No. 25-819

In the Supreme Court of the United States

JEANNE HEDGEPETH,

Petitioner,

v.

JAMES A. BRITTON, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE MANHATTAN INSTITUTE, SOUTHEASTERN LEGAL FOUNDATION, AND DEFENSE OF FREEDOM INSTITUTE AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether and in what circumstances public employers may discipline employees based on their expression of controversial views while off the job.

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INTEREST OF *AMICI CURIAE*[1]

The **Manhattan Institute** (MI) is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. MI has historically sponsored scholarship and filed briefs opposing regulations that either chill or compel speech.

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[1] Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amici*, their members, or their counsel funded its preparation or submission.

Amici file this brief because they believe that public-employee speech should be protected. The current jurisprudential framework has failed to properly account for the rapid expansion of communication technologies and emerging questions of speech rights. A government's valid restrictions of speech in its role as employer must be balanced against private speech rights, but the *Pickering-Garcetti* standard has been too subjective to clarify these questions thus far.

SUMMARY OF ARGUMENT

"Your comments reveal your biases and are inconsistent with the values the District upholds." App.51. That was what Petitioner Jeanne Hedgepeth was told in a letter from Township High School District 211 dismissing her from her tenured teaching position she had held for 20 years. The purported revealing of her "biases" happened in posts discussing matters of public concern on her private Facebook page. The "values" the district apparently upholds are dismissing a teacher for having a different viewpoint on a contentious issue because that opinion upset some people.

That sentence from the district's letter, as well as other evidence on the record, is a stark demonstration of viewpoint discrimination. Ms. Hedgepeth apparently has "biases," while the district has "values." More accurately, she has a viewpoint—and the district and some concerned members of the public also have viewpoints. The Seventh Circuit below cited "disruptions" caused by this clash of viewpoints among district officials, members of the community, and a few students. In other words, these disruptions resulted entirely from the emotive impact of Hedgepeth's words

on those who read them—and the actions *those individuals* then took.

In most First Amendment questions, speech being "disruptive" *because of the content of the speech* is not a sufficient reason to ban that speech. The First Amendment would be almost meaningless if speech could be banned because it engendered controversy, offense, anger, or even vituperative counter-speech. While some opinions may cause disruption, the reaction to expression alone is not generally grounds for silencing speech. *See, e.g.*, *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 209 (3d Cir. 2001) (Alito, J.). The First Amendment cannot be defeated by the screams of a disagreeable mob.

Public employees are understandably subject to certain limits on their speech, but "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573 (1968). Moreover, the First Amendment "protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). The Seventh Circuit thought that "in certain circumstances" did not include Facebook posts on important and controversial issues of public concern that Hedgepeth made while on summer vacation when school was not even in session.

The lower court's opinion highlights important holes in this Court's public-employee speech doctrine. Those holes are becoming more apparent in a divisive political climate where every citizen can express their opinions on social media. Opinions on controversial

topics can cause "disruption" just because the topic is controversial and the other side reacts in anger. If Ms. Hedgepeth had made her posts in a geographical area that was more friendly to her views, perhaps the "disruption" would not have happened. Perhaps the emails to the school district would have supported her and she would have been promoted. Such geographical vagaries should not be relevant to the right of public employees to speak on matters of public concern in their off-work and personal capacities.

The Court should thus grant the petition to update how *Pickering* and *Garcetti* should be applied, especially at a time when potentially career-damaging communications are more common than ever.

ARGUMENT

I. FIRING TEACHERS TO AVOID "DISRUPTION" BASED ON VIEWPOINT-BASED COMPLAINTS IS A FORM OF VIEWPOINT DISCRIMINATION AGAINST PUBLIC EMPLOYEES' PRIVATE, OFF-WORK SPEECH ON MATTERS OF PUBLIC CONCERN

Public school teacher Jeanne Hedgepeth posted her thoughts about inherently controversial matters of public concern on her private Facebook page. Some people in her school district didn't like her thoughts. The lower court determined her posts were "disruptive" because other people were offended and complained enough about it to get her was fired.

Her resulting lawsuit should have been quickly resolved in her favor, but the Seventh Circuit instead endorsed a type of viewpoint discrimination by invoking the need to prevent workplace "disruption." Oddly, the words "viewpoint discrimination" don't appear in the

court's opinion—or even the word "viewpoint"—indicating that the court seemed unconcerned that outspoken disagreement with Hedgepeth's opinions was what created the "disruption." But this Court has long held that when speaking outside of work on matters of public concern, "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573 (1968). Public employees should not be terminated because some people don't like their out-of-work opinions on controversial subjects.

Pickering, followed by *Garcetti v. Ceballos*, 547 U.S. 410 (2006), established a framework that balances the speech interests of employees and the government employer's interests in a functioning workplace. Workplace disruption is a valid concern, but "employers cannot use *Pickering-Garcetti* balancing generally or unsupported claims of disruption in particular to target employees who express disfavored political views." *MacRae v. Mattos*, 145 S. Ct. 2617, 2621 (2025) (Thomas, J., respecting the denial of certiorari).

The Seventh Circuit agreed that Ms. Hedgepeth's posts were plainly on matters of public concern and thus receive some First Amendment protection, which is why she was "entitled to proceed to *Pickering* balancing at step two." *Hedgepeth v. Britton*, 152 F.4th 789, 797 (7th Cir. 2025). But the court felt that emails received by a few students—but more alumni as well as others without any direct connection to the school—constituted sufficient "disruption" to allow the school district to punish her speech. Pet. 7–8. Furthermore, the court felt that Ms. Hedgepeth used "vulgar

language"—apparently because her comments referred to a septic tank—so her speech interests were weakened because her role as a teacher "counsels instead for a 'calm, reasoned presentation of her views on [a] sensitive subject,'" even on her private Facebook account. *Id.* at 798 (quoting *Darlingh v. Maddaleni*, 142 F.4th 558, 566 (7th Cir. 2025)).

The Seventh Circuit is wrong. Even if the court's characterization of Hedgepeth's tone and allegedly inappropriate language were accurate, the purported vulgarity of her words untethered from any real-world harm should not be part of the court's constitutional calculus. Vulgar language is of course protected by the First Amendment, partially because vulgarity can be an effective way to increase the impact of speech. It is "often true that one man's vulgarity is another's lyric." *Cohen v. California*, 403 U.S. 15, 25 (1971) (protecting the right to wear a jacket saying "Fuck the Draft" in a courthouse). And protections have been afforded to much more vulgar and offensive speech. *See generally*, *e.g.*, *Snyder v. Phelps*, 562 U. S. 443 (2011).

Ms. Hedgepeth comments may have been strong in tone and invoking a septic tank filled with excrement, but they were influenced by thinkers such as Thomas Sowell and Larry Elder. In one exchange Hedgepeth responded to a former student and emphasized that "I am about facts, truth-seeking[,] and love." App.75. She emphasized her free speech in saying "I will speak on any topic I choose because I live in a free country." *Id.* The court's broad characterization of Ms. Hedgepeth's speech as vulgar and inappropriate focuses on a few of her posts while ignoring others and provides an unhelpful generalization about her opinions. Moreover, in focusing on the tone of the posts at issue, it seems

that the Seventh Circuit is okay with "banning speech deemed by government officials to be 'immoral' or 'scandalous[,]'" which, as Justice Alito warned, "can easily be exploited for illegitimate ends." *Iancu v. Brunetti*, 588 U.S. 388, 400 (2019) (Alito, J., concurring).

Of Hedgepeth's allegedly "vulgar, intemperate, and racially insensitive" speech, *Hedgepeth*, 152 F.4th at 799, two of those descriptors relate to tone, but one—"racially insensitive"—relates to content and viewpoint (or, more specifically, the Seventh Circuit's and the school board's views on Hedgepeth's viewpoint). First of all, this Court has already rejected government efforts to squelch speech based on claims that the speech is "disparaging to racial and ethnic groups." *Matal v. Tam*, 582 U.S. 218, 233 (2017) (holding that the clause that prohibited registration of the band name "The Slants" was viewpoint-discriminatory). But also, in citing commentators like Sowell—who presumably has different views on racial issues than most supporters of Black Lives Matter, *see*, *e.g.*, Thomas Sowell, *Black Rednecks and White Liberals* (2009)—Ms. Hedgepeth might characterize her own views as "racially sensitive." While there is no legally dispositive answer to that question, there are certainly different viewpoints on it. That Ms. Hedgepeth was not perceived by some people as having the "correct" viewpoint is not an adequate basis for abridging a public employee's First Amendment right to speak outside of work on matters of public concern.

Indeed, the record is replete with evidence that the school board's problems with Ms. Hedgepeth's speech were based on its viewpoint. The board's Notice of Charges called her views "racially charged" and claimed that they "devalue and demean." App.51-53.

Moreover, student complaints specifically targeted Hedgepeth's opinions, not her tone: "We don't want a teacher at Palatine who *believes* we are being dramatic when a racist act has been done. We want a teacher *who understands* what we are going through and the obstacles presented to us for simply being of different color." *Hedgepeth*, 152 F.4th at 797 (emphases added). In other words, some students want a teacher with different *beliefs* and *understandings*.

Yet the principle of viewpoint neutrality remains in effect within the *Pickering-Garcetti* framework. "Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse . . . simply because superiors disagree with the content of employees' speech." *Rankin v. McPherson*, 483 U.S. 378, 384 (1987). As if fulfilling *Rankin*'s warning, some board members who submitted written comments about Hedgepeth (and also voted for her dismissal) later posted comments online that didn't hide *their* personal views and used strong invectives and even vulgar language. Board Member Cavill, who was a strong advocate for terminating Hedgepeth, tweeted that "America was in the process of choosing whether to be a white nationalist fascist state or an inclusive democracy." App.144. Later, she tweeted an invective and vulgarity against Justice Alito: "Roses are red, violets are blue, Plan B prevents ovulation, so screw you." *Id.* Like Hedgepeth, Cavill is free to express those opinions in her private capacity, but, by the Seventh Circuit's theory, she could face termination if her views created a "disruption" in the board's work. "That some may not like the political message being conveyed is par for the course and cannot itself be a basis for finding disruption of a kind that outweighs the

speaker's First Amendment rights." *Dodge v. Evergreen Sch. Dist.,* 56 F.4th 767, 783 (9th Cir. 2022).[2]

Ms. Hedgepeth had opinions on deeply controversial topics that, especially at the time, were causing charged speech all over the country. If she took any side, someone would likely have been offended. She could have mounted a full-throated defense of the protestors and a fulsome condemnation of police tactics and behavior. That certainly could have angered many. Regardless, it seems that the most important factor in her continued employment was whether enough people in the community (or on the school board) disagreed with her and complained about it.

As evidence of disruption, the lower court cites 113 emails about petitioner's posts and specifically quotes one email from disgruntled students to a district board member: "As students of color, we feel angered by Ms. Hedgepeth's statements and feel that she should no longer have a place as staff at PHS." *Hedgepeth*, 152 F.4th at 797. Students are of course free to be angered, and they are free to express that anger to the school

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[2] Other courts have rejected assertions of governmental interests in protecting listeners' ears from speech because of the "emotive impact that its offensive content may have on a hearer," even if doing so would purportedly foster a "safe, secure, and nurturing school environment." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 202, 209 (3d Cir. 2001) (Alito, J.). This Court has likewise rejected government claims of addressing the "secondary effects" of speech when the regulation only stops speech because of its "emotive impact." *E.g. Boos v. Barry*, 485 U.S. 312, 321 (1988) (invalidating regulation "protecting the 'dignity' of foreign missions" by regulating the content of signs outside of embassies); *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 124, 134 (1992) (invalidating an ordinance allowing a greater fee for assembling or parading if disruption is more likely because "[l]isteners' reaction to speech is not a content-neutral basis for regulation").

board. But their anger here clearly stems from having a different viewpoint. That distinguishes this type of complaint from viewpoint-neutral complaints, such as Ms. Hedgepeth's earlier reprimands for using curse words *in class*. *Id.* at 793. Perhaps if Hedgepeth changed her mind, if she "did the work," had an epiphany, and posted that she now sees the protestors as doing important work for social justice, the students' anger might have disappeared and she would have kept her job. That is viewpoint discrimination.

The court quotes vague mentions of classrooms being thrown "into disarray and unsettl[ing] . . . colleagues' classrooms." *Hedgepeth*, 152 F.4th at 797. Yes, such things can happen when someone exercises First Amendment rights. The court also discusses how "summer school had been derailed by ongoing discussion about the controversy." *Id*. Again, that is an expected result of political speech on controversial issues. A similar "disruption" could have occurred had Taylor Swift or Kanye West weighed in on a controversial issue and students discussed and debated it in class. The "disruptions" purportedly caused by Ms. Hedgepeth could have—and perhaps were—used as "teachable moments," but some evidently believed that this teacher's views were beyond rational discussion and she deserved termination.

The implications are disturbing. If a teacher expresses pro-life opinions on her social media page in a generally pro-choice jurisdiction, she may cause a "disruption." Some students may think pro-life views "devalue and demean" women, and they may not want her

to be employed. They may write strong letters about their disagreement and even speak out in class.

Or consider the inverse, with pro-choice views expressed in a generally pro-life district. That could lead to comments and complaints like, "I don't want my kids to go to a school with someone who believe in murdering babies." Disruption, at least in the Seventh Circuit's sense, could result. Yet both scenarios are a type of viewpoint discrimination through a heckler's veto. Under the lower court's view, had this case originated in a different school district, it is possible that people would not have been offended and instead Board Member Cavill could be censured or recalled for her posts about a "white nationalist fascist state."

The Seventh Circuit's formulation of the *Pickering-Garcetti* framework allows a government to fire a teacher based solely on whether enough people disagree with her and make a stink about it. That is wholly incompatible with the core values of the First Amendment. Courts have long emphasized that "no official, high or petty, can prescribe what shall be orthodox in politics." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) This includes attempts to suppress speech on grounds that it offends. *Matal*, 582 U.S. at 243 ("Giving offense is a viewpoint.") "In short, courts may not inquire into whether political speech presents a 'substantial disruption' based on its viewpoint alone." *Defending Educ. v. Olentangy Loc. Sch. Dist.*, 158 F.4th 732, 775 (6th Cir. 2025).

II. THE SEVENTH CIRCUIT'S OPINION PROVIDES A CANCEL-CULTURE ROADMAP

In upholding concerns over disruption as reason to fire Ms. Hedgepeth, the Seventh Circuit provided a

clear roadmap for how to silence speech in the future. As noted in the petition, there was evidence of a coordinated email campaign. App.137. Indeed, even a school board member noted that the emails were "part of an organized network from a community activist to discredit a teacher of over 20 years." App.139. Furthermore, most of these emails were from outsiders. App.137; *cf. Melton v. Forrest City*, 147 F.4th 896, 903 (8th Cir. 2025). If outsiders can cause disruptions based on the out-of-work speech of public employees, that has dangerous consequences for free speech, particularly in the age of social media,

The roadmap looks like this: First, identify a public employee with controversial opinions, perhaps on divisive issues like race or gender-transitioning. Next, create a coordinated media/backlash campaign, perhaps by contacting a relevant activist organization on the issue. A form email can be drafted and distributed through the activist organization's member network. That email can then be sent to the public employer's superiors by people who want to complain. Then, at least one person from within the organization or school would need to be found. As documented in the petition and the record, in Hedgepeth's case, of all of 76 unique emails received from members of the community, only three were from current students. (The lone message from another teacher expressed support for Ms. Hedgepeth. App.137.) After that, under the Seventh Circuit's reasoning, sufficient "disruption" has been created. In today's interconnected digital world, this is not particularly hard to do. Recent examples, such as the #MeToo movement, demonstrate how to do it.

If disruption sufficient for termination can be achieved when someone's social media posts "[spark]

outrage, [draw] media attention," *Hedgepeth*, 152 F.4th at 797, or otherwise offend a motivated and loud minority, free speech is endangered. Much of today's discourse occurs publicly and online. In 2025, 71 percent of American adults at least used Facebook, and half used Instagram. Jeffrey Gottfried & Eugenie Park, "Americans' Social Media Use 2025," Pew Research Ctr., Nov. 20, 2025, https://tinyurl.com/47d24fdt. Social media frenzies over online speech are common, and it is easy to mobilize the type of emailing campaign seen in this case.

Ms. Hedgepeth kept her Facebook account private, did not identify herself as a Palatine High School teacher, and did not accept current students as "friends." She also did not extend invitations to former students to be "friends," but accepted them if sent to her. App.127–28. Aside from completely abstaining from social media, or self-censoring her opinions on important and controversial issues, she took reasonable steps to limit any negative impact of her speech.

Meanwhile, at Palatine High School, Ms. Hedgepeth herself had promoted a welcoming environment and civil dialogue. She had sponsored a club developed to promote inclusion and volunteered for a non-bullying initiative. She organized and oversaw forums where students discussed sensitives issues and helped produce a video that promoted diversity. App.130.

There is little more that Ms. Hedgepeth could have done to ensure that her exercise of her First Amendment rights would not cause disruption or upset her fellow students and colleagues. Sure, she could have just shut up, but the First Amendment protects her decision to share her thoughts on matters of public concern outside of work. Unless, of course, courts like the

Seventh Circuit here continue to erode public employees' First Amendment rights by giving a heckler's veto to chronic social-media trolls.

III. CURRENT JURISPRUDENCE APPLYING THE *PICKERING-GARCETTI* STANDARD REQUIRES CLARIFICATION

The *Pickering-Garcetti* framework has become too subjective and overly broad, calling out for clarification. For one thing, it is unclear what role outsiders play in a court's evaluation of alleged disruption. Also, some courts have rejected the heckler's veto as a basis to "cancel the other side" of political debate, *e.g.*, *Noble v. Cincinnati & Hamilton Cnty. Pub. Libr.*, 112 F.4th 373, 383 (6th Cir. 2024), while others like the Seventh Circuit permit it under the guise of workplace disruption. In addition, the *Pickering-Garcetti* framework has led courts to judge speech in reference to its content, as the Ninth Circuit has explicitly noted: "[N]ot all statements of 'public concern' are treated equally under the *Pickering* balancing test." *Moser v. Las Vegas Metro. Police Dep't*, 984 F.3d 900, 905–06 (9th Cir. 2011). Finally, it is unclear what weight to confer on government expression with which employees disagree and speak against while off-duty.

Social media's emergence has multiplied the presence and importance of these disputes, and its ubiquitous and relatively novel presence contributes to this lack of clarity. Social media can be easily amplified, with "disruption" be manufactured. Justice Thomas has rightly questioned how "workplace disruptions" should be viewed if the disruption results from disagreement with a viewpoint. *MacRae*, 145 S. Ct. 2620–21 (Thomas, J., respecting the denial of certiorari).

Circuits have taken different approaches to what counts as a disruption and the role of outsiders in determining a disruption. Many of these splits are addressed in the Petition. Particularly relevant to this case is the role of outsiders.

The lower court found that complaints from students and parents are "evidence of internal disruption . . . enough to distinguish" the Eighth Circuit's decision in *Melton*. *Hedgepeth*, 152 F.4th at 797. There, the Eight Circuit held that a fire department illegitimately dismissed a firefighter over his social media posts. *Melton v. Forrest City*, 147 F.4th 896 (8th Cir. 2025). Much of the evidence of "disruption" in *Melton* was similar to this case: members of the community called officers and firefighters to express their displeasure at the social media post. *Id.* at 903. There was a "firestorm" wherein "phone lines [were] jammed" with calls from concerned citizens. *Id.* However, "[n]o current firefighter complained or confronted [Melton] about it. Nor did any co-worker or supervisor refuse to work with [Melton]." *Id.* The *Melton* court concluded that there was no perceivable impact on the fire department itself and that upholding the city's actions would have set a precedent wherein "[e]nough outsider complaints could prevent government employees from speaking on any controversial subject, even on their own personal time." *Id*.

That concern is highly relevant here. The presence of some dissenting viewpoints from within the school and school district allowed the Seventh Circuit to wave away *Melton* as focusing on whether workplace disruption comes from *within* the workplace.

Cases like *Melton* have emphasized the need for disruption to occur inside a place of employment for it

to be actionable by an employer. Other rulings, such as the First Circuit's in *Hussey v. City of Cambridge*, hold, in contrast, that taking "account [of] the public's perception of an employee's expressive acts" is not a "heckler's veto." 149 F.4th 57, 72 n.7 (1st Cir. 2025). This case provides an opportunity for the Court to address this disagreement because the overwhelming source of the conflict here came from outside of Hedgepeth's schoolhouse.

As described above, social media gives "outsiders" a path to using their social media presence to influence the internal dynamics of a public workplace. While the Seventh Circuit discussed how disruption emerged within Palatine High School, it did not recognize the way that the disruption itself came from outside and was in many ways driven by outside forces. Today, a school in Texas can be "disrupted" because a teacher's speech upset people in New York. Eventually, as Justice Thomas has noted, government employers may find it convenient to attempt to "restric[t] . . . disfavored or unpopular speech in the name of preventing disruption." *MacRae*, 145 S. Ct. at 2621 (Thomas, J., respecting denial of certiorari) (quoting *Dodge v. Evergreen School Dist. #114*, 56 F. 4th 767 (9th Cir. 2022)).

The Seventh Circuit struggled with how to characterize Ms. Hedgepeth's speech. The court claimed that, because it took the form of social-media posts, it carried a "clear risk of amplification" and therefore could be viewed as furthering the disruption at the school. *Hedgepeth*, 152 F.4th at 798. But "amplification" can occur even on social media accounts set to private. Those who can see the posts can take screenshots and repost the images to their accounts. Others can then share those images and engender outrage. Users with

possibly controversial ideas can set their account to private, as Hedgepeth did, but they can't fully guarantee their views won't be amplified. Nonetheless, the lower court concluded that "though not technically public, [Hedgepeth's posts] functioned more like a stage whisper than a secret [t]hus, even drawing inferences in her favor, the posts predictably and rapidly circulated within the PHS community." *Id.* at 798.

The Fourth Circuit has highlighted how social media amplifies both employee and employer interests in the public-employee speech context. In *Liverman v. City of Petersburg*, 844 F.3d 400 (4th Cir. 2016), a police officer was terminated for social media posts. The court noted that "[a] social media platform amplifies the distribution of the speaker's message—which favors the employee's free speech interests—but also increases the potential, in some cases exponentially, for departmental disruption, thereby favoring the employer's interest in efficiency." *Id*. at 407.

Social media can amplify the reach of an opinion, which could heighten the possibility of disruption, but *Pickering* itself dealt with a teacher who amplified his own speech by writing a letter to the local newspaper. *Pickering*, 391 U.S. at 564. The *Pickering* Court regarded such amplified speech as important for "free and open debate" that contributes to "informed decision-making by the electorate. *Id.* at 571–72.

Furthermore, the *Pickering-Garcetti standard* creates lingering questions of whether and how courts should evaluate public-employee speech based on its purported value to public discourse. In *Connick v, Myers*, the Court looked at a questionnaire that was distributed by an employee to others in the district attorney's office. 461 U.S. 138, 140–41 (1983). The Court

deferred to the supervisor's belief that it was an act of insubordination, but noted that a "a stronger showing [on the government's part] may be necessary if the employee's speech more substantially involved matters of public concern." *Id.* at 152. The Ninth Circuit has explicitly noted this tension in *Pickering*: "[N]ot all statements of 'public concern' are treated equally under the *Pickering* balancing test . . . [C]ourts . . . have effectively established a sliding scale for how much weight to give . . . when balancing the employee's and the government's competing interests." *Moser*, 984 F.3d at 905–06 (citing *Connick*, 461 U.S. at 150).

Consistently, the Fourth Circuit has held that racially charged comments and comments advocating violence are "not of the same ilk" as other types of public-employee speech on matters of public concern. *Grutzmacher v. Howard Cnty.*, 851 F.3d 332, 348 (4th Cir. 2017). Other courts have argued that sexually explicit language should receive less protection. *See, e.g.*, *Dible v. City of Chandler*, 515 F.3d 918, 928 (9th Cir. 2008) ("[I]t is a bit difficult to give [sexual expression] the same weight as the right to engage in political debate."). These cases show how some courts applying *Pickering-Garcetti* balancing are deciding what level of protection different types of speech receive—expressly by reference to its content—even if the speech is on matters of public concern.

Here, the Seventh Circuit, while acknowledging Ms. Hedgepeth's speech as being on a matter of public concern, still evaluated that speech by reference to its content: as being "vulgar," which "weakens [Hedgepeth's] speech interests since her role of public trust counsels instead for a 'calm, reasoned presentation of her views on [a] sensitive subject.' *Hedgepeth*, 152

F.4th at 798 (quoting *Darlingh*, 142 F.4th at 566–67). This Court should clarify whether courts are to weigh the value of speech when applying *Pickering-Garcetti*.

Finally, the *Pickering-Garcetti* framework is also unclear on the relationship between public-employee speech and the potentially contrary institutional viewpoints taken by public employers. In *Durstein v. Alexander*, 629 F. Supp. 3d 408 (S.D.W. Va. 2022), a West Virginia district court applied *Pickering-Garcetti* to uphold the termination of a schoolteacher who had made social media posts about Muslims that contained prejudicial language. The court there noted that the plaintiff's tweets were "antithetical to the Board's mission to provide a safe and nondiscriminatory school environment, as laid out in its policies." *Id.* at 416. The district court cited widely to the policy of the Board of Education of Cabell County Schools, which stated that "[i]t is the responsibility of all students and employees to promote and maintain an environment free of all types of religious/ethnic harassment." *Id.* at 408, 424. Justice Thomas has emphasized, however, that "[i]t undermines core First Amendment values to allow a government employer to adopt an institutional viewpoint on the issues of the day and then, when faced with a dissenting employee, portray this disagreement as evidence of disruption." *MacRae*, 145 S. Ct. at 2620 (Thomas, J., respecting denial of certiorari). Such a pretext for discrimination is another way in which the government speech doctrine is "susceptible to dangerous misuse." *Matal*, 582 U.S. at 235.

The Court has already recognized the growing problem and lack of clarity around *Pickering*. Several decisions have "misapplied First Amendment precedents in cases involving controversial political speech"

Id. at 2620-21. The Court should provide further clarity on the free speech rights of public employees.

CONCLUSION

This case presents an important First Amendment question in need of this Court's clarification. Government employees should not have different First Amendment rights depending on the federal circuit where their employer is located.

For the foregoing reasons, and those stated in the petition, the Court should grant certiorari.

Respectfully submitted,

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