IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

CASEY D. COPELAND **PLAINTIFF**

vs. **Case No. 4:21-CV-00477-DPM**

MARTY SULLIVAN, IN HIS OFFICIAL CAPACITY AS DIRECTOR, ARKANSAS ADMINISTRATIVE OFFICE OF THE COURTS AND STASIA BURK MCDONALD, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE COURTS' DEPENDENCY-NEGLECT ATTORNEY AD LITEM PROGRAM **DEFENDANTS**

REPLY BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND DECLARATORY RELIEF

I. INTRODUCTION

In response to Plaintiff's motion for preliminary injunction and declaratory relief (Doc. 2) (hereinafter "Pl's Mot."), Defendants respond first that the signature block on his e-mail– which contained information equivalent to Plaintiff Copeland's letterhead and his other e-mail signatures – somehow purported to speak for the AOC and justified termination of his contract. If that justification sounds specious, it is. Copeland contends defendants' explanation – offered for the first time in this litigation -- is nothing more than a post-hoc rationalization for defendants' actions in retaliating against him and violating his free speech rights.

Defendants next contend that sovereign immunity prevents the Court from any remedy for their violation of Copeland's free speech rights because, despite renewing Copeland's contract annually since 2012, and adding additional appellate services last year, no "negotiations" over his contract renewal occurred before his termination. Copeland contends that this Court has the power to remedy the violations of his rights under *Ex Parte Young*, and its progeny. Copeland thus asks that the Court grant his motion and enter a preliminary injunction

in his favor and against Defendants reinstating him to his prior position and caseload with seniority and benefits to which he would have been entitled, but for Defendants' violation of his constitutionally protected rights.

II. ARGUMENTS

A. The First Amendment Retaliation Framework Shows Plaintiff has a Reasonable Likelihood of Success on the Merits of his Claim.

The availability of injunctive relief turns on whether Plaintiff has shown a fair chance of success on the merits. *Cf. Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 731–32 (8th Cir. 2008)(noting higher standard of likely to prevail on the merits applies when seeking to enjoin implementation of a state statute, not in cases like this). To establish a *prima facie* case of retaliation, Copeland must show: (1) he engaged in activity protected by the First Amendment, (2) that Defendants took an adverse action against him, and (3) the protected conduct was a substantial or motivating factor in Defendant's decision to take the adverse employment action. *See, e.g., Davison v. City of Minneapolis, Minn.*, 490 F.3d 648, 654-55 (8th Cir. 2007); *Lyons v. Vaught*, 875 F.3d 1168, 1172 (8th Cir. 2017) ("*Lyons II*"). Plaintiff easily satisfies these elements for a prima facie case, and has demonstrated a reasonable likelihood of success on the merits.

1. Copeland's March 30, 2021 email was protected speech.

The undisputed evidence shows Plaintiff's March 30, 2021 e-mail to Fite was speech protected by the First Amendment. The First Amendment protects individual speech in "pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *See, e.g., Roberts v. U.S. Jaycees,* 468 U.S. 609, 622 (1984). A party's expression on public issues "rests on the highest rung of the hierarchy of First Amendment values." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)); *accord Connick*, 461 U.S. at 150 (detailing that the greater the extent to which the speech

involves matters of public concern, the stronger the employer's showing has to be). Political speech has long been considered at the core of the First Amendment. *W. Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943)(stating core speech includes "politics, nationalism, religion, and other matters of opinion"). What speech right could be more central to political speech than the right of constituent to express his opinion on pending legislation to his own elected representative?

In examining a First Amendment retaliation claim, courts in the Eighth Circuit look first to whether the party in question spoke as a citizen on a matter of public concern. *Garcetti v. Ceballos,* 547 U.S. 410, 418 (2006). If not, then the speaker has no First Amendment claim based on the government entity's reaction to the speech. *Id.* If the speech at issue is within the ordinary scope of an employee's duties, then it is not protected because speech made pursuant to official duties is not that of the employee speaking as a citizen for First Amendment purposes. *Lyons II,* 875 F.3d at 1172; *accord Garcetti,* 547 U.S. at 418. If the speech is as a citizen on a matter of public concern, then the potential First Amendment claim exists. *Garcetti,* 547 U.S. at 418.

A First Amendment claim exists here and is subject to the highest level of First Amendment protection. Plaintiff Copeland spoke about HB 1570, a bill restricting medical care available to transgender youth. That issue was newsworthy. (*See* Ex. C to Copeland Supp. Decl. Ex. 22 attached hereto). It received national media attention. (*Id.*) His message was directed to his own elected representative. (*Email,* Ex. 2 to Pl's Mot. (Doc. 2) at 15.) As a result, his speech is core political speech. Plaintiff easily meets the test in this circuit as to whether a public contractor is speaking as a citizen on a matter of public concern. *Belk v. County of Eldon,* 228 F.3d 872 (8th Cir. 2000) ("Criticism, no matter how obnoxious or offensive, of government officials and their policies clearly addresses matters of public concern."); s*ee also Barnard v.*

Jackson County, 43 F.3d 1218, 1225 (8th Cir. 1995) ("[A]llegations of wrongdoing by public officials are on the highest order of First Amendment concern"). "Heightened public interest in a particular issue, while not dispositive, may also indicate that the issue is one of public concern." *Belk*, 228 F.3d at (citing *Bowman v. Pulaski County Special School Dist*., 723 F.2d 640, 644 (8th Cir.1983)). Plaintiff criticized a public official on a matter of intense public interest. The fact coverage of the issue by national media is significant. (*See* Ex. C to Copeland Supp. Decl. Ex. 22 attached hereto). As a result, the first element of the prima facie case is established.

2. Defendants took an adverse action against Copeland by terminating his contract.

No one disputes that Copeland's contract was terminated based on his e-mail to Representative Fite. *See* Termination Letter, Ex. 4 to Pl's Mot. (Doc. 2) at 20; *Sullivan Decl.* (Doc. 13-1) at ¶¶ 16-21; *Sullivan E-mail*, Ex. 6 to Pl's Mot. (Doc. 2) at 25.) Termination of his contract constitutes an adverse action. *See Umbehr,* 518 U.S. at 685 (discussing termination as adverse action); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 715 (1996) (finding removal of independent contractor from list of authorized service providers was adverse action). "Official reprisal from protected speech offends the Constitution because it threatens to inhibit exercise of the protected right … and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions … for speaking out." *Hartman v. Moore,* 547 U.S. 250, 256 (2006); *see also L.L. Nelson Enter., Inc. v. City of St. Louis, Mo.*, 673 F.3d 799, 809 (8th Cir. 2012) (noting threat to business was sufficient to chill speech); *Garcia v. City of Trenton*, 348 F.3d 726, 729 (8th Cir. 2003) (noting adverse action "need not be great in order to be actionable").

3. Defendants were motivated by Copeland's e-mail to Representative Fite to terminate his contract.

Copeland's e-mail to Representative Fite was a motivating factor in the termination of his contract, if not the sole basis for its termination. *See* Termination Letter, Ex. 4 to Pl's Mot. (Doc. 2) at 20; *Sullivan Decl.* (Doc. 13-1) at ¶¶ 16-21; *Sullivan E-mail,* Ex. 6 to Pl's Mot. (Doc. 2) at 25.) This evidence is direct evidence that specifically links the protected speech with the challenged contract termination. Even absent that evidence, however, the record demonstrates strong circumstantial evidence itself adequate to find causation exists as the Eighth Circuit has long noted temporal proximity between protected activity and adverse employment action may establish the element of causation. *See, e.g., Davison v. City of Minneapolis, Minn.,* 490 F.3d 648, 657 (8th Cir. 2007).

Defendants had renewed Copeland's contract annually since becoming a part-time contractor. (*Copeland Decl.,* Ex. 21 to Pl's Mot. (Doc. 2) at 81-82, ¶¶6-12.) Defendants even expanded his duties in December 2020, to include additional, appellate services. (*Id.* at ¶10; *Contract,* Ex. 1 to Pl's Mot. (Doc. 2) at 13-14.) Yet, on April 1, 2021, Defendants delivered notice Copeland's contract was terminated. (*Termination Letter,* Ex. 4 to Pl's Mot. (Doc. 2 at 20.) The Eighth Circuit has held that temporal proximity of four months sufficient to infer a causal link between an adverse action and the protected conduct, where an employee had an otherwise good employment record. *Hudson v. Norris,* 227 F.3d 1047, 1051 (8th Cir. 2000). The notice of termination of Copeland's contract came approximately 48 hours after Copeland sent his e-mail to Representative Fite. (*Termination Letter,* Ex. 4 to Pl's Mot. (Doc. 2) at 20; *Emails,* Exs. 2 & 6 to Pl.'s Mot. (Doc. 2) at 15, 24, respectively.) This timing is no coincidence. Defendant Sullivan was considering termination of his contract less than two hours after Plaintiff Copeland hit "send" and transmitted his e-mail to Representative Fite. (*Email,* Ex. 6 to Pl.'s Mot.

(Doc. 2) at 24.) As a result, it is clear that the e-mail as a substantial or motivating factor in the defendants' decision to terminate his contract. (*Sullivan Decl.* (Doc. 13-1) at ¶¶ 16-21; *Sullivan E-mail*, Ex. 6 to Pl's Mot. (Doc. 2) at 25.)

B. The Defendants Have Not Carried Their Burden of Showing that Absent Protected Activity, Defendants Would Have Terminated His Contract.

Defendants' contend that it was the manner of the communication, not its content that justified termination of Copeland's contract. This explanation is, at best, pretextual, and inadequate to show that the defendants would have made the same decision in the absence of the protected activities, as the First Amendment retaliation framework requires. *See Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 287 (1977); *Davison*, 490 F.3d at 658 (citing *Mt. Healthy, supra*). Plaintiff's contract was terminated because he criticized Fite, not because the e-mail included his "AOC title and AOC website."

Defendants may prevail, if they can show they would have terminated the contract regardless of the protected speech. *Board of County Comm'rs, Wabanunsee County v. Umbehr*, 518 U.S. 668, 685 (1996). Defendants explain their termination of Plaintiff's contract as based on the manner in which he criticized Representative Fite, not the criticism itself. However, these items are inseparable. The signature block was appended to the communication to his elected official. (*E-mail*, Ex. 2 to Pl's Mot. (Doc. 2) at 15.) Defendants' justification was first articulated by Defendant Sullivan in his June 28, 2021, declaration—some 89 days after the notice of termination was provided to Copeland and 91 days after his e-mail to Fite—as "the misuse of his AOC title and the AOC website in an e-mail conveying the authority to speak for the AOC." (*Sullivan Decl.* (Doc.13-1) at 4, ¶¶21-22.)

Significantly, Defendants point to no official attorney *ad litem* duties that might encompass Plaintiff's communication to Representative Fite. They cite no Supreme Court or

Eighth Circuit cases suggesting that Copeland's speech was made pursuant to any official duties. *Cf. Garcetti v. Ceballos,* 547 U.S. 410, 421 (2006) ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes and the Constitution does not insulate their communication from employer discipline."); *Nagel v. City of Jamestown,* 952 F.3d 923, 930 (8th Cir. 2020) (holding media interview was within scope of police officer's job duties, so speech was unprotected).

To the contrary, as Plaintiff will address, Defendants rely on *Bowers v. Rector and Visitors of the University of Virginia*, a district court case from the Fourth Circuit for the unremarkable proposition that an employee can lose First Amendment protections in some circumstances, although even there the district court found the employee spoke on a matter of public concern. *Bowers v. Rector & Visitors of the Univ. of Va.,* 478 F.Supp.2d 874, 885 (W.D. Va. 2007), *aff'd sub nom. Bowers v. Scurry*, 276 F. App'x 278 (4th Cir. 2008) (unpublished *per curiam*). Defendants acknowledge that *Bowers* is not controlling. (Resp. (Doc. 13) at 11.) Yet, they say that by using the signature block, he somehow "removed his speech from the realm of First Amendment protection by speaking pursuant to his official duties, and must face the consequences." *Id.* at 12 (citing *Bowers, supra*).

Sullivan acknowledges that "Copeland resigned from full-time employment on March 1, 2017, and became a contracted (part-time) Attorney Ad Litem." (*Sullivan Decl.* (Doc. 13-1) at 3, ¶10.) Defendants, however, obfuscate Copeland's employment status. The First Amendment protects both contractors and employees. *Board of County Comm'rs, Wabanunsee County v. Umbehr,* 518 U.S. 668, 684 (1996). Yet, the distinction remains important because the interests of the parties may differ, as the interests of a governmental entity using a contractor may be mitigated, and lesser than the interests of an employer, because a contactor is a step removed in

his relationship with the governmental entity. *Id.* Apparently, Defendants hope to obfuscate Plaintiff's relationship in hopes this Court will think Plaintiff was an AOC employee or staff member (which he was not), bound by the employee manual (Ex. 2 to Defs.' Resp. in Opp. (Doc. 13-2) they attach, rather than merely a part-time contractor. The response brief and the Sullivan Declaration repeatedly and erroneously refer to Plaintiff as an "employee" and refer to "staff" and "employees" in justifying their actions. (*See, e.g., Sullivan Decl.* (Doc. 13-1) at ¶¶ 19, 23; Def. Resp. in Opp. to Mot. for Prelim. Inj. at 16.)[1]

From the evidence, Plaintiff communicated to Fite as a private citizen, not a representative of AOC. The contents of the e-mail itself show that Plaintiff was speaking for himself and not in behalf of the AOC. (*E-mail,* dated Mar. 30, 2021, Ex. 2 to Pl's Mot.(Doc. 2) at 15. It states, "***I*** just wanted to say how ashamed ***I*** am of you . . ." and "***I*** truly hope . . . ." *Id.* (emphasis added.) Nothing in the e-mail suggests that Plaintiff's communication with Fite was on behalf of the AOC. *Id.* Fite was also his elected representative. The March 30, 2021 e-mail was sent from his personal account, not an official AOC account, with his personal contact information and from his personal computer on his own time. (Copeland Supp. Decl., Ex. 22, attached hereto).

Fite, for her part, recognized Plaintiff communicated as a private citizen, not with any authority from the AOC as she then immediately e-mailed Sullivan, whom she obviously knew was the AOC Director. (*E-mail,* dated Mar. 30, 2021, Ex. 3 to Pl's Mot. (Doc. 2) at 16.) Defendant McDonald acknowledged that Plaintiff had communicated with Fite precisely because she was his elected representative. (*Email,* Exh. 8 to Pl's Mot. (Doc. 2) at 27.) Fite passed on the

[1] Sullivan also erroneously asserts that Plaintiff self-identified as an employee of the judiciary branch in his e-mail. (Sullivan Decl. (Doc. 13-1), ¶19.) This statement is inaccurate.

e-mail without any comment, saying only "E-mail I received today from Ad Litem." (*E-mails*, Ex. 3 to Pl's Mot. (Doc. 2) at 16-17 (subject line).). Her e-mail to Brooke Steen was similar. (E-mail, Ex. 5 to Pl's Mot. (Doc. 2) at 21-23.) She doesn't inquire of Sullivan or Steen to ask whether Plaintiff speaks for the AOC or whether they approved of this communication. (*Id.*) When Representative Fite texts Jennifer Cruan, AOC, with a copy of the e-mail, she doesn't ask if Plaintiff is speaking for the AOC. (*Texts*, Ex. 9 to Pl's. Mot. (Doc. 2) at 28-29.) She doesn't ask Janet Bledsoe with whom she apparently has a personal relationship. (*Emails*, Ex. 10 to Pl's Mot. (Doc. 2) at 30; *Texts*, Ex. 16 to Pl's Mot. (Doc. 2) at 38-39.) Instead, Fite asks "Should his ad Litem information be on an email of this nature?" (*Id; see also* Ex. 10 to Pl's Mot. (Doc. 2) at 30.) The evidence suggests Fite's e-mails to Sullivan, Bledsoe, and Cruan were sent to stop his criticism of her -- *i.e.* to chill the speech of a citizen to his elected representative on a matter of public concern. Private statements made to a public official in his official capacity are protected by the First Amendment. *Rankin v. McPherson*, 483 U.S. 378, 387 (1987); *Belk*, 228 F.3d at 879 ("Criticism, no matter how obnoxious or offensive, of government officials and their policies clearly addresses matters of public concern.").

Even though they contained the exact same signature block at issue in this lawsuit, previous correspondence from Plaintiff to Fite was not critical of her, so apparently the signature block was not an issue for Fite. (*See Copeland Supp. Decl*. Ex. 22, at ¶11 & *E-mail*, dated Mar. 24, 2020, Ex. A thereto, attached to this Reply and incorporated herein by this reference.) In a subsequent e-mail to Fite, Plaintiff explains that he was expressing his personal disgust to his state representative. (*Id.* at ¶12 & *E-mails*, Ex. B, thetero.) The facts demonstrate Plaintiff communicated with his elected representative, Representative Fite, on an issue before her, which was both newsworthy and a matter of public concern. *Id.*

1. Defendants' claim that the inclusion of the signature information on the e-mail is pretext, not a legitimate basis for termination.

Defendants assert that they would have terminated Copeland anyways for "misusing" his authority. (Defs.' Resp. in Opp. to Mot. for Prelim. Inj. (Doc. 13) at 23.) The source of this alleged "misuse of authority," they do not specify. (*Id.*) However, presumably, the misuse is Copeland's signature block which Defendants now claim somehow links the AOC to a political message. In reality, Defendants, both prior to and after the March 30, 2021 e-mail, expressed no concerns about Plaintiff's inclusion of his credentials or the AOC website address.

At no time did they manifest any concern that their usage would indicate to others, including Fite, that Plaintiff was speaking on behalf of the AOC. This is evidenced by their utter silence about it when they saw the same information in the 2019 letter to Fite and that Plaintiffs' e-mails contained the same information after the 2021 e-mail. (*See* Letter, dated Jan. 12, 2019, Ex. 17 to Pl's Mot. (Doc. 2) at 40-41; Exs. A & B to Ex. 22, attached hereto.) Never –and continuing to the present– has AOC administrative staff requested or even suggested to Plaintiff that he should remove the signature block information because it might mislead others into thinking that his communications are in behalf of the AOC. Why? Because they know the signature block does not mislead anyone.

Plaintiff works as an attorney *ad litem* in domestic relations cases over which the AOC has no authority, contractual or otherwise. The credentials and website addresses included in his e-mail to Fite confirm Plaintiff's qualifications as an *ad litem* attorney for the courts in domestic relations cases unconnected to the AOC and his qualifications to handle AOC dependency-neglect cases. *E-mail,* dated Mar. 30, 2021, Ex.3 to Pl's Mot. (Doc. 2)). His signature block references his credentials as a child welfare law specialist and an attorney *ad litem* with the website address of each qualifying organization. *Id.* The e-mail contained no indication that he

was a contractor (much less an employee) of AOC. *Id.* Indeed, the "arcourts.org" website gives no such indication as that website belongs to the Arkansas Judiciary—not just the AOC— and contains a directory of *ad litem* attorneys qualified to handle dependency-neglect cases under the auspices of the AOC or domestic relation cases by appointment from individual courts. *Id*. The e-mail does not contain Plaintiff's title other than the identification that he is an attorney *ad litem* nor does it suggest he has any authority to speak for the AOC on any issue. *Id.*

Nor is Copeland, an independent contractor, subject to the administrative direction in the same sense as other staff employees of the AOC. As an attorney *ad litem*, while the AOC may determine the size of his caseload, Copeland must exercise independent judgment for his clients. Ark. R. Prof. Conduct 5.4(c) ("A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgement in rendering such legal services."); *see Polk County v. Dodson*, 454 U.S. 312, 321-22 (1981) (making similar observations about public defenders). As an attorney *ad litem*, his clients are the children whose interests he represents in court, not the AOC.

Defendants' attempts to distinguish Copeland's 2019 letter from his 2021 e-mail are unpersuasive. Both contained the same personal contact information, the same identification as an attorney *ad litem*, the same credentials with the web addresses of the credentialing organizations. The 2019 letter identifies Plaintiff in the body as an attorney *ad litem.* (*Letter*, dated Jan. 12, 2019, Ex. 17 to Pl's Mot. (Doc. 2) at 40-41.) Defendants do not take issue with this: "Copeland's statement that he worked as an ad litem merely informed the reader . . .. " Defs.' Resp. in Opp. to Mot. For Prelim. Inj. (Doc. 13) at 21. Plaintiff's signature block in the 2021 e-mail similarly merely informed Fite that he worked as an *ad litem*. No substantive difference exists between the two communications.

Defendants' reliance on Copeland's use of the same e-mail for business and commercial communications is undercut by his prior 2019 communications with Fite – communications of which the AOC was aware. (Exs. 17, 18, 19 to Pl's Mot. (Doc. 2) at 40-43.) His 2019 letter (Ex. 17) has the same e-mail address the Sullivan describes as Copeland's "official email address." (*Letter*, dated Jan. 12, 2019, Ex. 17 to Pl's Mot. (Doc. 2) at 40.) Both Bledsoe and Defendant McDonald were aware of Copeland's communications with Representative Fite from that same e-mail address, as it was included on the email string. (*Emails*, Exs. 18 & 19, at 42-43.)

Defendants' attempt to distinguish the 2019 letter by saying it did not include a link to the AOC website in the signature block is disingenuous. (Defs.' Resp. in Opp. to Mot. For Prelim. Inj. (Doc. 13) at 21; *Sullivan Decl.*, Ex. 1 to Defs' Resp. (Doc. 13-1) at ¶28.) Defendants were not using the "arcourts.gov" website at that time. Instead, the 2019 letter refers to the AOC juvenile courts division website address, "arjdc.org," —the relevant website address at that time before defendants transitioned to the current subdirectory on the Arkansas Judiciary website. (*Letter*, dated Jan. 12, 2019, Ex. 17 to Pl's Mot. (Doc. 2) at 40 (footer stating "Attorney Ad Litem – arjdc.org").) So, defendants' argument that the 2019 letter is different because it does not refer to the Arkansas Judiciary website is disingenuous given that the 2019 letter refers to the 2019 website, while the 2021 e-mail refers to the 2021 website.

Nothing in the attorney *ad litem* Policy Manual[2], which applies to contract attorneys *ad litem* prohibits the use of credentialing information in e-mails. (*See* Policy Manual, Ex. 20 to Pl's Mot. (Doc. 2) at 44-79, *passim.*) A provision requires attorneys *ad litem* to present

[2] For clarity, Copeland does not refer to the AOC Employee Handbook and Policy Manual which applies only to "all employees of the Administrative Office of the Courts." AOC Employee Handbook and Policy Manual (Doc. 13-2) at 1 (discussing "Scope" at p. 7 of 36). As a contractor, the AOC Employee Handbook and Policy Manual does not apply to him. (*Id.*; *see also Copeland Decl.*, Ex. 21 to Pl's Mot. at 82, ¶12.)

dependency-neglect proposals to AOC staff before submitting proposed legislation to a legislator. (*Id.* at 55.) That provision, however, does not apply to Plaintiff's e-mail which contains no legislative proposal. (*E-mail*, Ex. 2 to Pl's Mot. (Doc. 2) at 15.) That provision apparently resulted from Plaintiff Copeland's 2019 communications with Representative Fite. (*Sullivan Decl.* (Doc. 13-1) at ¶¶27-29; *Letter, dated* Jan. 12, 2019, Ex. 17 to Pl's Mot. (Doc. 2) at 40-41.) Nothing about that policy, however, offers any insight into the issue of use of their certifications or other credentials. In fact, there was no policy or other measure to prevent attorneys *ad litem* from listing their credentials on correspondence. (There still isn't.)

Defendants attempt to explain away the incriminating text message of Jennifer Croun, who had participated in the discussion about terminating Plaintiff's contract. (*Texts,* Ex. 14 to Pl's Mot. (Doc. 2) at 35-36.) Their contorted explanation, however, is unpersuasive. A reading of the message compels the conclusion that Copeland's use of his attorney *ad litem* title (and the corresponding AOC web address where one would confirm he holds those credentials) was seized on by Defendants as a pretext for the termination of his contract because he sent a "political e-mail" criticizing his state representative. So, they admit the content of the e-mail was political – a significant admission for the public interest and public concern issues (Defs.' Resp. in Opp. to Mot. For Prelim. Inj. (Doc. 13) at 20.) They hyperbolically state, however, that "in no other political activity has Copeland misused his AOC title or so blatantly linked the AOC to his message." *Id.* Absent from this hyperbole is any specification of a policy or procedure in the manual applicable to contractors like him, that Copeland violated.

Nor do Defendants explain how including the reference to "arcourts.gov" somehow links the AOC to his message. The "arcourts.gov" website is not the AOC's exclusive website. but rather that of the "Arkansas Judiciary," a fact that is apparent when one visits the site. The site

references Arkansas courts at all levels in addition to court administration and other related functions. Copeland's signature references the site because the site includes link where one would find the directory of certified domestic relation and probate attorneys *ad litem*. Copeland previously made an identical disclosure in his 2019 letter to Fite without any suggestion from Defendants that this was inappropriate. *Letter,* dated Jan. 12, 2019, Exh. 17 to Pl's Mot. (Doc. 2) at 40-41 (identifying himself as "Dependency-Neglect Attorney Ad Litem in Sebastian County" and stating in footer "Arkansas DN and DR PR Attorney Ad Litem – arjdc.org" and "NACC Child Welfare Law Specialist – naccchildlaw.org.").

His e-mail exchange with Defendant Sullivan in 2018 contains virtually the same information. (*Emails,* Ex. 5 to Defs.' Resp. in Opp. (Doc. 13-5) at 1.) Sullivan himself was aware of Plaintiff's use of this sort of signature block for personal communications. (*Id.*) When Copeland reached out to discuss the issue of seeking political office, an act Defendant Sullivan stated was contrary to their official AOC policy, Copeland's communication must have been a personal communication, not an official AOC communication. (*Id.*) Sullivan himself was a party to a series of communications where Copeland used a similar e-mail signature. (*Id.*) Yet, he took no action. (*Id.*) Defendants never suggested the signature block Copeland used was inappropriate. (*Copeland Decl.,* Ex. 21 to Pl's Mot. (Doc. 2) at 81, ¶¶9, 15, 24; *Copeland Supp. Decl.*, Ex. 22, hereto, at 4, ¶10.)

Despite being aware of prior communications from the same address containing the same information in the signature block that they now rely upon for termination of his contract, defendants' silence demonstrates a lack of concern about Copeland's signature block. Now, they point to no policy that limits the display of credentialing information, or covers the use of signature blocks for correspondence. When examined in the context of the multiple prior

communications of which Defendants were aware and their record of doing nothing in response to precisely the same content they now find objectionable, as the Cruan text shows, Defendants' articulated reason for termination of Copeland's contract is nothing more than a pretext for their retaliation against Copeland to silence his criticism of his elected representative – a representative whose favor AOC attempted to curry at Copeland's expense. (*Text,* Ex. 14 to Pl's Mot. (Doc. 2) at 35-36.)

2. The Record includes neither evidence of actual disruption nor any reasonable anticipation of disruption in the relevant period of March 30 to April 1, 2021.

Defendants produce no record evidence of actual disruption, and no evidence of a reasonable possibility of disruption to their delivery of services, the inquiry of this Court is simply whether Defendants had a legitimate reason to dismiss Plaintiff, not related to his exercise of his First Amendment rights. The lack of evidence of even the reasonable possibility of disruption caused by the e-mail means this Court need not reach the *Pickering* test or evaluate any factors. Absent evidence of actual or probable reasonably-anticipated disruption, no basis exists for the Court to apply the *Pickering* factors: "[w]here there is no evidence of disruption, resort to the *Pickering* factors is unnecessary because there are no government interests in efficiency to weigh against First Amendment interests." *Henry v. Johnson,* 950 F. 3d 1005, 1011 (8th Cir. 2020)(quoting *Belk, supra,* 228 F.3d at 881). The law requires a public employer "with specificity, demonstrate the speech at issue created workplace disharmony, impeded the plaintiff's performance, or impaired working relationships." *Id.* at 1012 (quoting *Lindsey v. City of Orrick,* 491 F.3d 892, 900 (8th Cir. 2007)); *see also Mattingly v. Milligan,* No. 4:11-CV-00215, 2011 WL5184283, *4**,** 94 Emp. Prac. Dec. P 44,328 (E.D. Ark. 2011)(unreported) (noting "bare allegations that the speech caused disruptions supported by minimal evidence is

insufficient to invoke the *Pickering* balancing test")(citing *Kincade v. City of Blue Springs, Mo.*, 64 F.3d 389, 395 (8th Cir.1995), *cert. denied* 517 U.S. 1166 (1996)).

Even if an employer (or contractor) need not show actual disruption, it still must demonstrate a reasonable prediction of disruption. *Henry*, 950 F. 3d at 1011. And the disruption must involve workplace disharmony, impediment of Plaintiff's performance, or impaired working relationships." *Id*. As stated in *Deschenie v. Board of Education of Cent. Consol. Sch. Dist. No. 22*, " [i]n evaluating the government interest in restricting the speech, the court may consider "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." 473 F.3d 1271, 1279 (10th Cir. 2007) (citing *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (cited by Defendants, Defs. Resp. in Opp. to Mot. for Prelim. Inj. (Doc. 13) at 16).

Even if the employer doesn't have to wait for actual disruption to occur, a prediction of disruption must be more than a bare assertion. It must be supported by specific evidence. *Id*. Defendants have submitted no evidence at all of either actual or anticipated disruption of workplace harmony, impediment of Plaintiff's performance or impaired working relationships. (*See* Sullivan Decl. (Doc. 13-1) at 1-6, ¶¶1-31.) In the 48-hour interval between Plaintiff sending the e-mail and his termination, there was none. Significantly, neither Defendants nor any other AOC administrative staff articulate any concern about the AOC's impartiality in their numerous e-mails and texts about Copeland's e-mail. *E-mail*, Ex. 3 to Pl's Mot. (Doc. 2) at 16-19; *E-mails*, Exs. 5 to and including 8 to Pl's Mot. (Doc. 2) at 21-27; *E-mails*, Ex. 8 to Pl's Mot. (Doc. 2) at 21-27; *Text*, Ex. 9 to Pl's Mot. (Doc. 2) at 28-29; *E-mails*, Ex. 12 to Pl's Mot. (Doc. 2) at 32;

Texts, Ex. 14 to Pl's Mot. (Doc. 2) at 35-36. Indeed, the circumstances of the e-mail were such that there could be no possible disruption. The e-mail was private – sent to only Representative Fite. (*E-mail,* Ex. 2 to Pl's Mot. (Doc. 2) at 15.) It never became public. (*Id.*) It was not disclosed to colleagues, court personnel, other attorneys or judges. (*See id.*) Fite sent it to Sullivan and Steen only. (*E-mail,* Ex. 3 to Pl's Mot. (Doc. 2) at 16-19; *E-mail,* Ex. 5 to Pl's Mot. (Doc. 2) at 21-22.) Sullivan, however, sent it to other members of AOC administrative staff. (*E-mail,* Ex. 3 to Pl's Mot. (Doc. 2) at 16-19.)

Defendants refer to Plaintiff's actions in writing post-termination to colleagues as promoting disharmony. (Defs.' Resp. in Opp. to Mot. for Prelim. Inj. (Doc. 13) at 19.) A determination of disruption is only relevant to justify an adverse employment action, if it occurred *before* the adverse action. In this case, that would be the 48-hours between Plaintiff having sent his 3:30 p.m. March 30, 2021 e-mail message and his receipt at 4:00 p.m. on April 1, 2021 of notice of termination. *See generally, E-mail,* dated Mar. 30, 2021, Ex. 2 to Pl's Mot. (Doc. 2) at 15; *Termination Letter,* Ex. 4 to Pl's Mot. (Doc. 2) at 20; *Email,* dated Apr. 1, 2021, Ex. 12 to Pl's Mot. (Doc. 2) at 32-33.) Plaintiff's post-termination communications are thus irrelevant. Moreover, Plaintiff's communications to colleagues were made only because his contract was terminated. Absent his termination, the fact he had communicated with his representative never would have become known to anyone but himself, Fite and certain AOC staff.

Simply put, there is no disruption in the record before the Court. No actual disruption. No specific evidence offered to support "reasonable predictions" of disruption. No evidence of disruption exists in the record. As such, disruption cannot offer a basis for termination. Nor

does it offer any counterweight to Copeland's protected speech for purposes of any balancing test, so this Court need not engage in the *Pickering* balancing test. *Henry*, 950 F. 3d at 1011.

3. If this Court were to apply the balancing test of *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), the result would be the same—Defendants violated Plaintiff's First Amendment rights.

Under applicable precedent, free speech protections extend to public contractors, like Copeland, and in ascertaining whether a violation occurred, the Eighth Circuit has applied the framework and analysis from government employee cases to public contractors. *See, e.g.*, *Umbehr, supra,* 518 U.S. at 675; *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 715 (1996)(finding regular service providers are protected contractors); *Heritage Constr., Inc. v. City of Greenwood, Ark.*, 545 F.3d 599, 601 (8th Cir. 2008) (same). The *Pickering* test weighs the speech rights of the speaker against the governmental entity's rights to protect its interests in promoting the efficiency of the public services provided. 391 U.S. at 568.

Defendants weigh the various factors but relying on *Morgan v. Robinson*, 920 F.3d 521, 523 (8th Cir. 2019) and *Nord v. Walsh Cnty.*, 757 F.3d 741 (8th Cir. 2015), Defendants urge the Court apply an even more deferential standard to Defendants' allegations of disruption. (Defs. Resp. in Opp. to Mot. for Prelim. Inj. (Doc. 13) at 13-14.) No basis in law or fact exists for such treatment; nor is there support for applying the two central cases upon which the defendants rely. Instead, Copeland contends that once the factors are considered, the *Pickering* test confirms Defendants violated his rights.

a. No basis for deferential treatment exists.

Defendants correctly state that the Eight Circuit has not extended heightened deference to non-law enforcement government agencies. *See id.* Nevertheless, Defendants attempt to equate "AOC's concern about disrupting the appearance of impartiality" with the unique organizational

concerns of law enforcement agencies noted by the courts in *Morgan* and *Nord.* Defs. Resp. in Opp. to Mot. for Prelim. Inj. (Doc.13) at 14. This false equivalency, however, simply does apply.

Both *Nord* and *Morgan* concerned small local sheriff's departments where deputy sheriffs were terminated for statements made during unsuccessful election campaigns for the sheriff's job. *See Morgan,* 920 F.3d at 532; *Nord,* 757 F.3d at 748. In both cases, greater deference was given to elected sheriff, who had supervisory authority to hire and fire deputy sheriffs, because of the unique nature of the relationship between the sheriffs and their deputies, who are deemed to "act as the sheriff" and because they were law enforcement agencies. *Morgan,* 920 F.3d at 523; *Nord,* 757 F. 3d at 744.

The Eighth Circuit has noted that law enforcement agencies are given this latitude. *See, e.g., Morgan v. Robinson,* 920 F.3d 521, 526 (8th Cir. 2019)(en banc); *Nord,* 757 F. 3d at 741; *Buzek v. County of Saunders,* 972 F.2d 992, 995 (8th Cir. 1992) ("Law enforcement agencies, more than other public employers, have special organizational needs that permit greater restrictions on employee speech."). Defendants cite no authority that actually applies the more deferential standard courts have permitted in cases involving law enforcement agencies to other governmental agencies like the AOC.

Nor do the facts support such deferential treatment to Defendants. The unique organizational features applicable to law enforcement agencies are absent here. Unlike law enforcement agencies who often operate in high pressure situations when public security is a priority, the AOC has no public safety function. *See. e.g., Morgan,* 920 F.3d at 526. While lauding the "appearance of impartiality of the judiciary," the AOC is not the judiciary. It is neither a court, nor a judge. While it attempts to assume that mantle of the judiciary, it ignores the context of the recognized compelling interest in impartiality – a context that has no analog in

the Attorneys Ad Litem programs administered by Defendants. In *Wersal v. Sexton*, cited by Defendants in their Response, the case involved a challenge to the prohibition on judicial candidates publicly endorsing or opposing other candidates, or soliciting funds either for themselves or for other candidates or political organizations. 674 F.3d 1010, 1019 (8th Cir. 2012). The Court noted that due process required a fair trial in a fair tribunal before a judge with no actual bias or interest in the case. *Id.* at 1020-21. Because a voter might question whether a judge is impartial, if there were political interests or if there were significant financial contributions made, it upheld the restrictions. *Id.* at 1027, 1031.

Such concerns, however, are not present here. Plaintiff is an independent contractor who works for his clients, or alternatively the circuit court and in, dependency-neglect cases only, under the auspices of the AOC. Copeland thus has no close working relationship with AOC administrative staff; nor is such a relationship necessary. As with any attorney, his primary role is to advocate for the best interests of his clients, usually minor children in these court proceedings. The role of the AOC is generally to see that attorneys *ad litem* are qualified to handle such cases, to distribute the workload equitably, and to pay for the services rendered. As a part-time contractor in Sebastian County, Copeland has no co-workers but, instead, works out of his home and represents his clients just as any sole practitioner would. (Copeland Decl., Ex. 21 to Pl's Mot. (Doc. 2) at 84, ¶17. Because none of the same factors are present, Defendants are not entitled to the same broadly deferential treatment given to law enforcement agencies. Defendants offer neither law nor facts that entitles them to such deferential treatment. When considered in the context of the factual record, no basis exists.

b. Defendants' central cases involve e-mails but are neither controlling, nor persuasive on this factual record.

Defendants cite *Deschenie* and *Bowers* as persuasive decisions by non-Eighth Circuit Courts. The only consistency among this case and *Deschenie* and *Bowers* are that they involve e-mail as the medium of communication. Otherwise, they are easily distinguishable.

In *Deschenie,* an employee--not a contractor--who was first the head of the school district's bilingual education program (and at the relevant time the district's bilingual education coordinator) sent an e-mail to the editor of the local newspaper, which was published as a letter to the editor. The communication expressed a position regarding bilingual education inconsistent with the school board's official position. Deschenie signed the e-mail in her capacity as a school administrator with her title as the school district's Director of Indian Education and Bilingual Education, thus appearing as if she was speaking for the school district. *Deschenie*, 473 F.3d at 1281. The Court found that Deschenie's position as Director of Indian Education and Bilingual Education a major factor in supporting her employer's restriction of her speech, stating:

> Here, not only was Deschenie speaking as a school official, but she was the school official in charge of the very program the speech concerned, making her statements even more capable of interfering with the Board's official position. The manner in which Deschenie spoke further increased the potential for disruption. By going outside internal channels and airing her concerns publicly without district approval, Deschenie chose a method of expression which inherently had greater potential for disruption than other alternatives.

Id. at 1281.

The differences with the circumstances of Plaintiff's and Deschenie's speech are significant. Plaintiff did not identify himself as a contractor with AOC, much less an administrator. Nor was he in a leadership position at the AOC. The subject of his e-mail, a bill restricting medical care for transgender youth, had nothing to do with any position or policy of AOC, and was not a public communication. Given these facts, plus the fact that the 2021 e-mail

was private, *Deschenie* isn't persuasive authority for Defendants but instead illustrates the reasons why Defendants' adverse action vis à vis Plaintiff is unconstitutional.

Similarly, factual differences between this case and *Bowers* undercuts its persuasive value. Bowers, a University of Virginia employee in its human resources department, worked for the University when it was attempting to restructure its pay scale system. Bowers used her university e-mail account and university computer to send e-mails to a number of people attaching NAACP documents. The e-mail contained her stamp identifying her as a university human resources employee. Believing that documents attached to the e-mail were official university documents, one of the e-mail recipients forwarded the e-mail and documents to hundreds of other people. *Bowers v. Rector & Visitors of the Univ.of Va.*,478 F. Supp.2d 874, 877-78 (W.D. Va. 2007), aff'd sub nom., *Bowers v. Scurry*, 278 Fed. App'x 278 (4th Cir. 2008) (unpublished opinion). In a follow-up e-mail, Bowers again used her university e-mail account. *Id*. at 878. The Court found that Bowers had knowingly used her university title in conjunction with use of her university e-mail account; her communication was pertinent to her employment in the human resources department and contradicted the university's official position regarding altering the university's wage scale. *Id*. at 877-78. Bowers did not clarify that she was not speaking as a university employee and, in fact, furthered further disseminated the information. *Id*. at 885. Her actions confused the university's official position on the wage scale issue. *Id.*

None of the facts from *Bowers* is similar to Plaintiff's acts here beyond the use of an e-mail as the method of communication. Copeland did not use either AOC's email or its equipment. (*Copeland Supp. Decl*., Ex. 22 hereto). He did not knowingly identify himself as an AOC employer (or contractor). (*E-mail*, Ex. 3 to Pl's Motion (Doc. 2) at 15.) His e-mail concerned a political issue about which he was expressing his opinion to his own elected legislator. (*Id.*)_ It

did not concern any official position or policy of AOC. (*Id.*) Copeland did not do anything to further disseminate his e-mail, and the e-mail did not cause confusion as to him being involved in any leadership capacity at the AOC. (*Id.*) For these reasons, *Bowers* simply does not apply here.

In summary, *Deschenie* and *Bowers* do not offer a sufficiently similar basis to be applicable in this action. When the facts are examined, here, they lack an adequate basis to be applied.

c. *The* Pickering *factors confirm Plaintiff's rights were violated.*

When the record justifies its application, courts have held the *Pickering* factors an appropriate test to examine the contractor's rights. *Umbehr, supra,* 518 U.S. at 675. Effectively, the *Pickering* test weighs the independent contractor's free speech interests against the efficiency interests of the government as contractor.

Free Speech Interests. Here, Copeland's speech is core political speech. He spoke about the government's role on an issue that was then being debated and which would go on to spark a veto by the Governor and a second vote. (*E-mail,* Ex. 2 to Pl's Mot. (Doc. 2) at 15.) It was directed to his own elected representative – Representative Fite, a fact recognized by the defendants. (*McDonald Email,* Ex. 8 to Pl's Mot. (Doc. 2) at 27.) It, therefore, is entitled to the highest protection under the First Amendment. *See Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964) (calling speech on public affairs "the essence of self-government"); *NAACP*, 458 U.S. at 913 (noting protection at "the highest rung"); *Connick,* 461 U.S. at 150 (noting that stronger showing needed where such rights involved).

Efficiency Interests. Weighed against that core speech are the following efficiency considerations: (1) the need for harmony in the workplace; (2) whether the government's responsibilities require a closing working relationship, (3) the time, manner, and place of the expression, (4) the context in which any dispute arose, (5) the degree of public interest in the

speech; and (6) whether the speech impeded the speaker's ability to perform his or her duties. *Rankin v. McPherson,* 483 U.S. 378, 388 (1987). These considerations are focused on the effective functioning of the public entity's mission. *Id.* at 388. Given the independent contractor relationship between Copeland and the AOC, none of the six considerations outweigh his First Amendment rights. *E.g., Connick,* 461 U.S. at 150 (noting employers must make a stronger showing where core First Amendment rights are implicated)

Workplace Harmony. The need for harmony in the workplace does not favor defendants. As a contractor, Copeland worked from his home, and did not have immediate co-workers. (*Copeland Decl.,* Ex. 21 to Pl's Mot. (Doc. 2) at 84, ¶17.) He stated that he did not send the initial e-mail to Fite to anyone else. (*Id.* at 83-84, ¶16.). During the time before his termination, there was no disharmony. (*Id.* at 84.) This factor favors Copeland.

Close Working Relationship. Nothing about the AOC's work suggests a close working relationship is required. Copeland is a contractor who provides legal services as an attorney *ad litem.* (*Id.* at ¶¶5-8.) His priority are his clients – children involved in the court proceedings—who he individually represents. (*Id.* at ¶17.) That does not require any sort of close working relationship. As discussed above, nor is the AOC a public safety organization like a fire or police department. Nothing the in record suggests the sort of close cooperation and training necessary to carry out and administer the public safety duties that Eighth Circuit courts have held justify deferential treatment for fire and police departments. *Cf. Morgan,* 920 F.3d at 526; *Nord,* 757 F. 3d at 741; *Buzek*, 972 F.2d at 995. Nor is there any authority finding that the impartiality of the AOC, as a party who determines caseload and qualifications for attorneys *ad litem* is as important an interest as the appearance of an impartial judge or factfinder. This factor is inconsequential here.

Time, Place, and Manner. Copeland is a part-time contractor. (*Copeland Decl.,* Ex. 21 to Pl's Mot. (Doc. 2) at 81, ¶6.) Copeland's communication was sent from his own personal computer, from his own home, on his own time. (*Id.* at 83, ¶13; *Copeland Supp. Decl.,* Ex. 22, hereto, ¶14.) It was sent via e-mail, but does not identify Copeland as a contractor or employee of the AOC. (*Copeland Decl.,* Ex. 21 to Pl's Mot. (Doc. 2) at 82, ¶13; *Copeland Supp. Decl.,* Ex. 22, hereto, ¶9.) As noted above, the e-mail simply lists his qualifications and locations where his qualifications may be verified. It contains his address, telephone and fax numbers, not contact information associated with the AOC. (*Id.* at ¶7.) While Defendants clearly knew how to spell out restrictions on political involvement for employees, nothing in the response points to a parallel policy for contractors. (*Compare* AOC Employee Handbook & Policy Manual, Ex. 2 to Defs.' Resp. in Opp. (Doc. 13-2) at 21, §10.10 (specifically addressing issues) *with* Policy Manual, Ex. 20 to Pl's Mot. (Doc. 2) at 54 (requiring only that contractors have an e-mail account)). Nor did the AOC take any action to inform him of any issues with the signature block it now claims constitutes misuse despite being aware of Copeland using similar signature blocks in the past. (*See, e.g., Letter,* Ex. 17 to Pl's Mot. (Doc. 2) at 40; *Emails,* Ex. 5 to Defs.' Resp. in Opp. (Doc. 13-5) at 1. As a result, these factors favor Copeland.

Context. Defendants submit that the fact that Copeland sent his e-mail to his legislator saying he was ashamed of her vote and support of the measure and he hoped that federal courts would strike down the measure translates to this factor favoring them. To the contrary, it favors Plaintiff. Plaintiff's communication was directed to his own elected representative – Representative Fite, a fact recognized by the defendants. (*McDonald Email,* Ex. 8 to Pl's Mot. (Doc. 2) at 27.) Because HB 1570 was ultimately vetoed and a second vote was necessary to override the Governor's veto, the criticism of Plaintiff for having not sent the message *before* the

first vote occurred seems misplaced. His communication—speech attempting to prevail upon his legislator to not support HB 1570—is core political speech. The context thus favors Plaintiff and the exercise of such speech rights, rather than their chilling.

Public Interest. Defendants concede, as they must, that Plaintiff's e-mail involves a matter of public concern but in the next sentence says because the e-mail only went to his elected representative the public interest favors the defendants. To the contrary, it is always in the public interest to "protect constitutional rights." *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008), *overruled on other grounds by Phelps-Roper v. City of Manchester*, 697 F.3d 678, 692 (8th Cir. 2012) (en banc). As a result, Copeland contends that this factor favors him because the First Amendment protects the constitutional right of core political speech irrespective of the size of the audience.

Impediment. Here, the speech did not create any impediment to Copeland completing his engagements as a part-time attorney *ad litem* on behalf of his clients. Defendants offer neither evidence nor argument on this point. This factor thus favors Copeland.

Summary. The *Pickering* factors on these circumstances collectively do not outweigh Copeland's right to engage in core political speech. Because of his unique relationship as a part-time contractor and an attorney who has a duty to his clients, not the agency that pays his invoices, many of the concerns are not applicable here but are more appropriately applied to employees who work side-by-side in an employer's location, *i.e.* facts not present here. As a result, Copeland contends that even if the Court determines to engage in the analysis under *Pickering* – which it ought not given the dearth of evidence – he still prevails under that analysis as the limited concerns about orderly administration do not outweigh his core First Amendment speech rights.

C. Defendants Cannot Avoid a Remedy Based on Sovereign Immunity.

Defendants acknowledge, as they must, that *Ex Parte Young*, 209 U.S. 123 (1908), permits a suit for prospective relief against an ongoing violation of a federal right, and that reinstatement of employment is a proper request for relief. (Defs.' Resp. in Opp. to Pl's Mot. for Prelim. Inj. & Decl. Relief (Doc. 13) at 24.) The Eighth Circuit has been clear that seeking a declaratory judgment and injunctions against future retaliation is the sort of prospective relief that a party may seek in federal court under *Ex Parte Young* from state officials sued in their official capacities, notwithstanding that a state may have sovereign immunity. *Bennie v. Munn*, 822 F.3d 392, 397 (8th Cir. 2016); *Mahn v. Jefferson County, Mo.*, 891 F.3d 1093, 1099 (8th Cir. 2018) ("The goal of reinstatement is not compensatory; rather it is to compel the state official to cease her actions in violation of federal alw and to comply with constitutional requirements."). *Ex Parte Young* also permits an award of costs including attorneys' fees against a state as part of that relief. *See, e.g., Hutto v. Finney*, 437 U.S. 678, 689-98 (1978); *El-Tabech v. Clarke*, 616 F.3d 834, 837 (8th Cir. 2010). That is precisely what Plaintiff in his Motion (Doc. 2) asks this Court to do – reinstate him and to enjoin the defendants from future retaliation and permit him recovery of his fees and costs.

Defendants would have this Court undermine its ability to award relief by finding that reinstatement is limited to thirty (30) days employment. Defendants contend that because there were no on-going negotiations over the renewal of his contract at the time he was terminated, this Court can only reinstate for the remaining term. If the Court accepts the defendants' argument, then reinstatement is effectively useless. This Court is, however, not neutered by Defendants' timing, and has the equitable power to fashion a declaratory judgment that not only provides declaratory relief that Copeland's termination was contrary to his rights, but also that protects Copeland from future retaliation by providing that his reinstatement is for a term of 14

months, *i.e.*, the two months remaining on the existing 2020-21 contract, and the renewal that he expected to receive for 2021-2022.

While Defendants suggest that the expectancy for renewal was unilateral, their conduct belies that suggestion. The record evidence shows that Copeland's contract was regularly renewed in the years since 2017 when he served as a contractor (*Copeland Decl.*, Ex. 21 to Pl's Mot. (Doc. 2) at 81, ¶¶6-7), and that such renewals were typically not addressed until late in the contract year in April or May, *i.e.*, after the time period in which his 2020-21 contract was terminated. (*Copeland Supp. Decl.*, Ex. 22, hereto, ¶¶3-5.) When one combines the repeated renewals since 2017 with the fact that in December 2020 the defendants had expanded Copeland's scope of services to include appellate attorney services as well (*Copeland Decl.*, Ex. 21 to Pl's Mot. (Doc. 2) at 82, ¶10), it is clear that the defendants expected to retain Copeland, at least until their receipt of Fite's e-mail message.

Moreover, the U.S. Supreme Court has repeatedly held that nonrenewal of a contract cannot be based on the contractor's exercise of First Amendment rights. *See, e.g., Shelton v. Tucker*, 364 U.S. 479, 485-86 (1960); *Keyishian v. Board of Regents*, 385 U.S. 598, 605-606 (1967). In *Shelton* and *Keyishian*, the Court specifically held that the nonrenewal of the contracts of nontenured public school teachers, who like plaintiff, served on an annual one-year contracts may not be predicated on their exercise of First Amendment rights. *Id.* In *Perry*, the Court noted that the lack of formal contractual or tenure security in continued employment at Odessa Junior College which had employed Sindermann for four years under successive one-year contracts was "irrelevant to his free speech claim." 408 U.S. at 597-98. Having been deprived of not only the final two months, but also the renewal of his contract by defendants'

actions, Copeland contends that the Court may fashion an appropriate injunction to address his injuries, the sovereign immunity that may be owed to the state notwithstanding.

III. CONCLUSION

Defendants' response does not alter the factors. Copeland contends that the factors necessary for injunctive relief are satisfied and he has shown a likelihood of success on the merits on his claim of First Amendment retaliation. While Copeland contends the Court need not engage in the *Pickering* analysis—given the lack of evidence of disruption in the period after his speech, but before his termination—if it does, Copeland contends the test still favors his core political speech and nothing articulated by the Defendants outweighs his First Amendment speech rights. The Eleventh Amendment does not insulate Defendants from the remedies sought. As a result, Copeland asks that the Court grant his motion and enter a preliminary injunction in his favor and against Defendants reinstating him to his prior position as a contractor and caseload with the seniority and benefits to which he would have been entitled, but for Defendants' violation of his rights, and restraining Defendants from further retaliation and continued violation of his constitutional rights by prohibiting further retaliation during the term of his renewal for 2021-22, and any future renewals.

DATED: July 16, 2021

Respectfully submitted,

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On behalf of the Arkansas Civil Liberties Union Foundation, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

CASEY D. COPELAND **PLAINTIFF**

vs. **CASE No. 4:21-cv-477-DPM**

MARTY SULLIVAN, IN HIS OFFICIAL CAPACITY AS DIRECTOR, ARKANSAS ADMINISTRATIVE OFFICE OF THE COURTS and STASIA BURK MCDONALD, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE COURTS' ATTORNEY AD LITEM PROGRAM **DEFENDANTS**

SUPPLEMENTAL DECLARATION OF CASEY COPELAND

CASEY D. COPELAND hereby declares:

1. I make this supplemental declaration in support of my Complaint and Motion for Preliminary Injunction and Declarative Relief in the captioned case.

2. I have been a part-time contractor with the Administrative Office of the Courts ("AOC"), since 2017. At no time in the period from 2017 to present, have I ever been an AOC employee.

3. Since 2017, my annual contracts with AOC were each renewed. In my experience, contract renewals were never discussed, much less executed, before April, and certainly, never in March. For example, I signed my 2020-2021 contract on May 26, 2020, and Defendant Sullivan signed the contract on June 5, 2020. Contract, Ex. 1 to Pl's Motion for Prelim. Inj. & Decl. Relief (Doc. 2) at 12.

EXHIBIT 22

4. Before my contract was terminated April 1, 2021, I expected my contract renewal for 2021-2022 to be discussed in April or May and executed shortly thereafter, but certainly before the end of my 2020-2021 contract term.

5. The expected timing of a renewal in April or May was based on my previous experience as a contractor with the AOC. I signed my 2017-2018 contract on April 27, 2017, and Defendant Marty Sullivan signed it on May 4, 2017. I signed my 2018-2019 contract on May 8, 2018 and Defendant Sullivan signed it on May 15, 2018. I signed my 2019-2020 contract on May 8, 2019 and Defendant Sullivan signed it on May 15, 2019.

6. Both my January 12, 2019, letter and my March 30, 2021, e-mail reference the same e-mail address: CaseyDCopeland@gmail.com. *Compare* E-mail, dated Mar. 31, 2021, Ex. 2 to Pl's Motion for Prelim. Inj. & Decl. Relief (Doc. 2) at 15, *with* Letter, dated Jan. 12, 2019, Ex. 17 to Pl's Motion for Prelim. Inj. & Decl. Relief (Doc. 2) at 40. This is my personal e-mail, although I have used it for communications concerning my work. It is not an official email address issued by the AOC, which would have involved the "arcourts.gov" domain.

7. Both my January 12, 2019, letter and my March 31, 2021 e-mail contain my address, telephone number and fax numbers. *Id.* These are my personal contact information. The address is not the address of the AOC. The telephone and fax numbers are not associated with the AOC. In fact, the March

31, 2021 e-mail was sent from my personal computer.

8. The signature blocks contain virtually the same information: my certification as a Child Welfare Law Specialist by the National Association of Counsel for Children ("NACC"); its website, "naccchildlaw.org;" and my qualification to work as an Arkansas attorney *ad litem*, which demonstrates that I satisfy the Arkansas Supreme Court's requirements for attorneys *ad litem* set forth in Administrative Order No. 15, and the corresponding website address of the Arkansas Judiciary webpage, "arcourts.gov." My January 12, 2019, letter refers to the website of the dependency-neglect attorney *ad litem* program, arjdc.org, the Arkansas Judiciary website address for the juvenile courts before it was later incorporated into the current website at "arcourts.gov/administration/arjdc." Letter, dated Jan. 12, 2019, Ex. 17 to Pl's Motion for Prelim. Inj. & Decl. Relief (Doc. 2) at 40 (portion in footer highlighted). Neither my January 12, 2019, letter nor my March 31, 2021, email refers to me as a contractor (much less an employee) of the AOC; however, both communications to Representative Fite included links to the AOC or its predecessor web address and to the NACC. Neither communication included any official title.

9. None of the information in the email or letter conveys that I am either a contract attorney or an employee of the AOC's Dependency-Neglect Attorney Ad Litem Program. The email and letter both, however reference my credentials. I am

certified as a child welfare specialist by the NACC, which website is "nacchildlaw.org." I am also qualified as attorney ad litem for dependency-neglect and domestic relations cases. The website for the organization qualifying me to be attorney ad litem is arcourts.org.

10. At no time, either during the two-day interval between Defendant Sullivan's receipt of the copy of the e-mail I sent to Representative Fite, during the thirty days from the date of notice of my termination until the date of termination, or during the period afterwards, has anyone at the AOC requested or even suggested I ought to remove the credentials from my emails, or letterhead on communications with the AOC or third parties.

11. On or about March 24, 2020, I sent Representative Fite an email which offered my help in dealing with the COVID-19 pandemic. Email, dated Mar. 24, 2020, Ex. A to this Decl. This email also included the exact same credentialling information and website addresses as the March 30, 2021 email, including arcourts.gov. Representative Fite did not forward this email to anyone at the AOC. Representative Fite questioned my use of the signature block only *after* I criticized her sponsorship and support of HB1570 on March 31, 2021.

12. Following my initial March 30, 2021 email to her, Representative Fite and I had an exchange of emails in which I explained I was expressing my personal disgust to her as my State Representative. During this email exchange on March

30, 2021, Fite expressed disapproval of my tone and accused me of speaking to her in a tone that I would not sue if speaking to her husband. *See* Mar. 30, 2021 emails, Ex. B to this Decl. The emails exchanged show that Representative Fite was aware that that I was not speaking on behalf of the AOC, since she immediately complained to Defendants about my email signature. *See* Email Message, dated Mar. 31, 2021, Ex. 5 to Motion (Doc. 2) at 21-23; E-mail string, dated Mar. 31, 2021, Ex. 6 to Motion (Doc. 2) at 24-26; text message, dated Mar. 30, 2021, Ex. 9 to Motion (Doc. 2) at 28-29.

13. The topic of my email HB 1570 was the subject of numerous stories in the local and national media. An accurate copy of one such story appeared in the *Washington Post*. *See* Wash. Post article, dated Mar. 29. 2021, Ex. C to this Decl. https://www.washingtonpost.com/dc-md-va/2021/03/29/arkansas-passes-bill-restricting-access-medical-treatments-transgender-children/?outputType=amp.

14. As a part-time attorney *ad litem*, I do not have regular or "normal" working hours. I work weekends and evenings in providing representation as my professional obligations require. I doubt any part-time Arkansas attorney ad litem has "regular" or "normal" working hours. The March 30, 2021 email to Representative Fite was sent on my own time and not while I was working.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Executed this 16th day of July, 2021, at Prairie Grove, Arkansas.

Casey D. Copeland

Gmail

Casey Copeland <caseydcopeland@gmail.com>

COVID-19

1 message

Casey Copeland <caseydcopeland@gmail.com> Tue, Mar 24, 2020 at 7:45 PM
To: "Fite, Charlene" <charlene.fite@arkansashouse.org>

Rep. Fite,

Please let me know if there is anything you think I can do to help with Arkansas's response to COVID-19 pandemic. As you know, our courts are currently closed to in-person proceedings, and most matters are being postponed and continued until after we expect things to star returning to normal. However, I think we can and should expect that the court will be inundated with old and new cases as soon as they are opened again. This could cause significant delays in the administration of justice to a significant number of Arkansans. So, if there is any way I can help, please don't hesitate to ask.

Casey D. Copeland
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Arkansas Attorney Ad Litem, arcourts.gov
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Ph: 479-305-0750 Fx: 479-935-9246
CaseyDCopeland@gmail.com

CHILD WELFARE LAW SPECIALIST
National Association of Counsel for Children
CERTIFIED BY NACC

EXHIBIT A

Gmail Casey Copeland <caseydcopeland@gmail.com>

HB1570

7 messages

Casey Copeland <caseydcopeland@gmail.com> Tue, Mar 30, 2021 at 2:40 PM
To: "Fite, Charlene" <charlene.fite@arkansashouse.org>

Representative Fite,

I just wanted to say how ashamed I am of you for sponsoring and supporting HB1570. Not only does this bill put lives in danger, it fully illustrates the arrogance of you and your party to think that you have the authority to dictate such personal matters. I truly hope and expect the federal courts will strike down this ridiculous law as soon as possible.

Shame on you.

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Arkansas Attorney Ad Litem, arcourts.gov
PO Box 270, Prairie Grove, AR 72753
Ph: 479-305-0750 Fx: 479-935-9246
CaseyDCopeland@gmail.com

EXHIBIT B

Fite, Charlene <charlene.fite@arkansashouse.org> Tue, Mar 30, 2021 at 3:16 PM
To: Casey Copeland <caseydcopeland@gmail.com>

More than 86% of Americans, and likely a higher percentage of Arkansans, believe giving hormone blocking medications to children under 18 has long range, harmful effects. Leading gynecologists have testified that hormone blockers often lead to life long issues with fertility, as well as other health issues. We don't allow our children to smoke cigarettes or get tattoos. Why would we want them to make decisions that cannot easily be altered, and may cause life long consequences?

Charlene Fite, Chairman
House Committee on Aging, Children and Youth,
Military and Legislative Affairs

On Mar 30, 2021, at 2:41 PM, Casey Copeland <caseydcopeland@gmail.com<mailto:caseydcopeland@gmail.com>> wrote:

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[https://docs.google.com/uc?export=download&id=1DNjJm-NdLsMLgnBZ4wlOAWALUUoOcuTH&revid=0B_BgDI7HEFdLTUFteE5SMjZTa0JHb0tSRHpEcENvQU5zaW1BPQ]
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Casey Copeland <caseydcopeland@gmail.com> Tue, Mar 30, 2021 at 3:22 PM
To: "Fite, Charlene" <charlene.fite@arkansashouse.org>

Are you saying that a personal, medical decision is subject to majority approval? Are you saying that parents cannot or should not have the ability and authority to make this decision for and with their children. Are you saying that you and the Republican Party can and should decide such private matters for people. Shame on you.

Casey D. Copeland
Arkansas Bar No. 2005022
Child Welfare Law Specialist, naccchildlaw.org
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CaseyDCopeland@gmail.com

[Quoted text hidden]

Fite, Charlene <charlene.fite@arkansashouse.org> Tue, Mar 30, 2021 at 4:39 PM
To: Casey Copeland <caseydcopeland@gmail.com>

If all parents made good decisions, we wouldn't need Ad Litems, would we?

Charlene Fite, Chairman
House Committee on Aging, Children and Youth,
Military and Legislative Affairs

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[https://docs.google.com/uc?export=download&id=1DNjJm-NdLsMLgnBZ4wlOAWALUUoOcuTH&revid=0B_BgDI7HEFdLTUFteE5SMjZTa0JHb0tSRHpEcENvQU5zaW1BPQ]

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[Quoted text hidden]

Casey Copeland <caseydcopeland@gmail.com> Tue, Mar 30, 2021 at 5:04 PM
To: "Fite, Charlene" <charlene.fite@arkansashouse.org>

I think you are comparing apples to oranges.

Did you really report me to the Director of the AOC? You realize that I'm a constituent?

Is this Tom I've been emailing with?

Casey
[Quoted text hidden]
--
Casey D. Copeland
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CaseyDCopeland@gmail.com

Fite, Charlene <charlene.fite@arkansashouse.org> Tue, Mar 30, 2021 at 5:22 PM
To: Casey Copeland <caseydcopeland@gmail.com>

Were you speaking with my husband, it would be a completely different tone.

Charlene Fite, Chairman
House Committee on Aging, Children and Youth,
Military and Legislative Affairs

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Casey Copeland <caseydcopeland@gmail.com> Tue, Mar 30, 2021 at 5:40 PM
To: "Fite, Charlene" <charlene.fite@arkansashouse.org>

I would not engage Mr Fite at all. He is not my Rep. You are, and, even though we may not like each other, I respect you enough to express my disappointment with you as I did.

You're also an advocate for parents and children, so it is shocking, disappointing, and frustrating to learn that you supported this bill. Such decisions should be left to parents, children, and medical professionals.

I have expressed my appreciation to you I the past, as well as disappointment and disagreement; I've invited you to speak to the PG Lions Club (before COViD shut everything down); and I've encouraged you to support or oppose various legislation. So I am further disappointed that you felt the need to report me to the AOC.

Perhaps my initial email was a bit on the harsh side, and certainly not my most professional communication, but I was expressing my personal disgust to my State Representative. I am still ashamed of your support for that bill, but I'm even more ashamed that I cannot express such to my elected representative without fear of reprisal from the AOC.

You will not hear from me again on this or any other subject.

Casey

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The Washington Post
Democracy Dies in Darkness

Arkansas passes bill restricting access to medical treatments for transgender children

By Samantha Schmidt

March 29, 2021 | Updated March 31, 2021 at 1:27 p.m. EDT

Arkansas became the first state on Monday to pass a bill prohibiting doctors from providing gender-affirming medical care to transgender children, treatments that major medical organizations describe as essential to the mental health of an already vulnerable community of young people.

Lawmakers voted 28 to 7 in favor of the bill, which would ban doctors from providing transgender minors with gender-affirming treatments such as puberty blockers, hormone therapies and transition-related surgeries, or referring them for such treatments.

The legislation is the first to pass among a series of similar bills introduced by Republican lawmakers in more than 17 states so far this year, part of a growing effort by politicians to restrict the rights of transgender young people across America — in both doctor's offices and high school sports teams.

The bill will now be sent to the desk of Arkansas Gov. Asa Hutchinson (R), who last week signed a law banning transgender girls from competing in school sports teams consistent with their gender identity. He also signed legislation last week allowing doctors to refuse treatment to a patient based on religious or moral objections.

During Monday's Senate vote, one of the bill's Republican sponsors, state Sen. Alan Clark, described gender-affirming treatments as "at best experimental and at worst a serious threat to a child's welfare." He argued the bill would "protect children from making mistakes that they will have a very difficult time coming back from."

"I know that their parents are looking for any kind of answer, and my heart truly goes out to them," he said. "But this is certainly not the answer."

But major medical organizations including the American Academy of Pediatrics and the

EXHIBIT C

But major medical organizations including the American Academy of Pediatrics and the Endocrine Society have supported access to treatments such as puberty blockers and hormone treatments for children diagnosed with gender dysphoria, defined as the distress caused by a mismatch between one's sex assigned at birth and one's gender identity.

Many pediatricians and endocrinologists say these bills are rooted in misinformation about transgender medical treatments. Under medical guidelines in the United States, doctors do not perform most gender-affirming surgeries on transgender minors, requiring that they wait until they are 18. Doctors do not recommend any medical interventions before a child reaches puberty.

Once reaching puberty, medical guidelines say transgender children can consider puberty blockers, which are reversible treatments that pause puberty and give transgender children time to decide what to do next. Later in their teenage years, transgender adolescents can consider hormone replacement therapies, such as estrogen for trans girls and testosterone for trans boys, which create more permanent changes to their bodies.

Research on these medications is limited, due in part to the nascent nature of the treatments, the challenges of performing studies on children, and the small size of the transgender youth population. But several studies on puberty blockers have found that transgender young people who were treated with the medications showed lower rates of depression and anxiety and demonstrated better global functioning. A study from the Harvard Medical School and the Fenway Institute published in the journal Pediatrics last year showed that young people who wanted a puberty suppressant and were able to access it had lower odds of considering suicide.

Lee Beers, president of the American Academy of Pediatrics, spoke in opposition to the Arkansas bill in a news conference before Monday's vote, describing it as "discrimination by legislation." She pointed out the high rates of suicide for transgender youth, mental health concerns that have been exacerbated in the pandemic. A survey conducted online among a non-random volunteer sample of 27,715 transgender people found that 40 percent of respondents had attempted suicide in their lifetimes, eight times the rate of the general population.

"This bill is harmful in two ways," Beers said. "One, it threatens the health and well-being

of transgender youth, and two, it puts politicians rather than pediatricians in charge of a child's medical care."

Under the legislation, titled the Save Adolescents from Experimentation (SAFE) Act, the state would prohibit public funds from being granted to organizations or entities that provide gender-affirming procedures to people under 18. It would ban state-owned facilities from providing transition-related care and would prohibit Arkansas's Medicaid program from reimbursing or providing coverage for gender-affirming care to people under 18. If the bill is signed into law, doctors who provide gender-affirming care to minors would be subject to losing their licenses.

In a Senate committee hearing last week, one of the bill's Republican sponsors, state Rep. Robin Lundstrum, compared gender-affirming treatments to surgical and chemical "mutilation," and said children should not be allowed to make such decisions before they turn 18.

"This is about protecting minors," she said. "Many of you, I would hazard to guess, did things under 18 that you probably shouldn't have done … why would we ever even consider allowing a sex change for a minor?"

But parents of transgender young people in Arkansas and across the country have described treatments such as puberty blockers and hormone therapies as lifesaving medications for their children.

Joanna Brandt, the mother of a transgender 15-year-old in Arkansas, said allowing her child to undergo hormone therapy was a choice she did not make lightly. After her son, Dylan, came out as a transgender boy, she took him to many therapy appointments and doctor's visits. And after extensive research and consultation with medical professionals, she decided to allow him to begin the hormone treatment. Now, 18 months later, "Dylan is happy, healthy, confident and hopeful for his future," Brandt said in a news conference Monday. "His outside now matches how he feels on the inside."

Losing access to these treatments "would be heartbreaking not only for him but for all of the other trans youth in Arkansas that depend on this care," Brandt said. While the bill's

the other trans youth in Arkansas that depend on this care," Brandt said. While the bill's sponsors have said mental health therapy would still be allowed under the legislation, Brandt said that "therapy alone is not enough for these kids."

"No amount of therapy will help them when they realize that the government that seems to oppose their existence is now in control of their bodies," Brandt said.

Evelyn Rios Stafford, a county justice of the peace and Arkansas's only openly transgender elected official, described the legislation as "a national embarrassment for Arkansas."

"I'm hearing from trans people who are wondering whether they need to move out of the state," she said.

But if the bill is signed into law, lawyers with the American Civil Liberties Union have vowed to challenge it in court.

"It violates the Constitution. It singles out a group of young people solely because you do not understand them and because you find them to be politically unpopular," said Chase Strangio, deputy director for transgender justice at the ACLU. "The litigation will be costly and it will painful for the young people who have to endure it. But we will be standing with them … and we will take this to court as soon as we have to and as fast as we have to."