NO. 20-_____

In the Supreme Court of the United States

DANYELLE BENNETT,

Petitioner,

v.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, contrary to *Rankin v. McPherson*, 483 U.S. 378 (1987), a public employee's political debate on an issue of national importance may be silenced and accorded diminished constitutional protection based solely on the speaker's use of an offensive word.

2. Whether the Sixth Circuit erred in ruling, in conflict with other circuits, that the private exercise of free speech by a public employee on a matter of public concern may be curtailed based on the government's purely speculative concerns of public perception.

3. Whether the effect of the Sixth Circuit's holding is to render the *Pickering* balancing test meaningless by constitutionalizing a "heckler's veto" for controversial expressions.

PARTIES TO THE PROCEEDINGS

Petitioner

Danyelle Bennett, is an adult citizen and resident of Nashville, Tennessee. She was, at all times relevant, an employee of the Metropolitan Government of Nashville and Davidson County.

Respondent

The Metropolitan Government of Nashville and Davidson County, Tennessee, is a local body politic and municipality and exists under and by virtue of the laws of the State of Tennessee.

LIST OF PROCEEDINGS

United States Court of Appeals for the Sixth Circuit

No. 19-5818

Danyelle E. Bennett, *Plaintiff-Appellee,* v.
Metropolitan Government of Nashville and
Davidson County, Tennessee, *Defendant-Appellant*

Date of Final Opinion: October 6, 2020

Date of Rehearing Denial: November 6, 2020

United States District Court for the Middle District of Tennessee

No. 3:17-cv-00630

Danyelle Bennett, *Plaintiff,* v.
Metropolitan Government of Nashville and
Davidson County, Tennessee, *Defendant*

Date of Final Order: June 25, 2019

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All pertinent decisions in this case to date are entitled *Bennett v. Metropolitan Government of Nashville and Davidson County, Tennessee*. The district court's ruling in favor of the Danyelle Bennett appears at 383 F.Supp.3d 790 (M.D. Tenn. 2019), and the Sixth Circuit's reversal at 977 F.3d 530 (6th Cir. 2020).

JURISDICTION

The U.S. Court of Appeals rendered its panel decision on October 6, 2020, and denied a timely petition for rehearing *en banc* on November 6, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

U.S. Const., amend. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

1. Jurisdiction of the District Court

This is a First Amendment retaliatory discharge case in which the district court's jurisdiction was invoked pursuant to 28 U.S.C. § 1331.

2. Facts Material to Consideration of the Questions

Danyelle Bennett was employed as a 9-1-1 operator with the Metropolitan Government of Nashville and Davidson County ("Metro"). On November 8, 2016, the nation elected Donald J. Trump as its 45th President of the United States. Early on the morning of November 9, 2016, around 3:00 a.m., just after the announcement by the news media that Trump had passed the 270 electoral votes threshold needed to win the election, Ms. Bennett posted on her personal Facebook an image depicting the electoral map and a statement: "Officially over 270. This girl has got to go to bed."

Within minutes after posting this message, Ms. Bennett noticed an unusual response pop up on her Facebook from a stranger whom she did not recognize named Mohamed Aboulmaouahib. The response read as follows: "Redneck states vote for Trump, niggaz and latinos vote for Hillary." Ms. Bennett disagreed with the stranger's assertion that the Presidential election was decided solely on racial division, and expressed her rebuttal in three short sentences: "Thank God we have more America loving rednecks. Red spread across all America. Even niggaz and latinos voted for Trump too."

There was no dispute at trial but that when Ms. Bennett posted her political comment, she was speaking in her capacity as a private citizen and her comment was not directed to anyone within her department or within Metro. Trial Tr., 1942. Her rebuttal to Mr. Mohamed's political comment did not express any grievance related to the operation of her department. Trial Tr., 1942.

Bennett removed her comment within hours, but despite her voluntary removal of the post, the next morning, she was administratively suspended by her employer and never allowed to return to her job of fifteen years. Thirty days later, despite her written apology, she was terminated for "conduct unbecoming a Metro Employee," "failure of good behavior" and for violating Metro's social media policy.[1]

Metro admitted at trial that even if Ms. Bennett had quoted from Dr. Martin Luther King's "Letter from the Birmingham Jail" or President Barack Obama's use of the N-word during a CNN televised interview, her use of a derivative of the N-word in any context would nonetheless violate Metro's employee conduct policy. Trial Tr., 2602-03.[2]

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[1] It is puzzling why Judge Gibbons of the Sixth Circuit Panel based her concurring opinion, in part, on an incorrect finding that Bennett failed to apologize. App.32a. The record is clear that Bennett issued a four-page, handwritten apology to her superiors. Tr. Pl. Exh. 11.

[2] Despite the non-work setting of Ms. Bennett's speech, its political context was not considered a factor in Metro's decision to terminate her employment. Trial Tr., 2617. The decision to terminate Ms. Bennett's employment was based specifically on the words she used, and the situation in which she used them– political or not—was irrelevant. App.12a at fn.2.

No investigation of any disruption was conducted by Metro prior to terminating Ms. Bennett. Trial Tr., 2611 and 2332. Her direct supervisors each testified that they observed no disruption of the workplace as a result of Ms. Bennett's speech activity.[3] There was no evidence that during the short span that Ms. Bennett's post remained visible on Facebook that it ever went "viral". The jury found that there was no reasonable likelihood of any impairment of discipline, impact on performance of Bennett's duties, or interference with the orderly operation of her department from Ms. Bennett's political remarks.[4] App. at 88a-89a.

The Sixth Circuit reversed the district court's ruling that Ms. Bennett's political comment was entitled to substantial constitutional protection and outweighed her employer's speculative fears of negative public perception and disruption. The Sixth Circuit further acknowledged that it was the "words" that Ms. Bennett used that prompted Metro to terminate her employment, and that it did not matter that these words were uttered by her in the context of a political debate. App.12a.

First Amendment Violations

The determination of whether a government employer's termination of an employee purely because of their speech activity violates the First Amendment

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[3] Out of the 120-125 employees who comprised Ms. Bennett's Department on election night in 2016, only five expressed any concern at all about Ms. Bennett's comment. Tr., 2524. None of these employees put their concerns in writing, despite being told to do so by management. Tr., 2612.

[4] *See* Special Jury Verdict, App.88a.

must be analyzed under the two-step test in *Connick v. Myers*, 461 U.S. 138, 140 (1983). The first step asks whether the employee's speech was on a matter of public concern. "Speech on matters of public concern is at the heart of First Amendment protection." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-759 (1985). It is the "essence of self-government." *Garrison v. Louisiana*, Louisiana, 379 U.S. 64, 74-75 (1964). The First Amendment reflects what this court has called "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

This initial step in the two-step analysis also includes, as a component, whether the employee spoke as a private citizen or a public employee in the course of their employment. *See Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). Here, Ms. Bennett's off-hour political speech bore no nexus to her government employment.[5] It is speech that by definition does not relate to "internal office affairs" or an employee's status as an employee.

Once it is determined that the employee's speech involved a matter of public concern, then the second step requires an application of the balancing factors in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).[6] A

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[5] Metro did not challenge on appeal the district court's finding that Ms. Bennett's speech was political in nature. App.12a.

[6] The test, first enunciated by Justice Thurgood Marshall, has been in use since 1968, and consists of a set of three simple components: 1) the employee must speak as a private citizen, and not as part of the employee's official job duties; 2) the speech must touch on matters of public concern; and 3) the employee's interest in speaking must outweigh the government's interest. 391 U.S. at 568.

threshold and critical aspect of the balancing test is to first determine the degree of protection to which the speech is entitled. This is because the "more tightly the First Amendment embraces the speech the more vigorous a showing of disruption must be made." *Hyland v. Wonder*, 972 F.2d 1129, 1139 (9th Cir. 1992), citing *Connick v. Myers*, 461 U.S. 183 (1983); *McGreevy v. Stroup*, 413 F.3d 359, 361 (3rd Cir. 2005). Accordingly, this court has recognized that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) quoting *Connick v. Myers*, 461 U.S. 138, 145, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) (internal quotation marks omitted).

In this case, Ms. Bennett's off-hours political debate centered around an issue of paramount national importance -- did race play a determining factor in the outcome of a Presidential election? It is difficult to imagine a topic more deserving of heightened constitutional protection. Consequently, the district court found that it rested on the highest rung of First Amendment protection. It is the Sixth Circuit's rejection of this principle, and its relegation of Ms. Bennett's speech to a lesser degree of protection in the *Pickering* balance, that runs afoul of this Court's precedents.[7]

Likewise, the manner, time, and place of the employee's expression are relevant when making the

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[7] The Sixth Circuit's reversal of the district court's finding on this important legal finding was pivotal to its application of the *Pickering* balancing factors. As the court stated: "So, even though Bennett's speech was protected, it was not in the 'highest rung' of protected speech as the district court erroneously found.'" App.13a.

Pickering analysis, as is the context in which the speech arose. The following contextual facts were either conceded by Metro at trial or found to exist by the jury and not contested on appeal:[8] 1) the speech in question was private speech by a government employee wholly unrelated to her job duties; App.63a-64a; 2) the speech in question was on a matter of public concern; App.58a; 3) it was the speech itself and not specific policy violations that resulted in the termination of Ms. Bennett's employment, App.59a at fn. 9; and 4) the reason for Ms. Bennett's termination was her repeating back the derivative of the N-word when expressing her disagreement with a political assertion that race was the determining factor in the outcome of a national election App.59a-60a.

The Panel's failure to accord Ms. Bennett's speech the degree of First Amendment protection to which it was entitled stripped her speech of the weight it deserved in the Panel's balancing of the *Pickering* factors. Consequently, the Sixth Circuit held that "less of a showing of disruption is required." App.27a.[9] In effect, the Sixth Circuit, unlike the Ninth and Seventh Circuits, applied a weighted balancing test to the *Pickering* standard thereby creating an unlevel playing field and tipping the scale at the outset in favor of

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[8] None of the jury's findings were contested on appeal.

[9] Indeed, in the instant case the bar was lowered to virtually no disruption of the workplace as a sufficient justification for punishing the speech in question. The Panel's holding practically ignores the jury's finding that there was "no reasonable likelihood to interfere with the orderly operation of the Emergency Center." App.89a, Jury Special Interrogatory No. 4).

the employer.[10] It has now held that the government may restrict an employee's free speech, even on matters of political and public concern, if there is merely speculative concern over negative public perception and disruption.

The effect of the Sixth Circuit's recalibration of the *Pickering* test is to constitutionalize a "heckler's veto", and allows a government employers to silence free speech whenever a fellow employee claims to be offended by another's off-duty, private expression on a topic of public concern.[11]

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[10] *See Godwin v. Rogue Valley Youth Correctional Facility*, 656 Fed.Appx. 874, 877 (9th Cir. 2016) (finding no evidence of actual disruption and Defendants' predictions of future disruption were purely speculative, the district court erred in granting summary judgment in favor of Defendants), citing *Nichols v. Dancer*, 657 F.3d 929, 934 (9th Cir. 2011) ("[A]n employer cannot prevail under *Pickering* based on mere speculation that an employee's conduct will cause disruption."). *See also*, *Gustafson v. Jones*, 290 F.3d 895, 909 (7th Cir. 2002) ("Pickering balancing is not an exercise in judicial speculation."); and *Kinney v. Weaver*, 367 F.3d 337, 363 (5th Cir. 2004) ("[E]ngaging in *Pickering* balancing is not like performing rational basis review, where we uphold government action as long as there is some imaginable legitimate basis for it.").

[11] When one considers the sheer number of public employees in the United States, it is possible to gain a better sense of the enormity of the issue of a government employer's ability to stifle employee speech on matters of public concern. According to the U.S. Census Bureau, in 2019, state and local governments employed 19.7 million people. *Annual Survey of Public Employees & Payroll Report: 2019* (June 30, 2020). https://www.census.gov/content/dam/Census/library/publications/2020/econ/2019_summary.pdf

REASONS FOR GRANTING THE PETITION

From the employee's standpoint, any application of the *Pickering* factors must begin with a constitutional presumption that the "more tightly the First Amendment embraces the speech the more vigorous a showing of disruption must be made." *Hyland v. Wonder*, 972 F.2d 1129, 1139 (9th Cir. 1992), citing *Connick v. Myers*, 461 U.S. 183 (1983); *McGreevy v. Stroup*, 413 F.3d 359, 361 (3rd Cir. 2005). Because Ms. Bennett's expression "lies at the core of speech on matters of public concern [the outcome of a Presidential election] defendant's showing of disruption, real or potential, must be correspondingly great." *Id.*

The Sixth Circuit opinion runs counter to this well-established "strong showing" requirement, and even appears on its face to ignore prior settled Sixth Circuit precedent on this point. *See Devlin v. Kalm*, 630 Fed. Appx. 534 (6th Cir. 2015) ("[I]f an employee's speech substantially involve[s] matters of public concern, an employer may be required to make a particularly strong showing that the employee's speech interfered with workplace functioning before taking action."), citing *Leary v. Daeschner*, (6th Cir. 2000). The Panel's holding effectively turns this constitutional presumption on its head, and grants government employers favored standing in the balancing calculus by allowing them to apply a purely arbitrary standard of "offensiveness" to the private speech as a justification for silencing it. It further tilts in favor of the public employer the discretion to ban employee speech on matters of heighted public concern without demonstrating a "stronger showing" of how the

employee's free speech interests are outweighed by government concerns in the efficiency of its operation.

I. THE SIXTH CIRCUIT'S HOLDING CONFLICTS WITH THIS COURT'S PRECEDENT IN *RANKIN V. MCPHERSON* BY ALLOWING GOVERNMENT TO BAN SPEECH BASED ON ITS INAPPROPRIATE OR CONTROVERSIAL CONTENT.

This Court has repeatedly held that the controversial nature of speech is not the measure of its constitutional protection. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). "[T]he proudest boast of our free speech jurisprudence," then, is that we protect the speech "we hate." *Matal v. Tam*, 137 S.Ct. 1744, 1764 (2017) (Alito, J., opinion) (citation omitted); *Snyder v. Phelps*, 562 U.S. 443 (2011); *Texas v. Johnson*, 491 U.S. 397, 421 (1989) (Kennedy, J., concurring).

The same is true when it comes to the protection of public employee speech, particularly when it is private and pertains to issues of paramount public concern.[12] *Rankin v. McPherson*. The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern. *Id.* at 387. "Debate on public issues should

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[12] As this Court noted in *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410, 415, n. 4, "Private expression . . . may in some situations bring additional factors to the *Pickering* calculus."

be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials" *Id.*

Yet, in this case, the Sixth Circuit found that it was Ms. Bennett's use of a single word in her political rebuttal to a stranger's comment on race and the election that rendered it undeserving of heightened First Amendment protection. Specifically, the court held that the use of a derivative of the N-word "in any setting is inappropriate and indefensible . . . " App. 23a, fn.7. Ironically, despite Ms. Bennett's repetition of this word in an effort to dispel a bigoted falsehood and fallacy about race, the court held that Metro was justified in terminating her. To the court below, the context of her remark was, for all intents and purposes, irrelevant. App.12a, fn. 2.[13]

The effect of the Panel's ruling is to also allow government employers to parse out discrete components of an employee's speech that it finds objectionable "and conduct a constitutional analysis on each of them." *Liverman v. City of Petersburg*, 844 F.3d 400, 410 (4th Cir. 2016); *see Stroman v. Colleton Cty. Sch. Dist.*, 981 F.2d 152, 157 (4th Cir. 1992). "Because the court does not have 'license to ignore the portions' of the commu-

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[13] This myopic finding by the Sixth Circuit ignores the jury's response to the Verdict Form: "Do you find that the Plaintiff has proven by a preponderance of the evidence that the adverse action was motivated at least in part by her constitutionally protected conduct (*i.e.*, using the term "niggaz" when expressing her views regarding the outcome of a national election on Facebook)?" Response: "Yes". App.87a. It further ignores the message being conveyed by Ms. Bennett, *i.e.* that the election outcome was a product of diversity, and not race.

nication that touch on a matter of public concern, we must view the statements 'as a single expression of speech to be considered in its entirety.' *Liverman*, 844 F.3d at 410 citing *Campbell v. Galloway*, 483 F.3d 258, 267 (4th Cir. 2007).

A further constitutional concern exists in the instant case when one considers the Sixth Circuit's recognition that the use of the same offensive word by public employees of color "would not have the same meaning", and, by implication, would therefore be entitled to a greater degree of protection under the First Amendment. App.15a, fn. 5. Thus, another way of stating the test now under the Sixth Circuit's unique recalibration of the *Pickering* factors is that while a certain word when uttered by a non-African American public employee is too offensive to be afforded First Amendment protection regardless of its context, the same word if used by a person of color "as a term of camaraderie", should be analyzed differently and may be afforded the full panoply of protection under the First Amendment. *Id.*[14]

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[14] There was ample testimony at trial that African-American employees within Ms. Bennett's department used the "N-word" in their social media conversations with others without consequence. Tr. 2268, 2454-55.

II. THE SIXTH CIRCUIT HAS RAISED THE *PICKERING* BAR FOR PUBLIC EMPLOYEES BY ALLOWING SPECULATIVE CONCERNS OF PUBLIC PERCEPTION OR DISRUPTION TO OVERRIDE EMPLOYEE'S SPEECH ON MATTERS OF PUBLIC CONCERN, THEREBY PERPETUATING A CIRCUIT SPLIT.

The Sixth Circuit's decision perpetuates a split in the circuits by holding that government employers may stifle private, free speech by public employees on matters of public concern by citing to purely conjectural and speculative concerns of disruption. For the first time, the Sixth Circuit has adopted a standard that the mere "reasonable prediction" that public perception of an employee's speech may negatively impact the government's operations, without more, is sufficient to punish private, off-duty speech by an employee on an issue of inherent public concern.[15]

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15 "[A]lthough we have not addressed the issue directly, other circuits have held that a reasonable prediction that the public perception will impact the government's operations is sufficient. *See Locurto v. Giuliani*, 447 F.3d 159, 179-181 (2d Cir. 2006) ("Where a Government employee's job quintessentially involves public contact, the Government may take into account the public's perception of that employee's expressive acts in determining whether those acts are disruptive to the Government's operations. . . . [The Government] may legitimately respond to a reasonable prediction of disruption."); *Grutzmacher v. Howard Cnty.*, 851 F.3d 332, 346 (4th Cir. 2017) (finding that part of the job of public servants "is to safeguard the public's opinion of them" and that even the threat of deteriorated "community trust" grants greater discretion to the employer). *Grutzmacher* acknowledges that speech on social media 'amplifies the distribution of the speaker's message.' 851 F.3d at 345. Although this situation, in some respects, "favors the employee's free speech interests," it also "increases the potential, in some cases exponentially, for

This more stringent standard not only runs counter to this Court's instruction that a "stronger showing" may be necessary [to justify a governmental restriction] if the employee's speech more substantially involved matters of public concern,[16] but also is a departure from the holdings in other circuits.

Such extreme deference to the employer's speculative judgment is not appropriate when public employees voice concern over issues of paramount public concern such as a national election. The Panel's unconstrained deference to government officials' undifferentiated fears of negative public perception would permit government agencies to fire workers for any off-duty speech to which the public might object without any meaningful tether to the effectiveness of government operations.[17]

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departmental disruption, thereby favoring the employer's interest in efficiency.' *Id.*" App.21a.

[16] As one commentator characterized this Court's "stronger showing" language: "I think the most plausible interpretation of Connick is that [when employee speech directly implicates matters of public concern] the government cannot depend upon judicial deference to managerial anticipation of harm to institutional culture, but must instead bring sufficient evidence before a court to convince it that the government's restriction of speech is in fact necessary for the attainment of institutional goals." Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum,* 34 UCLA L. REV. 1713, 1814 n. 351 (1987).

[17] As one commentator notes: "This trend threatens to gain momentum with employers' increasing ability to learn of workers' off-duty speech through YouTube, Facebook, and other social networking and communications technologies." Helen Norton, *Constraining Public Employee Speech: Government's Control of*

In *Liverman v. City of Petersburg*, 844 F.3d 400 (4th Cir. 2016), the Fourth Circuit rejected this overly deferential standard followed now by the Sixth Circuit finding that it elevates the government's interests and allows regulation of employees' speech based on unsubstantiated fears of disruption or negative public perception. Citing *Pickering* and *United States v. Nat'l Treasury Employees Union (NTEU)*, 513 U.S. 454 (1995), the court held that "[t]he Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." *Id.* at 468, 115 S.Ct. 1003 (quoting *Pickering*, 391 U.S. at 571, 88 S.Ct. 1731). Further, the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* at 475. (emphasis not in original).

Similarly, the Ninth Circuit has held that the government cannot satisfy its burden under *Pickering* by relying on mere speculation that an employee's speech will cause disruption. *Moser v. Las Vegas Metro. Police Dep't*, 2021 WL 98249, at *6 (9th Cir. Jan. 12, 2021); citing *Nichols v. Dancer*, 657 F.3d 929, 933-34 (9th Cir. 2011). The Ninth Circuit stated, as its rationale for rejecting such a standard: "Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of the

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Its Workers' Speech to Protect Its Own Expression, 59 DUKE L.J. 47, 50 (2009).

employees' speech." *Moser v. Las Vegas Metro. Police Dep't*, 2021 WL 98249, at *7 (9th Cir. Jan. 12, 2021), quoting *Rankin*, 483 U.S. at 384, 107 S.Ct. 2891.

Likewise, the Seventh Circuit, while giving substantial weight to an employer's reasonable prediction of disruption, has stopped short of allowing a government employer to stifle an employee's speech on matters of public concern based on speculation. *See Craig v. Rich Twp. High Sch. Dist. 227*, 736 F.3d 1110, 1119 (7th Cir. 2013) ("[A]n employer's assessment of the possible interference caused by the speech must be reasonable—the predictions must be supported with an evidentiary foundation and be more than mere speculation."

The split among the circuits if particularly evident when the speaker is not a member of law enforcement. *See Godwin v. Rogue Valley Youth Correctional Facility,* 656 Fed.Appx. 874, 877 (9th Cir. 2016) (finding that because there was no evidence of actual disruption and that Defendants' predictions of future disruption were purely speculative, the district court erred in granting summary judgment in favor of Defendants), citing *Nichols v. Dancer*, 657 F.3d 929, 934 (9th Cir. 2011) ("[A]n employer cannot prevail under *Pickering* based on mere speculation that an employee's conduct will cause disruption."). *See also*, *Gustafson v. Jones*, 290 F.3d 895, 909 (7th Cir. 2002) ("*Pickering* balancing is not an exercise in judicial speculation."); and *Kinney v. Weaver*, 367 F.3d 337, 363 (5th Cir. 2004) ("[E]ngaging in *Pickering* balancing is not like performing rational basis review, where we uphold government action as long as there is some imaginable legitimate basis for it."). *See also Gazarkiewicz v. Town of Kingsford Heights, Indiana*, 359 F.3d 933, 944 (7th Cir.

2004) (holding that to be reasonable, the prediction must be supported with an evidentiary foundation and be more than mere speculation); *Flanagan v. Munger*, 890 F.2d 1557, 1566-67 (10th Cir. 1989) ("[A]pprehension of disturbance is not enough to overcome the right to freedom of expression.")

The following factors further support the speculative and conjectural nature of Metro's rush to judgment in punishing the speech at issue in this case.

A. Failure to Conduct an Investigation.

In *Waters v. Churchill*, 511 U.S. 661, 663 (1994) this court held that before terminating an employee because of their speech activity, a public employer is required to conduct a reasonable investigation. 511 U.S. at 663. (Justice Scalia concurring, joined by Justice Kennedy and Justice Thomas).[18] Ostensibly, the justification for the requirement of "reasonable investigation" is to prevent an employer from terminating an employee based on purely speculative, uniformed grounds. "To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced." *United States v. Nat'l Treasury Emps. Union,* 513 U.S. 454 (1995) (quoting *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring)).

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[18] Justices Scalia, Kennedy and Thomas concluded that the Court should adhere to its previously stated rule that a public employer's disciplining of an employee violates the First Amendment only if it is in retaliation for the employee's speech on a matter of public concern, and should not add to the *Pickering* test this prohibition a requirement that the employer conduct an investigation before taking disciplinary action.

Yet, the decision below directly dismissed the failure of Metro to conduct any meaningful investigation whatsoever. Bruce Sanschargrin, the person entrusted with making any investigation, did not conduct a single interview of any complainant. "He did not even know how many complainants there were; when asked on cross-examination to confirm that only five employees complained, he replied, 'Actually I do not know how many did because they didn't come to me.' When Director Donnegan was asked the same thing, she was able to answer only, 'I do not know that number to be correct.'" App.77a.[19]

B. Failure to Present Any Evidence of Likelihood of Disruption.

In yet another first for the Sixth Circuit, the Panel adopted the Second Circuit's "reasonable prediction" of negative public perception as a valid basis for restricting a public employee's speech on an issue of admittedly public concern. (Doc. 55-3, Opinion at 15) (citing as the basis for this new precedent the case of *Locurto v. Giuliani*, 447 F.3d 159 (2d Cir. 2006)). *Locurto* turned on a finding that "because police departments function as paramilitary organizations charged with maintaining public safety and order, they are given more latitude in their decisions regarding discipline and personnel regulations than an ordinary government employer." *Id.* at 179. Despite the fact that Ms. Bennett did not wear a badge, did not carry a weapon and did not even identify herself

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[19] As the district court noted: "The 'investigation,' if one can call it that, of Mr. Sanschargrin was entirely inadequate to inform her on these matters, and she made the decision uninformed." App.76a.

by name when interacting with the public in her job as a 9-1-1 operator, the Panel equated her role with that of a police officer on the street.

By contrast, the Fourth Circuit held in *Liverman* that the Department failed to satisfy its burden of demonstrating actual disruption to its mission. "Apart from generalized allegations of budding 'divisiveness' and claims that some 'patrol officers sought [shift] transfers,' [the Department] presented no evidence of any material disruption arising from plaintiffs'—or any other officer's—comments on social media." 844 F.3d 400, 408-09 (4th Cir. 2016).[20]

In this case, the Panel failed to assign any weight to testimony from two of the highest ranking officials in Metro management, Assistant Director Angie Milliken and Supervisor Kim Rentz both of whom confirmed that they were unaware of any disruption within the operation of the ECC. (Angie Milliken, Trial Tr., RE 169 Page ID# 2422 lines 4-18); (Kim Rentz, Trial Tr., RE 170 Page ID# 2651 lines 1-8). Ms. Rentz further confirmed that based on her observation there was no interference with the orderly operation of the workplace caused by Ms. Bennett's Facebook post. (Trial Tr., RE 170 Page ID# 2667 lines 1-12). These supervisors were in a particularly unique position to observe and oversee

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[20] As the Court noted: "But the speculative ills targeted by the social networking policy are not sufficient to justify such sweeping restrictions on officers' freedom to debate matters of public concern. *Id.* at 408-09 (4th Cir. 2016); *See McVey v. Stacy*, 157 F.3d 271, 279 (4th Cir. 1998) (Murnaghan, J., concurring in part and concurring in the judgment) ("A stronger showing of public interest in the speech requires a concomitantly stronger showing of government-employer interest to overcome it.").

the working relationships between all of the ECC employees following Ms. Bennett's Facebook comment.

The panel's decision also runs afoul of *Waters v. Churchill*, 511 U.S. 661, 114 S.Ct.1878 (1994) which holds for the proposition that while a government employer is entitled to a degree of deference in making reasonable predictions of harm, in order to avoid unwarranted infringement of public employee speech, government employers must apply a "substantial likelihood" standard. *Id.* at 1890-91 (Plurality opinion). Under this more balanced approach, a government employer must take precautionary measures to examine the context of the speech before reprimanding an employee if, as in the instant case, a substantial likelihood exists that the speech is protected. This standard would be met, according to *Waters*, by conducting what it calls a reasonable investigation. As stated, in the instant case, the panel recognized that no investigation was needed or performed.[21]

By adopting an overly deferential standard for determining workplace disruption, the Panel has effectively abrogated the free-speech rights of government employees. Granting public employers virtually

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[21] As the Ninth Circuit recognized in *Moser v. Las Vegas Metro. Police Dep't*, 2021 WL 98249 (9th Cir. Jan. 12, 2021), a court may discount the government employer's fears of disruption if there is little evidence that the offending speech has been or will be discovered. In the instant case, several of Ms. Bennett's fellow employees testified that they were completely unaware of her Facebook comment about the election until Metro brought it up during roll call on the morning it suspended Ms. Bennett. In fact, the only employee who exhibited any emotional reaction to Ms. Bennett's comment at work did so during roll call following Metro's announcement. Tr. 2148, 2170 and 2527).

unrestricted license to curtail employee private speech on matters of public concern without a scintilla of any evidentiary showing of threat to its public mission works as a bludgeon against public employee speech when a scalpel offers a more appropriate tool for balancing the government's legitimate expressive interests. In addition, public employees speaking as private citizens on issues of public concern now run the risk of adverse action if their employers only speculate concerns of potential disruption. First Amendment values of free speech should not hinge on such a precarious balance.[22]

III. THE EFFECT OF THE SIXTH CIRCUIT'S HOLDING IS TO CONSTITUTIONALIZE A "HECKLER'S VETO" FOR CONTROVERSIAL EXPRESSIONS.

"Within the universe of the First Amendment, listener disapproval seldom provides a valid basis for restricting speech." Randy J. Kozel, *Free Speech and Parity: A Theory of Public Employee Rights*, 53 WM. & MARY L. REV. 1985, 2018 (2012).[23] Kozel makes a

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[22] The Sixth Circuit's alignment with the Second Circuit on this point appears at odds with its prior precedent. In *Hardy v. Jefferson Community College*, 260 F.3d 671, 682 (6th Cir. 2001), the court held that a public employee's termination presented a classic illustration of "undifferentiated fear" of disturbance on the part his university employer. "Only after Reverend Coleman voiced his opposition to the classroom discussion [and use of the N-word] did [his superiors] become interested in the subject matter of Hardy's lecture. Just like the school officials in *Tinker*, Green and Besser were concerned with "avoid[ing] the discomfort and unpleasantness that always accompany" a controversial subject. *Id.* at 509, 89 S.Ct. 733.

[23] Citing *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation. Speech cannot be financially burdened,

poignant point that is particularly relevant to the instant case: "the *Pickering* test can be understood as constitutionalizing a 'heckler's veto' for controversial expressions." *Id.* at 2018. This is because the "core of the employee's free speech right is entirely dependent on the likely reaction of co-workers and the public to the employee's speech." *Id.*[24] *See Feiner v. New York*, 340 U.S. 315, 320 (1951) ("[T]he ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker."); *Bieluch v. Sullivan*, 999 F.2d 666, 673 (2d Cir. 1993) ("To hold otherwise [in a case involving the disciplining of a state trooper for off-duty speech on local political controversies] would seriously undermine the first-amendment rights of public employees. Whenever a government employee became personally involved in a controversial public issue, those on the opposite side of the issue could get the employee transferred or discharged simply by expressing a concern to the employee's superior that government functions were being threatened.").

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any more than it can be punished or banned, simply because it might offend a hostile mob." (citations omitted)); *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) (plurality opinion) ("[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."). *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844, 880 (1997) (expressing disapproval of a "heckler's veto" approach to regulating speech).

[24] In this case, only 5 out of over 120 employees even complained; none of them submitted any written basis for their objection to the Plaintiff's comment, even though instructed to do so by their superiors. Tr., 2524, Tr., 2612. There was also evidence at trial that the underlying motivation for these specific individual objectors was their ties as union stewards or members with the Service Employees International Union (SEIU). App.13a.

"Historically, one of the most persistent and insidious threats to first amendment rights has been that posed by the 'heckler's veto,' imposed by the importuning of government to curtail 'offensive' speech at the peril of suffering disruptions of public order." *Berger v. Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985). *See Edwards v. South Carolina*, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963); *Terminiello v. City of Chicago,* 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949). Government's instinctive and understandable impulse to try and avoid all risks of public disorder by chilling speech assertedly or demonstrably offensive to some elements of the public is a recurring theme in first amendment litigation. *See, e.g.*, *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974); *Cohen v. California,* 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971); *Rowan v. Post Office Department*, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970); *Terminiello v. City of Chicago*, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949); *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

The Sixth Circuit's explanation for rejecting this argument was that the "heckler's veto" prohibition has only been applied in the context of "a hostile mob" of outsiders.[25] In the instant case, the "hecklers" were not members of the public; they were fellow employees within Ms. Bennett's own department. To paraphrase from Kozel, the Sixth Circuit's holding "implies that

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[25] The Sixth Circuit relief for this assertion on the Ninth Circuit opinion in *Dible v. City of Chandler*, 515 F.3d 918, 928-29 (9th Cir. 2008) (In which the public had discovered the police officer's sex website); and the Second Circuit case of *Locurto v. Giuliani*, 447 F.3d 159, 182-83 (2nd Cir. 2006) (a public outcry to the NYPD officers' black-face participation in a New York City parade).

every utterance made by a government employee, no matter how important or valuable, can provide a lawful basis for retaliation so long as it threatens to create a sufficient stir among their fellow employees. 53 WM. & MARY L. REV. 1985 at 2020.[26] This is the equivalent of no protection at all.

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[26] Kozel is not alone in his concern about exaggerated deference to public employers as a means of curtailing employee off-duty speech based on an objection by a fellow employee. *See also*, Helen Norton, *Constraining Public Employee Speech: Government's Control Of Its Workers' Speech To Protect Its Own Expression*, 59 DUKE L.J. 47 (2009) at fn. 189. (Unexamined deference to government's fears about onlookers' reactions to workers' off-duty speech threatens to institutionalize the long-maligned "heckler's veto").

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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