSAY IN THIS COURT, THAT'S
9 FOR SURE. AND --

10 THE COURT: I KNOW, BUT IF I ANALYZE IT IN TERMS OF
11 MAYOR REED AND HIS DECISION TO FIRE CHIEF COCHRAN AFTER THE
12 SUSPENSION, AND HE'S SAYING ONE OF THE THINGS I RELIED ON WAS
13 THIS STUDY THAT OTHERS -- AS A WAY TO EXPLAIN WHY HE MADE THE
14 DECISION, THAT TO ME SEEMS LIKE AN EXCEPTION TO THE HEARSAY RULE
15 BECAUSE HE'S NOT SAYING, AND EVERYTHING IN THAT'S TRUE, HE'S
16 SAYING, WELL, AT THE TIME THAT'S WHAT I HAD IN FRONT OF ME. AND
17 CERTAINLY YOU CAN MAKE YOUR ARGUMENTS, BUT I DON'T SEE WHY
18 THAT'S HEARSAY IN THAT CONTEXT.

19 MR. THERIOT: WELL, I THINK THAT IT HAD TO BE TRUE IN
20 ORDER FOR HIM TO REASONABLY RELY UPON IT. BUT EVEN IF IT'S NOT
21 HEARSAY, I THINK THE FACT THAT IT -- THAT IT'S -- IT FLIES IN
22 THE FACE OF THE SWORN TESTIMONY, WHICH IS MUCH BETTER EVIDENCE
23 OF WHAT WAS GOING ON, THEN IT SHOULD BE GIVEN VERY LITTLE WEIGHT
24 AND -- AND IS AN INDICATION THAT IT IS ONE MORE OF THE SHIFTING
25 RATIONALES AND THE MULTIPLE RATIONALES THAT THEY'VE ARTICULATED

1 AS A BASIS FOR CHIEF COCHRAN'S TERMINATION. AND IN THE BALLARD
2 CASE IT SAYS THAT MULTIPLE REASONS AND SHIFTING REASONS IS AN
3 INDICATION IN AND OF ITSELF THAT THERE IS A PRETEXT, AND THAT
4 THIS WAS A PRETEXT AND THAT THE REAL REASON WHY HE WAS
5 TERMINATED WAS BECAUSE OF THE CONTENTS OF HIS BOOK AND HIS
6 BELIEFS AND NOT BECAUSE OF THIS REPORT. AND THE SAME THING
7 APPLIES TO THE ALLEGATION THAT ONE OF THE REASONS WHY HE WAS
8 TERMINATED WAS BECAUSE THAT HE DISOBEYED THE INSTRUCTION NOT TO
9 SPEAK WHILE HE WAS ON -- WHILE HE WAS ON SUSPENSION. AND
10 THERE'S A DISPUTE OF FACT. THERE'S CERTAINLY A MATERIAL DISPUTE
11 OF FACT ABOUT THAT. CHIEF COCHRAN SWEARS THAT, NO, THEY TOLD ME
12 NOT TO TALK TO THE PRESS, AND I DIDN'T. AND THEY SAY THAT, NO,
13 WE TOLD YOU NOT TO MAKE ANY PUBLIC COMMENTS, WHICH IS -- YOU
14 KNOW, CERTAINLY THAT'S SOMETHING THAT DOESN'T SEEM TO BE ALL
15 THAT CREDIBLE GIVEN THE FACT THAT THEY USUALLY DON'T MAKE PUBLIC
16 COMMENTS. AND THEY SPOKE AT LENGTH NOT ONLY ON THE FACEBOOK
17 POST, BUT TO THE ATLANTA JOURNAL CONSTITUTION -- "THEY" BEING
18 THE MAYOR AND HIS STAFF -- AND THE NEW YORK TIMES AND NATIONAL
19 PUBLIC RADIO. SO THAT IS A VERY WEAK REASON AND CERTAINLY AN
20 INDICATION OF PRETEXT FOR THE TERMINATION, AND WE DON'T THINK
21 THAT THAT WAS A -- SURVIVES THE BUT-FOR ANALYSIS WHICH IS PART
22 FOUR OF THE PICKERING -- THE PICKERING TEST. AND, OF COURSE,
23 THAT'S THE PLAINTIFF'S BURDEN. AT THAT POINT THE BURDEN OF
24 PROOF SHIFTS TO THE PLAINTIFF. AND BASED UPON THE UNDISPUTED
25 FACTS WE DON'T THINK THAT THEY'VE SATISFIED THAT.

1 IF I MAY, YOUR HONOR, I'D LIKE TO MOVE TO PRIOR RESTRAINT
2 UNLESS YOU HAVE SOME MORE QUESTIONS ABOUT THAT.

3 THE COURT: NO. I THINK THAT'S GOOD FOR NOW. THANK
4 YOU.

5 MR. THERIOT: WELL, WHY DON'T I DO THIS. WHY DON'T I
6 JUST -- BECAUSE OF -- JUST BECAUSE THERE WAS THE MOST RECENT
7 THING THAT THE DEFENDANTS TALKED ABOUT, I'LL START WITH THE
8 VIEWPOINT DISCRIMINATION.

9 THE COURT: OKAY.

10 MR. THERIOT: IF THAT'S OKAY WITH YOU.

11 THE COURT: THAT'S FINE.

12 MR. THERIOT: ALL RIGHT. SO THE FIRST -- IN RESPONSE
13 TO THE COURT'S QUESTION ABOUT WHETHER VIEWPOINT DISCRIMINATION
14 ANALYSIS IS SUBSUMED IN THE PICKERING ANALYSIS, WE DID SOME
15 LOOKING INTO IT AND DON'T THINK THAT IT IS. AND, AS A MATTER OF
16 FACT, WE -- THE ELEVENTH CIRCUIT IN COOK VS. GWINNETT COUNTY
17 ACTUALLY ANALYZED THE VIEWPOINT DISCRIMINATION CLAIM SEPARATELY
18 THAN THE PICKERING ANALYSIS. SO WE'VE GOT AN ELEVENTH CIRCUIT
19 OPINION DIRECTLY ON POINT. THE TUCKER CASE, WHICH WE ALSO --
20 WHICH WE ALSO CITE, ALSO ANALYZE VIEWPOINT DISCRIMINATION
21 SEPARATELY FROM THE PICKERING ANALYSIS BECAUSE THERE WAS AN
22 INDICATION THAT THERE -- THE EMPLOYERS IN BOTH OF THOSE CASES
23 HAD ALLOWED SPEECH THAT WAS UNRELATED TO WORK, BUT THEY
24 RESTRICTED IT BASED UPON THE VIEWPOINT IN CERTAIN CIRCUMSTANCES.
25 AND THE COURT IN THE ELEVENTH CIRCUIT AND IN THE NINTH CIRCUIT,

1 THEREFORE, MADE TWO DIFFERENT ANALYSES AND SAID THAT, NO, WE
2 CAN -- WE ANALYZE THE VIEWPOINT DISCRIMINATION DIFFERENTLY. AS
3 A MATTER OF FACT, IN TUCKER THEY GRANTED SUMMARY JUDGMENT ON
4 THAT CLAIM.

5 THE COURT: I JUST HAVE A HARD TIME FIGURING OUT HOW
6 TO RECONCILE THE IDEA THAT IF I FIND UNDER PICKERING THAT THE
7 SPEECH IS NOT CONSTITUTIONALLY PROTECTED, HOW I CAN ALSO THEN
8 FIND THAT THEY HAVE A CLAIM FOR VIEWPOINT DISCRIMINATION ON WHAT
9 IS NOT CONSTITUTIONALLY PROTECTED SPEECH.

10 MR. THERIOT: WELL, THAT'S BECAUSE THOSE STATEMENTS IN
11 MOSS AND BATTLE (VERBATIM) THAT THE COURT REFERENCED, THEY'RE
12 NOT ANALYZING WHETHER THAT'S THE ONLY TEST TO EVALUATE ALL FIRST
13 AMENDMENT CLAIMS. I THINK IT'S CLEAR THAT THAT IS THE TEST,
14 PICKERING IS THE TEST TO ANALYZE RETALIATORY DISCHARGE CLAIMS
15 BASED UPON SPEECH. THERE'S NO QUESTION ABOUT THAT. THE
16 QUESTION IS WHETHER THAT ALSO APPLIES TO OTHER TYPES OF SPEECH,
17 LIKE, RELIGIOUS SPEECH AND FREE EXERCISE. AND IT'S CLEAR THAT
18 IT DOESN'T APPLY TO THOSE TYPES OF FIRST AMENDMENT CLAIMS. AND
19 SO TO SAY THAT IT SUBSUMES ALL FREE SPEECH IS CONTRARY TO WHAT
20 THE ELEVENTH CIRCUIT SAID.

21 THE COURT: NO, I'M NOT SAYING IT SUBSUMES ALL FREE
22 SPEECH, BUT WHAT WE HAVE IS A CASE THAT DEALS SPECIFICALLY WITH
23 SPEECH IN THE WORKPLACE FOR WHICH THE INJURY THAT OCCURRED IS
24 THE FIRING. AND SO WHAT WE'RE GOING TO DO IS ANALYZE THE SAME
25 THING, WHICH IS THE SPEECH IN THE WORKPLACE THAT RESULTED IN THE

1 FIRING. AND WE'RE ANALYZING THE EXACT SAME THING THAT PICKERING
2 TOLD US WAS VERY SPECIFIC TO THE WORKPLACE. WE'RE ANALYZING IT
3 SEPARATELY AND WE'RE ANALYZING IT USING CASES THAT DON'T -- OR
4 AT LEAST THE ONES I SAW IN YOUR BRIEF, DID NOT DEAL WITH THE
5 WORKPLACE. THEY WERE ALL CASES OUTSIDE THE WORKPLACE WHERE THE
6 SUPREME COURT HAS ALREADY STATED THAT YOU DON'T HAVE THE SAME
7 FIRST AMENDMENT RIGHTS WHEN YOU'RE IN A GOVERNMENT -- WHERE YOU
8 ARE A GOVERNMENT EMPLOYEE, YOU HAVE DIFFERENT RIGHTS. SO BY
9 USING THESE CASES OUTSIDE THE WORKPLACE WHEN WE'VE ALREADY BEEN
10 TOLD YOUR RIGHTS ARE DIFFERENT IN THE WORKPLACE, THAT'S
11 TROUBLING TO ME BECAUSE I DON'T THINK THAT THAT'S CONSISTENT
12 WITH WHAT THE SUPREME COURT HAS TOLD ME TO DO.

13 MR. THERIOT: AND I UNDERSTAND THAT, YOUR HONOR, AND I
14 THINK THE ELEVENTH CIRCUIT'S DECISION IN COOK VS. GWINNETT
15 COUNTY AND THE NINTH CIRCUIT'S DECISION IN TUCKER VS. THE
16 EDUCATION DEPARTMENT OF CALIFORNIA -- BOTH OF WHICH ARE CITED IN
17 OUR PAPERS AND NOT IN THE VIEWPOINT SECTION, BUT THEY ARE CITED
18 IN OUR PAPERS -- DEFINITELY INDICATE THAT YOU CAN CONSIDER THEM
19 DIFFERENTLY. AND I THINK THAT THAT MAKES SENSE IN VIEW OF THE
20 SUPREME COURT JURISPRUDENCE. PICKERING WAS DECIDED IN 1968,
21 CONNICK IN 1972, AND RANKIN IN 1987. AND THE SUPREME COURT
22 REALLY DIDN'T DEVELOP ITS VIEWPOINT DISCRIMINATION ANALYSIS
23 UNTIL 1992, FIRST, IN THE R.A.V. VS. CITY OF ST. PAUL. WE
24 HAVEN'T CITED THAT, YOUR HONOR, BUT --

25 THE COURT: WELL, LET'S TAKE THE SNIPES CASE THAT THE

1 CITY OF ATLANTA WAS TALKING ABOUT WHERE YOU HAD SOMEONE THAT WAS
2 COMMENTING ON THE TRAVON MARTIN CASE ON FACEBOOK, AND THE
3 ELEVENTH CIRCUIT SAID THAT IT WAS OKAY TO FIRE HIM UNDER THOSE
4 SAME CIRCUMSTANCES. YOU'RE SAYING THAT SOMEONE THAT MADE THAT
5 KIND OF COMMENT COULD STILL HAVE A VIEWPOINT DISCRIMINATION CASE
6 BECAUSE IF HE WOULD HAVE SAID ANOTHER POINT OF VIEW ON THAT TO
7 THAT STORY HE WOULDN'T HAVE NECESSARILY BEEN FIRED?

8 MR. THERIOT: WHAT I'M SAYING IS THAT THAT'S A
9 DIFFERENT ANALYSIS THAT YOU HAVE TO UNDERGO IF IT WAS IN FACT --
10 THERE WAS NO VIEWPOINT DISCRIMINATION CLAIM IN THAT CASE, BUT IF
11 THERE HAD BEEN, THEN WHAT THE COURT WOULD HAVE TO DO WAS APPLY
12 THE VIEWPOINT DISCRIMINATION ANALYSIS, WHICH IS BASICALLY
13 COMPELLING INTEREST.

14 THE COURT: BUT COOK IS A FORM ANALYSIS, SO COOK HAD
15 TO DO WITH SOMEONE THAT WAS PUTTING FLIERS IN PEOPLE'S
16 PAYCHECKS, AND IT WAS A FORM ANALYSIS TYPE OF CASE, WHICH SEEMS
17 TO ME VERY DIFFERENT THAN WHAT WE HAVE HERE WHICH IS JUST THE
18 SAME -- WE HAVE THE SPEECH FOR THE RETALIATION, THE SPEECH FROM
19 THE VIEWPOINT DISCRIMINATION, AND WE'RE NOT DOING THE SAME KIND
20 OF FORM ANALYSIS THAT DIFFERS BETWEEN THE WAY THE INFORMATION
21 IS. WHY DOES THIS FORUM ANALYSIS CASE WORK FOR WHAT YOU'RE
22 SAYING?

23 MR. THERIOT: IT WORKS FOR SEVERAL REASONS. NUMBER
24 ONE, THERE DOESN'T HAVE TO BE ACTUALLY EVEN A PHYSICAL LOCUS IN
25 ORDER FOR FORUM ANALYSIS TO TAKE PLACE. AS A MATTER OF FACT,

1 THE SUPREME COURT SAID IN ROSENBERGER THAT A FORUM CAN BE A
2 FORUM IN A METAPHYSICAL SENSE. AND, THERE, IT WAS ACCESS TO
3 MONEY. THERE WASN'T ANY KIND OF LAND, ANY KIND OF PROPERTY THAT
4 IT WAS BEING GIVEN ACCESS TO. AND IN TUCKER THE FORUM WAS YOU
5 CAN'T DISPLAY RELIGIOUS ITEMS OUTSIDE OF YOUR WORKPLACE. THE
6 COURT SAID, WELL, OTHER PEOPLE WERE ALLOWED TO DISPLAY RELIGIOUS
7 ITEMS OUTSIDE THEIR WORKPLACE, THEREFORE, WE CAN ENGAGE IN
8 VIEWPOINT ANALYSIS BECAUSE THAT IN ESSENCE IS A FORUM FOR THE
9 PURPOSES OF THOSE WORKERS. WE HAVE AN INDICATION --

10 THE COURT: BUT THAT WASN'T ALSO A RETALIATION CASE.

11 MR. THERIOT: YES, IT WAS.

12 THE COURT: WELL, DO YOU HAVE ANY CASES THAT ARE
13 RETALIATION AND VIEWPOINT DISCRIMINATION THAT AREN'T FORUM
14 ANALYSIS CASES?

15 MR. THERIOT: NO. WELL, TUCKER. TUCKER DIDN'T ENTER
16 IN -- THEY DIDN'T SAY THERE WAS A FORUM. WHAT I'M SAYING IS
17 THEY DON'T HAVE TO DETERMINE THAT THERE IS A FORUM, SO TUCKER IS
18 ONE. AND THE POINT THAT I'M MAKING IS THE FORUM DOESN'T HAVE TO
19 BE A TRADITIONAL FORUM. IT CAN BE A FORUM IN AN UNTRADITIONAL
20 SENSE. AND IF THEY ALLOW THE SPEECH -- AND THAT'S EXACTLY WHAT
21 HAPPENED IN TUCKER. AND AS A MATTER OF FACT, IN COOK VS.
22 GWINNETT COUNTY THEY SAID THE SAME THING, SPEECH UNRELATED TO
23 WORK --

24 THE COURT: WELL, WHAT CONCERNS ME, LET'S SAY YOU HAVE
25 A SITUATION WHERE YOU HAVE A NEO-NAZI WHO IS FIRED AND THEY ARE

1 FIRED BECAUSE THEIR COMMENTARY DISRUPTS THE WORKPLACE. AND WHEN
2 THEY BALANCE IT, THEY SAY, OKAY, THE INTEREST IN BEING THESE
3 NEO-NAZI VIEWS VERSUS THE DISRUPTION, IT'S CLEAR YOU CAN FIRE
4 THIS PERSON. OKAY. AND THEY CLEARLY DID FIRE THIS PERSON
5 BECAUSE OF THEIR VIEWS. THERE'S NO DOUBT ABOUT THAT. THEN I
6 THINK THAT PERSON WOULD HAVE A VIEWPOINT DISCRIMINATION CASE IF
7 WE WERE NOT USING THE TYPICAL LAW THAT DEALS WITH PEOPLE THAT
8 ARE EMPLOYEES BECAUSE, YES, YOU CAN GO ON A SIDEWALK AND SAY
9 ANYTHING YOU WANT TO ABOUT YOUR NEO-NAZI BELIEFS, AND THE
10 GOVERNMENT CAN'T NECESSARILY DO ANYTHING ABOUT IT. BUT THERE'S
11 BEEN A RECOGNITION THAT THAT TYPE OF BEHAVIOR IN A WORKPLACE IS
12 VERY DIFFERENT. AND WHAT I SEE THAT YOU'RE TELLING ME THAT I
13 SHOULD DO IS SAY, THROW AWAY THE ANALYSIS THAT DEALS WITH WHAT
14 HAPPENS IN A WORKPLACE AND GO TO KIND OF THE SIDEWALK ANALYSIS,
15 WHEN THIS IS CLEARLY NOT A SIDEWALK. THIS IS SOMEONE THAT WORKS
16 FOR THE GOVERNMENT. AND THAT'S WHY THE FORUM PIECE IS GIVING ME
17 SOME PAUSE BECAUSE I THINK THAT, YES, I UNDERSTAND THAT IF
18 SOMEONE IS A GOVERNMENT EMPLOYEE, MAYBE THEY CAN STILL GO ON THE
19 SIDEWALK AND DO SOMETHING ON THEIR OWN TIME AND MAYBE THAT'S
20 OKAY, BUT THAT'S NOT THE SAME AS SAYING THAT THESE THINGS
21 HAPPENING AT WORK IS OKAY.

22 MR. THERIOT: WELL, I THINK, FIRST OF ALL, IT'S
23 IMPORTANT TO NOTE, YOUR HONOR, THAT THE VIEWPOINT DISCRIMINATION
24 ANALYSIS ISN'T JUST LIMITED TO A FORUM OR A CONVENTIONAL FORUM
25 AS IN ROSENBERGER. BUT AS THE SUPREME COURT --

1 THE COURT: I KNOW THAT.

2 MR. THERIOT: YEAH.

3 THE COURT: I'M JUST SAYING THAT WHEN YOU'RE DEALING
4 WITH AN EMPLOYEE, I THINK IT'S DIFFERENT.

5 MR. THERIOT: WELL, IN R.A.V. VS. ST. PAUL, THERE
6 WAS -- IT SAID THAT EVEN WITH REGARD TO SPEECH THAT IS EVEN LESS
7 PROTECTED THAN EMPLOYEE SPEECH, AND, THAT IS, SPEECH THAT IS
8 FIGHTING WORDS, THAT YOU CAN'T ENGAGE IN VIEWPOINT
9 DISCRIMINATION IF YOU'RE THE GOVERNMENT. SO THE FACT --

10 THE COURT: BUT YOU CAN USE FIGHTING -- BUT HERE'S THE
11 THING, IS IF YOU'RE USING FIGHTING WORDS AT WORK, YOU'RE SAYING
12 THAT YOU COULD STILL HAVE A VIEWPOINT DISCRIMINATION CLAIM FOR
13 FIGHTING WORDS AT WORK?

14 MR. THERIOT: YEAH, AND WHAT I'M SAYING IS THAT
15 DOESN'T MEAN THAT THE -- THAT THE GOVERNMENT CANNOT RESTRICT
16 THAT. THEY JUST HAVE TO SHOW A COMPELLING INTEREST IN DOING SO.
17 IT'S A DIFFERENT STANDARD THAN PICKERING WHEN YOU ENGAGE IN
18 VIEWPOINT DISCRIMINATION. IT'S ONE THING TO PUNISH AN EMPLOYEE
19 FOR ENGAGING IN SPEECH BASED UPON CONTENT, BUT WHAT THE SUPREME
20 COURT HAS SAID SINCE PICKERING IS THAT THERE'S A PRESUMPTION
21 THAT VIEWPOINT DISCRIMINATION IS UNLAWFUL. THAT'S A -- THAT'S A
22 PARTICULARLY EGREGIOUS FORUM OF CONTENT BASED DISCRIMINATION,
23 AND SO IT ADDS ANOTHER LAYER OF ANALYSIS, AND THAT'S WHY WE HAVE
24 A SEPARATE CLAIM FOR VIEWPOINT DISCRIMINATION IN THIS CASE.
25 THAT'S WHAT THE CASE -- THAT'S WHAT THE CASES SAY IN OUR VIEW

1 AND IT'S WHAT THE ELEVENTH CIRCUIT INDICATED IN THE ELEVENTH
2 CIRCUIT -- IN THE COOK COUNTY VS. CASE (VERBATIM), WHAT THE
3 TUCKER CASE INDICATED IN THE NINTH CIRCUIT, AND I THINK WHAT THE
4 COURT HAD SAID -- AND, OF COURSE, MOST RECENTLY THAT -- IN THE
5 METALL VS. TAAM (PHONETIC) CASE, THAT VIEWPOINT DISCRIMINATION,
6 EVEN WHEN YOU'RE TALKING ABOUT --

7 THE COURT: I'VE ACTUALLY JUST BEEN TOLD THAT TUCKER
8 IS A FORUM CASE BECAUSE IT HAS TO DO WITH THE INTERIOR, WHAT
9 PEOPLE ARE PUTTING ON THE WALLS IN THEIR OFFICE.

10 MR. THERIOT: THE COURT DIDN'T CALL IT A FORUM CASE.

11 THE COURT: OKAY. BUT IT IS A FORUM CASE.

12 MR. THERIOT: WELL, I THINK IT'S IN A -- A FORUM CASE
13 JUST IN THE SENSE THAT THIS IS A FORUM CASE AND THAT, FOR
14 INSTANCE, THERE'S A BOOK CLUB THAT WAS ALLOWED. SO BOOKS WERE
15 ALLOWED TO BE DISCUSSED AT THE WORKPLACE. AND IF -- AND IF A
16 FORUM IS VERY -- IT DOESN'T HAVE TO BE A CONVENTIONAL FORUM,
17 THEN CERTAINLY THIS CAN BE A FORUM FOR SPEECH TO TALK ABOUT
18 UNRELATED THINGS. AND AS A MATTER OF FACT, THAT'S WHAT THE
19 ELEVENTH CIRCUIT SAID IN THE COOK CASE, THAT FORUM CAN BE A
20 SITUATION WHERE YOU'RE JUST ALLOWED TO TALK -- NOW, IT WAS
21 ALLOWED TO TALK ABOUT THE NON-WORK RELATED STUFF. THAT WAS AN
22 IMPORTANT FACTOR IN THE COOK CASE. NOW, I -- IT IS TRUE THAT
23 ONE -- THE SPECIFIC THING THEY MENTIONED WAS NOT ALLOWED TO PUT
24 PRO UNION STUFF INTO THE EMPLOYEE'S ENVELOPES, BUT THE
25 PRINCIPLE'S THE SAME. SO I THINK IT'S CLEAR, THOUGH, THAT

1 THERE'S NO CASE THAT SAYS THAT PICKERING SUBSUMES THE -- A
2 VIEWPOINT DISCRIMINATION CLAIM. THERE ARE NOT ANY OUT THERE.
3 AND THERE ARE DEFINITELY TWO CASES THAT WE'RE AWARE OF THAT
4 INDICATES THAT IT DOES NOT. AND IF YOU READ THAT IN VIEW OF THE
5 COURT'S JURISPRUDENCE FROM PICKERING THROUGH LAMB'S CHAPEL AND
6 ROSENBERGER, I THINK THERE'S A GOOD INDICATION THAT A VIEWPOINT
7 ANALYSIS HAS TO BE ANALYZED SEPARATELY. THAT'S OUR POSITION.
8 REGARDING -- AND JUST TO TIE THAT UP, AND THERE'S CLEARLY
9 INDICATION OF VIEWPOINT DISCRIMINATION HERE. THE DEFENDANTS IN
10 THEIR BRIEF AT PAGE 22 HAVE CONCEDED THAT.

11 THE COURT: YOU AGREE THAT YOU HAVE TO HAVE A
12 COMPARATOR TO PROVE YOUR CASE OF VIEWPOINT DISCRIMINATION AS THE
13 CITY SAYS?

14 MR. THERIOT: WE DON'T BECAUSE NONE OF THE CASES HOLD
15 THAT YOU HAVE TO. THEY USE HYPOTHETICAL COMPARATORS ALL THE
16 TIME. AS A MATTER OF FACT, IN TUCKER THEY USE HYPOTHETICAL
17 ABOUT A -- A HYPOTHETICAL SPEAKER WITH A HYPOTHETICAL
18 COMPARATOR. THEY SAID THAT IF SOMEONE -- AND THE PLAINTIFF IN
19 THIS CASE IN TUCKER DIDN'T SAY -- IF SOMEONE WERE TO EXPRESS A
20 VIEW ANTITHETICAL TO SAME-SEX MARRIAGE BASED UPON RELIGION,
21 THEN -- AND THEN SOMEONE ELSE EXPRESSED A VIEW IN FAVOR OF
22 SAME-SEX MARRIAGE THAT WASN'T BASED UPON RELIGION, THAT WOULD BE
23 VIEWPOINT DISCRIMINATION EVEN THOUGH THOSE -- NEITHER OF THOSE
24 INSTANCES ACTUALLY OCCURRED IN THE WORKPLACE. SO, NO, YOU DON'T
25 HAVE TO. YOU CAN USE HYPOTHETICAL COMPARATORS.

1 THE COURT: SO IF I WAS DOING THIS IN THE CONTEXT OF
2 KIND OF THE NAZI SPEECH THAT I HAD, YOU'RE SAYING THAT IF YOU
3 WORK FOR THE CITY AND THEY FIRED YOU FOR MAKING NEO-NAZI
4 SPEECHES AT WORK, THAT WOULD BE VIEWPOINT DISCRIMINATION IF YOU
5 DIDN'T FIRE SOMEBODY ELSE FOR SAYING ANTI NEO-NAZI SPEECHES AT
6 WORK?

7 MR. THERIOT: YES, YES, IF THAT WAS BASED UPON
8 VIEWPOINT, ABSOLUTELY. NOW, I'M SAYING IT'S VERY LIKELY THAT
9 THE EMPLOYER WOULD HAVE A COMPELLING INTEREST IN DOING SO, SO
10 THEY WOULD NOT RUN AFOUL OF THE FIRST AMENDMENT IN DOING SO.

11 THE COURT: WHERE DOES THE COMPELLING INTEREST PIECE
12 TO YOUR VIEWPOINT DISCRIMINATION, WHERE DOES THAT FIT IN THE
13 LEGAL STANDARD?

14 MR. THERIOT: ONCE YOU'VE ESTABLISHED THAT THERE'S
15 VIEWPOINT DISCRIMINATION, THEN THE -- IT'S UP TO THE CITY TO
16 ESTABLISH A NARROWLY TAILORED COMPELLING INTEREST IN JUSTIFYING
17 THAT. AND THEY -- IT'S PRESUMED UNCONSTITUTIONAL. HOWEVER,
18 THAT DOESN'T MEAN THAT IT IS. AND I THINK IN YOUR PARTICULAR
19 HYPOTHETICAL IT CLEARLY -- I MEAN, ENGAGING IN HYPOTHETICAL --
20 IN ENGAGING IN FIGHTING WORDS AND -- THEN DEFINITELY THERE WOULD
21 BE A COMPELLING INTEREST IN JUSTIFYING THAT.

22 THE COURT: WELL, I GUESS THAT GOES BACK TO THIS ISSUE
23 OF SINCE I GUESS IT'S A MATTER OF LAW AT THIS STAGE. SO YOU'VE
24 GOT WHAT YOU HAVE ON ONE SIDE, SOMEONE SAYING THAT THIS IS HATE
25 SPEECH THAT DOES HAVE THIS COMPELLING INTEREST, HOW DOES THE

1 RELIGION ASPECT KIND OF CHANGE THAT ANALYSIS? BECAUSE CERTAINLY
2 I UNDERSTAND YOUR CLIENT'S POSITION THAT IT'S NOT HATE SPEECH,
3 BUT IT'S RELIGION, BUT THERE IS ANOTHER SIDE TO THIS THAT DOES
4 CLARIFY THIS AND CATEGORIZE IT AS HATE SPEECH AS THE CITY HAS
5 BEEN DOING. SO WHEN I'M LOOKING AT THIS NARROWLY TAILORING,
6 KIND OF EXPLAIN WHY I SHOULD GO IN YOUR FAVOR ON THAT WITH THIS
7 IDEA THAT SOME PEOPLE WOULD PERCEIVE THIS AS BEING HATE SPEECH,
8 EVEN THOUGH YOU DON'T AGREE THAT IT IS, SOME PEOPLE THINK THAT
9 IT IS.

10 MR. THERIOT: RIGHT. AND IF YOU'RE ASKING WHETHER
11 HATE SPEECH IS PROTECTED OR NOT?

12 THE COURT: NO. I'M JUST ASKING YOU. YOU'VE GOT
13 PEOPLE ARE CALLING WHAT YOUR CLIENT DID HATE SPEECH AND
14 CLASSIFYING IT IN THAT CATEGORY. AND CERTAINLY THERE ARE PEOPLE
15 THAT DO BELIEVE THAT IT IS HATE SPEECH. AND YOU'RE SAYING THAT,
16 IN THE NEO-NAZI EXAMPLE, THE GOVERNMENT WOULD PROBABLY HAVE A
17 COMPELLING REASON TO STOP THAT BECAUSE I THINK BECAUSE OF THE
18 CONTENT OF THE SPEECH. BUT PEOPLE WOULD CLASSIFY YOUR CLIENT IN
19 THAT SAME BUCKET. AND WHEN I'M DOING THAT ANALYSIS, WHAT DO I
20 DO WITH THE FACT THAT MAYBE 20 PERCENT OF OUR POPULATION THINKS
21 OF WHAT YOUR CLIENT SAID AS HATE SPEECH?

22 MR. THERIOT: WELL, BEING OFFENDED IS NOT ENOUGH TO
23 JUSTIFY A VIEWPOINT DISCRIMINATION IN THE GOVERNMENT'S EYES.

24 THE COURT: RIGHT. AND I'M NOT SAYING THAT IT IS.
25 I'M JUST SAYING THAT WHEN YOU DO THAT ANALYSIS, FREQUENTLY HATE

1 SPEECH AND DEROGATORY RACIAL SPEECH IS THE KIND OF SPEECH THAT
2 IS NOT FOUND TO MEET THAT STANDARD. AND THERE ARE PEOPLE THAT
3 CLASSIFY WHAT YOUR CLIENT DID AS THE SAME THING AS SAYING
4 DEROGATORY RACIAL COMMENTS, SAYING HATE SPEECH. THEY CLASSIFY
5 IT LIKE THAT. AND WE'VE GOT A LARGE PORTION OF THE POPULATION
6 THAT'S NOT JUST OFFENDED BY IT, THEY HAVE IT IN THE SAME BUCKET
7 AS KIND OF RACIST HATE-FILLED TYPE RHETORIC. AND WHEN I GO DOWN
8 THAT ANALYSIS, TALK ME THROUGH WHAT YOUR POSITION IS TO THAT
9 PIECE.

10 MR. THERIOT: WELL, THE CASES THAT I'M AWARE OF THAT
11 ANALYZE THAT KIND OF SPEECH IN THE WORKPLACE, THEY WERE
12 ADVOCATING -- AND IT WAS JUSTIFIED -- THEY WERE ADVOCATING
13 VIOLENCE OR -- OR, LIKE, IN THE MCMULLEN CASE THAT THE
14 DEFENDANTS CITE, THAT THEY WERE ADVOCATING -- ASSOCIATING WITH A
15 VIOLENT GROUP THAT WAS ADVOCATING ILLEGAL BEHAVIOR AND -- AND
16 THAT'S NOT WHAT THIS CASE IS. AND THERE IS NO INDICATION THAT
17 HIS BOOK ADVOCATES THAT AT ALL. AND, AS A MATTER OF FACT -- SO
18 WHAT WE'RE TALKING ABOUT IS OFFENSE. AND MERE OFFENSE IS NOT
19 ENOUGH TO JUSTIFY RESTRICTING SPEECH BASED UPON VIEWPOINT.
20 THAT'S CLEAR MOST RECENTLY IN METALL VS. TAAM (PHONETIC) WHAT
21 THE SUPREME COURT HELD. EVEN RACIST SPEECH THAT'S OFFENSIVE IS
22 NOT -- IT CANNOT BE -- CANNOT JUSTIFY VIEWPOINT DISCRIMINATION.
23 WHAT THERE HAS TO BE IS AN INDICATION --

24 THE COURT: DO YOU HAVE A CASE THAT SAYS THAT RACIST
25 SPEECH IN A WORKPLACE CAN BE PROTECTED UNDER VIEWPOINT

1 EXPRESSION?

2 MR. THERIOT: NOT UNDER VIEWPOINT EXPRESSION, NO, YOUR
3 HONOR, BUT IN THE BERGER CASE THERE IS AN INDICATION THAT A
4 GUY -- A POLICE OFFICER THAT PERFORMED IN BLACK FACE WASN'T IN
5 THE WORKPLACE, BUT HE DID PERFORM IN BLACK (VERBATIM), AND THEY
6 WERE SAYING THAT IT AFFECTED THE WORKPLACE AND THEY SAID THAT
7 THAT DID NOT RESULT IN SUBSTANTIAL DISRUPTION. SO THERE IS
8 SOME -- THAT, BUT NOT IN THE VIEWPOINT CONTEXT, YOUR HONOR.

9 THE COURT: OKAY.

10 MR. THERIOT: THERE'S NOT A LOT OF DEVELOPMENT OF THAT
11 CASE LAW AT ALL, BUT I DO BELIEVE THE CLAIM IS THERE.

12 THE COURT: OKAY. THANK YOU.

13 MR. THERIOT: AND JUST TO BE CLEAR, THE VIEWPOINT
14 DISCRIMINATION, THERE -- IT'S CLEAR THAT HE WAS DISCRIMINATED
15 BASED UPON VIEWPOINT. AND AS A MATTER OF FACT, MS. YANCY, FOR
16 INSTANCE, ONE EXAMPLE IS SHE SAID HE CAN HAVE A VIEWPOINT. HE
17 JUST HAS TO GET PERMISSION TO SAY IT FIRST. AND THAT LEADS ME
18 TO THE PRIOR RESTRAINT ARGUMENT. AND THE PRIOR RESTRAINT
19 ARGUMENT IS -- IS, I BELIEVE, ON ALL FOURS WITH N.T.E.U. THE --
20 YOU HAVE A SITUATION WHERE YOU HAD -- YOU HAD TO GET PERMISSION
21 IN ORDER TO ENGAGE IN SPEECH FOR PAY. AND IT'S UNDISPUTED THAT
22 THAT'S WHAT 2820 (D) AND 114-730 -- -436 AND 437 DO.

23 THE COURT: DO YOU AGREE THAT THOSE STATUTES APPLY TO
24 YOUR CLIENT?

25 MR. THERIOT: YES, ABSOLUTELY, ABSOLUTELY.

1 THE COURT: OKAY.

2 MR. THERIOT: THAT THEY -- NOW, WE DON'T AGREE THAT --
3 OBVIOUSLY WE THINK THAT, ALTHOUGH THEY'VE SAID THAT THAT'S THE
4 PRIMARY REASON WHY THEY SUSPENDED HIM WITHOUT PAY, AS A MATTER
5 OF FACT, THE ONLY NON-DISCRIMINATORY REASON THAT THEY'VE OFFERED
6 TO DATE FOR SUSPENDING HIM WITHOUT PAY WAS THAT HE DIDN'T GET
7 PERMISSION FIRST. OTHERWISE, IT'S ALL JUST CONTENT BASED. AND
8 WE -- IT'S ALSO THE REASON THAT THEY SAY ONE OF THE PRIMARY
9 REASONS THAT HE WAS TERMINATED. AND SO -- SO WE DISPUTE THAT.
10 WE THINK THAT THE -- BOTH OF THE PRIMARY REASONS IN BOTH OF
11 THOSE INSTANCES WERE THE CONTENT OF HIS SPEECH, BUT,
12 NEVERTHELESS, THEY'VE CONCEDED THAT THAT'S --

13 THE COURT: WELL, THERE WAS SOME, AT LEAST IT SEEMED
14 LIKE, AT LEAST CONFUSION ON MY PART, THAT MAYBE YOU SAID THAT
15 THESE STATUTES -- WELL, I GUESS THEY'RE STATUTES, THEY'RE RULES
16 OR WHATEVER THEY ARE --

17 MR. THERIOT: ORDINANCES, RIGHT.

18 THE COURT: -- ORDINANCES, THAT THEY DIDN'T
19 NECESSARILY APPLY TO HIM BECAUSE THIS HAS TO DO WITH MORE OF HIS
20 RELIGIOUS EXPRESSION AND IT WASN'T REALLY IN THIS
21 EMPLOYMENT-BASED CONTEXT, THAT MAYBE THESE ORDINANCES REALLY
22 WEREN'T -- WE'RE NOT DEALING WITH THE SAME -- THESE ARE CONFLICT
23 OF INTEREST POLICIES THAT DEAL WITH OUTSIDE EMPLOYMENT, AND THIS
24 IS A RELIGIOUS BOOK THAT HE WROTE ON HIS SPARE TIME. AND IT
25 SEEMED THAT YOU MIGHT BE MAKING THIS ARGUMENT THAT HE DIDN'T

1 HAVE TO GO THROUGH THIS, BUT IT SOUNDS LIKE YOU ARE NOT.

2 MR. THERIOT: WELL, WE DID MAKE THAT ARGUMENT IN OUR
3 COMPLAINT UNDER OUR VAGUENESS CLAIM.

4 THE COURT: OKAY.

5 MR. THERIOT: BUT IT DOESN'T APPLY, BUT THAT'S BEEN
6 DISMISSED.

7 THE COURT: OKAY. BUT YOU'RE NOT SAYING THAT AS PART
8 OF YOUR CASE FOR THIS PART; CORRECT?

9 MR. THERIOT: THAT'S CORRECT.

10 THE COURT: OKAY.

11 MR. THERIOT: THAT'S CORRECT. SO IT'S THAT -- OF
12 COURSE, AS YOUR HONOR ALLUDED TO, THE N.T.E.U. IS A -- TEST IS A
13 MODIFICATION OF THE PICKERING TEST. IT'S REALLY -- THERE'S THE
14 FIRST TWO FACTORS, WHETHER IT'S A MATTER OF PUBLIC CONCERN AND
15 THEN THE WEIGHING FACTOR, BUT THERE IS AN ADDITIONAL THUMB ON
16 THE SCALE IN FAVOR OF THE SPEAKER BECAUSE THEY HAVE TO WEIGH THE
17 GOVERNMENT'S INTEREST NOT ONLY IN RESTRICTING THE PLAINTIFF'S
18 SPEECH, BUT ALSO THE PLAINTIFF'S CO-WORKERS, ALL FUTURE
19 CO-WORKERS, AND ANYONE WHO HAS -- WHO WOULD LIKE TO HEAR THEM
20 SPEAK. SO IT'S A VERY HEAVY BURDEN, ESPECIALLY WHEN YOU HAVE A
21 BLANKET PROHIBITION LIKE YOU HAVE HERE. NOW, THEY'VE SAID, OH,
22 BUT THIS ISN'T A BLANKET PROHIBITION LIKE N.T.E.U. ACTUALLY
23 THIS IS MORE LIKE A CONVENTIONAL PRIOR RESTRAINT WHERE YOU HAVE
24 TO GET PERMISSION FIRST. AND THAT'S EXACTLY WHAT MOST OF THE
25 SUPREME COURT CASES ARE ABOUT, THAT WHEN YOU HAVE TO GET

1 PERMISSION, THAT'S THE PROBLEM BECAUSE RESTRICTING SPEECH OR
2 REQUIRING PERMISSION BEFORE YOU ENGAGE IN SPEECH COMPLETELY
3 UNDERMINES WHAT THE FIRST AMENDMENT IS ALL ABOUT IN FREE SPEECH
4 BECAUSE ESPECIALLY WHEN -- THAT'S WHY PRIOR RESTRAINTS ARE
5 PRESUMED UNCONSTITUTIONAL. NOW, THEY CAN BE CONSTITUTIONAL, BUT
6 THEY HAVE TO SATISFY NOT ONLY THE WEIGHING TEST, BUT TWO VERY
7 IMPORTANT THINGS. AND NUMBER ONE IS THEY HAVE TO BE -- THEY
8 HAVE TO BE OBJECTIVE STANDARDS THAT GUIDE THE DISCRETION OF THE
9 DECISION-MAKER. AND IN THIS CASE WE HAVE ABSOLUTELY NONE.

10 THE COURT: NOW, I HAD A LITTLE CONCERN ABOUT THE WAY
11 THIS WAS BRIEFED IN YOUR MOTION FOR SUMMARY JUDGMENT BECAUSE I
12 DO SEE THAT YOU DO REFERENCE THIS CASE AND TALK ABOUT IT, BUT I
13 DON'T REALLY SEE THAT YOU APPLIED IT IN THE SAME WAY THAT THE
14 SUPREME COURT DID. I SEE KIND OF LESS OF AN APPLICATION OF THE
15 BALANCING AND KIND OF WHAT HIS INTERESTS WERE AND THINGS OF THAT
16 NATURE AND MORE OF A KIND OF CONCLUSORY KIND OF APPROACH TO
17 DEALING WITH IT. IN TERMS OF THIS BALANCING TEST, AND I WANTED
18 YOU TO KIND OF ADDRESS THAT BECAUSE I DON'T SEE WHERE YOU POINT
19 TO KIND OF YOUR CLIENT'S INTERESTS IN THIS ANALYSIS, AND KIND OF
20 LOOK TO THAT PART OF WHAT YOU'RE SUPPOSED TO DO UNDER THAT TEST.

21 MR. THERIOT: BOTTOM LINE IS OUR CLIENT'S INTEREST IS
22 BEING ABLE TO SPEAK WITHOUT HAVING TO GET PERMISSION FIRST, AND
23 THAT INCLUDES WRITING A BOOK, EVEN IF HE SELLS IT OR GIVES IT
24 AWAY. IT DOESN'T MATTER. AND UNDER N.T.E.U. I THINK THAT'S
25 PRETTY CLEAR. AND THAT TYPE OF SPEECH IS SUBSTANTIALLY

1 PROTECTED. IT'S CERTAINLY A MATTER OF PUBLIC CONCERN. WE
2 ALREADY -- THAT'S NOT BEEN DISPUTED AT ALL IN THE BRIEFING.
3 THAT'S BEEN CONCEDED, SO WE REALLY DIDN'T HAVE TO GET INTO
4 WHETHER OR NOT IT'S PROTECTED SPEECH -- OR, EXCUSE ME, IT'S A
5 MATTER OF PUBLIC CONCERN. REALLY THE QUESTION IS THE
6 GOVERNMENT'S INTEREST. AND WHEN WEIGHING THE GOVERNMENT'S
7 INTEREST, YOU TALK ABOUT NARROWLY TAILORED AND WHETHER OR NOT
8 THERE ARE OBJECTIVE FACTORS GOVERNING THEIR -- THEIR DISCRETION.
9 AND IT -- THOSE OBJECTIVE FACTORS AND -- WELL, LET'S TALK ABOUT
10 NARROWLY TAILING (VERBATIM) FIRST. ONE OF THE WAYS TO DETERMINE
11 WHETHER IT'S NARROWLY TAILORED OR NOT IS WHETHER IT'S OVERLY
12 BROAD, AND THAT'S ONE OF OUR CLAIMS, IS IT IS OVERLY BROAD
13 BECAUSE 2820(D) APPLIES TO ALL SPEECH OF THE INDIVIDUALS NAMED
14 IN THERE EXCEPT THAT IT -- IT APPLIES TO ALL SPEECH EVEN IF IT'S
15 UNRELATED TO WORK.

16 NOW, ALSO, THEIR INTEREST GOES DOWN IF IT'S UNDERINCLUSIVE.
17 SO THEIR INTEREST IS TO MAKE SURE THAT THERE ARE NO CONFLICTS OF
18 INTEREST WITH THE CITY. HOWEVER, THEY ALLOW ONE-TIME SPEAKING
19 ENGAGEMENTS FOR PAY WITHOUT PERMISSION EVEN THOUGH THERE'S --
20 THEY'RE CLEARLY RELATED TO WORK AND CLEARLY CONFLICT WITH THE
21 CITY'S -- THE CITY'S INTEREST. SO IT'S BOTH OVERLY BROAD AND
22 UNDERINCLUSIVE, THAT UNDERMINES THE STATE'S INTEREST IN
23 RESTRICTING THE SPEECH. SECONDLY, THERE ARE NO OBJECTIVE
24 FACTORS TO GUIDE THE DISCRETION OF THE DECISION-MAKERS, AND
25 THAT'S A BIG DEAL WHEN IT COMES TO PRIOR RESTRAINTS BECAUSE IT

1 ALEVES (VERBATIM) THE DECISION TO THE WHIM OF THE -- OF THE --
2 OF THE GOVERNMENT OFFICIAL AND IT ALLOWS HIM TO DISCRIMINATE
3 BASED UPON VIEWPOINT. AND THE SUPREME COURT SAID YOU CAN'T DO
4 THAT. AND THERE'S A COMPLETE DEARTH OF OBJECTIVE FACTORS
5 LIMITING THE DISCRETION. IN 2820(D), ALL IT SAYS IS THEY HAVE
6 TO DECIDE WITHIN 30 DAYS, AND IT CAN'T CONFLICT WITH EMPLOYMENT.
7 AND THE 114-736 -- I'M SORRY -- 436 AND 437, THERE ARE NO
8 FACTORS AT ALL RESTRICTING THE DISCRETION OF THE -- OF THE
9 DECISION-MAKER. AS A MATTER OF FACT, 437(B) SAYS THE GOVERNMENT
10 OFFICIAL SHALL APPROVE OR DENY THE -- THE REQUEST. IT DOESN'T
11 SAY THAT THEY HAVE TO DO IT WITHIN A CERTAIN TIME.

12 THE COURT: DON'T WE ALSO LOOK AT HOW THIS IS OPERATED
13 IN ACTUAL PRACTICE? AND IS THERE ANY EVIDENCE THAT THIS HAS
14 BEEN UTILIZED IN ANY WAY TO DENY ANYBODY'S EXPRESSION OR BEING
15 EMPLOYED IN ANY WAY THAT HAS RESULTED IN THE PREVENTION OF ANY
16 SPEECH? BECAUSE FROM WHAT I HEAR THE CITY SAYING, IS THAT, YES,
17 WE HAVE THIS RULE BECAUSE IT DEALS WITH CONFLICT OF INTEREST,
18 BUT I GUESS EVERYONE THAT GOES THROUGH IT GETS APPROVED, AND
19 WE'VE NEVER HAD A SITUATION WHERE SOMEONE HAS BEEN DENIED BASED
20 ON ANY KIND OF CONTENT OR VIEWPOINT OR THINGS OF THAT NATURE.
21 DO I LOOK AT THAT HISTORY AS WELL AS PART OF THIS ANALYSIS?

22 MR. THERIOT: YOU DO NOT, YOUR HONOR. UNDER FORSYTH
23 COUNTY, ALL THAT MATTERS IS WHETHER THEY HAVE THE DISCRETION TO
24 DENY IT BASED UPON VIEWPOINT. AND IF THEY DO, THEN IT'S AN
25 UNCONSTITUTIONAL PRIOR RESTRAINT. THAT'S WELL-SETTLED LAW.

1 THE COURT: NOW, ARE YOU ARGUING AN AS APPLIED
2 CHALLENGE AS WELL?

3 MR. THERIOT: YES. SO IN THIS CONTEXT, AS THE COURT
4 SAID IN N.T.E.U., THE AS APPLIED IN FACIAL CHALLENGE ARE
5 CONFLATED. I'M NOT EXACTLY SURE I UNDERSTAND WHY THAT'S TRUE,
6 BUT IT IS TRUE. SO NOT ONLY DOES IT MATTER WHETHER IT FACIALLY
7 VIOLATES THE FIRST AMENDMENT, BUT IN ANALYZING THAT IT
8 AUTOMATICALLY APPLIES WHEN IT COMES TO HOW IT'S APPLIED.

9 THE COURT: SO YOU'RE SAYING IT'S NOT A DIFFERENT
10 ANALYSIS, IT'S JUST THE SAME THING.

11 MR. THERIOT: IT'S NOT A DIFFERENT ANALYSIS. IT'S THE
12 SAME. THAT'S VERY CLEAR IN N.T.E.U. AND IN THE CIRCUIT COURTS
13 INTERPRETING THAT, THE SANJOUR CASE THAT WE CITE AND HARMON THAT
14 WE CITE.

15 THE COURT: DOES IT MATTER THAT YOUR CLIENT DID NOT GO
16 THROUGH THE FORMAL REQUIREMENTS OF IT AT ALL?

17 MR. THERIOT: IT DOES NOT.

18 THE COURT: OKAY.

19 MR. THERIOT: ESPECIALLY SINCE THEY'VE ARTICULATED AS
20 ONE OF THE EXCUSES FOR FIRING HIM. SO IF THERE ARE -- IF
21 THEY'RE SAYING THAT -- AND THEY'RE SAYING IT'S THE PRIMARY ONE
22 FOR SUSPENDING HIM WITHOUT PAY AND THE PRIMARY ONE FOR
23 TERMINATING HIM, THEN IT CERTAINLY UNDERMINES ANY INTEREST THEY
24 MIGHT HAVE IN FIRING HIM OR TERMINATING -- OR, EXCUSE ME, OR
25 SUSPENDING HIM BECAUSE OF WHAT HE SAID. AND THE -- AS THE -- MY

1 COLLEAGUES CONCEDED, IT WOULD APPLY EVEN TO A BOOK ABOUT GOLF.
2 SO IT'S NOT NARROWLY TAILORED TO INTEREST THAT WOULD AFFECT THE
3 INTEREST OF THE CITY. AND ALL OF THE CASES THAT THE -- THAT
4 THEY CITE ARE SITUATIONS WHERE IT'S LIMITED TO WHERE THEY SAY A
5 PRIOR RESTRAINT HAS BEEN UPHELD OR SITUATIONS WHERE IT'S LIMITED
6 TO A PARTICULAR TYPE OF SPEECH OR A PARTICULAR INDIVIDUAL.
7 AND --

8 THE COURT: NOW, WE'VE GOT THE BLOEDORN CASE THAT YOU
9 HAVEN'T MENTIONED, AND MY LAW CLERK REMINDED ME BECAUSE I WAS
10 THINKING THAT THERE WAS SOME CASE THAT DEALT WITH THE ACTUAL
11 PRACTICE. WHY DOESN'T BLOEDORN SAY THAT I HAVE TO LOOK AT AS
12 WELL HOW THIS IS OPERATED?

13 MR. THERIOT: WHAT -- MY READING OF BLOEDORN IS THAT
14 ALL HE DID WAS CHALLENGING -- CHALLENGE IT BASED UPON HOW IT WAS
15 APPLIED. HE CHALLENGED THE FACT THAT THEY HAD DISCRETION TO --
16 UNBRIDLED DISCRETION TO DECIDE WHERE HE SPOKE ON THE UNIVERSITY
17 CAMPUS IN A PARTICULAR FREE SPEECH AREA, AND THEY HAD DISCRETION
18 TO -- UNBRIDLED DISCRETION TO DETERMINE HOW LONG THAT HE SPOKE.
19 THOSE WERE THE ONLY TWO CHALLENGES. HE WASN'T CHALLENGED --

20 THE COURT: OKAY. WELL, MY READING OF THEIR ANALYSIS
21 WAS THAT YOU HAVE TO LOOK AT THE ACTUAL PRACTICE AS WELL.

22 MR. THERIOT: OF BLOEDORN?

23 THE COURT: YES.

24 MR. THERIOT: NOT THAT I'M AWARE OF, YOUR HONOR.

25 THE COURT: OKAY.

1 MR. THERIOT: AND IF THAT IS WHAT IT SAYS, THAT
2 IT'S -- THEN IT'S IN CONFLICT WITH THE SUPREME COURT AUTHORITY
3 IN FORSYTH COUNTY BECAUSE YOU DON'T LOOK AT THE ACTUAL PRACTICE.
4 IF THEY -- IF THERE'S UNBRIDLED DISCRETION CERTAINLY -- AND IN
5 THAT PARTICULAR INSTANCE THEY FOUND THAT THE POLICY ITSELF, THE
6 POLICY ITSELF SAID YOU CAN ONLY SPEAK IN ONE PLACE, AND SO THERE
7 IS NO DISCRETION TO DETERMINE WHERE HE SPOKE. AND THE MAXIMUM
8 AMOUNT IS 1.5 HOURS. SO THERE'S NO DISCRETION. SO THE COURT
9 SAID THERE WAS NO UNBRIDLED DISCRETION IN THAT PARTICULAR
10 INSTANCE BECAUSE THE POLICY SAID THERE WASN'T. IN THIS CASE YOU
11 DON'T HAVE ANY RESTRICTIONS BY THE POLICY AND, THEREFORE, THERE
12 IS UNBRIDLED DISCRETION. AND JUST THE THREAT OF THAT VIEWPOINT
13 DISCRIMINATION IS SUFFICIENT TO STRIKE IT DOWN AS AN
14 IMPERMISSIBLE PRIOR RESTRAINT.

15 THE COURT: OKAY. I'LL LOOK AT BLOEDORN. I DON'T
16 REMEMBER BLOEDORN SAYING WHAT YOU SAID IT DID, BUT I WILL TAKE A
17 LOOK AT THAT.

18 MR. THERIOT: OKAY. ALL RIGHT. IF I MAY, I'D LIKE TO
19 MOVE TO THE DUE PROCESS ARGUMENT. IT'S UNDISPUTED THAT THE
20 DEFENDANTS HAVE SAID THAT THEY SUSPENDED CHIEF COCHRAN WITHOUT
21 PAY AND THEY TERMINATED HIM IN PART BECAUSE HE DID NOT GET
22 PERMISSION FROM THE ETHICS BOARD TO WRITE HIS BOOK BEFOREHAND.
23 AND SO -- BUT THE PROCESS THAT'S IN THAT ETHICS CODE THEY SAY
24 HE'S NOT ENTITLED TO. THEY ARE USING THE ETHICS CODE AS BOTH A
25 SWORD AND A SHIELD. THEY WANT THE RIGHTS OF IT WITHOUT THE

1 RESPONSIBILITIES. AND AS MY COLLEAGUE, MR. GEVERTZ, MENTIONED
2 TODAY, THOSE PROCESSES ARE VERY IMPORTANT. AND IF YOU GO
3 THROUGH THE PROCESSES, THEN THERE'S AN INDICATION THAT YOU WILL
4 BE PROTECTED. THE PROCESSES ARE IMPORTANT. HOWEVER, IF
5 SOMEBODY IS ACCUSED OF VIOLATING THE ETHICS CODE, THERE'S
6 PROCESSES IN PLACE THAT YOU HAVE TO -- THAT YOU HAVE TO GO
7 THROUGH, NOTICE, AND A HEARING PRE TERMINATION. AND IT'S
8 UNDISPUTED THAT CHIEF COCHRAN GOT NEITHER OF THOSE.

9 NOW, THEIR PRIMARY ARGUMENT FOR WHY IT ISN'T IS BECAUSE HE
10 IS A -- HE IS A CLASSIFIED EMPLOYEE AND -- OH, I'M SORRY,
11 BECAUSE HE'S AN UNCLASSIFIED EMPLOYEE AT-WILL. HOWEVER, THERE'S
12 SOME DISPUTE OF FACT ABOUT THAT. AS THEY SAID IN THE SUSPENSION
13 LETTER, THEY CITED 114-528 THAT SAYS THAT NO EMPLOYEE CAN BE
14 FIRED EXCEPT FOR CAUSE. AND THAT'S -- BUT SINCE THEN THEY'VE
15 SAID, WELL, SINCE LITIGATION ENSUED. THEY'VE CHANGED THEIR
16 POSITION AND SAID, WELL, THAT SUSPENSION LETTER WAS WRONG AND,
17 AS A MATTER OF FACT, HE WAS AN EMPLOYEE AT-WILL, HE SERVED AT
18 THE PLEASURE OF THE MAYOR UNDER THE CITY CHARTER AND, THEREFORE,
19 WE CAN FIRE HIM FOR VIOLATING THE ETHICS CODE, BUT DON'T HAVE TO
20 GIVE HIM ANY OF THE PROCESSES. AND IN RESPONSE TO THE QUESTION,
21 WELL, HOW DO YOU DETERMINE IF THERE IS AN ETHICS CODE VIOLATION,
22 THE H.R. COMMISSIONER, MS. YANCY, SAID, WELL, WE HAVE TO -- WE
23 CAN'T MAKE THAT DETERMINATION, THE ETHICS COMMISSION HAS TO. SO
24 IT'S A LITTLE UNCLEAR HOW THE PROCESS WORKS, BUT IT'S VERY CLEAR
25 HE DID NOT GET ANY OF IT.

1 MOREOVER, THE GEORGIA COURTS HAVE DETERMINED THAT JUST
2 BECAUSE YOU'RE AN EMPLOYEE AT-WILL, THAT DOESN'T MEAN THAT YOU
3 ARE NOT ENTITLED TO ANY PROCESS. THERE CAN BE OTHER RULES.
4 THERE CAN BE OTHER ORDINANCES THAT GIVE YOU PROCESS APART FROM
5 THOSE THAT SAY THAT YOU'RE AN EMPLOYEE AT-WILL. THE BROWN CASE
6 SAYS THAT. AND, MORE PARTICULAR, THE DOSS CASE SAID, AND EVEN
7 THOUGH THERE WAS A CITY-WIDE EMPLOYEE HANDBOOK THAT SAID
8 EVERYBODY IS AT-WILL, THERE WAS ACTUALLY A STANDARD OPERATING
9 PROCEDURE THAT FORBID ILLEGAL DRUG USE. AND THIS PARTICULAR
10 POLICE OFFICER WAS CHARGED WITH VIOLATING THAT STANDARD
11 OPERATING PROCEDURE, BUT THEY DIDN'T GIVE HER THE PROCESSES THAT
12 WAS ARTICULATED IN THAT, AND THE COURT SAID SHE DID HAVE A
13 PROPERTY INTEREST. AND I -- I JUST ACTUALLY MISSPOKE. SHE SAID
14 THAT SHE HAD A PROPERTY INTEREST. THE COURT AGREED WITH HER
15 THAT SHE DID, BUT BECAUSE THEY ACTUALLY GAVE HER A NOTICE AND
16 HEARING ANYWAY, SHE HAD ALREADY GOTTEN THE PROCESS THAT SHE WAS
17 DUE, JUST TO BE CLEAR ON THAT.

18 SO -- AND I THINK THE PERRY VS. SINDERMAN CASE, THE
19 SUPREME COURT CASES, IT'S IMPORTANT TO NOTE ON THIS THAT WHETHER
20 OR NOT THERE'S A PROPERTY INTEREST SUFFICIENT TO JUSTIFY THE
21 PROTECTION OF THE DUE PROCESS CLAUSE IS NOT A RIGID
22 DETERMINATION, AND WE HAVE TO TAKE THAT INTO ACCOUNT. THERE ARE
23 NO CASES CITED BY THE DEFENDANT THAT -- WHERE AN EMPLOYEE WAS
24 TERMINATED FOR VIOLATING A PARTICULAR CODE PROVISION THAT
25 PROVIDED DUE PROCESS RIGHTS THAT THAT EMPLOYEE WAS DENIED. I'M

1 NOT AWARE OF ANY CASE THAT SAYS THAT. SO WE BELIEVE THAT WE ARE
2 DECIDED -- THAT WE ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW
3 ON OUR DUE PROCESS CLAIM.

4 NOW, THE TWO CLAIMS THAT WE HAVE NOT MOVED FOR SUMMARY
5 JUDGMENT ON, BUT THE CITY HAS, ARE THE FREE EXERCISE CLAIM AND
6 THE FREEDOM OF ASSOCIATION CLAIM. AND IF I MAY, I'D JUST LIKE
7 TO SPEND THE REMAINDER OF MY TIME TALKING ABOUT FREE EXERCISE.
8 THE FREEDOM OF ASSOCIATION CLAIM, WE -- IS PRETTY CLEAR UNDER
9 COOK VS. GWINNETT COUNTY THAT THAT IS SUBSUMED IN THE PICKERING
10 ANALYSIS, AND I THINK THAT'S TELLING FOR THE PURPOSES OF THE
11 VIEWPOINT DISCRIMINATION. THEY SPECIFICALLY SAID THAT THE
12 FREEDOM OF ASSOCIATION IS GOVERNED BY PICKERING, BUT VIEWPOINT
13 IS NOT, BUT I DIGRESS.

14 SO REGARDING FREE EXERCISE, THE FIRST CHARACTERIZATION THAT
15 MY COLLEAGUE MENTIONED AS OUR CLAIM, AND, THAT IS, THAT OUR FREE
16 EXERCISE CLAIM IS BASED UPON THE FACT THAT HE WAS FIRED BECAUSE
17 OF HIS BELIEFS, IT BASICALLY WAS A RELIGIOUS TEST. THAT'S THE
18 ESSENCE OF OUR CLAIM. IT'S NOT THAT 2820(D) IS UNCONSTITUTIONAL
19 BECAUSE IT'S A FREE EXERCISE VIOLATION. IT'S BASED UPON
20 MCDANIEL VS. PATY AND THE TORQUESO (PHONETIC) CASE THAT SAYS
21 THAT WHEN YOU TAKE INTO ACCOUNT SOMEBODY'S RELIGIOUS CONVICTIONS
22 WHEN YOU TERMINATE THEM, THEN IF THAT'S THE SOLE REASON, THAT'S
23 PER SE UNCONSTITUTIONAL. THERE'S NOT EVEN A WEIGHING ANALYSIS.
24 HOWEVER, IF IT'S ONE OF THE REASONS, THEN A COMPELLING INTEREST
25 TEST APPLIES UNDER MCDANIEL VS. PATY. AND, OF COURSE, ARTICLE

1 SIX SAYS THAT THERE'S NO RELIGIOUS TEST WHATSOEVER. THE COURT
2 DIDN'T APPLY THAT IN TORQUESO, AND THEN WE'RE ACTUALLY NOT AWARE
3 OF ANY CASE THAT HAS, JUST TO BE COMPLETELY CANDID. HOWEVER,
4 THAT PROVISION OF THE CONSTITUTION IS STILL OUT THERE. AND ONE
5 THING IS CLEAR BASED UPON THE MCDANIEL VS. PATY OPINION,
6 BRENDON'S OPINION IN MCDANIEL VS. PATY, THAT YOU CAN'T FIRE
7 SOMEONE BECAUSE THEY MADE PUBLIC STATEMENTS ABOUT THEIR
8 RELIGION. THERE IS ABUNDANT EVIDENCE HERE THAT THAT'S EXACTLY
9 WHAT HAPPENED. THE H.R. DIRECTOR SAID THE BOOK WAS PROBLEMATIC
10 BECAUSE IT ESPOUSED BELIEFS THAT WERE OFFENSIVE TO MANY
11 DIFFERENT GROUPS. BELIEFS. THE MAYOR WAS OFFENDED BY THE
12 SENTIMENTS OF THE BOOK BECAUSE OF HIS OWN BELIEFS. THEY GOT
13 OPPOSING VIEWS REGARDING CHIEF COCHRAN'S BELIEFS DURING THE
14 INVESTIGATION FROM THE ANTI-DEFAMATION LEAGUE WHO SAID THAT,
15 BECAUSE OF THE PREJUDICES IN HIS BOOK AND THE PERSONAL
16 SENTIMENTS IN HIS BOOK, THAT HE COULDN'T SERVE AS THE FIRE
17 CHIEF.

18 THE COURT: IT ISN'T CLEAR TO ME IN YOUR BRIEFING THAT
19 THAT'S WHAT YOU WERE ARGUING IN THIS CASE. IT APPEARED THAT YOU
20 WERE ARGUING THAT IT WAS THESE STATUTES, THESE ORDINANCES THAT
21 WERE VIOLATING YOUR CLIENT'S FREEDOM OF EXERCISE RIGHTS. I
22 THINK IT'S BEEN KIND OF UNCLEAR TO ME WHAT THAT CLAIM WAS, AND I
23 THINK THE CITY IN ADDRESSING IT HAD SOME CONFUSION ABOUT IT.

24 MR. THERIOT: WELL, I APOLOGIZE FOR THAT, YOUR HONOR.

25 THE COURT: OKAY.

1 MR. THERIOT: BUT IF I -- AS I --

2 THE COURT: BECAUSE I MISUNDERSTOOD IT AS WELL I
3 THINK.

4 MR. THERIOT: AS I STAND HERE TODAY, THE CLAIM IS THAT
5 THERE'S A RELIGIOUS TEST, AND THAT RELIGIOUS TEST IS -- WAS
6 ESTABLISHED BY THE MAYOR AND HIS STAFF. AS A MATTER OF FACT --

7 THE COURT: IT SOUNDS ALMOST IDENTICAL TO YOUR
8 VIEWPOINT DISCRIMINATION ARGUMENT.

9 MR. THERIOT: IT IS VERY SIMILAR.

10 THE COURT: OKAY.

11 MR. THERIOT: IT IS VERY SIMILAR, BUT IT'S NOT
12 SUBSUMED BY THE PICKERING ANALYSIS.

13 THE COURT: I KNOW, BUT YOU'RE SAYING THAT -- HOW IS
14 THE TEST DIFFERENT, HOW IS THIS DIFFERENT FROM THE VIEWPOINT
15 DISCRIMINATION TEST AND CLAIM?

16 MR. THERIOT: WELL, FIRST OF ALL, IF IT'S THE SOLE
17 REASON WHY THEY FIRED HIM, THEN IT'S PER SE UNCONSTITUTIONAL FOR
18 THE EVEN -- THERE'S NOT EVEN A QUESTION WHETHER THERE'S
19 COMPELLING INTEREST. THE COURT PRESUMES THAT THERE IS NOT. AND
20 BUT IF IT IS --

21 THE COURT: IF IT IS ONE OF THE REASONS, HOW IS THAT
22 DIFFERENT FROM THE VIEWPOINT DISCRIMINATION ANALYSIS?

23 MR. THERIOT: THE CASES ARE DIFFERENT. THE TEST IS
24 VERY SIMILAR.

25 THE COURT: OKAY.

1 MR. THERIOT: SO IT'S ACTUALLY VERY RELATED TO THE
2 VIEWPOINT DISCRIMINATION CLAIM.

3 THE COURT: OKAY. AND THAT'S MAYBE WHY I WAS CONFUSED
4 BECAUSE IT SEEMED LIKE THE SAME THING.

5 MR. THERIOT: IT IS. I WOULDN'T SAY IT'S EXACTLY THE
6 SAME BECAUSE WE HAVE MULTIPLE CLAIMS AND BECAUSE THE FIRST
7 AMENDMENT PROTECTS MULTIPLE THINGS, BUT THE FREE EXERCISE CLAIM
8 IS CLEAR. AND, OF COURSE, I THINK AT BOTTOM THAT THERE'S AT
9 LEAST A DISPUTE OF FACT ABOUT WHETHER HIS RELIGIOUS BELIEFS WERE
10 TAKEN INTO CONSIDERATION WHEN NOT ONLY HE WAS FIRED -- EXCUSE
11 ME -- SUSPENDED WITHOUT PAY AND WHEN HE WAS TERMINATED, AND SO
12 THE DEFENDANTS AREN'T ENTITLED TO SUMMARY JUDGMENT ON THAT
13 ISSUE. AND, OF COURSE, THAT'S BORNE OUT EVEN BY THE STATEMENT
14 OF COUNCILMAN WAN WHO SAID THAT CHIEF COCHRAN CAN HAVE RELIGIOUS
15 BELIEFS, BUT WHEN THEY DIFFER WITH THE CITY'S, HE HAS TO CHECK
16 THEM AT THE DOOR.

17 JUST TO BE CLEAR, YOUR HONOR, AM I GOING TO GET A CHANCE TO
18 SUM UP ON REBUTTAL, OR SHOULD I SUM UP RIGHT NOW?

19 THE COURT: YOU SHOULD SUM UP RIGHT NOW.

20 MR. THERIOT: OKAY. IT'S UNDISPUTED THAT RELIGIOUS
21 CONTENT WAS CONSIDERED BY THE DEFENDANTS. IT'S UNDISPUTED THAT
22 IT DIDN'T CAUSE ANY DISRUPTION. AND WE BELIEVE THE UNDISPUTED
23 FACTS INDICATE THAT THERE WAS NO PROBABILITY THAT IT WOULD.
24 AND, OF COURSE, THAT -- THAT SPEECH WAS RELIGIOUS, SO THAT HAS
25 IMPLICATIONS NOT ONLY FOR HIS FREE SPEECH RIGHTS, BUT ALSO HIS

1 FREE EXERCISE RIGHTS. WE, BASED UPON OUR BRIEFS AND BASED UPON
2 THE ARGUMENT AND DISCUSSION THIS MORNING, WE ARE ENTITLED TO
3 JUDGMENT AS OF LAW ON BEHALF OF CHIEF COCHRAN ON OUR FREE SPEECH
4 CLAIM, BOTH OUR RETALIATION CLAIM AND OUR VIEWPOINT
5 DISCRIMINATION CLAIM, AS WELL AS OUR DUE PROCESS CLAIM AND
6 CERTAINLY BASED UPON PRIOR RESTRAINT. AND IF I MAY ADD AN ASIDE
7 THERE, YOUR HONOR, WE CERTAINLY HAVE DIFFERENT VIEWS OF THE
8 FACTS, AS YOU ALLUDED TO EARLIER, ON MOST OF THE CLAIMS, BUT I
9 THINK TWO CLAIMS THAT ARE CLEARLY READY FOR SUMMARY JUDGMENT ARE
10 THE PRIOR RESTRAINT CLAIM AND THE DUE PROCESS CLAIM WHERE WE
11 DON'T HAVE MUCH OF DISPUTE ABOUT EVEN WHAT THE FACTS MEAN, MUCH
12 LESS ABOUT WHAT THEY ARE.

13 AND THEN, AT MINIMUM, THOUGH, THE FACTS SHOW THAT WITH
14 REGARD TO OUR PICKERING ANALYSIS AND WITH REGARD TO OUR FREE
15 EXERCISE CLAIM AND CERTAINLY THE VIEWPOINT DISCRIMINATION CLAIM,
16 THERE IS A MATERIAL DISPUTE ABOUT EXACTLY WHAT THOSE FACTS ARE,
17 AND THE DEFENDANT SHOULD -- CANNOT SURVIVE THEIR BURDEN OR
18 HAVEN'T MET THEIR BURDEN TO BE AWARDED SUMMARY JUDGMENT. BOTTOM
19 LINE IS THE CITY HAS ARTICULATED MANY REASONS WHY, BUT THEIR
20 PRIMARY CONCERN IS THEY WANT TO BE VIEWED AS AN INCLUSIVE CITY.
21 AND IT'S INTERESTING THAT THEIR VIEW OF INCLUSIVITY MEANS
22 EXCLUDING PEOPLE THAT DISAGREE WITH THEM. AND THAT'S WHAT THIS
23 CASE IS ABOUT, AND WE BELIEVE THAT IT SHOULDN'T BE COUNTLESS AT
24 THIS STAGE OF THE LITIGATION ESPECIALLY. THANK YOU, YOUR HONOR.

25 THE COURT: OKAY. THANK YOU.

1 OKAY. FOR DEFENDANTS.

2 MR. GEVERTZ: BRIEFLY, YOUR HONOR, THERE ARE A COUPLE
3 POINTS THAT MR. THERIOT RAISED THAT I WANTED TO -- EXCUSE ME --
4 SPEAK TO. I'M DOING THESE IN THE ORDER IN WHICH THEY WERE
5 RAISED, SO IT MAY APPEAR DISJOINTED.

6 THE COURT: THAT'S FINE.

7 MR. GEVERTZ: WITH RESPECT TO TITLE VII, I THINK THE
8 COURT WAS RIGHT, AND I THINK THAT THIS WAS A FACTOR IN SNIPES AS
9 WELL. ACTUAL LIABILITY WAS FORESTALLED BY THE PROMPT REMEDIAL
10 ACTION THAT THE CITY WAS BOTH LEGALLY OBLIGATED TO TAKE AND DID
11 TAKE IN THIS CASE WITH RESPECT TO SUSPENDING, INVESTIGATING AND
12 TERMINATING. BUT ALL THAT THE ELEVENTH CIRCUIT NEED SHOW IS A
13 REASONABLE POSSIBILITY OF SOME SORT OF DISRUPTION. THE COURT IS
14 WELL AWARE OF THE JURISPRUDENCE IN TITLE VII, ESPECIALLY WITH
15 RESPECT TO HOSTILE ENVIRONMENT CLAIMS. IT IS A REASONABLE
16 POSSIBILITY THAT AN UNSUCCESSFUL APPLICANT, THAT AN EMPLOYEE WHO
17 DOES NOT RECEIVE A PROMOTION, THAT AN EMPLOYEE WHO IS TERMINATED
18 WOULD, ONCE THIS INFORMATION, NAMELY CHIEF COCHRAN'S VIEWS,
19 BECAME KNOWN TO THEM, THAT THEY WOULD CONTEND THAT THAT
20 DECISION, THAT ADVERSE EMPLOYMENT ACTION WAS MADE BECAUSE THEY
21 WERE, IN HIS VIEW AND IN THE VIEW OF APPARENTLY OTHER PEOPLE WHO
22 WERE SYMPATHETIC WITHIN THE POLICE -- WITHIN THE FIRE DEPARTMENT
23 TO HIM, TO BE ANTITHETICAL TO THEIR OWN. SNIPES REFUTES THE
24 NOTION THAT YOU HAVE TO LET THIS PLAY OUT BEFORE YOU REALLY HAVE
25 A REASONABLE POSSIBILITY OF DISRUPTION TO OCCUR. IT WOULD BE AN

1 UNFORTUNATE IRONY INDEED IF THE EMPLOYER, IN THIS CASE THE CITY,
2 IN COMPLYING WITH ITS TITLE VII OBLIGATION TO PROMPTLY REMEDIATE
3 THE PROBLEM NOW CREATES A CONSTITUTIONAL PROBLEM FOR ITSELF
4 BECAUSE IT HASN'T LET THE PROBLEM PERCOLATE TO THE POINT WHERE
5 THE PLAINTIFF CONTENDS IT MUST.

6 THERE WAS ALSO SOME DISCUSSION ABOUT WHAT THE BOOK SAYS AND
7 WHETHER OR NOT THIS COULD BE REASONABLY CONSTRUED AS HURTFUL TO
8 SUCH A WOULD-BE PLAINTIFF. I'M CITING SPECIFICALLY FROM PAGES
9 61 THROUGH 64 OF THIS BOOK. THE NAKED ARE CALLED SINNERS,
10 WICKED, UNGODLY, WORKERS OF INIQUITY, SCORNERS, SLOTHFUL,
11 CURSED, EVILDOERS. SPECIFICALLY THEY ARE TOLD THAT THE NAKED
12 DIE FOR WANT OF WISDOM, THAT THEY SHALL NOT INHERIT THE EARTH,
13 THAT -- AND HERE'S THE QUOTE THAT THE COURT WAS SEARCHING FOR --
14 WHEN IT GOES WELL WITH THE CLOTHED, THE CITY REJOICES. WHEN THE
15 NAKED PERISH, THERE IS SHOUTING, SHOUTING MEANING JOY.
16 SIMILARLY, THE BOOK GOES ON ON PAGE 63 TO SAY THE COUNCIL OF THE
17 NAKED ARE DECEIT. A NAKED MAN IS LOATHSOME AND COMES TO SHAME.
18 AND THE COURT IS WELL AWARE OF THE CONTEXT OF WHAT CONSTITUTES
19 THE NAKED.

20 ONCE A NAKED PERSON LEARNED OF THE BOOK, WE HAVE A WHOLE
21 DIFFERENT CONTEXT IN WHICH THE LIKELIHOOD OF SOME SORT OF A
22 REASONABLE POSSIBILITY OF DISRUPTION OCCURS. IT SEEMS
23 UNREASONABLE AND SOMEWHAT DISINGENUOUS FOR A PLAINTIFF TO BE
24 ABLE TO CONTROL THE MESSAGE TO A LIMITED GROUP OF LIKE-MINDED
25 PEOPLE AND SAY, SEE, THEY DIDN'T HAVE A PROBLEM. READING THE

1 FACTUAL RECORD REVEALS THAT ULTIMATELY THAT MESSAGE CAME OUT.
2 AND WHEN IT DID, THE NEXT AND ONLY GAUGE OF THE EMPLOYEE'S
3 SENTIMENT WAS THE INVESTIGATION THAT THE LEGAL DEPARTMENT
4 UNDERTOOK. AND WHILE THE PLAINTIFF CONTENDS THAT IT'S VAGUE, I
5 GUESS, BECAUSE SPECIFIC PEOPLE WEREN'T CALLED OUT AS HAVING
6 EXPRESSED A SPECIFIC VIEWPOINT, WHICH I THINK WOULD BE
7 INAPPROPRIATE ON A VARIETY OF LEVELS, THAT WAS THE ONLY GAUGE OF
8 THE TEMPERATURE ONCE THE NAKED OR SO CALLED NAKED PEOPLE LEARNED
9 OF THE VIEWPOINTS THAT MR. COCHRAN HELD.

10 NEXT, WHAT I UNDERSTAND IS THAT THE PLAINTIFF IS ALSO
11 CONTENDING THAT THIS WAS NOT POTENTIALLY DISRUPTIVE BECAUSE IT
12 WAS OVERWHELMING OR BY AN 80 PERCENT TO 20 PERCENT TALLY OF
13 PEOPLE WHO SUBMITTED E-MAILS, THAT THE DECISION BY THE MAYOR TO
14 SUSPEND THE FIRE CHIEF WAS DISAPPROVED OF. NOT ONLY DO I THINK
15 IT'S DIFFICULT, IF NOT INAPPROPRIATE, TO GAUGE THE PUBLIC'S
16 SENTIMENT BASED UPON E-MAIL RESPONSES, WE NEED TO REMEMBER THOSE
17 E-MAIL RESPONSES WERE PURPOSEFULLY GENERATED, WHIPPED UP, IF YOU
18 WILL, BY THE PLAINTIFF VIA HIS PUBLIC RELATIONS WORK WITH THE
19 GEORGIA BAPTIST CONVENTION. THE PLAINTIFF ENLISTED THE
20 CONVENTION TO COME UP WITH A PUBLIC RELATION'S BATTLE PLAN.
21 THAT'S WHY YOU HAVE AN 80, 20 SPLIT. THE CITY WAS NOT ENGAGED
22 IN SOMETHING LIKE THAT. THERE WERE WEB-BASED EDITORIALS
23 CRITICIZING HIS POTENTIAL. THERE WAS AN ON-LINE PETITION
24 CIRCULATED IN ORDER TO EXPLAIN OR SHARE THE VIEWPOINT OF THOSE
25 WHO WERE LIKE-MINDED TO MR. COCHRAN. THERE WAS A SOCIAL MEDIA

1 CAMPAIGN. ALSO, IN THE UNDISPUTED RECORD, THE PUBLIC WAS URGED
2 TO CONTACT THE MAYOR AND DEMAND THAT HE APOLOGIZE TO COCHRAN.
3 SO IT SEEMS A LITTLE CIRCULAR THAT THE PLAINTIFF WOULD ENGAGE IN
4 A HIGHLY SOPHISTICATED P.R. CAMPAIGN AND THEN SAY, OH, LOOK AT
5 THE RESULTS OF THE CAMPAIGN, 80 PERCENT OF THE PEOPLE ARE ON MY
6 SIDE, HENCE, THIS COULD NOT POSSIBLY HAVE BEEN GRIST FOR A
7 PUBLIC DISPUTE. THAT'S NOT REALLY THE WAY IT PANNED OUT.

8 ADDITIONALLY, BOTH THROUGH THE BRIEFING AND THROUGH THE
9 ORAL PRESENTATION, THERE SEEMS TO BE A LOT OF CONFLATING ABOUT
10 WHAT THE HARM WAS AND WHAT THE BASIS FOR THE DECISION FOR THAT
11 HARM WAS. SOMETIMES WE TALK ABOUT THE BASIS FOR THE SUSPENSION.
12 BUT AS I THINK THE COURT POINTED OUT IN ITS QUESTION, THE BASIS
13 FOR THE CASE IS THE TERMINATION. THAT IS CLEAR. THAT'S WHAT'S
14 CONTESTED IN THE COMPLAINT. AND WHAT IS RARELY DISCUSSED IN THE
15 BRIEFING BY THE PLAINTIFF AND WHAT IS RARELY DISCUSSED AT ORAL
16 ARGUMENT IS THE FACT THAT IMMEDIATELY PRIOR TO HIS SUSPENSION
17 AND CITED AS A BASIS FOR HIS TERMINATION WAS THE MAYOR'S BELIEF,
18 CORRECT IN THIS CASE, THAT MR. COCHRAN WAS BEHIND CIRCULATING
19 ALL OF THESE MASS PETITIONS, E-MAILS AND PHONE CALLS TO HIS HOME
20 AND TO THE CITY SERVERS, AND THAT THAT IS A FORM OF
21 INSUBORDINATION.

22 ONCE AGAIN, I REITERATE THAT WE CANNOT FIND ANY
23 JUSTIFICATION FOR, UNDER PICKERING OR OTHERWISE, AS BEING
24 SOMETHING THAT AN EMPLOYEE WOULD BE ENTITLED TO UNDERTAKE. SO
25 WE CAN TALK ABOUT THE SUSPENSION DECISION AND WE CAN TALK ABOUT

1 THE FACT THAT THE ONLY SO CALLED OBJECTIVE INFORMATION THAT WAS
2 OUT THERE WAS THAT HE HADN'T APPLIED VIA THE CODE, BUT BY THE
3 TIME THE TERMINATION OCCURS, WE HAVE A LOT MORE THAN THAT. AND
4 I DON'T EVER SEE ANY DISCUSSION OF THE PLAINTIFF AS TO HOW THAT
5 SORT OF BEHAVIOR IS NOT BEHAVIOR THAT PICKERING WOULD ALLOW AN
6 EMPLOYER TO CONDEMN AND TO PUNISH AND PUNISH WITH TERMINATION.

7 THERE WAS SOME BRIEF DISCUSSION ABOUT WHETHER OR NOT THE
8 CONTENTS OF THE REPORT WERE HEARSAY. CANDIDLY, I THINK THAT THE
9 COURT IS CORRECT WITH RESPECT TO ITS ANALYSIS THAT WHEN YOU ARE
10 NOT LOOKING AT THE TRUTH OF THE MATTER ASSERTED, BUT YOU'RE
11 LOOKING AT THE IMPACT ON THE DECISION-MAKER AND AN EXPLANATION
12 AS TO EITHER THEIR MOTIVES OR ACTIONS, THAT THAT IS A CLEAR
13 EXCEPTION TO THE HEARSAY RULE. IT'S USED REPEATEDLY WITH
14 RESPECT TO EMPLOYMENT CASES. AND I BELIEVE THAT I HEARD
15 PLAINTIFF'S COUNSEL REFERENCE THAT THE DECISION-MAKER MUST HAVE
16 A REASONABLE RELIANCE ON THAT INFORMATION. THAT IS NOT THE
17 STANDARD OF WITH RESPECT TO HEARSAY. IT IS WHETHER OR NOT THE
18 DECISION-MAKER RELIED ON IT, NOT WHETHER OR NOT HE OR SHE
19 REASONABLY DID SO. AND HERE THE RECORD IS UNCONTESTED THAT ONE
20 OF THE FACTORS THAT THE MAYOR BASED HIS TERMINATION DECISION ON
21 WAS HIS UNDERSTANDING VIA THE REPORT THAT THERE WAS AN
22 OVEREROSION OF CONFIDENCE IN THE CHIEF'S LEADERSHIP ABILITY.

23 THERE ALSO SEEMS TO BE CONFLATION BETWEEN THE MAYOR'S
24 STATEMENT AT A PRESS RELATION -- AT A PRESS CONFERENCE SAYING
25 THAT HE DID NOT ENDORSE THE BELIEFS IN THE BOOK AND THAT HE

1 PERSONALLY DISAGREED WITH IT WITH SOME SORT OF INSIGHT OR
2 EXPLANATION INTO WHY HE MADE THE DETERMINATION DECISION. I
3 THINK THAT THEY'RE TWO ENTIRELY DIFFERENT TOPICS. THE MAYOR DID
4 NOT SPEAK TO WHY HE TOOK THE ACTION HE DID AT THE PRESS
5 CONFERENCE. THE MAYOR EXPRESSED HIS OWN PERSONAL VIEW THAT THE
6 CITY AND HE WERE NOT ENDORSING THE CONTENTS OF THE BOOK. IN HIS
7 DEPOSITION THE MAYOR WAS ASKED THE QUESTION, WHY DID YOU MAKE
8 THE SUSPENSION DECISION, WHY DID YOU MAKE THE TERMINATION
9 DECISION. AND AT THAT POINT IN TIME IT'S QUITE CLEAR THAT HE
10 REPEATEDLY ARTICULATED THAT WHILE HE DISAGREED WITH THE CONTENTS
11 OF THIS, THAT THAT WAS NOT WHY HE ENGAGED IN THE DECISIONS AT
12 ISSUE.

13 WITH RESPECT TO THE PRIOR RESTRAINT OF TRADE -- EXCUSE
14 ME -- THE PRIOR RESTRAINT ON COMMERCE, WHEN YOU TAKE THE
15 N.T.E.U. STANDARD WHICH THE PLAINTIFF APPLIES AND WHICH WE
16 BRIEFED, WE BELIEVE THAT, UNLIKE N.T.E.U., THE FACT THAT THE
17 SECOND PROVISION IN THE CODE, THE ONE THAT IS 2820, IS LIMITED
18 WITH RESPECT TO THE AUDIENCE IS AN IMPORTANT DISTINCTION. WE
19 ARE TALKING ABOUT PEOPLE WHO ARE AT A HIGH LEVEL AND ARE
20 PERCEIVED AS SPEAKING ON BEHALF OF THE ADMINISTRATION. FURTHER,
21 THE PLAINTIFF DOES AN ARTFUL JOB OF SEGREGATING OUT 2820(D) FROM
22 THE REST OF THAT PROVISION. AND IT'S PRETTY CLEAR WHEN YOU TAKE
23 IN A CONTEXT WHAT THE INCOMPATIBLE INTERESTS ARE, THAT 2820(D)
24 ADDRESS, WE ARE TALKING ABOUT INVESTMENTS IN FINANCIAL BUSINESS,
25 COMMERCIAL, OR OTHER PRIVATE TRANSACTIONS. WE ARE TALKING ABOUT

1 THE OWNERSHIP OF STOCK. 282(D) (VERBATIM) BEING THEN IN THAT
2 CONTEXT DOES PROVIDE SOME OBJECTIVE STANDARDS BECAUSE WHEN YOU
3 JUST READ (D), IT TALKS ABOUT WHAT THE ETHICS BOARD IS
4 SPECIFICALLY INTERESTED IN, ALL REQUESTS FOR APPROVAL OF OUTSIDE
5 EMPLOYMENT SHALL STATE THE TYPE AND PLACE OF EMPLOYMENT, THE
6 HOURS OF WORK, THE EMPLOYER'S NAME AND ADDRESS.

7 IT'S FAIRLY CLEAR THAT THE CONTENT THAT THE ETHICS BOARD
8 WANTS TO KNOW ABOUT AND WANTS TO BE ABLE TO LOOK AT IS WHO ARE
9 WE DEALING WITH. ARE YOU DEALING WITH A VENDOR TO THE CITY
10 WHERE YOU MIGHT AS A CHIEF PROCUREMENT OFFICER BE ALLEGED TO BE
11 ENGAGING IN SOME SORT OF BEHAVIOR THAT THE CITY OUGHT TO BE
12 CONCERNED ABOUT? WHERE DO THEY WORK? WHAT ARE YOUR HOURS SO
13 THAT YOU'RE NOT BILLING TIME FOR US WHILE YOU'RE WORKING OVER
14 THERE? THESE ARE THE STANDARDS. AND I THINK IT'S A CHALLENGE
15 TO OVERLOOK THOSE AND STILL CONTEND THAT THE STATUTE IS
16 INAPPROPRIATELY VAGUE.

17 YOUR HONOR, I'D LIKE TO ALLOW MS. HINTON TO COME UP AND
18 ADDRESS ON REBUTTAL THE DUE PROCESS, FREE EXPRESSION AND
19 VIEWPOINT ISSUES.

20 THE COURT: BUT VERY BRIEFLY.

21 MS. HINTON: THANK YOU, YOUR HONOR. VERY BRIEFLY I'LL
22 TALK ABOUT THE VIEWPOINT DISCRIMINATION QUESTION. WE STILL
23 CONTEND THAT PICKERING DOES APPLY BECAUSE THIS IS AN ADVERSE
24 EMPLOYMENT ACTION, ADVERSE EMPLOYMENT ACTION CLAIM, NOT A FORUM
25 CLAIM, AS YOU ALL EARLIER ARTICULATED. AND INDEED IF YOU LOOK

1 AT THE NINTH CIRCUIT CASE THAT I HAD EARLIER CITED, BERRY, WHICH
2 ACTUALLY CAME OUT TEN YEARS AFTER TUCKER, WHICH IS THE CASE THAT
3 PLAINTIFF'S COUNSEL CITED, YOU WILL SEE THAT IN THAT CASE
4 THEY -- THEY EMPHASIZE THAT THEY ARE GOING TO APPLY PICKERING TO
5 PLAINTIFF'S CLAIMS THAT DEAL WITH ADVERSE EMPLOYMENT ACTIONS.
6 SO THE DISCIPLINE THAT WAS IMPOSED ON THE EMPLOYEE FOR
7 DISPLAYING RELIGIOUS MATERIAL, DISCIPLINE THAT WAS IMPOSED FOR
8 DISCUSSING HIS RELIGIOUS BELIEFS WITH CLIENTS. HOWEVER, WITH
9 RESPECT TO A FORUM ANALYSIS, IN THAT CASE THE PLAINTIFF WAS ALSO
10 CHALLENGING THE EMPLOYER'S PROHIBITION ON THE USE OF A
11 CONFERENCE ROOM FOR RELIGIOUS MEETINGS. THE COURT ACTUALLY DID
12 CONDUCT A LIMITED FORUM ANALYSIS WITH RESPECT TO THAT CLAIM,
13 BUT, AGAIN, APPLIED PICKERING TO THE ONES THAT WERE PREMISED ON
14 AN ADVERSE EMPLOYMENT. SO, AGAIN, I THINK WE CONTEND THAT
15 THERE'S REALLY NO WAY TO ARGUE THAT PLAINTIFF'S VIEWPOINT
16 DISCRIMINATION CLAIM IS NOT PREMISED ON HIS TERMINATION AND
17 SUSPENSION AND THAT, THEREFORE, PICKERING SHOULD APPLY.

18 WITH RESPECT TO THE DUE PROCESS CLAIM, AGAIN, PLAINTIFF'S
19 COUNSEL COMPLETELY IGNORES THE CITY CHARTER ARGUMENT THAT IS THE
20 BASIS OF OUR CONTENTION THAT MR. COCHRAN HAD NO PROPERTY
21 INTEREST RIGHTS IN HIS EMPLOYMENT, WHICH IS A PREREQUISITE FOR
22 HIS DUE PROCESS CLAIM. THE EXISTENCE OF PROVISIONS IN THE
23 ETHICS CODE AND IN OTHER PARTS OF THE CITY'S CODE SIMPLY CANNOT
24 CONTROL. AND THE CASE THAT WE CITE, WATERS VS. BUCKNER, WHICH
25 IS THE NORTHERN DISTRICT OF GEORGIA CASE AFFIRMED BY THE

1 ELEVENTH CIRCUIT, ACTUALLY DEALT WITH THE VERY SIMILAR FACTS
2 HERE. THERE, A POLICE CHIEF HAD NO PROPERTY INTEREST IN HIS
3 EMPLOYMENT WHERE THE CITY CHARTER STATED THAT HE COULD BE
4 TERMINATED WITHOUT CAUSE. HE THEN POINTED TO OTHER IRRELEVANT
5 REGULATIONS IN THE CITY CODE THAT PURPORTED TO STATE THAT HE
6 COULD ONLY BE FIRED FOR CAUSE. AND THE COURT EXPRESSLY HELD
7 THAT CITY ORDINANCES WHICH ARE INCONSISTENT WITH A CITY CHARTER
8 ARE VOID, AND DECLINED TO FIND ANY PROPERTY INTEREST FOR THAT
9 POLICE CHIEF. SO WE BELIEVE THAT THAT CONTROLS HERE AND THAT
10 MR. COCHRAN'S DUE PROCESS CLAIM FAILS OUTRIGHT.

11 FINALLY, WITH RESPECT TO THE FREE EXERCISE CLAIM, YOU KNOW,
12 FIRST, I WILL POINT OUT THAT THE PLAINTIFFS FULLY BRIEFED IN
13 THEIR RESPONSE TO OUR MOTION FOR SUMMARY JUDGMENT OUR ARGUMENTS
14 CHALLENGING -- OR DEFENDING THE STATUTES AS THE BASIS OF THAT
15 CLAIM. THEY REALLY WERE NOT CLEAR THAT THERE WAS SOME OTHER
16 BASIS FOR THE FREE EXERCISE CLAIM WITH RESPECT TO A TEST IMPOSED
17 BY THE MAYOR. SO TO THE EXTENT THAT YOU NEED ADDITIONAL
18 BRIEFING, WE WOULD SEEK LEAVE TO DO THAT TO THE EXTENT YOU NEED
19 IT. BUT SEPARATE AND APART FROM THAT, WE STILL BELIEVE THAT
20 EVEN IF THAT CLAIM IS CLEARLY ARTICULATED SUFFICIENT TO BE
21 ADDRESSED HERE, THAT THE MAYOR DID NOT TAKE ANY ACTION AGAINST
22 MR. COCHRAN BECAUSE OF HIS RELIGIOUS BELIEFS, WHICH IS WHAT THE
23 RELIGIOUS TEST CLAIM WOULD NEED TO SHOW. I WON'T RECOUNT OUR
24 ENTIRE DEFENSE ON THIS TOPIC NOW, AS I KNOW MR. GEVERTZ HAS JUST
25 DONE, IT'S IN OUR BRIEFING, BUT HIS RELIGIOUS BELIEFS WERE

1 SIMPLY NOT THE BASIS OF THE MAYOR'S ACTIONS AND, THEREFORE, THAT
2 CLAIM STILL FAILS. THANK YOU.

3 THE COURT: THANK YOU.

4 AS I MENTIONED AT THE OUTSET, I'M NOT GOING TO RULE FROM
5 THE BENCH. AS YOU'VE ALL HEARD, IT'S A VERY COMPLEX SET OF
6 ISSUES. AND I AM GOING TO GIVE IT THE TIME AND ATTENTION IT
7 DESERVES. I'VE ALREADY SPENT A LOT OF TIME ON IT, BUT WHAT I'M
8 GOING TO DO NOW IS, WITH THE BENEFIT OF YOUR ARGUMENTS AND SOME
9 OF THE ADDITIONAL CASE LAW, I'M GOING TO GO BACK THROUGH
10 EVERYTHING, LOOK AT EVERYTHING, MAKE SURE THAT I HAVE IT
11 CORRECT, AND WILL ISSUE A WRITTEN ORDER. I WOULDN'T THINK THAT
12 IT WOULD BE TERRIBLY LONG IN THAT THIS IS SOMETHING I WANT TO
13 WORK ON NOW WHILE IT'S ALL FRESH IN MY MIND, BUT GIVEN IT'S
14 COMPLEXITY, IT CERTAINLY WON'T BE NEXT WEEK OR SOMETHING OF THAT
15 NATURE. I WOULD EXPECT IT TO BE IN THREE WEEKS OR SO, SOMETHING
16 IN THAT TIME FRAME, ALTHOUGH SOMETIMES IT TAKES LONGER. IF I DO
17 HAVE ANY OTHER QUESTIONS, I WILL LET YOU KNOW AND ALLOW YOU TO
18 FILE SUPPLEMENTAL BRIEFS ON ANY ISSUES. THERE MAY BE THE NEED
19 TO DO THAT. LET ME LOOK AT IT A LITTLE BIT MORE CLOSELY, BUT I
20 DO THINK THAT YOU WERE ALL VERY PATIENT WITH MY QUESTIONS, AND I
21 DO APPRECIATE THAT AS WELL. SO I WILL TAKE IT UNDER ADVISEMENT,
22 TAKE A HARD LOOK AT EVERYTHING AND TRY TO GET A WRITTEN ORDER AS
23 SOON AS POSSIBLE.

24 AND FOR THOSE OF YOU THAT ARE UNSURE OF THE NEXT STEPS,
25 BASICALLY ONE OF TWO THINGS WILL HAPPEN. ONE, IS THAT I FIND

1 THAT I COULD RULE ON ALL OF THIS AS A LEGAL MATTER AND I WILL
2 ISSUE AN ORDER AND IT WILL CONCLUDE THE CASE. THAT IS ONE
3 POSSIBILITY. THE OTHER POSSIBILITY IS THAT ALL OF THE CLAIMS OR
4 JUST CERTAIN CLAIMS REMAIN, AND THEN WHAT WE'LL DO, IF THAT'S
5 THE CASE, IS WE'LL HAVE A TRIAL PROBABLY SOMETIME EARLY THIS
6 SPRING, AND THE JURY WILL SORT OUT THE FACTUAL ISSUES THAT I AM
7 NOT ABLE TO SORT OUT. SO EITHER IT WILL GET RESOLVED BY THIS
8 ORDER, OR WE WILL LIKELY HAVE A TRIAL IN THE SPRING TO KIND OF
9 FINISH THIS UP. SO EITHER WAY THERE WILL BE A CONCLUSION TO
10 THIS CASE, I WOULD THINK, SOMETIME THIS YEAR, AT LEAST IN THE
11 TRIAL COURT. EITHER PARTY WOULD HAVE THE RIGHT TO THEN APPEAL
12 THE CASE TO THE ELEVENTH CIRCUIT COURT OF APPEALS, AND THEY
13 WOULD THEN TAKE UP THE ISSUES ON APPEAL IF THE PARTIES SO
14 DESIRE. SO THAT'S WHERE WE ARE IN THE CASE. AND, WITH THAT, WE
15 ARE ADJOURNED. THANK YOU.

16 (PROCEEDINGS ADJOURNED.)

C E R T I F I C A T E

UNITED STATES OF AMERICA

NORTHERN DISTRICT OF GEORGIA

I, MONTRELL VANN, RPR, RMR, RDR, CRR, OFFICIAL COURT REPORTER FOR THE UNITED STATES DISTRICT COURT, FOR THE NORTHERN DISTRICT OF GEORGIA, DO HEREBY CERTIFY THAT THE FOREGOING 107 PAGES CONSTITUTE A TRUE TRANSCRIPT OF PROCEEDINGS HAD BEFORE THE SAID COURT, HELD IN THE CITY OF ATLANTA, GEORGIA, IN THE MATTER THEREIN STATED.

IN TESTIMONY WHEREOF, I HEREUNTO SET MY HAND ON THIS, THE 12TH DAY OF FEBRUARY 2019.

/S/ MONTRELL VANN
MONTRELL VANN, RPR, RMR, RDR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

_____)	
)	
Plaintiff(s))	
)	Case No. _____
V.)	
)	
_____)	
Defendant(s))	

NOTICE OF FILING OF OFFICIAL TRANSCRIPT

Notice is hereby given that an official transcript of a proceeding has been filed by the court reporter/transcriber in the above-captioned matter. Counsel/Parties have twenty-one (21) days from the date of delivery of the transcript to the Clerk to file with the Court a Request for Redaction of this transcript. If no Request for Redaction is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days.

Any counsel or party needing a copy of the transcript to review for redaction purposes may purchase a copy from the court reporter/transcriber or view the document at the Clerk's Office public terminal.

_____	_____
Date	Court Reporter

VERIFICATION OF FINANCIAL ARRANGEMENTS

Proceeding Type: _____

Proceeding Date: _____

Volume Number: _____

Notice is hereby given that financial arrangements for a copy of the transcript have been made with the following individual(s): _____

as counsel/party in this case. He/She is to be provided with remote access to the transcript via CM/ECF and PACER.

_____	_____
Date	Court Reporter