

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

AMICI CURIAE BRIEF

Presented by the

**Freedom of Expression Institute Law Clinic
Consejo de la Prensa Peruana, The Peruvian Press Council**

In the case of

Eduardo Perales Martinez (Petitioner)

Case No. 12.143 (Chile)

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The Freedom of Expression Institute Law Clinic and Consejo de la Prensa Peruana, The Peruvian Press Council (the "Amici"), respectfully submit this brief of amicus curiae in support of the petition filed with the Inter-American Commission on Human Rights (the "Commission") by Educardo Perales Martinez against the State of Chile.

I. INTEREST OF AMICI

The Freedom of Expression Institute Law Clinic ("FXI"), based in Johannesburg, South Africa, provides free technical, legal and financial assistance and advice to people and organizations whose rights to freedom of expression and access to information have been undermined. Last year the FXI intervened as amicus curiae in the Constitutional Court decision in Laugh It Off Promotions cc versus South African Breweries International (Finance) B.V. t/a Sabmark International, where the Court upheld the right to parody. The FXI has made numerous other successful interventions in precedent-setting cases around freedom of expression.

Consejo de la Prensa Peruana, The Peruvian Press Council, is a nonprofit nongovernmental civil society organization founded by leading print media institutions in Peru. It was constituted with the purpose of defending freedom of the press, speech, opinion and information in Peru. Furthermore, it aims to promote and raise ethical standards in national journalism, as well as the right of citizen's to access public information. Currently, 26 national media institutions are members of the organization.

II. INTRODUCTION

Two streams of First Amendment jurisprudence converge in this matter. The first is quite simple and well settled: jokes—particularly when targeted at matters of public interest—are protected by the First Amendment. The second is not so simple, but equally well settled: public employees do not automatically forfeit First Amendment protections in exchange for their decision to work for the government.

If Petitioner were a private employee and told his joke to a group of friends during dinner, his speech would be fully protected. This is true because "[a]t the

heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.” *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988). Satirical speech about issues of public interest—even if offensive, outrageous or repugnant—must necessarily be insulated from attack if this “free flow of ideas” is to be uninhibited. *Id.* at 50. *Cf. Garrison v. State of Louisiana*, 379 U.S. 64, 73 (1964).

Petitioner was not, however, a private employee. He was a police officer, and as such, would be subject to a First Amendment analysis that differs from the average citizen. The issue in the instant case is whether there exists a valid governmental purpose to be served by stripping Petitioner, a public servant, of the free speech rights enjoyed by those who work in the private sector. The answer to this question—reached by application of a balancing test that focuses on the need for restrictions on expression—is quite clearly “no.” Jokes told in an informal small setting do not undermine morale, promote discord, incite disrespect, undercut discipline or otherwise operate to justify limitations on free speech. In other words, the proper functioning of the *Carabineros de Chile* was not undermined in any way by Petitioner’s speech.

The importance of this case, however, should not be measured by this specific issue. Jokes are only one type of speech that is protected by the First Amendment. They represent, however, a broad range of communications that deserve protection and thus offer an excellent starting point to explore the relationship between freedom of speech and government employment.

III. BACKGROUND

A. Petition and Admissibility.

Eduardo Perales Martinez (“Petitioner”) alleges that the Republic of Chile violated his right to due process of law, as he was not afforded the opportunity to defend himself. He also contends that his freedom of speech was violated.

On the admissibility of the petition, the petitioner claims that all internal procedures were completed and that the petition complies with all formal and

substantive requirements for admission. The Republic of Chile claims that it did not violate any right guaranteed by the Inter American Convention on Human Rights.

On April 22, 1999, the Inter American Commission of Human Rights received a petition alleging the violation by the Republic of Chile of articles 8 N°1, 13 N°1 and 25 N°1 of the Inter American Convention on Human Rights.

Having analyzed the positions of the parties to the case, the Commission concluded that it is competent to analyze the alleged violations to articles 8 N°1, 13 N°1 and 25 N°1 of the Inter American Convention on Human Rights and that the petition is admissible.

B. The purpose of this Amicus Brief.

The United States has a lengthy history dealing with issues involving freedom of expression. The First Amendment to the U.S. Constitution was one of the initial efforts by any government to ensure that free speech is not only encouraged, but aggressively protected.

Over the course of more than two centuries, the First Amendment has evolved considerably, but its basic purpose has not been diluted. A look at that evolution—as applied to the facts of Petitioner’s case—can provide this Commission some insight into a fair and just resolution of the matter presently before it. Thus, this Brief applies the First Amendment to the facts of Petitioner’s case, and argues how that matter would be decided if the issue arose in the United States.

Although the position of the United States as a world leader in protecting freedom of expression is well-established, it is helpful to measure U.S. jurisprudence with another jurisdiction that places a high value on human rights. Accordingly, the Brief will examine similar cases handled by the European Court of Human Rights. Although there exist significant differences between the approaches of the United States’ First Amendment and the European Convention’s

Articles Article 10, in situations such as Petitioner's, the result in each jurisdiction would be substantially similar.

C. Statement of facts.

In 1998, the Government of Chile appropriated fourteen thousand million Chilean pesos (approximately US \$30,000,000) toward an increase in salaries for the members of *Carabineros de Chile*. The *Carabineros de Chile* is the Chilean police force. The distribution was to be 60% for officers and the remaining 40% to the rest of the force. The decision was obviously controversial and the focus of intense discussion among the Chilean police force population.

On April 22, 1998, Petitioner, a member of the *Carabineros de Chile*, during an informal conversation at the officers' cafeteria in the city of Puerto Montt, Chile, repeated a joke he had previously heard to six of his peer officers. The joke related to the distribution of the wages' increase, a topic that had been creating conflicts. The petitioner's fellow officers all laughed at the joke and afterward the topic of the conversation changed.

The joke in essence described the distribution as "the rule of 60 y pico"—60% for the officers and "pico" for the others. The word "Pico" in Chile is a vulgar name for the masculine reproductive organ. In other Latin American countries the word "pico" (especially when is used in the context of money quantities—as here) refers to "change money" or "fraction". In this context, "60 y Pico" meant something like "60 and spare change," a clear jab at the disproportionate distribution of funding.

Immediately after telling the joke, Petitioner was compelled by his superior to give an explanation of his joke, apparently because he believed it could be considered sedition. Two days later, he was asked by the General in charge of his geographic area to voluntarily resign. Petitioner, who believed it was not guilty of any misconduct, much less sedition, did not agree to quit unless the legal procedure to dismiss a member of the any member of the Armed Forces or the Police body, the *Sumario Administrative*, was followed.

The case was sent to the General in charge of human resources in Santiago who in turn sent it to the General Director of Carabineros, the maximum authority within the police force. The General Director of Carabineros requested the President of the Republic to issue a Supreme Decree to remove Petitioner from the police force. The President issued the Supreme Decree on June 3, 1998 and the petitioner was effectively removed of his job.

Petitioner appealed the Supreme Decree. On August 21, 1998, the Appeals Court overturned the President's Supreme Decree and ordered the petitioner's job restored. On October 28, 1998, the Supreme Court of Chile in turn overturned the Appeals Court's decision arguing that the power to issue Supreme Decrees is the prerogative of the President and he does not need to explain the motives of his decision.

IV. THE PROTECTION OF HUMOR AND SATIRE IS NECESSARY TO ENSURE THAT THE FUNDAMENTAL PURPOSE OF THE FIRST AMENDMENT IS SATISFIED.

The first step in this exploration of free speech in the government arena is to examine the speech in question and determine whether it would be protected speech outside of the employment environment. If the speech is not protected in the general public forum, it stands to reason that it certainly will not be protected in the government employment setting.

Certain types of speech are subject to limitations even for "ordinary" citizens, *e.g.*, false speech, obscene speech, "fighting words," and commercial speech. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 385 (1974); *Miller v. California*, 413 U.S. 15, 23 (1973); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 758-60 (1976). However, these limitations are the exception to the general rule encompassed in this observation by the United States Supreme Court:

“[t]he freedom to speak one’s mind is not only an aspect of individual liberty—and thus a good unto

itself—but also is essential to the common quest for truth and the vitality of society as a whole.” *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503-04 (1984).

This high minded principle can find some of its best illustrations in a rather low brow location—humor. Jokes, satire and parody are often used as effectively as the most eloquent oration or incisive essay, and they have long played an important role in shaping the United States' attitude towards freedom of expression.

The seminal case that analyzed whether humor—in this case parody—was deserving of First Amendment protection is *Hustler Magazine v. Falwell*, a case involving a bawdy magazine that published a particularly crude cartoon lampooning Jerry Falwell, a well-known Christian evangelist. The Supreme Court, while evidencing a strong distaste for the manner in which *Hustler* expressed its opinion of Mr. Falwell, nonetheless saw the merit in allowing this type of cartoon the full protection of the First Amendment:

Justice Frankfurter put it succinctly in *Baumgartner v. United States*, 322 U.S. 665, 673-674 (1944), when he said that '[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures.' Such criticism, inevitably will not always be reasoned or moderate; public figures as well as public officials will be subject to 'vehement, caustic, and sometimes unpleasantly sharp attacks,' *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)."
Hustler Magazine, 485 U.S. at 51.

The Court's decision was based in no small part on the history humor and satire have played in political commentary in the United States. After cataloging a number of cartoonists prominent in the American political scene, the Court reasserted language from an earlier decision that "[t]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Hustler*, 485 U.S. at 55 (quoting *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978)).

The legal principal set forth by *Hustler*—humor is protected speech under the First Amendment—is well-supported in numerous other cases. See e.g., *San Francisco Bay Guardian, Inc. v. Superior Court*, 17 Cal. App. 4th 655 (1993) (newspaper issue lampooning public officials and private parties was recognized as an April Fool's parody and, therefore, not actionable); *Polygram Records, Inc. v. Superior Court*, 170 Cal. App. 3d 543 (1985) (off-color jokes about a wine distributors' products were not actionable, as the context and content of the comments would make it impossible to take the joke seriously); *Frank v. National Broadcasting Co., Inc.*, 119 A.D. 2d 252 (N.Y.A.D. 1986) (skit on well-recognized sketch comedy show parodying a local accountant was not defamatory, as it was easily recognized as a joke by anyone who viewed it.).

Thus, Petitioner's joke regarding the allotment of tax monies within the *Carabineros de Chile* is precisely the sort of humorous speech the Supreme Court aimed to protect in order to foster the uninhibited flow of ideas.

V. TELLING A JOKE TO A SMALL GROUP OF POLICE COLLEAGUES PRESENTS NO THREAT TO MORALE, DISCIPLINE, EFFICIENCY OR ANY OTHER GOVERNMENT INTEREST, AND IS THUS PROTECTED BY THE FIRST AMENDMENT.

A. GOVERNMENT EMPLOYEES SPEAKING AS CITIZENS IN A MATTER OF PUBLIC INTEREST MAY HAVE THEIR FIRST AMENDMENT RIGHTS PREEMPTED ONLY IF NECESSARY FOR THEIR EMPLOYERS TO OPERATE EFFICIENTLY AND EFFECTIVELY.

1. The application of the First Amendment to public employee speech has evolved significantly in favor of the employee.

Tension often exists between a public employer's need for efficient workplace operations and the protection offered by the First Amendment against governmental infringement of free speech. *Pickering v. Board of Education*, 391 U.S. 563 (1968). In addressing this tension, the law governing freedom of expression for public employees has evolved over several distinct stages. Until the early 1950s, the Supreme Court consistently held that "a public employee had no

right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights" on the ground that public employment was a privilege, not a right. *Connick v. Myers*, 461 U.S. 138, 143 (1983). Subsequently, while still favoring the government, the Court gradually began to acknowledge that public employees do not necessarily relinquish their constitutional rights merely by accepting government employment. *See e.g., Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886 (1961); *Shelton v. Tucker*, 364 U.S. 479 (1960). More recently, the Court established the "*Pickering*" test as the standard for deciding public employee free speech cases and the law now attempts to balance deference to the state's needs as an employer to operate efficiently against acknowledgement of the right of a public employee to free speech. *See generally, Pickering*, 391 U.S. 563 (1968).

This shift in authority was due in part to understanding that the threat of dismissal from public employment could significantly inhibit free speech and in part to the Court according greater weight to the First Amendment in general. *Connick*, 461 U.S. at 144-45. The *Connick* Court noted that "*Pickering* is rooted" in cases where the issue is whether the employees' exercise of their constitutionally protected speech could be "chilled" by their fear of discharge. *Id., see also, Pickering*, 391 U.S. at 574 ("It is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech."). As "[s]peech concerning public affairs is . . . the essence of self-government" and occupies the "*highest rung of the hierarchy of First Amendment values,*" even the speech of government employees requires a high degree of protection. *Connick*, 461 U.S. at 145 (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)).

2. Each of the four elements of the *Pickering* test weighs heavily in Petitioner's favor.

The *Pickering* test contains four elements: (1) the employee suffered an adverse employment action; (2) the speech at issue involved a matter of public concern; (3) the employee's interest in commenting on matters of public concern outweighed his employer's interest in promoting efficiency; and (4) causation, *i.e.*, the adverse employment action was motivated by the speech. *Pickering*, 391 U.S.

at 568; *Connick*, 461 U.S. at 146-48; *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-85 (1977). Application of each of these factors—if applied to Petitioner—militates strongly in his favor.

a. Adverse Employment Action

The first requirement necessary to establish a First Amendment violation is the existence of an adverse employment action arising as a result of the exercise of the right to free speech. *McCabe v. Sharrett*, 12 F.3d 1558, 1563 (11th Cir. 1994). Adverse employment actions encompass more than actual or constructive discharge and include demotions, refusals to hire, refusals to promote, and reprimands. *Id.*, citing *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 74 (1990). Mere criticism, informal verbal reprimands and assignment of a heavy workload, however, do not rise to a level sufficient to trigger First Amendment protection. *Benningfield v. City of Houston*, 157 F.3d 369, 376-77 (5th Cir. 1998). Because Petitioner was terminated from his position, he obviously would satisfy this criterion if the *Pickering* analysis were to be applied to his situation.

b. Matters of Public Concern

The second requirement is that the speech at issue must involve matters of public concern. *Connick*, 461 U.S. at 145. Matters of public concern are those which can "be fairly considered as relating to any matter of political, social, or other concern to the community." *Branton v. City of Dallas*, 272 F.3d 730, 739 (5th Cir. 2001) (quoting *Connick*, 461 U.S. at 146). The content of a public employee's speech may encompass matters of public concern provided it does not involve solely personal matters or a discussion of management policies that triggers public interest only by virtue of an employee's status with the government. *Branton*, 272 F.2d at 740. *See also*, *Connick*, 461 U.S. at 147; *Kennedy v. Tangipahoa Parish Library Bd. of Control*, 224 F.3d 359, 372 (5th Cir. 2000) (citing *Wilson v. UT Health Ctr.*, 973 F.2d 1263, 1269) (5th Cir. 1992)). The nature of public employment does not exclude the possibility that an issue of private concern to the employee may also be an issue of concern to the public. *Gonzalez v. Benavides*, 774 F.2d 1295, 1300-01 (5th Cir. 1985). Moreover, while

the public concern requirement is more likely to be triggered when a public employee communicates to the public as opposed to restricting his statements to the internal workplace, private statements regarding matters inherently of public concern are "not forfeited [merely] by [the employee's] choice of a private forum." *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 415-416 (1979). Finally, public employee speech need not directly relate to one's employment to receive First Amendment protection. *Rankin v. McPherson*, 483 U.S. 389, 390-91 (1987).

The public concern inquiry as a critical threshold requirement in a public employee free speech case was established in *Connick v. Myers*. *Connick*, 461 U.S. 138 (1983). *Pickering*, however, had earlier begun to define the boundaries of public concern. In *Pickering*, a teacher was fired for sending a letter to a newspaper criticizing the school board's allocation of funds and methods of raising funds. *Pickering*, 391 U.S. at 571. The Court held that the letter clearly involved matters of public interest because it stated an opinion regarding the "preferable manner of operating the school system," and because it raised questions upon which "free and open debate is vital to informed decision-making by the electorate." *Id.* *Pickering* thus suggests that *any* commentary relating to the operation of a government enterprise will fall within the scope of public concern. *Connick* sought to clarify this somewhat open-ended view of public concern. In *Connick*, the Court held that a public employee did not have a free speech right to distribute a questionnaire to her coworkers where the complaints at issue, transfer policies, office morale and the need for a grievance committee in her office, were primarily personal grievances, not matters of public concern. *Connick*, 461 U.S. at 141-42. The Court noted that not every conversation made within the public employment context rises to the level of public concern since "[t]o presume that all matters which transpire within a government office are of public concern would mean that virtually every remark . . . would plant the seed of a constitutional case". *Id.* at 149. *Connick* thus emphasizes the need for an employee to speak "as a citizen upon matters of public concern," rather than "as an employee upon matters only of personal interest." *Id.* at 147.

Branton v. City of Dallas illustrates this latter point well. *Branton* involved statements made by an internal affairs officer regarding misconduct within a police department. *Branton v. City of Dallas*, 272 F.3d 730, 735-737 (2001). In finding that the statements met the public concern requirement, the Court distinguished "speech pertaining to internal personnel disputes and working conditions" which ordinarily will not involve matters of public concern from speech "complaining of misconduct within the police department" which does involve matters of public concern. *Id.* at 738.

Petitioner clearly was speaking on a matter of public concern. He was commenting, via humor, on how the government had distributed tax monies within the *Carabineros de Chile*—a situation parallel to that in *Pickering* where a teacher was complaining about the allocation of bond funds between educational and athletic programs. *Pickering*, 391 U.S. at 566. Petitioner was not commenting on matters solely of a personal interest, nor was he airing views on purely internal personnel disputes. Thus, Petitioner would satisfy this factor of the *Pickering* analysis.

c. The Balancing Test

Pickering's third requirement involves a determination of whether a public employee's interest in commenting on matters of public concern is outweighed by the government employer's "interest ... in promoting the efficiency of the public services it performs through its employees." *Rankin*, 483 U.S. at 384. In other words, the government must demonstrate an adequate justification for treating a government employee differently from a member of the general public. *Pickering*, 391 U.S. at 568.

Pickering established a balancing test; courts will consider whether the speech was "(1) likely to generate controversy and disruption, (2) impeded the [employer's] general performance and operation, and (3) affected working relationships necessary to the [employer's] proper functioning." *Pickering*, 391 U.S. at 569-73; *Rankin*, 483 U.S. at 388. A showing that an employee's speech *actually* disrupted the employer's operations is not always necessary; rather

"reasonable predictions of disruption are sufficient." *Brewster v. Board of Education*, 149 F.3d 971, 979 (9th Cir. 1998). However, "[a] stronger showing of disruption may be necessary if the employee's speech more substantially involves matters of public concern." *Connick*, 461 U.S. at 152. Finally, and of particular importance in the instant case, statements will not be considered in a vacuum; rather "the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose." *Rankin*, 483 U.S. at 388.

As noted above, in *Pickering*, the plaintiff, a public school teacher, was fired for writing a letter to a newspaper alleging irresponsible spending by the school district on sports programs. Using what has now become known as the "*Pickering* balancing test", the Court noted that for a statement by a public employee to fall within the parameters of First Amendment protection, the employee's interest "as a *citizen*, in commenting upon matters of public concern," must outweigh "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. The Court established certain factors to consider in determining whether the balance should be tipped in favor of the employee's speech rights or the employer's interest in efficient operation. *First*, the Court examined the proximity of the relationship between the plaintiff and his employer. *Id.* at 569-70. Since the teacher's relationship with his employer was not close and did not require personal loyalty and confidence, the proximity of the relationship was not sufficient to warrant shifting the balance toward the employer. *Id.* at 570. *Second*, the Court evaluated the extent to which the employer's operations had been harmed as a result of the employee's letter. *Id.* Again, the employee was favored since factual inquiry demonstrated that the letter neither caused any negative repercussions for the school board nor interfered with the efficient functioning of the board. *Id.* *Third*, the Court considered the degree to which the issue was a matter of public concern, noting that where the issue is in the public interest and addresses matter that concern the electorate "it is essential that [public employees] be able to speak out freely on such questions without fear of retaliatory dismissal." *Id.* at 563, 571-72. Because matters of school financing fall within the scope of public concern and

teachers are likely to have informed opinions on the operation of schools, the Court reasoned that they should be able to speak about how the government should allocate funds within this particular realm. *Id.* at 172. The Court pointed out that "[o]n such a question, free and open debate is vital to informed decision making by the electorate." *Id.* at 571-572. As a result, "absent proof of false statements knowingly or recklessly made by him [the plaintiff's] exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." *Id.* at 574.

Similarly, in *Rankin*, the Court emphasized that speech involving matters of public concern that does not interfere with the "effective functioning of the public employer's enterprise" is protected under the First Amendment. *Rankin*, 483 U.S. at 388-389. *Rankin* involved a rather distressing statement about the President of the United States: "if they go for him again, I hope they get him" offered by a county deputy constable after hearing of an assassination attempt on President Ronald Reagan. *Id.* at 380. Applying a similar analysis to that used in *Pickering*, the Court noted that there was no evidence that—despite its aggressive nature—the remark interfered with the efficient functioning of the employer's office nor did it render the employee unable to perform her duties. *Id.* at 380. The statement was made in a private conversation and the deputy served no confidential, policy-making, high level, or public contact role. *Id.*

The *Pickering* balancing test weighs resoundingly in favor of Petitioner; indeed, none of the elements that make up the test even tend to favor the government. For example:

- The joke at issue here did not generate any controversy or disruption. Although the allocation of funds was a matter of discussion among Petitioner and his colleagues, as is likely to be expected, the joke generated only brief laughter and the conversation quickly turned to other topics.

- Not surprisingly, the joke did not interfere with the operation of the *Carabineros de Chile*. It did not bring the organization into disrepute, affect operational readiness, interfere with ongoing investigations, decrease morale, embarrass any member, or otherwise adversely impact the group. Petitioner was in no way hampered in his ability to perform his own duties. If anything, the levity provided an opportunity to promote comradeship among Petitioner and his colleagues by providing an opportunity to address an important subject by means of levity in an informal setting.
- The time, manner and place of Petitioner's joke were completely appropriate. Petitioner did not offer his remarks in a public forum in a manner that might be seen as humiliating to his superiors. His remarks were made in a collegial, informal setting with colleagues. A single joke was told once, generated laughter from Petitioner's peers, and the conversation moved on.

In short, far from interfering with the obligations of the *Carabineros de Chile*, Petitioner's conduct is an example of why freedom of speech is an important component of a democratic society. A system that punishes light hearted comments about a matter of public concern told in an informal setting to a group of colleagues is a system that will generate far more enmity and resentment than it will loyalty and dedication. The facts at hand clearly demonstrate that the *Pickering* balancing test weighs in Petitioner's favor and the government is not justified in restricting his speech.

d. Causation

The fourth requirement for the imposition of liability is that the employee's speech must be a "motivating factor" for the public employer's action. *Mt. Healthy City*, 429 U.S. at 285. If this is the case, the burden shifts to the employer to show by a "preponderance of the evidence that it would have reached the same decision ... even in the absence of the protected conduct." *Id.*

There is no doubt that Petitioner's joke resulted in his termination. The causation element is thus established. This element, however, underscores an issue that is particularly important in Petitioner's case. When the Supreme Court of Chile overturned the Appeals Court, it based its decision on the ground that the President's prerogative in terminating Petitioner was for all practical purposes

unlimited. Thus, the Court believed that no justification for the President's decision was necessary. Such deference to the executive violates any fundamental concept of due process, but is particularly problematic when applied to freedom of expression issues. The legal system in the United States has thus imposed specific burdens of proof—variable dependant on the type of expression involved—on government attempts to punish speech.

As made clear in *Mt. Healthy City* and throughout First Amendment jurisprudence, an unfettered ability to trample on protected speech is wholly inconsistent with the principles of a democratic society and simply cannot be tolerated. Once a determination is made that the speech is protected, the burden necessarily rests with the government to prove that a termination or other adverse action was motivated by reasons other than the exercise of the First Amendment. *Mt. Healthy City*, 429 U.S. at 287; *see also Walton v. Safir*, 122 F. Supp. 2d 466, 480 (S.D.N.Y. 2000) (finding that the New York City police department did not meet its burden of proving that it would have fired the plaintiff absent her publicly speaking out against the police department.)

Protection of freedom of expression is thus intertwined with the constitutional protections of due process. *New York Times v. Sullivan*, 376 U.S., 254, 286. The United States Supreme Court recognized in this seminal case that lofty principles of free speech meant little if they can be cavalierly ignored:

“This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across ‘the line between speech unconditionally guaranteed and speech which may legitimately be regulated.’ *Speiser v. Randall*, 357 U.S. 513, 525 (1958). In cases where that line must be drawn, the rule is that we ‘examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.’ *Pennekamp*

v. Florida, 328 U.S. 331, 335 (1946); *see also One, Inc., v. Olesen*, 355 U.S. 371 (1958); *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958). We must ‘make an independent examination of the whole record,’ *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963), so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.”

Id. at 285.

Yet ignoring Petitioner’s right of expression is exactly what the Supreme Court of Chile did in this matter. By conferring on the President *carte blanche* to decide Petitioner’s fate, that Court abdicated its responsibility to provide Petitioner with the justice to which he is entitled. Freedom of speech is illusory if the government may arbitrarily and without justification ignore key mandates such as the First Amendment or Article 13 of the American Convention on Human Rights. The United States Supreme Court has recognized that the First Amendment would be nothing but empty words in the United States Constitution if government efforts to limit speech were not subject to judicial review. Similarly, Article 13 would be relegated to the status of a platitude if courts are not permitted to “make an independent examination of the whole record.” *Edwards v. South Carolina, supra* at 235.

3. The most recent United States Supreme Court case involving a public employee’s First Amendment rights, *Garcetti v. Ceballos* does not alter the *Pickering* analysis in this matter.

Garcetti v. Ceballos, ___ U.S. ___, 126 S.Ct. 1951 (May 30, 2006) represents the United States Supreme Court’s latest foray into the relationship between the First Amendment and public employees. Although adding a new wrinkle to the *Pickering* balancing test, *Garcetti* does not alter the analysis discussed above. Indeed, the case reinforces the fact that the “First Amendment limits the ability of a public employer to leverage the employment relationship to restrict incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens.” *Id.* at 1954. *Garcetti* specifically recognizes the value of speech such as that uttered by Petitioner: “Many citizens do much of their talking inside their respective

workplaces, and it would not serve the goal of treating public employees like ‘any member of the general public,’ *Pickering*, 391 U.S., at 573, to hold that all speech within the office is automatically exposed to restriction.” *Id.* at 1959. What *Garcetti* does do is permit restrictions on communications made in the course of official business. This limitation was considered necessary to avoid putting courts in the position of overseeing “communications between and among government employees and their superiors in the course of official business.” *Id.* at 1954.

Petitioner’s joke was not made as part of his official responsibilities. Indeed, as discussed above, the communication was limited to the appropriate time and place—an informal gathering of colleagues. *Garcetti* thus has no bearing on the issues herein, except as additional support for the concepts developed in *Pickering* and *Connick*.

VI. BOTH THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (“EUROPEAN CONVENTION”) AND THE AMERICAN CONVENTION ON HUMAN RIGHTS (“AMERICAN CONVENTION”) ADOPT AN APPROACH SIMILAR TO THE PICKERING TEST, AND COMPEL A SIMILAR RESULT IN FAVOR OF PETITIONER.

- 1. Although from different starting points, the First Amendment, the European Convention, and the American Convention provide similar freedom of expression protections to public employees.**

A legitimate check on whether the approach of the United States as described above is a sound one is to compare the U.S. law with that of the European Convention and the American Convention.

The First Amendment to the United States constitution is simple and absolute: “Congress shall make no law ... abridging the freedom of speech ...” U.S. Const. amend. I. As discussed above, exceptions to this absolute prohibition have evolved through judicial interpretation, thereby allowing for limitations on speech when necessary to protect interests of equal or greater importance.

The law pertaining to free speech and public employees as ultimately expressed in the *Pickering* test is an excellent example of how courts in the United States have balanced the absolute prohibitions of the First Amendment to accommodate the practical needs of the government. The *Pickering* test is the result of a slow evolution of judicial thought on First Amendment jurisprudence.

The European Convention has adopted an approach to freedom of expression that differs from that of the United States, but often ends up at the same place. Article 10 of the European Convention recognizes the right of free expression, but also specifies the situations where other interests outweigh that right:

“(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...

“(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

The European Court of Human Rights has accorded Article 10 much the same status as courts in the United States have given the First Amendment. Article 10 “constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man.”

Handyside v. United Kingdom, 1 EHRR 737, para. 48 (1979-80).

The American Convention is similar to the European Convention. Article 13 ensures that everyone has the “freedom to seek, receive, and impart information

and ideas of all kinds” so long as the exercise of that right does not jeopardize “respect for the rights or reputation of others or the protection of national security, public order, or public health or morals.”

The two Conventions thus specifically protect a citizen’s ability to “*impart information and ideas.*” That right, however, must be balanced against other social interests such as national security and the prevention of disorder or crime. In other words, both Conventions parallel the First Amendment approach that evolved via the United States judiciary: freedom of expression is often balanced against competing interests. Thus, it is not surprising that when the rights protected by Article 10 are raised by government employees, the European Court of Human Rights uses an analysis similar to the *Pickering* balancing test. A look at a specific application of Article 10 to a member of the armed forces is instructive.

2. The European Convention provides strong protection to freedom of expression, including that of public employees.

Berthold Gubi was a soldier in the Austrian army.ⁱ He was also was a member of the Austrian Communist Party, which advocated the abolition of the army, and he belonged to the *Verinigung Demokratischer Soldaten Ostriches* (“VDSO”), an organization that was highly critical of life in the Austrian army.

Mr. Gubi was not a happy soldier. He was a frequent complainer and, soon after his induction, even initiated a protest against the President of Austria. He generated the most controversy, however, when he attempted to distribute a copy of *der Igel*, VDSO’s monthly magazine, in his barracks. That particular issue—consistent with VDSO’s general philosophy—was not complimentary of Mr. Gubi’s employer, criticizing training in particular and national service in general. Mr. Gubi was ordered to cease distributing the VDSO magazine in his barracks, and the matter ended up before the European Court of Human Rights.

The Austrian government argued to the Court of Human Rights that the distribution of the magazine interfered with the preservation of order in the armed forces, undermined the army’s effectiveness, and created unrest among the soldiers.

Although the Court of Human Rights recognized each of the grounds argued by the government to be legitimate reasons to limit a soldier's freedom of expression, it found that none of the dire consequences raised by the army were present:

“None of the issues of *der Igel* submitted in evidence recommend disobedience or violence, or even question the usefulness of the army. Admittedly, most of the issues set out complaints, put forward proposals for reforms or appeals proceedings. However, despite their often polemical tenor, it does not appear that they overstepped the bounds of what is permissible in the context of a mere discussion of ideas, *which must be tolerated in the army of a democratic State just as it must be in a society that such an army serves.*” (Emphasis added.)

Thus, the Austrian army lost, and Mr. Gubi and *der Igel* won.

The parallels between the approach adopted by the Court of Human Rights in *Gubi* and the United States Supreme Court in *Pickering* are obvious. Both courts started with the same premise: freedom of expression is a valuable right even for public servants. Both courts then recognized that there are situations unique to public service that justify limitations on that freedom, *e.g.*, disruption of morale, the need for discipline, and interference with the government's mission. However, simply invoking the mantra of the government's need for discipline and orderliness among its employees will not be adequate to overcome the right to expression if those perverse effects cannot be proven.

Petitioner's conduct was far less egregious than that of Mr. Gubi. Petitioner told a joke to some colleagues. He did not stand up in a barracks or mess hall and preach to all who were present. He did not criticize specific areas of training, question the need for the *Carabineros de Chile*, or do anything else that would undermine morale the effectiveness of the organization he served. In short, whether governed by the *Pickering* test or the *Gubi* analysis—*i.e.*, the First Amendment or Article 10—the result is the same. Petitioner's joke is a protected exercise of freedom of expression.

VII. CONCLUSION

Citizens of the United States do not automatically give up their First Amendment rights as a condition of government employment. Those rights are clearly not unqualified. If the government can demonstrate—and it is the government’s obligation to do so—that its efficiency or mission would be compromised by a particular communication, it may take action to mitigate that threat.

However, this is not such a situation. It is abundantly clear that the *Carabineros de Chile* was not compromised by Petitioner’s joke. Its morale was not damaged, its objectives were not defeated, and its reputation was not undermined. Specific individuals in positions of authority were not ridiculed. The public was not made aware of facts that would prove embarrassing to the organization or its personnel. The Petitioner engaged in communications common to every public employee in every country around the world. In an appropriate setting, he expressed an opinion, communicated a thought, articulated a viewpoint and did so in a humorous fashion that created no disturbance and damaged no one. There are no facts whatsoever which suggest that his comment had any last effect—indeed, any effect at all—on the organization. What is more likely is that the heavy handed response of the *Carabineros de Chile* was deleterious to the morale of others in the police force who lost a colleague simply because he told a joke.

Justice Thurgood Marshall succinctly summarized the principle that should guide the analysis of freedom of expression in the workplace:

“Vigilance is necessary to ensure that public employers do not use authority over their employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees’ speech.”

Rankin v. McPherson, supra, 483 U.S. at 384.

Although Petitioner expressed an opinion in a humorous way, the fact that provides him First Amendment protection is that he was expressing himself about

an important matter in a way that caused no injury to his peers, his colleagues or the organization he represented. To terminate his employment for this reason is a clear violation of a basic human right—whether guaranteed by the First Amendment or Article 13: the right to “seek, receive, and impart information about ideas of all kinds, regardless of frontiers.”

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END NOTES

ⁱ The facts and quotes of the *Gubi* case can be found at *Verinigung Demokratischer Soldaten Ostriches and Gubi v. Austria*, 302 Eur. Ct.H.R. (ser A)(1994).

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