No. 20-1078

In The
Supreme Court of the United States

DANYELLE BENNETT,

Petitioner,

v.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Sixth Circuit properly hold that the offensive nature of government employee speech is relevant under the *Pickering* factors, which examine the effect of the speech on the efficiency of the workplace?

2. Did a public employer properly conclude that an employee's speech was not protected where there was actual disruption to the agency and the jury found that the speech was also reasonably likely to undermine the department's mission and reasonably likely to have a detrimental impact on close working relationships in the department?

3. Did the Sixth Circuit properly reject Petitioner's argument that her termination constituted a "heckler's veto" where the disruption arose from within the department and negatively affected close working relationships?

RELATED CASES

Petitioner Danyelle Bennett's List of Proceedings accurately reflects the trial court's first entry of judgment, on June 25, 2019 (U.S. District Court, M.D. Tenn., Docket No. 3:17-cv-00630), but not the second. The original judgment was stayed pending appeal, and the District Court entered a new final judgment on December 3, 2020, following the Sixth Circuit Court of Appeals' remand.

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INTRODUCTION

In this First Amendment retaliation lawsuit brought pursuant to 42 U.S.C. § 1983, Petitioner Danyelle Bennett challenges her termination from employment as an emergency dispatcher for the Metropolitan Government of Nashville and Davidson County's Emergency Communications Center. In its decision below, the Sixth Circuit applied settled legal principles and properly held that an employee's use of a racial slur in a Facebook comment about a presidential election is not protected speech under *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968), where the comment was reasonably likely to damage the employee's close working relationships and undermine the mission of the government agency. Petitioner Danyelle Bennett attempts to capture this Court's attention through mischaracterized facts, misapplied law, and an irrelevant circuit split. But the Sixth Circuit's holding was faithful to this Court's precedents, and the petition provides no justification for Supreme Court review.

First, the Sixth Circuit appropriately held that the offensive nature of speech is relevant in the *Pickering* balancing. Bennett's argument that the offensive nature of speech is irrelevant to the *public concern prong*, an entirely different element of a retaliation claim, is a red herring. Further, even if the Sixth Circuit had misapplied this Court's precedent, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . misapplication of a properly stated rule of law." S. Ct. R. 10. Bennett's discussion of cases

in which the government attempted to regulate offensive speech in its role as a sovereign and not in its role as an employer are also inapposite, providing no justification for review here.

Second, the Sixth Circuit applied settled law and held that the jury's findings of a reasonable likelihood of damage to close working relationships and undermining of the agency's mission rendered the employee's speech unprotected. Moreover, even if the circuits disagree on when and if actual disruption is required to justify discipline for employee speech, the issue need not (indeed, cannot) be settled in this case, which involved actual disruption to the agency.

Third, Bennett's claim that the Sixth Circuit's decision constitutionalizes the "heckler's veto" is nothing more than a criticism of the fifty-year-old *Pickering* test itself. Lower courts have applied that test without stumbling over "heckler's veto" issues any more than a handful of times. Even when those issues have arisen, lower courts have identified workable solutions. More importantly, this is not a "heckler's veto" case in the first instance because the workplace disruption resulted not from disgruntled outside observers but from Bennett's own co-workers, which falls squarely within the *Pickering* analysis.

In the end, Bennett's attempts to sensationalize the facts of this case and manufacture legal quandaries fall flat. The Sixth Circuit's straightforward application of this Court's fifty-year-old *Pickering* framework to the extensive workplace disruption that Bennett's

speech generated provides no persuasive basis for Supreme Court review.

JURISDICTIONAL STATEMENT

Jurisdiction in this Court is not disputed, though Petitioner does not satisfy the standard for review set forth in Supreme Court Rule 10. Petitioner's jurisdictional statement, however, omits the date of final judgment entered in the trial court proceedings, which is December 3, 2020.

COUNTERSTATEMENT

Facts Material to Petition

Danyelle Bennett was employed as an emergency telecommunicator in the Emergency Communications Center ("ECC"), a facility within the Metropolitan Government of Nashville and Davidson County, Tennessee ("Metropolitan Government"). (Pet. App. 2a.) Ms. Bennett fielded emergency calls and was certified in emergency medical and fire dispatch. (*Id.*)

In the early morning hours of November 9, 2016, Bennett was awaiting Presidential election results. (*Id.* at 2a-3a.) When the electoral votes for Donald Trump, the candidate that Bennett supported, reached 270, she posted a celebratory statement on her public Facebook page. (*Id.* at 3a.) An individual who Bennett did not know named Mohamed Aboulmaouahib

commented on her post, stating: "Redneck states vote[d] for Trump, niggaz and latinos states vot[ed] for hillary." (*Id.*) Bennett replied: "Thank god we have more America loving rednecks. Red spread across all America. Even niggaz and latinos voted for trump too!" (*Id.*)

Bennett's use of the "n-word" in response to Mr. Aboulmaouabhib quickly sparked outrage. The next morning, while off-duty, Bennett noticed a comment on her post from her friend and former colleague, asking, "Was the niggaz statement a joke? I don't offend easily, I'm just really shocked to see that from you." (*Id.*) Bennett spoke with another former colleague, Tamika Barker, by phone after she commented on the post and removed the post after their call. (*Id.*) Numerous complaints from Bennett's co-workers also began to roll in, both to supervisory level employees and to the union steward, Alisa Franklin. (*Id.* at 3a-4a.) Michele Donegan, the ECC Director, also received an email from the mayor's office about the post, which included a constituent complaint. (*Id.* at 4a-5a.)[1]

When Bennett met with Director Donegan and Human Resources Manager Bruce Sanschargrin to

[1] Bennett's petition includes a self-serving suggestion that the post had no impact on the workplace merely because a couple employees testified that that ECC employees continued performing their duties as expected. (Pet. 4 & n.3.) The quantity of complaints that ECC had to address more than supported the jury's finding that the post negatively affected close working relationships in the department. Bennett's quibble over the full extent of the disruption is not a persuasive basis for Supreme Court review.

discuss the post, Bennett "acknowledged that other employees appeared to be outwardly offended," but "believed they were just 'playing the victim' and were not really offended." (*Id.* at 4a, 6a.) She also "claimed that she was the real victim in the situation and resented being ganged up on." (*Id.* at 6a.) Director Donegan ultimately determined that Bennett should be placed on administrative leave pending an investigation and to allow tensions in the workplace to calm. (*Id.*)

Conversations about Bennett's post continued even after she was placed on leave, and union stewards raised the issue with Director Donegan at the union's monthly meeting. (*Id.* at 7a.) The union stewards "described a great deal of tension in the call center, explaining that there was not the same level of communication going on as there was before the incident, reflecting a disconnect among the employees." (*Id.*)

Bennett was charged with violating Metropolitan Government policy, and a disciplinary hearing was conducted. (*Id.* at 7a-8a.) Following the hearing, Director Donegan terminated Bennett's employment. (*Id.* at 9a.) During the hearing and as recently as trial, Bennett continued to defend her conduct and made no effort to acknowledge her colleagues' feelings about the post. (*Id.* at 17a.) As the Sixth Circuit appropriately recognized, "[s]uch facts indicate that if she had returned to work at ECC, her presence would have continued or exacerbated the disharmony." (*Id.*)

Trial Court Proceedings

At trial, the District Court submitted several special interrogatories to the jury, which were patterned after language from this Court's decision in *Rankin v. McPherson*, 483 U.S. 378 (1987). In response to two of those interrogatories, the jury concluded that Bennett's Facebook comment was "reasonably likely to have a detrimental impact on close working relationships at the Emergency Communications Center" and "reasonably likely to undermine the mission of the Emergency Communication Center." (Pet. App. 89a.) After the jury verdict, the trial court conducted the *Pickering* balancing, recognizing that it "is a matter of law for the court to decide." *Gillis v. Miller*, 845 F.3d 677, 684 (6th Cir. 2017).

The District Court credited the jury's findings that weighed in favor of Bennett but discounted the findings that weighed in the Metropolitan Government's favor. For example, the jury found that Bennett's Facebook comment was likely to have a detrimental impact on close working relationships in the ECC. (Pet. App. 70a.) The Court attempted to minimize the finding, noting that the only working relationships affected were with the individuals who were upset with Bennett, that she had not directed the comment at any coworkers, and that she did not work as closely with colleagues as a police officer or firefighter. (*Id.* at 71a, 74a.)

In addition, while the jury concluded that Bennett's Facebook comment was reasonably likely to

undermine the ECC's mission, the District Court heavily discounted the importance of public perception on the functioning of a government operation. (*Id.* at 70a, 78a-79a.) The District Court ultimately noted that while the Metropolitan Government's concerns were not "irrational, significant, or frivolous," "they [we]re attenuated" and that it was speculative to question whether an African American resident would be hesitant to call 9-1-1 based on Bennett's comment. (*Id.* at 79a-80a.)

The District Court did not similarly critique the jury's findings that weighed in Bennett's favor, effectively discarding this Court's equal treatment of the *Pickering*/*Rankin* factors. Ultimately, the District Court held that while "the goal of ECC leadership to head off possible racial tension from Plaintiff's comment was laudable," Bennett's speech was nonetheless protected. (*Id.* at 82a.)

Sixth Circuit Decision

The Sixth Circuit Court of Appeals reversed the trial court, affirming several of the Metropolitan Government's arguments. Of particular relevance here, the Court appropriately noted that "[b]ecause Bennett's speech does not occupy 'the highest rung' of public concern, less of a showing of disruption is required." (*Id.* at 27a.) For example, "the concerns about Bennett's interference in the mission of ECC were not as attenuated as the district court described." (*Id.* at 20a.) Unlike the employee in *Rankin*, "Bennett was in a

public-facing role and used the slur in a public forum from a profile that implicated not only Metro Government but also the Metro Police Department." (*Id.*) As the Court properly concluded, "[t]his situation is exactly the type that *Rankin* warned could warrant a higher level of caution for public employees' choice of words." (*Id.* at 21a (citing *Rankin*, 483 U.S. at 390).)

The Sixth Circuit further recognized the public employer's right to rely on "a reasonable prediction that the public perception will impact the government's operations." (Pet. App. 21a (citing *Locurto v. Giuliani*, 447 F.3d 159, 179-81 (2d Cir. 2006)).) While the Sixth Circuit had not yet addressed the issue, numerous other courts have held that such reasonable predictions are properly considered in the *Pickering* balancing, as a result of *Rankin*. (*Id.* at 21a-22a.)

In the end, the Sixth Circuit concluded that "several factors weigh heavily in favor of Metro," and "sufficient disruption was shown to tip the *Pickering* balance toward Metro." (*Id.*) The Court's straightforward application of existing law provides no basis for review here.

REASONS FOR DENYING THE PETITION

I. THE SIXTH CIRCUIT PROPERLY CONSIDERED THE OFFENSIVE NATURE OF PLAINTIFF'S SPEECH IN BALANCING THE *PICKERING* FACTORS, AS REFLECTED IN THIS COURT'S PRECEDENTS.

Bennett's petition first asserts that the Sixth Circuit improperly held that the Metropolitan Government could consider the offensive nature of Bennett's speech in weighing the relevant interests at issue. (Pet. 10.) This argument provides no basis for Supreme Court review because it ignores settled authority from this Court and conflates *public employee* speech from other areas of speech regulation that are subject to entirely different constitutional tests.

As an initial matter, Bennett mischaracterizes the facts of this case in an effort to sensationalize the petition. She asserts that "the Sixth Circuit found that it was 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." (Pet. 11.) Bennett's reliance on *a footnote* in the Sixth Circuit opinion, however, undermines her suggestion that the opinion turned exclusively on that fact. (*Id.* (citing Pet. App. 23a n.7)) Even so, the Sixth Circuit carefully examined all of the circumstances of this case and properly applied this Court's precedents to conclude that the jury verdict—which established a reasonable likelihood of damage to working relationships and undermining of

the agency's mission—supported a finding that Bennett's speech was not protected.

In *Connick v. Meyers*, 461 U.S. 138 (1983), this Court explained that the *Pickering* balancing is a sliding scale of sorts: the more substantial the element of public concern in an employee's speech, the greater the showing an employer must make to establish that the speech is not protected. 461 U.S. at 152. The opinion states:

> Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action. *We caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern*.

Id. (emphasis added) (internal footnote omitted). This Court has also stated that the *Pickering* balancing test "is to be applied to the speech for which [the plaintiff] was fired." *Waters v. Churchill*, 511 U.S. 661, 681 (1994).

Applied here, the question becomes, what level of public concern did Bennett's speech involve and, consequently, how much protection was it entitled to receive. The speech was not purely political as Bennett suggests—she was terminated for using the term "niggaz" when expressing her views regarding the outcome of a national election on Facebook, in violation of ECC policy. (Pet. App. 90a.) And while the Metropolitan

Government does not dispute that Bennett's Facebook comments were *partly* political, that does not in and of itself render the speech entitled to the highest level of protection, as the District Court gave it. Commenting about a political election—and gratuitously using an offensive racial slur to do so—is hardly the same as reporting public corruption or speaking out about illegal activity in a workplace. The Sixth Circuit did not ignore the *partly*-political nature of Bennett's speech. It merely recognized the relevance that the character of the speech plays in the *Pickering* balancing.

Bennett also cites *Rankin* for the notion that "[t]he inappropriate or controversial character of a statement is irrelevant to *the question whether it deals with a matter of public concern*." (Pet. 10 (emphasis added).) But the Metropolitan Government has not asserted that the controversial nature of Bennett's speech renders it *not an issue of public concern*. That element has never been disputed. Rather, it is Bennett's suggestion that the Court must ignore the nature of her speech in the *Pickering* balancing that has no support in the law. In fact, such an argument would render the *Pickering* balancing utterly meaningless, as racial slurs are undoubtedly more likely to cause workplace turmoil and undermine the mission of government agencies than other more innocuous forms of speech.

Additionally, unlike Bennett and the District Court, the Sixth Circuit appropriately recognized a distinction between the government acting *as a sovereign* and acting *as an employer* and gave Bennett's speech the proper weight it deserved, thus lessening

the Metropolitan Government's required showing under *Pickering*. Bennett cites cases that are distinguishable on their facts and do not involve public employee speech at all. (Pet. 10 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (policy requiring school students to salute American flag unconstitutional); *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (striking as unconstitutional the Lanham Act's prohibition on registering disparaging trademarks); *Snyder v. Phelps*, 562 U.S. 443 (2011) (First Amendment protects picketing near military funeral service); *Texas v. Johnson*, 491 U.S. 397, 421 (1989) (First Amendment protects individual from criminal prosecution for flag burning)).)

In fact, unlike other distinguishable areas of speech regulation, this Court has recognized a public employer's right to regulate its employees' offensive speech. In *Waters*, this Court explained how restrictions that are fundamentally impermissible under the First Amendment in the general public context may be imposed in the public employment context. The *Waters* decision states unequivocally that "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Waters*, 511 U.S. at 675. Put another way, "[t]he government [as sovereign] cannot restrict the speech of the public at large just in the name of efficiency. *But where the government is employing someone for the very purpose of*

effectively achieving its goals, such restrictions may well be appropriate." *Id.* (emphasis added).

The *Waters* plurality further illustrates this distinction:

> To begin with, even many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees. The First Amendment demands a tolerance of "verbal tumult, discord, and even offensive utterance," as "necessary side effects of . . . the process of open debate." *Cohen v. California*, 403 U.S. 15, 24–25 (1971). *But we have never expressed doubt that a government employer may bar its employees from using Mr. Cohen's offensive utterance to members of the public or to the people with whom they work*.

Waters, 511 U.S. at 672 (emphasis added). Bennett's failure to recognize this important distinction renders her case a poor candidate for Supreme Court review.

II. WHILE THE SIXTH CIRCUIT APPROPRIATELY HELD THAT REASONABLE PREDICTIONS OF DAMAGE TO PUBLIC PERCEPTION ARE RELEVANT IN THE *PICKERING* BALANCING, THIS CASE INVOLVED ACTUAL DISRUPTION AND DOES NOT IMPLICATE A CIRCUIT SPLIT.

Bennett next asserts that the Sixth Circuit's decision has "raised the *Pickering* bar" by permitting

speculative concerns about public perception or workplace disruption to justify speech restrictions. (Pet. 13.) This argument not only ignores the jury findings but clings to a circuit divide that has nothing to do with this case.

First, Bennett's suggestion that the Sixth Circuit's finding amounts to a legal principle that *speculative* predictions of damage to public perception justify speech restrictions is baseless. The special interrogatories on the jury verdict form in this case were pulled directly from this Court's decision in *Rankin*. That case instructs courts to weigh whether the statements at issue were "reasonably likely" to do any of the following:

- "impair discipline by superiors,"
- "impair . . . harmony among co-workers,"
- "have a detrimental impact on close working relationships for which personal loyalty and confidence are necessary,"
- "impede the performance of the speaker's duties,"
- "interfere with the regular operation of the enterprise," or
- "undermine the mission of the public employer," paying attention "to the responsibilities of the employee within the agency."

Rankin, 483 U.S. at 388, 390. The jury answered Yes to two of the five—namely, damage to relationships and undermining of the agency mission. Nothing in *Rankin* suggests that an employer must wait for actual

workplace turmoil to manifest before taking action, and these factors plainly suggest otherwise.

This Court further emphasized this legal principle in its plurality opinion in *Waters v. Churchill*, noting the deference that courts must give to a government employer's "reasonable predictions of harm," making clear that actual disruption is not required for the government's interests to outweigh a public employee's interests under *Pickering*. 511 U.S. at 674. Thus, the Sixth Circuit properly analyzed the employer's reasonable predictions of harm, as determined by the jury.

More importantly, the purported circuit split to which Bennett cites—on the issue of whether a showing of actual workplace disruption is required before an employee may be disciplined for speech—is not outcome-determinative in this case. Unlike cases that rely solely on *predictions of harm*, and contrary to Bennett's rhetoric, her speech caused *actual workplace harm*. As the District Court acknowledged:

- Numerous employees complained about the speech.
- A constituent raised the issue with the mayor's office.
- Conversations about the issue continued even after Bennett was placed on leave, and union stewards raised the issue with Director Donegan at the union's monthly meeting.
- Union stewards described significant workplace tension following Bennett's comment

> and that employees were not communicating as they had before the incident.

Simply stated, this is not a case about potential disruption; it is a case of actual disruption. And Bennett's disagreement over whether the *extent* of disruption in this case was sufficient to tip the balance in her employer's favor is a fact-bound dispute that does not warrant Supreme Court review. S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings.").

The *Pickering* "considerations, and indeed the very nature of the balancing test, make apparent that the state interest element of the test focuses on the effective functioning of the public employer's enterprise." *Rankin*, 483 U.S. at 388. "Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest." *Id.* The indisputable impact of Bennett's speech on the workplace—numerous complaints during work hours over days and weeks, a citizen complaint to the mayor's office, increased tension and decreased communication among employees, and jury findings that the speech was reasonably likely to undermine the mission of the agency and close working relationships—takes this case far outside the "speculative concerns of public perception" on which the petition focuses. Granting

certiorari here would not resolve a circuit split,[2] and the Court should decline review.

III. THE SIXTH CIRCUIT'S DECISION DOES NOT CONSTITUTIONALIZE THE "HECKLER'S VETO," AND LOWER COURTS ARE APPROPRIATELY HANDLING THE ISSUES.

Bennett next asserts that the Sixth Circuit's ruling constitutionalizes a "heckler's veto" for controversial speech. (Pet. 21.) But nothing in Bennett's argument highlights an issue specific to this case. Bennett merely criticizes the *Pickering* test as a general principle and cites a nine-year-old law review article critiquing it. Bennett identifies no justification for

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[2] Beyond the circuit split being irrelevant, Bennett also overstates its impact on whether actual disruption must be established to justify an employee speech restriction. The Second, Third, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits all hold that a showing of actual disruption is not required before addressing employee speech. Employers may instead rely on reasonable predictions of harm. *See* discussion in *Gillis*, 845 F.3d at 685-87 (noting that to conclude otherwise would conflict with the Supreme Court's decision in *Waters v. Churchill*). Even the circuits finding otherwise do so on grounds that anything other than actual evidence of disruption is speculative and does not justify speech regulation. Here, the jury's findings of "reasonable likelihood" concerning damage to the agency mission and close working relationships negate any assertion that the employer's predictions were speculative in this case. *See, e.g.*, *Liverman v. City of Petersburg*, 844 F.3d 400, 408 (4th Cir. 2016) ("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.").

dispensing with the *Pickering* balancing test that this Court implemented more than fifty years ago. Lower courts have applied *Pickering* without consequence to public employee speech since that time. The Sixth Circuit appropriately applied the test here, and nothing in the facts of this case warrant revisiting it now.

In fact, this is not a "heckler's veto" case at all. Such cases typically involve the silencing of unpopular speech by the possibility of negative community reaction. This case, however, involved workplace disruption resulting primarily from internal complaints. The relevance of close working relationships in the *Pickering* balancing, as affirmed in *Rankin*, takes this far outside a traditional "heckler's veto" case.

But even if concerns about a "heckler's veto" had some potential significance in the employee speech context, the issue has not sufficiently worked its way through the lower courts to justify Supreme Court review. Bennett cites only three such cases arising in the employee speech context. *See Dible v. City of Chandler*, 515 F.3d 918, 928-29 (9th Cir. 2008); *Locurto*, 447 F.3d at 182-83; *Berger v. Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985). And despite *Pickering* having been decided more than fifty years ago, only a handful of other cases have addressed the "heckler's veto" in the context of *Pickering*, rendering Bennett's argument premature at best or irrelevant at worst.

In the end, lower courts, like the Sixth Circuit in this case, are sufficiently equipped to consider the ways in which workplace disruption arises and whether it

justifies a speech restriction or is more akin to a traditional heckler's veto. For example, numerous lower courts have properly rejected the "heckler's veto" argument where, as here, employees worked in roles that require them to interact with the public, such that public perception can inherently disrupt the government functions. *Craig v. Rich Township High Sch. Dist. 227*, 736 F.3d 1110 (7th Cir. 2013) (teacher); *Dible*, 515 F.3d 918; *Locurto*, 447 F.3d 159 (police officer); *Melzer v. Bd. of Educ. of City Sch. Dist. of City of New York*, 336 F.3d 185 (2d Cir. 2003) (teacher). In such situations, members of the public are not mere outside observers who may disagree with the content of speech. Rather, they are direct beneficiaries of the government function the employee is performing, rendering potential disruption from the public more relevant. Even so, until lower courts have addressed these issues and identified no workable solution—which has not occurred in the fifty years since *Pickering*—Supreme Court review is unwarranted.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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