UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DR. ANDREW K. FOX,

Plaintiff,

v.

CITY OF AUSTIN and JOEL G. BAKER, in his individual capacity,

Defendants.

Case No. 1:22-cv-00835-DAE

Hon. David A. Ezra

Plaintiff's Brief in Support of His Motion for Summary Judgment

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Introduction

Plaintiff Dr. Andrew Fox lost his volunteer chaplaincy with the Austin Fire Department (AFD) because he wrote on his personal blog that males shouldn't compete in women's sports. That view offended AFD's LGBT liaison. Instead of honoring Dr. Fox's free-speech and religious rights and investigating whether his blogs actually disrupted AFD's work, AFD unconditionally deferred to that liaison's viewpoint objection and fired Fox.

In so doing, Defendants violated the Free Speech Clause, the Free Exercise Clause, and the Texas Religious Freedom Restoration Act. These claims trigger strict scrutiny, and Defendants cannot possibly satisfy it. The mere fact that someone disagreed with Dr. Fox's mainstream view—articulated on a personal blog outside work—does not give the government a compelling reason to fire him. Nor was doing so remotely reasonable when Defendants could have simply clarified that Fox spoke for himself, not AFD.

If it were otherwise, no government chaplain could express a religious view off-duty without fear of retribution. After all, in our pluralistic society people disagree—often vigorously and emotionally—about religious issues. The religious doctrines that make one firefighter comfortable with a given chaplain may be a dealbreaker to someone else. Not every chaplain will be the right fit for every firefighter. That's why public safety departments like AFD hire a variety of chaplains, therapists, and other wellness options. But neither the Constitution nor Texas law allow the government to single out, punish, and sit in judgment over certain religious views. Because that's exactly what Defendants did here, Dr. Fox is entitled to summary judgment.

Factual and Procedural Background

Dr. Fox is a Christian "who holds to historic Christian beliefs." Pl.'s App. in Supp. of Mot. for Summ. J. ("App.") 508 (Fox Decl. ¶ 7). He believes that everything he does is for God's glory and his other business and academic pursuits are a "part of [his] ministry and spiritual calling." App. 509 (Fox Decl. ¶ 20). Through his Christian beliefs, he believes that every person was made in the "image of God," and this faith requires him to treat others with "respect and dignity." App. 508 (Fox Decl. ¶ 7). These tenets of his faith shape his ministry, academic, and chaplaincy endeavors.

Dr. Fox began volunteering as the Lead Chaplain in the Austin Fire Department in 2013. App. 508 (Fox Decl. ¶ 13). He was instrumental in getting AFD's volunteer chaplaincy program off the ground and was heavily involved from the start. App. 475 (Fox Dep. 60:13–20). Through his time as Lead Chaplain, Dr. Fox met with and cared for all types of AFD employees—even those in the LGBT community. App. 509 (Fox Decl. ¶ 16). He spent upwards of ten hours per week—all unpaid—ministering to AFD members and running the chaplaincy program. App. 506. His performance was exemplary—Chief Joel Baker had no concerns about Dr. Fox or his performance as chaplain. App. 069 (Baker Dep. 45:7–9; 45:18–20).

Dr. Fox had other ministries and businesses outside his volunteer chaplaincy. One was his blog, where he discussed various aspects of the Christian faith. App. 509 (Fox Decl. ¶ 21–22). Dr. Fox maintained this blog on his own time, off AFD premises. App. 509 (Fox Decl. ¶ 23). He kept his blog posts separate from his role as AFD chaplain. *Id.*

In 2021, Dr. Fox began a new blog series that discussed current cultural issues in the context of his religious beliefs. App. 510 (Fox Decl. ¶ 25). He delved into the scripture of how God designed each person as male or female, and that sex is immutable. App. 510 (Fox Decl. ¶ 25). In one post, he drew from scriptural and

scientific principles to argue that it's unfair to allow males to compete in women's sports. App. 480–85. This post engaged with an issue of immense public concern.[1] But Dr. Fox's theological view was neither groundbreaking nor surprising—in fact, 69% of Americans agree with Dr. Fox that males should not complete in women's sports.[2] And twenty-three states, including Texas, have passed women's sports bills that ensure only women and girls compete in women's sports.[3]

Most of the Austin Fire Department had no idea that Dr. Fox published a blog outside his volunteer chaplaincy; the blog mainly served his academic and ministry endeavors. App. 260; 070 (Chafino Dep. 62:20–24; Baker Dep. 49:16–18). But after Dr. Fox posted the blog series, Battalion Chief Christine Jones became aware of it. App. 284 (Jones Dep. 16:7–11). She called Lieutenant Xolochitl Chafino, AFD's LGBT Liaison, to tell her about the blog. App. 248 (Chafino Dep. 30:7–10). Lt. Chafino disagreed with Dr. Fox's views, found them "offensive," and "felt attacked as an LGBTQ member." App. 252 (Chafino Dep. 38:8–9). So she informed upper management. Lt. Chafino first discussed the blog at a diversity council meeting, with the goal of telling Chief Vires and Chief Baker. App. 251; 253;152 (Chafino Dep. 37:14–19; 39:2–5; Vires Dep. 26:2–18).

When Lt. Chafino informed Chiefs Baker and Vires, they had not heard about the blog. App. 070; 151–52 (Baker Dep. 49:16–18; Vires Dep. 25:22–26:4). They didn't know that Dr. Fox had a blog at all, nor did they know about this particular blog post, nor if awareness of the blog was widespread throughout AFD. App. 151; 070 (Vires 25:10–15; Baker Dep. 49:16–18). It wasn't. App. 260; 151 (Chafino Dep.

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[1] The Editors, *Biden's Pretzel Logic on Men in Women's Sports*, NATIONAL REVIEW (Apr. 12, 2023), https://bit.ly/48dLoDh.
[2] Matt Lavietes, *Most Americans oppose including trans athletes in sports, poll finds*, NBC NEWS (June 12, 2023), https://bit.ly/4bbxzrU.
[3] Katie Barnes, *Transgender athlete laws by state: Legislation, science, more*, ESPN (Aug. 24, 2023), https://bit.ly/48Lq5tJ; Press Release, Governor Abbott Signs Vital Save Women's Sports Act (June 15, 2023), https://bit.ly/49x0rci.

62:20–24; Vires Dep. 25:10–12). Not only were they unware, but Dr. Fox's blog did not offend either Chief Baker or Chief Vires. App. 072; 153 (Baker Dep. 54:18–55:2; Vires Dep. 33:6–17). After reading it, Chief Baker did not think that Dr. Fox should be terminated for writing the blog. App. 072 (Baker Dep. 55:18–22). In fact, during Chief Baker's deposition, he found the idea laughable. *Id*. And Lt. Chafino was the only person Chief Vires ever spoke to who was offended by the blog. App. 177 (Vires Dep. 126:23–127:1).

To appease Lt. Chafino's concerns, Chief Vires and Chief Baker met with Dr. Fox at the end of August 2021 to discuss the posts. App. 477–78 (Fox Dep. 145:16–146:7). During that meeting, Chief Vires and Dr. Fox thought it would help to hear Lt. Chafino's concerns directly from her. App. 155 (Vires Dep. 38:20–39:8). So they met with Lt. Chafino. App. 155 (Vires Dep. 39:9–40:9). But even though Chief Vires affirmed that the meeting went well and included "genuine[ness]" and "respectful dialogue" between the three of them, Lt. Chafino was not satisfied. App. 155 (Vires Dep. 40:3–5). To drum up complaints, Chafino printed out copies of the blog, traveled to different stations, and passed out the copies to her friends. App. 259–63 (Chafino Dep. 61:25–62:3; 63:10–14; 65:10–20). She asked them to provide comments on the blog. App. 263 (Chafino Dep. 65:17–20). Before Lt. Chafino approached these employees with the blog post, most of them did not know the blog even existed. App. 260 (Chafino Dep. 62:20–24). Lt. Chafino even solicited comments from some people outside of AFD. App. 264 (Chafino Dep. 67:15–19).

Chief Baker relied entirely on Lt. Chafino's say-so and never did his own investigation on the blog post. App. 078; 082 (Baker Dep. 78:4–8; 96:4–6). He didn't speak to anyone besides Lt. Chafino. App. 080 (Baker Dep. 88:20–23). He didn't know how many people were offended. App. 078 (Baker Dep. 80:6–10). He never knew who it was that complained about the blog. App. 078 (Baker Dep. 79:6–19). And Chief Baker did not even follow the investigative process that is usually used

in situations like this. App. 082 (Baker Dep. 96:1–3). Instead, he allowed Lt. Chafino to manufacture objections by showing the blog to her friends so they could express disagreement. App. 080; 259–63 (Baker Dep. 87:11–14; Chafino Dep. 61:25–62:3; 63:10–14; 65:10–20). He then relied entirely on her to justify his decision to terminate. *See* App. 099 (Baker Dep. 162:20–24).

Having conducted no investigation, Chief Baker directed Chief Vires to have Dr. Fox write an apology for his blog post. App. 173 (Vires Dep. 110:25–111:11). Thinking he could resolve the situation and quiet the concern from his blog, Dr. Fox drafted a letter to explain the blog and its purpose. But this was not enough. App. 083; 088; 486–88 (Baker Dep. 98:14–24; 121:10–16). He "needed to apologize for offending anybody." App. 178 (Vires Dep. 130:19–20). And Chief Baker and Vires did not think Dr. Fox's first explanation letter was sufficient.

Chief Vires asked Dr. Fox to write a clearer apology. His first letter was more of an "explanation letter," and Chief Baker needed an actual "apology" letter. App. 176 (Vires Dep. 124:10–13). Chief Vires needed him to "apologize" for the hurt his view caused a group of people. App. 178 (Vires Dep. 130:19–22). So Dr. Fox tried again and wrote another letter. App. 480–85; 489–90; *see* (Baker Dep. 123:10–12). But again, it was not enough. According to Chief Baker, Dr. Fox could blog what he wants—he just could not blog his views on LGBT issues. App. 083 (Baker Dep. 100:8–16). The view of his blog alone excluded him from his chaplaincy position.

Following Dr. Fox's second letter, Chief Vires sent Chief Baker a copy of the blog post discussing women's sports, both drafts of Dr. Fox's apology letter, and a scan of the complaints about Dr. Fox's blog. App. 491–500. Chief Baker used only these few documents to decide to terminate Dr. Fox. App. 099 (Baker Dep. 162:20–24). A week later, Chief Baker fired Dr. Fox from his position as Lead Chaplain. App. 092–93; 501 (Baker Dep. 137:25–138:4).

Legal Standard

Dr. Fox is entitled to summary judgment if he "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Argument and Authorities

Dr. Fox spoke as a public citizen on a matter of profound public and religious concern—that men and women are biologically different and that males should not compete on women's sports teams. In response, Defendants fired him from his volunteer chaplaincy position because they disagreed with Dr. Fox's religious views. The First Amendment bars this type of viewpoint discrimination—which applies to public employees and volunteers. Both have the freedom to discuss important issues. It also "makes no difference that [Dr. Fox] was a volunteer" chaplain; Defendants treated him differently than the other chaplains by removing only Dr. Fox's government benefit of his chaplaincy position. *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 356 (4th Cir. 2000) (italics removed).

Because Defendants engaged in viewpoint discrimination, strict scrutiny applies to Dr. Fox's free-speech claim. Strict scrutiny also applies to his free-exercise and TRFRA's claim because Defendants fired him for religiously motivated speech. But Defendants cannot meet this high bar. Terminating Dr. Fox did not serve any legitimate interest, much less do so in the least restrictive way possible.

So Dr. Fox will succeed on all of his claims. This Court should grant summary judgment for Dr. Fox.[4]

I. All of Dr. Fox's claims trigger strict scrutiny.

A. Dr. Fox's free-speech claim triggers strict scrutiny because Defendants engaged in viewpoint discrimination.

Viewpoint discrimination occurs "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject"—"when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Because "[g]overnment discrimination among viewpoints … is a more blatant and egregious form of content discrimination," (*Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2230-31 (2015)) it is "presumptively unconstitutional." *Rosenberger*, 515 U.S. at 829–830. Once a court determines that a decision "aim[s] at the suppression of" views, it is clear the government is discriminating based on viewpoint. *Matal v. Tam*, 582 U.S. 218, 248 (2017) (Kennedy, concurring).

Sometimes, a First Amendment retaliation claim requires the plaintiff to satisfy the *Pickering* balancing test—showing that a plaintiff's First Amendment interests outweigh the government's interests in efficiently providing public services. *See Kinney v. Weaver*, 367 F.3d 337, 356 (5th Cir.2004) (en banc) (citation omitted). But the First Amendment applies more strongly against viewpoint discrimination—even if the speaker is a public employee.

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[4] While Plaintiff acknowledges that there are disputed facts about the appropriate remedies, there is no dispute on the nominal damages. Plaintiff requests this Court grant summary judgment on liability, award nominal damages, and determine later the scope of the other remedies. *See Freeman v. Califano*, 574 F.2d 264, 268 (5th Cir. 1978) (court can determine liability and leave damages to be determined before a final judgment is entered); *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021) (discussing nominal damages). Further, Defendants admit that Chief Baker, who terminated Dr. Fox, was the final policymaker concerning his services. Ans. ¶¶ 226-33.

The Supreme Court has warned employers to stay "vigilan[t]" to ensure public employers do not silence public employees "simply because superiors disagree with the content of employees' speech." *Rankin v. McPherson*, 483 U.S. 378, 384 (1987). Viewpoint discrimination is "nearly always presumptively suspect." *Amalgamated Transit Union Loc. 85 v. Port Auth. of Allegheny Cnty.*, 39 F.4th 95, 108 (3d Cir. 2022). And the Fifth Circuit also demands viewpoint neutrality when the government makes decisions based on employee's speech. *James v. Texas Collin Cnty.*, 535 F.3d 365, 380 (5th Cir. 2008). Such regulations must be neutral to ensure that employers do not use their authority because they simply disagree with the employees' opinions. *Id.* (citing *Rankin*, 483 U.S. at 384).

These principles apply here first because Defendants fired Dr. Fox for his speech. *Beattie v. Madison Cnty. Sch. Dist.*, 254 F.3d 595, 601 (5th Cir. 2001). Dr. Fox "engaged in protected" speech and it was a "motivating factor in [his] discharge. *Id.* Chief Baker testified that without Dr. Fox's blog, he did not think he would have dismissed Dr. Fox. App. 093 (Baker Dep. 140:2). The burden then shifts to Defendants to show by a preponderance of evidence that they would have fired Dr. Fox absent his protected speech on his blog. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). Defendants cannot meet that burden.

For one, Chief Baker told Dr. Fox that without the blog, he would not have been terminated. App. 093 (Baker Dep. 140:2); *see* App. 415 (Baker Dep. 30(b)(6) 19:21–20:1). But even beyond the blog, Chief Baker had no other reason to fire Dr. Fox. Chief Baker was unaware of any other complaints directed toward Dr. Fox. App. 092 (Baker Dep. 135:12–13). He also was unaware of any other disruptions to the chaplaincy service. App. 092 (Baker Dep. 135:2–4). He did not see any issues with Dr. Fox's performance, and as far as he was concerned, Fox was doing a fine job as the Lead Chaplain at AFD. App. 069 (Baker Dep. 45:7–9; 45:18–20). Chief Baker did not have any plans to dismiss him, and they had a good working

relationship. App. 070 (Baker Dep. 46:3–7). Chief Baker had no reason to fire Dr. Fox other than his protected speech.

With causation settled, the only remaining question is whether Defendants acted because of Dr. Fox's views. They did, and that justifies strict scrutiny for four reasons: (1) Defendants fired Dr. Fox because of his viewpoint, (2) Dr. Fox's blog was not about the Austin Fire Department, (3) Defendants' inconsistencies show they acted solely because of Dr. Fox's views, and (4) the Defendants tried to manufacture disruption post-hoc to justify firing Dr. Fox for his views.

1. Defendants fired Dr. Fox because of his viewpoint.

The Supreme Court has held repeatedly that "public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Matal*, 582 U.S. 218, 244 (2107) *(quoting St. v. New York*, 394 U.S. 576, 592 (1969)). Restricting any message the government finds "offensive" is the very "essence of viewpoint discrimination." *Id.* at 249 (Kennedy, concurring). Defendants terminated Dr. Fox because of the viewpoints he expressed in his blog post—that men and women are biologically different, and males should not compete in women's sports. This discrimination is clear for two reasons.

First, Defendants "singled out" Dr. Fox's messages and disfavored his speech "based on the views [he] expressed" while allowing other controversial views. *Matal*, 582 U.S. at 248 (Kennedy, concurring). Chief Baker admitted that without Dr. Fox's blog, he would not have fired Dr. Fox from his position. App. 093 (Baker Dep. 140:2). But Chief Baker permits other employees to express their opinions and viewpoints on LGBT-related issues without fear of reprisal. *See* App. 240; 245 (Chafino Dep. 12:2–6; 12:20–22; 17:5–12) (discussing LGBT affinity groups and gender-neutral bathrooms).

While Defendants permitted and encouraged other employees to express their LGBT ideas, Dr. Fox's religious beliefs triggered his firing. Captain Carlos Anguiano called out the portion of Dr. Fox's blog that discusses the Bible's definition of a man and a woman and interpreted it to say that God was judging people because they are transgender. App. 337 (Anguiano Dep. 65:13–17). Anguiano said this part of the blog is "the most discriminating part." *Id.*

Lt. Chafino said the blog was "offensive" and she "felt attacked as an LGBTQ member." App. 252 (Chafino Dep. 38:6–10). She thought his view on biology was "demeaning" and didn't know if Dr. Fox could do anything to fix the blog. App. 256 (Chafino Dep. 54:1–4). She also felt chaplains must be "supportive" of anyone's desired gender transition. App. 258 (Chafino Dep. 59:15–17).

Assistant Chief Andre Jordan found the blog post to be "offensive" and "disrespectful" to the LGBTQ community. App. 352 (Jordan Dep. 36:9–10; 38:16–17). He felt it "disrespectful" toward people identifying as transgender that Dr. Fox suggested males who identify as transgender should not compete in the Olympics. App. 356 (Jordan Dep. 52:23–53:2). What's more, Jordan felt that Dr. Fox could not "edit" the blog or fix it with an apology. App. 365 (Jordan Dep. 88:16–22). The only way to "solve the problem" is to delete the blog entirely. App. 365 (Jordan Dep. 89:12–15). This take-down order underscores that Defendants took issue with Dr. Fox's views—the remedy for Defendants was the removal of those views. *See* App. 365 (Jordan Dep. 88:16–19). This is textbook viewpoint discrimination.

Second, Defendants terminated Dr. Fox even after he wrote two letters to Chief Baker. Thinking he could explain his blog and resolve the issue, Dr. Fox wrote the letter for Chief Baker. In his first letter, he explained that he did not want to offend anyone, but Chief Baker wanted a "clearer apology." App. 088 (Baker Dep. 121:15–16). Chief Baker also said he couldn't accept Dr. Fox's apology because of the mere fact that Dr. Fox chose to "write about" LGBT issues. App. 087

(Baker Dep. 115:2–15). Then, in Dr. Fox's second letter, he said, "For those who are offended, I apologize if my blogs make you feel offended." App. 089; 489–90 (Baker Dep. 125:24–25). But Chief Baker was again unsatisfied. Dr. Fox needed to more clearly apologize for what he said. *See* App. 090 (Baker Dep. 126:12–22).

Even the fact that Chief Baker and Chief Vires asked Dr. Fox to write an "apology" letter shows that their issue was Dr. Fox's views. By definition, an "apology" is "an act of saying that you are sorry for something wrong you have done."[5] An apology only makes sense if Dr. Fox's views were wrong in Defendants' eyes.

Indeed, if Chief Baker were concerned about disruption to the chaplaincy services, a simple apology or explanation would do. But Chief Baker demanded several letters and then flatly banned Dr. Fox's views by terminating him from his position as Lead Chaplain. The concern was Dr. Fox's viewpoint and not the impact the blog had on the Department. In effect, the Department erected a prior restraint against Dr. Fox's view that men shouldn't compete in women's sports. And the Department's actions towards Dr. Fox were a "wholesale deterrent" to an entire category of expression. *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 467 (1995). The only way to fix the blog was to delete it entirely. App. 365 (Jordan Dep. 88:16–22). This blanket ban violates the First Amendment.

2. Dr. Fox's blog was not about the Austin Fire Department.

Defendants' viewpoint discrimination is more egregious when considering that Dr. Fox's speech was wholly unrelated to an opinion or statement about the Austin Fire Department. Dr. Fox's religious opinion on how males do not belong in women's sports does not affect the functioning of the fire department. Neither

[5] *Apology*, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/apology.

would an opinion that males *do* belong on women's sports teams. Dr. Fox's statement was purely religious and political and was not about AFD.

The Supreme Court has struck down attempts to terminate employees for stating opinions that are irrelevant to their job description. In *Rankin v. McPherson*, a secretary at a police department was terminated for expressing a desire that President Ronald Reagan should have been assassinated. *Rankin*, 483 U.S. at 380, 394. While her opinion was inflammatory and unpopular at her workplace, she was terminated solely "based on the content of her speech." *Id.* at 390. McPherson's "duties were purely clerical" and given her "position in the office, and the nature of her statement" the Court was not convinced that the government had an interest in discharging her that outweighed her rights under the First Amendment. *Id.* at 392. McPherson's political opinion was unrelated to the secretarial role the station hired her to fill.[6]

In contrast, Dr. Fox's blog was irrelevant to the job he needed to fulfill—supporting AFD members as they respond to emergencies. His religious opinion on the biological differences between men and women did not affect the fire department's operations, or his ability to faithfully serve the AFD employees. Dr. Fox's comments did not address, criticize, or impact either AFD or its ability to effectively run its public function.

[6] This is unlike *Graziosi v. City of Greenville Mississippi*, where a police department fired an officer for posting negative statements about the chief on social media. 775 F.3d 731, 733 (5th Cir. 2015). The speech there communicated "no information at all other than the fact that a single employee [was] upset with the status quo." *Id.* at 738. It was more "akin to an internal grievance" than anything helpful to the public. *Id.* These posts could affect the functioning of the station and were not "entitled to First Amendment protection." *Id.*

3. Defendants' inconsistencies show they acted solely because of Dr. Fox's views, not out of concern for the disruption of the Austin Fire Department.

Defendants also treated employee situations within the Department differently than Dr. Fox and his blog post. This discrepancy shows that Defendants singled out Dr. Fox, treated him differently, and terminated him because of the views expressed in his blog. This is clear for two reasons.

First, Defendants treated Dr. Fox's views worse than others' views. "The government may not regulate … based on … favoritism … towards the underlying message expressed." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992). Defendants permit other employees at AFD to express their opinions on LGBT-related matters without fear of reprisal. In fact, AFD regularly celebrates and promotes LGBT ideas and themes. AFD celebrates Pride Month every June with sponsored AFD t-shirts. App. 099 (Baker Dep. 164:12–14; 165:19–20). AFD interacts with the community through events and public outreach, informing the community that AFD is recruiting LGBT members. App. 242 (Chafino Dep. 14:2–4). Even Chief Baker promoted LGBT ideas by supporting Lt. Chafino and helping her develop an AFD LGBT affinity group. App. 066 (Baker Dep. 33:2–14). Many find those views controversial.

AFD thus publicly celebrates and promotes some views on LGBT issues, while Dr. Fox's views are banned as offensive. Had Dr. Fox not written about women's sports, Chief Baker would not have terminated him. *See* App. 093 (Baker Dep. 140:2). Chief Baker used his authority to silence any opposing discourse on the LGBTQ topic, discriminating against Dr. Fox and his religious views. *Rankin*, 483 U.S. at 384.

Defendants also treated other employees' disciplinary matters better than they treated Dr. Fox. For example, AFD suspended a firefighter for using the "n word" while on duty, even though this speech lacked any public value. App. 094

(Baker Dep. 143:12–15). Another firefighter reported the incident to Chief Baker, and Chief Baker then wrote a letter explaining the situation to the rest of AFD. App. 094 (Baker Dep. 145:2–3). This firefighter used a racially discriminatory word while on duty and at an AFD station, did not write an apology letter, and only received a suspension. App. 094 (Baker Dep. 143:12–15). Meanwhile, Dr. Fox wrote a blog off-site and off-duty about his religious opinion as a minister on an issue of clear public concern, wrote two letters explaining the blog, and Defendants still fired him. In the Austin Fire Department, racism and sexual harassment are forgivable offenses, but Fox's commonly held religious view is an unforgiveable, terminable one—even though the former is much more likely to cause disruption.

Even Chief Baker himself could make an apology and keep his position as Chief. When AFD failed to represent white males in their diversity poster aimed to recruit firefighters, one firefighter complained to Chief Baker. App. 095 (Baker Dep. 147:16–19). In response, Chief Baker sent an apology to the Department and continued operating as the Department Chief. App. 095 (Baker Dep. 148:9–18). Chief Baker even kept his job after he offended several AFD employees by using sexually inappropriate language. App. 452 (Tanzola Dep. 85:20–86:2) (characterized a cake as a "titty cake."). Chief Baker faced no consequences. But Dr. Fox could not keep his volunteer position as chaplain despite writing an apology. Defendants treated Dr. Fox's views worse than others expressed by AFD employees. All this inconsistency underscores that Defendants targeted Dr. Fox's views and not any actual disruption caused by Fox. See *R.A.V.*, 505 U.S. at 387 (1992) (a "prohibition of constitutionally proscribable speech cannot be 'underinclusiv[e]' … a government must either proscribe *all* speech or no speech at all.").

Second, Defendants punished Dr. Fox for his blog based on who Dr. Fox's blog offended—a "highly subjective" and viewpoint-based standard. *Matal*, 137 S.

Ct. at 1756 n.5, 1763; *Iancu v. Brunetti*, 139 S. Ct. 2294, 2301 (2019) ("[A] law disfavoring 'ideas that offend' discriminates based on viewpoint…."). Besides taking issue with Dr. Fox's viewpoint on women's sports, some also claimed offense at plainly benign portions of Dr. Fox's blog. For example, in Dr. Fox's blog, he praises women for their high representation at the Rio Olympics and celebrates their great success. App. 355 (Jordan Dep. 48:20–25). But Chief Jordan felt that this celebration was offensive and "condescen[ding] toward women, because they did not need to be "applaud[ed]" for their involvement in the Olympics. *Id.* Jordan stated that achieving 45% of the Olympics was "not an achievement." Jordan Dep. 56:8–11. Assistant Chief Jordan was offended by the mere fact that Dr. Fox would discuss how many women had received the honor of representing their country at the Olympics. What's more, Jordan was offended by Dr. Fox's use of the term "woke." App. 357 (Jordan Dep. 54:24–25). Defendants acted against Dr. Fox's blog based on highly subjective complaints from AFD employees.

4. Defendants manufactured the only disruption they can show.

Defendants cannot show there was any disruption to the Department—besides the disruption their own employees manufactured. AFD did not lose the ability to respond to emergencies. App. 092 (Baker Dep. 135:24–25). Chief Baker participated in regular station visits in the summer and fall of 2021 but never remembered anyone discussing Dr. Fox's blog during those visits. App. 080–81 (Baker Dep. 89:22–90:7). Nor was Chief Baker aware of any disruption to emergency service operations. App. 092 (Baker Dep. 135:20–25).

The only "disruption" Chief Baker recounted was that Chafino told Chief Baker that she, and other people she knew, would not use either Chaplain Fox or the chaplain service. App. 088; 092 (Baker Dep. 118:17–24; 134:25–135:25; 136:10–20). That is a far cry from disrupting the operations or functioning of the

Department. *See Branton v. City of Dallas*, 272 F.3d 730, 741 (5th Cir. 2001). And there is no evidence that actual usage of the chaplaincy decreased. App. 092 (Baker Dep. 135:20–25). The only record evidence is that Dr. Fox saw no change in the usage of chaplaincy services. App. 511 (Fox Decl. ¶ 34).

The closest thing to a recounted disturbance was when Lt. Chafino printed copies of Dr. Fox's blog, traveled to different AFD stations, passed them out to her friends, and drummed up complaints. App. 262–63 (Chafino Dep. 64:19–65:25). Only then did AFD members even find out Dr. Fox had written a blog. App. 070 (Baker Dep. 49:16–18). And only then was there a disruption at the station—because Lt. Chafino "was there." App. 334 (Anguiano Dep. 56:15–19).

This manufactured offense is not enough to show actual disruption. Lt. Chafino claimed that some employees were "outraged," "offended," or uncomfortable by the blog. App. 256; 267; 270 (Chafino Dep. 54:16; 120:10; 167:16–17). But these feelings are not enough. Any feelings from speech, such as feeling "outraged," "upset," "angry," "intimidated," and "frustrated" all show that the "only disruption was the effect controversial speech [had] on those who disagree with it." *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 786 (9th Cir. 2022). If these feelings of "outrage" and "offense" were enough for disruption, then employees could fire anyone for any view. In a different office, this could mean firing someone for writing a blog about marriage equality that his employers found offensive.

And when Chief Baker decided to fire Dr. Fox, he relied on Lt. Chafino's reports rather than investigate the issue or hear about possible concerns or "disruptions" from AFD members directly. *See* App. 076–78; 080 (Baker Dep. 73:22–74:8, 79:6–80:10, 88:20–89:17). He also did not meet with anyone besides Lt. Chafino or Chief Vires to determine whether there was a real disruption in the station. App. 077 (Baker Dep. 74:2–4); *see Branton*, 272 F.3d at 741.

Despite "offer[ing] no evidence to show that [Dr. Fox's] speech" was likely to undermine AFD's functions and hearing no complaints from AFD members, Chief Baker still terminated Dr. Fox from the chaplaincy program. *Gonzalez v. Benavides*, 774 F.2d 1295, 1302 (5th Cir. 1985).

B. Dr. Fox's free-exercise claim triggers strict scrutiny because Defendants' actions were directed at religious speech.

The Free Exercise Clause "protects not only the right to harbor religious beliefs inwardly and secretly." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 524 (2022). "It does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life." *Id.*

To determine whether government action burdens religious exercise, courts look at "whether plaintiff's sincere religious beliefs motivate his conduct." *Merced v. Kasson*, 577 F.3d 578, 588 (5th Cir. 2009). So, Dr. Fox's must show that his religious beliefs motivated him to create the blog. *Id.* Dr. Fox believes he was called to AFD to offer counsel, advice, and prayer to those who need it. App. 507–08 (Fox Decl. ¶¶ 6, 15). He believes that everything he does is for God's glory, and his different businesses and nonprofits are part of his spiritual calling. App. 507 (Fox Decl. ¶ 6). He writes his blog about his religious beliefs on God's design for the two sexes, either male or female, and that sex is immutable. App. 510 (Fox Decl. ¶ 25). Dr. Fox's desire to write his blog to speak God's truth and to call out the fallacy of men competing in women's sports. App. 510 (Fox Decl. ¶¶ 25–26). By declaring Dr. Fox's religious beliefs as offensive and discriminatory, and terminating him because of his beliefs, Defendants burdened Dr. Fox's religion.

Defendants have no constitutionally permissible justification for burdening Dr. Fox's religion. Defendants violated the Free Exercise Clause because their actions were (1) not neutral or generally applicable, and (2) Defendants showed hostility toward Dr. Fox's religion. Any state action that burdens a plaintiff's

religion is not neutral or generally applicable and is hostile toward the plaintiff's religion requires the government to satisfy at least strict scrutiny. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 584 U.S. 617, 639 (2018). Dr. Fox's blog expressed his religious beliefs about God's design men and women. Defendants burdened his religious beliefs, and they cannot meet strict scrutiny.

First, Defendants' actions were neither neutral nor generally applicable. If the government's actions are directed at a religious practice or exercise, they are not neutral. *Kennedy*, 597 U.S. at 526. Defendants' termination targeted Dr. Fox's religious views. *Lukumi*, 508 U.S. at 537 (neutrality considers the "interpretation given" by the government). His blog discussed his religious beliefs regarding human sexuality, and Chief Baker admits that without Dr. Fox's blog, he would not have terminated him. App. 093 (Baker Dep. 140:2).

Defendants are essentially choosing which religious beliefs to endorse, Dr. Fox's, or others. But the government cannot judge which beliefs it wants to promote. "[T]he government … cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment on or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece*, 584 U.S. at 638. Defendants' targeted Dr. Fox's religious beliefs—they chose which viewpoints to promote, violating Dr. Fox's free exercise rights.

What's more, Defendants actions were not generally applicable. For one, the City and AFD openly promotes viewpoints contrary to Dr. Fox's views and determines on an ad hoc basis which speech offends AFD members. *Supra* § I.A.3 (Defendants' discrepancies further prove their actions are not neutral or generally applicable). Again, an AFD employee called Chief Jones a b****, and yet Chief Baker only gave this employee a one- or two-days' suspension. App. 096 (Baker Dep. 150:22–151:20). But when Dr. Fox wrote a private blog online, not in any AFD

station, Chief Baker fired him, showing Defendants' inconsistency with punishment and how they handle situations.

Second, Defendants were openly hostile to Dr. Fox's beliefs. Government officials may not convey "official expressions of hostility" toward religious exercise. *Masterpiece*, 584 U.S. at 639. But Chief Baker said Dr. Fox could express views in his blog—just not views on the LGBT community. *See* App. 083 (Baker Dep. 100:8–16). Defendants also denigrated Dr. Fox's beliefs and thought that by merely explaining his religious beliefs on his blog, he disqualified himself as an AFD chaplain. *See* App. 274–75 (Chafino Dep. 209:22–210:9).

Defendants cannot force Dr. Fox to choose between expressing his religious beliefs and working for the City as an AFD chaplain. Defendants' actions burden Dr. Fox's religious exercise and limit his free speech violating his First Amendment rights and triggering strict scrutiny. *See Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 881–82 (1990).

C. Dr. Fox's Texas Religious Freedom and Restoration Act claim triggers strict scrutiny.

Under the TRFRA statute, "a government agency may not substantially burden a person's free exercise of religion." Tex. Civ. Prac. & Rem. Code Ann. § 110.003(a). This does not apply "if the government agency demonstrates that the application of the burden … (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that interest." *Id.* at § 110.003(b). So the statute demands strict scrutiny.

For strict scrutiny to apply, the government must impose a burden on the plaintiffs' religious exercise, and that burden must be "substantial." *Merced*, 577 F.3d at 588. Both are true here.

Defendants' burden Dr. Fox's religious exercise. *Supra* § I.B. And that burden is substantial. Under the TRFRA, a burden is substantial if it is "real vs.

merely perceived, and significant vs. trivial." *Barr v. City of Sinton*, 295 S.W.3d 287, 301 (Tex. 2009). Ultimately, courts look to a "person's religious conduct" to see if it is "curtailed and the resulting impact on his religious expression." *Id.* Courts must measure the religious burden from the religious person's perspective, not the government's perspective. *Id.* Here, Dr. Fox lost a volunteer position that he loved and that gave him purpose. App. 508 (Fox Decl. ¶ 15). Dr. Fox had to endure the burden of hearing his fellow employees' negative views on his viewpoints and the pressure to apologize and change his views. The internal pressure and burden to change his views and potentially "chill" his speech violates the First Amendment. *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330 (5th Cir. 2020), *as revised* (Oct. 30, 2020) (students' First Amendment rights chilled and "their speech deterred, by the prospect of adverse" action by the University); *see Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67) (1963) ("means of coercion" showed the Commission suppressed publications it deemed "objectionable" and this censorship was enough for relief). Since Defendants substantially burdened Dr. Fox's religious practice, strict scrutiny applies.

II. Defendants' actions fail to satisfy strict scrutiny.

Because Defendants violated Dr. Fox's constitutional rights, Defendants must pass strict scrutiny. To do so, they must show that their terminating Dr. Fox was narrowly tailored to serve a compelling interest—also satisfying parts three and four under TRFRA.[7] *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Defendants cannot do so.

For compelling interest, Defendants cannot show an important enough reason to terminate Dr. Fox from his position as Lead Chaplain. To be sure,

[7] Courts look to federal decisions interpreting the Free Exercise Clause when looking at the compelling government interest and least restrictive alternatives under TRFRA. *Merced*, 577 F.3d at 592.

Defendants say they needed to fire Dr. Fox because of the "disruption" his blog caused. *See* App. 088; 090 (Baker Dep. 118:18–19; 127:13–14). But squelching unpopular views is not a compelling government interest.

Here, there was no actual disruption to the functioning of the Department, and yet, Dr. Fox was still terminated because of his blog. *See supra* § I.A.4. Defendants fired Dr. Fox because of what he said, and the Department disagreed with his views. Public employers cannot fire employees merely for disagreeing with their views on controversial topics—that is viewpoint discrimination. *See Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019) (Any government action that seeks to discriminate on "the basis of viewpoint" inevitably "collide[s]" with the First Amendment.).

Defendants may also assert a compelling interest in firing Dr. Fox to "restor[e] confidence in the chaplain services." App. 083 (Baker Dep. 100:1–3). It is important to AFD that employees have confidence in these services, so the firefighters have resources to deal with the severity of their job. But Chief Baker was unaware of anyone who sought chaplaincy services before the blog post but who stopped because of it. App. 092 (Baker Dep. 135:14–16). While Lt. Chafino says there were some employees who said they would not use the chaplain services after the blog, this is all inadmissible hearsay. *See Moss v. Ole S. Real Est., Inc.*, 933 F.2d 1300, 1312 (5th Cir. 1991) (even though statements were made in the deposition, they are "inadmissible as hearsay … because they are statements made outside the courtroom and are offered to prove the truth of the matter asserted."). What's more, Chief Baker did not know of anyone who was actually deterred from using the services who had previously used them before. App. 092 (Baker Dep. 135:14–16).

And these few objections to Dr. Fox's religious views wouldn't pass strict scrutiny anyway. By their nature, chaplains are religious figures with religious

beliefs that cater to some and not to others. *See Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 623–24 (2014) (Kagan, J., dissenting) (noting that a legislator complained about chaplain's sectarian prayer). AFD, for example, has a Roman Catholic chaplain. App. 069 (Baker Dep. 43:8–13). The Roman Catholic Church takes various positions on controversial subjects like abortion, same-sex marriage, contraception, euthanasia, any other topics that some firefighters—including Lt. Chafino—find offensive. *See* App. 273–78 (Chafino Dep. 208:14–213:17). Lt. Chafino herself testified that she would have a problem with a chaplain expressing those views. App. 274–76, 278 (Chafino Dep. 209:12–18; 209:22–210:9; 211:15–23; 213:9–17). Giving people a heckler's veto over every chaplain's religious views would spell the end of religious chaplaincy services in public entities. It also underscores how AFD plays favorites. Allowing the controversial view they like, targeting those they dislike.

Along those lines, Defendants have shown several exceptions that undermine any basis for terminating Dr. Fox. *See Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 802 (2011) ("Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint."). Defendants permit other employees to voice their opinions on current events, religion, politics, and other similarly controversial topics without termination. *See supra* § I.A.3. If Defendants permit other employees to voice their opinions without retribution, it cannot justify terminating Dr. Fox for conveying messages Defendants disagree with, especially since the First Amendment protects Dr. Fox's speech in his blog.

What's more, Defendants permit other employees to voice their opinions, even though that speech is more disruptive, and in some cases, more offensive than Dr. Fox's speech. For example, one employee called Battalion Chief Christine Jones a b****, and only received a one- or two-days' suspension. App. 096 (Baker Dep.

151:1–20). Another firefighter came into the station and stated that "the Mexicans are taking over." App. 096 (Baker Dep. 152:2–3). This firefighter only received a six-day suspension for voicing his offensive and disruptive opinion. In both situations, Chief Baker does not remember if the employees were forced to apologize. App. 096 (Baker Dep. 152:16).

Chief Baker also did not investigate these situations in the same way. There is an official policy and investigation process for discrimination, harassment, and retaliation claims for employees at AFD. App. 082 (Baker Dep. 95:20–96:3). Under this policy, the Public Standard Office interviews witnesses, and compiles testimony into a report for the decision-makers at AFD. App. 082 (Baker Dep. 96:25–97:11). While PSO only investigates employees, AFD did not follow any system or organized investigation for Dr. Fox. App. 082 (Baker Dep. 96:4–6; 97:12–13). He was treated worse than others at AFD, who were more offensive and disruptive. The firefighter who used the "n-word" on duty and at the station received a formal investigation. He received a three-day suspension, even though his speech had no public value at all. Meanwhile, Dr. Fox wrote a private blog off-duty about his religious beliefs and was still terminated from his position. This differential treatment demonstrates that the Department targeted Fox's particular religious views on this issue.

Defendants also failed to employ the least restrictive means for narrow tailoring when they terminated Dr. Fox. *First and foremost*, Chief Baker could have simply asked Dr. Fox to write a letter explaining that his blog expressed his personal religious opinions and not those of the City, Fire Department, or chaplaincy service. Indeed, Baker testified that's all he wanted Dr. Fox to do. App. 429 (Baker 30(b)(6) Dep. 74:12–15). But he never asked Dr. Fox to convey that simple message. App. 413 (Baker 30(b)(6) Dep. 12:11–15).

Second, if there were truly concerns about Fox's blog affecting the chaplaincy service at AFD, Defendants could have conducted a thorough investigation. App. 082; 420–21 (Baker Dep. 96:1–3; Baker 30(b)(6) Dep. 40:17–41:3). Chief Baker could have personally asked to hear from the individuals most bothered by the blog and provided Dr. Fox a chance to respond to the complaints. Defendants did none of that. Chief Baker had also received no complaints about Dr. Fox before he was terminated. App. 092 (Baker Dep. 135:12–13). As far as Chief Baker knew, Dr. Fox was performing his chaplaincy services adequately.

Third, Chief Baker could have written a letter to the Department saying that Dr. Fox's views are his own and not those of the Austin Fire Department. In fact, Chief Baker did just that when he received a complaint from an AFD diversity poster that omitted white males, and when a firefighter used the "n word" while on duty. App. 094–95 (Baker Dep. 143:12–15; 147:21–25; 148:19–23). Defendants had many options to achieve their goals of distancing AFD from Dr. Fox's personal views without terminating Dr. Fox from his position as AFD chaplain.

Defendants never proved they considered these "alternative measures," nor did they provide evidence that they would be ineffective. *McCullen v. Coakley*, 573 U.S. 464, 495 (2014). That does not satisfy any level of heightened review, much less strict scrutiny. *Id*. at 495–96.

III. Defendants' actions also fail to satisfy the *Pickering* balancing test.

While this Court need not consider the *Pickering* balancing factors because Defendants discriminated based on viewpoint, Defendants also cannot meet their burden under *Pickering*. For a First Amendment retaliation claim, a plaintiff must show: "(1) the plaintiff suffered an adverse employment decision, (2) the plaintiff's speech involved a matter of public concern, (3) the plaintiff's interest in speaking outweighed the governmental defendant's interest in promoting efficiency, and (4)

the protected speech motivated the defendant's conduct." *Kinney*, 367 F.3d at 356. Fox has already shown factors 1, 2, and 4. *See supra* § I.A. Fox meets the third factor too for five reasons: (1) Dr. Fox's blog was on a topic of public concern, (2) he wrote it off-duty, (3) Defendants only disruption was manufactured, (4) Defendants' mere offense was not enough to show disruption, and (5) chaplains regularly hold views others can find offensive.

1. Dr. Fox wrote his blog as a public citizen about a topic of public concern, so Defendants have a heavier burden to show disruption.

Dr. Fox spoke as a citizen when he wrote his blogs during his time as chaplain, including his blog series discussing women's sports. Under *Garcetti v. Ceballos*, a person speaks under his official duties when the speech "owes its existence to a public employee's professional responsibilities" or is "commissioned or created" by the employer. 547 U.S. 410, 421–22 (2006). Defendants must show greater disruption because Dr. Fox's speech involved significant topics of public concern. *Lane v. Franks*, 573 U.S. 228, 242 (2014).

When writing his blogs, Dr. Fox was not speaking as the AFD chaplain. Blogging was not part of his duties as Defendants admit. Def.'s Resp. to Pl.'s Request for Admission 3. They also admit that AFD could not control what Dr. Fox said in running his businesses, nonprofits, or speaking during those activities. App. 006; 042 (Am. Compl. ¶ 34, ECF No. 14; Answer to Am. Compl. ¶ 34, ECF No. 15). Chief Baker acknowledged that Dr. Fox's blogs did not identify him as an ADF chaplain. App. 075 (Baker Dep. 67:3–5).

What's more, Dr. Fox spoke on a matter of public concern in his blogs. To determine whether speech addresses a matter of public concern, courts look to the "content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147–48 (1983). Speech on a matter of public concern

relates to "any matter of political, social, or other concern to the community." *Id.* at 146. Even statements with "inappropriate or controversial character" may be on a matter of public concern. *Rankin*, 483 U.S. at 387.

Dr. Fox's speech in his blog was quintessential speech on a matter of public concern. App. 480–85**.** In the blog, Dr. Fox criticized Olympic policies. App. 480–85. He also discussed the new trend of males competing and dominating women's sports. App. 480–85; 074–75 (competitive bosh blog); (Baker Dep. 65:25–66:6). These topics are matters of public concern. Even the Supreme Court has said that "[S]exual orientation and gender identity" is "undoubtedly [a] matter[ ] of profound 'value and concern to the public.'" *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps.*, 138 S. Ct. 2448, 2476 (2018). Three factors bolster this.

First, Dr. Fox's speech touched on significant political and cultural issues of our day—human sexuality and males competing in women's sports. Since 2020, 23 states have passed laws protecting women's sports and in April 2023, the U.S. House of Representatives passed HR 734, federal version of the states' laws.[8] Males competing in women's sports is a political issue, and "[p]olitical speech is 'at the core of what the First Amendment is designed to protect.'" *Morse v. Frederick*, 551 U.S. 393, 403 (2007).

Second, Dr. Fox's speech was also religious—meaning it is "doubly protect[ed]." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 523 (2022) "That the First Amendment doubly protects religious speech is no accident." *Id.* Dr. Fox wrote his blog about his religious beliefs that God created every person male and female. App. 510 (Fox Decl. ¶ 25). The First Amendment protects Dr. Fox's religious speech.

[8] Barnes, *supra* at 3.

Third, Dr. Fox did not hold a policymaker or confidential position as defined by the Fifth Circuit. The Fifth Circuit has said a government's interests are stronger when a public employee has a policymaker of confidential position. *Brady v. Fort Bend Cnty.*, 145 F.3d 691, 707–08 (5th Cir. 1998). The Court defines a "confidential" position as someone who has a confidential relationship with a policymaking process. *Garza v. Escobar*, 972 F.3d 721, 729 (5th Cir. 2020). But here, Dr. Fox operated as an AFD chaplain, not in a confidential or policymaking role. The Supreme Court has held that the government cannot fire "a nonpolicymaking, nonconfidential government employee" on the sole ground of his political beliefs. *Elrod v. Burns*, 427 U.S. 347, 375 (1976).

2. Dr. Fox wrote his blog off-site and off-duty.

Dr. Fox wrote his blog on his own time—off-site and off-duty. Off-site citizen speech deserves greater protection than speech at work. The First Amendment is more likely to protect "[e]mployee speech which transpires entirely on the employee's own time, and in non-work areas of the office." *Connick*, 461 U.S. at 153 n.13; *see also Riley's Am. Heritage Farms v. Elsasser*, 32 F.4th 707, 726 (9th Cir. 2022) ("[W]e give less weight to the government's concerns about the disruptive impact of speech outside the workplace context.").

Dr. Fox wrote his blog as part of his other ministries and when he was off duty from his chaplaincy duties. Chief Baker acknowledged that Dr. Fox's blogs did not identify Dr. Fox as an AFD chaplain. App. 075 (Baker Dep. 67:3–5). And Defendants admitted that Dr. Fox did not have to blog. Def.'s Resp. to Pl.'s Request for Admission 3. Dr. Fox wrote his religious beliefs on his blog on his own time, in his own space. The First Amendment is more likely to protect this speech.

3. Defendants manufactured complaints about Dr. Fox's views, which does not satisfy *Pickering* balancing.

Not only do AFD's alleged disruptions not rise to the *Pickering* standard, but Defendants manufactured any disruption from Dr. Fox's blog. The burden remains on the employer to show the "cost or disruption" of the employee's action not merely rely on "hypothetical hardship." EEOC, *Compliance Manual* § 12-IV(B)(1) (1/15/21). Defendants cannot meet this burden as they manufactured any disruption to AFD's operations. *See supra* § I.A.4.

4. Mere offense is not enough disruption to tip the scales of *Pickering* balancing.

The only potential "disruption" Defendants can assert is that Dr. Fox's blog posts offended some employees. Mere offense, however, does not outweigh Dr. Fox's significant speech rights. "[R]eal, not imagined, disruption is required." *Branton*, 272 F.3d at 741. And "[m]ere allegations of disruption are insufficient." *Sexton v. Martin*, 210 F.3d 905, 912 (8th Cir. 2000). At its core, the First Amendment protects speech that is sometimes offensive. And "[L]earning how to tolerate speech … of all kinds is 'part of learning how to live in a pluralistic society,' a trait of character essential to a 'tolerant citizenry.'" *Kennedy*, 597 U.S. at 741 (cleaned up).

Generally, listeners' reactions to speech cannot be used to silence speech. *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970) ("[I]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers"); *Feiner v. New York*, 340 U.S. 315, 320 (1951) ("ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker"); *Melzer v. Bd. of Educ. of City Sch. Dist. of City of New York*, 336 F.3d 185, 199 (2d Cir. 2003) ("community reaction cannot dictate whether an employee's constitutional rights are protected").

In other words, "'[t]he First Amendment generally does not permit the so-called "heckler's veto," i.e., 'allowing the public, with the government's help, to

shout down unpopular ideas that stir anger.'" *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 475 (3d Cir. 2015), *as amended* (Oct. 25, 2019) (quoting *Melzer*, 336 F.3d at 199).

What's more, if mere offense does not show de minimus harm to deny a religious accommodation under Title VII, then mere offense cannot be the basis to punish someone for speaking. *See* EEOC, *Compliance Manual* § 12-IV(B)(4) (1/15/21) ("[u]ndue hardship requires more than proof" that some coworkers were "offended by an unpopular religious belief"). Surely, if private employers may not regulate an employee's speech based on mere offense, government employers should not be able to either. The U.S. Supreme Court recently considered what constitutes a reasonable accommodation for a worker's religious practices under Title VII. *Groff v. DeJoy*, 600 U.S. 447, 472 (2023). There, the Supreme Court held that "bias or hostility to a religious practice or a religious accommodation" is no "defense to a reasonable accommodation claim." *Id.* That logic applies in the First Amendment context too: mere offense is not enough to show disruption. Rather, AFD's hostility toward Dr. Fox because of his religious beliefs was not an adequate basis to terminate him from his chaplaincy position.

5. Chaplains regularly hold views that others could find controversial.

Not only is mere offense not enough to satisfy *Pickering*, but mere offense applied to a unique chaplaincy practice tilts the balance decisively in Dr. Fox's favor. Chaplains and other religious personnel routinely hold positions and values that others may find controversial. *Lukumi*, 508 U.S. at 526 ("certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety"). In fact, many AFD employees had mixed feelings about common religious beliefs, such as abortion, same-sex marriage, gender identity, and wives submitting to their husbands. *See generally* App. 273–78; 100; 297 (Chafino Dep. 208:14–

213:17; Baker Dep. 167:25–169:5; Jones Dep. 66:13–68:21). All religions involve beliefs that others could find offensive.

And if mere offense is enough to terminate a chaplain, that would allow, and encourage government officials to sit in judgment over which religious beliefs it believes are good or bad or true or false. *See Masterpiece*, 584 U.S. at 637 (the government treated other conscience-based objections more favorably than his, "thus sitting in judgment of his religious beliefs themselves.").

If government officials could rely on mere offense to make hiring or firing decisions for their chaplains, Defendants could fire religious personnel anytime a chaplain stated a religious belief others find to be controversial. The very nature of religion to some is offensive, but that should not give the government, or Defendants, the right to terminate any chaplain for expressing widely held religious views. *See McCreary Cnty., Ky. v. Am. C.L. Union of Ky.*, 545 U.S. 844, 860 (2005) ("liberty and social stability demand a religious tolerance that respects the religious views of all citizens.").

Conclusion

Everyone's freedom is threatened when the government punishes people for expressing views on important political and cultural topics. Defendants undermined Dr. Fox's freedom of speech and religion when they terminated him because of the actions of one employee and the alleged disruption she manufactured at work. Defendants cannot favor one viewpoint and ideology while silencing another—it threatens the constitutional foundations this nation was built upon. Dr. Fox asks this Court to grant his summary-judgment motion, award nominal damages, and schedule a hearing on any additional remedies to be awarded.

Respectfully submitted this 20th day of February, 2024.

By: *s/ Henry W. Frampton, IV*

Ryan L. Bangert
Texas Bar No. 24045446
Jonathan A. Scruggs*
Arizona Bar No. 030505
Henry W. Frampton, IV*±
South Carolina Bar No. 75314
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, Arizona 85260
(480) 444-0020
(480) 444-0028 Fax
rbangert@ADFlegal.org
jscruggs@ADFlegal.org
hframpton@ADFlegal.org

Johannes S. Widmalm-Delphonse*
Virginia Bar No. 96040
Kelly E. Howard*
Virginia Bar No. 94724
Rachel Rouleau*
Virginia Bar No. 97783
Alliance Defending Freedom
44180 Riverside Parkway
Lansdowne, Virginia 20176
(571) 707-2119
(571) 707-4790 Fax
jwidmalmdelphonse@ADFlegal.org
khoward@ADFlegal.org
rrouleau@ADFlegal.org

Hillary K. Lynch
Texas Bar No. 24055800
3419 Westminster Ave., Suite 328
Dallas, Texas 75205
(214) 206-6335
hillary@kramerlynch.com

Attorneys for Plaintiff

*Admitted *Pro Hac Vice*
±Designated as Lead Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of February, 2024, I electronically filed the foregoing document with the Clerk of Court using the ECF system which will send notification of such filing to all counsel of record who are registered users of the ECF system.

By: *s/ Henry W. Frampton, IV*

Henry W. Frampton, IV
South Carolina Bar No. 75314*
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
Telephone: 480–444–0020
hframpton@ADFlegal.org

Attorney for Plaintiff
* Admitted *Pro Hac Vice*