No. 24-355

In the Supreme Court of the United States

KARI MACRAE,

Petitioner,

v.

MATTHEW MATTOS, ET AL.,

Respondents.

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

BRIEF OF CATHOLICVOTE.ORG EDUCATIONAL FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE*[1]

CatholicVote.org Education Fund ("CVEF") is a nonpartisan voter education program devoted to promoting religious freedom for people of all faiths. Given its educational mission, CVEF is concerned about the First Circuit's opinion in *MacRae v. Mattos*, 106 F.4th 122 (1st Cir. 2024), which takes *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968) to authorize a public school's firing a teacher for political speech she made months before accepting a position at that school. This capacious interpretation is inconsistent with *Pickering* and its progeny, which limit the government's ability to regulate employee expression to speech made during the government employer-employee relationship. *Garcetti v. Ceballos*, 547 U.S. 410, 418-19 (2006) (citation omitted) (recognizing that "[g]overnment employers … need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services…. When [employees] speak out, they

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[1] Each party received notice of the filing of this *amicus* brief as required by Rule 37.2. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

can express views that contravene governmental policies or impair the proper performance of governmental functions.").

Accordingly, by permitting government employers to punish pre-employment speech that was fully protected when made, the First Circuit not only infringes on the First Amendment rights of hundreds of thousands of government employees in the First Circuit, but also unconstitutionally chills the speech of millions more who might seek government employment at some point in the future. CVEF comes forward, therefore, to urge this Court to grant certiorari and to determine whether *Pickering* permits a government employer to fire a current employee for political expression she made prior to joining that government entity.

SUMMARY OF ARGUMENT

The First Circuit has decided an important and novel federal question—whether *Pickering* applies to speech that a candidate for political office makes months before becoming a government employee—in a way that directly conflicts with this Court's government-as-employer precedents. Contrary to the First Circuit's opinion, this Court has never suggested, let alone held, that *Pickering* applies outside the limited context of speech that a government employee makes while employed by the government—and for good reasons. The First

Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). This broad protection is necessary because "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Accordingly, speech on matters of public concern "has always rested on the highest rung of the hierarchy of First Amendment values." *Carey v. Brown*, 447 U.S. 455, 467 (1980). And this Court has repeatedly confirmed the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

When the government acts in a special capacity, such as a landlord, educator, or employer, the First Amendment grants it some authority to regulate expression that interferes with or undermines the government's unique interests in that role:

> [T]he extra power the government has … comes from the nature of the government's mission as employer. Government agencies … hire employees to help do [particular] tasks as effectively and efficiently as possible. When someone who is paid a

> salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her.

Waters v. Churchill¸ 511 U.S. 661, 675 (1994). The government's power is predicated on and confined to the unique relationship between government employers and their employees.

Before entering an employment relationship with the government, individuals enjoy the full scope of First Amendment speech protection. *Id.* ("The government cannot restrict the speech of the public at large just in the name of efficiency."). When accepting government employment, an individual relinquishes some First Amendment freedom within the context of that employment relationship. The government, however, cannot "deny [employment] to a person because of [her] constitutionally protected speech or associations." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Such a power would "penalize[] or inhibit[]" her "exercise of those freedoms," permitting "the government to 'produce a result which [it] could not command directly.' Such interference with constitutional rights is impermissible." *Id.* (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). The First Circuit's opinion, which enables a public school

to dismiss a teacher based on her pre-employment speech activity, contravenes these well-established principles.

Moreover, left unchecked, the First Circuit's opinion will chill the expression of hundreds of thousands of people in the First Circuit who work for government entities as well as the millions more who may want to do so in the future. *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("[First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."). Accordingly, review is needed to determine whether government employers can punish current employees for speech activity prior to the advent of the government employer-employee relationship, and if not, to remove the unconstitutional chill the First Circuit's opinion imposes on the pre-employment speech of millions of current and future government employees.

ARGUMENT

I. *Pickering* grants government employers a limited authority to regulate certain types of expression by current employees, not a broad power to punish the speech of political candidates (or others) made prior to becoming a government employee.

As this Court has acknowledged, neither "students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969); *Lane v. Franks*, 573 U.S. 228, 231 (2014) (confirming "that citizens do not surrender their First Amendment rights by accepting public employment"). Undeterred, the First Circuit *expanded* the scope of *Pickering*, allowing public schools to punish the speech of teachers that was made months or years before they traversed the schoolhouse gate as a teacher. In particular, the panel upheld a public school's dismissal of a teacher, Kari MacRae, because of political expression she engaged in—and that was fully protected—before she was hired as a public school teacher. *MacRae*, 106 F.4th at 128. This broad grant of governmental authority is inconsistent with the reasons *Pickering* advanced

for giving government employers some limited power over their employees' speech.

As an employer, a public school acts in a special capacity, which gives it more authority to regulate the speech of its employees than the government has when acting as sovereign. Specifically, a public school can, in certain circumstances, restrict employee speech that interferes with the efficient operations of the school:

> [The government] need[s] a significant degree of control over [its] employees' words and actions; without it, there would be little chance for the efficient provision of public services. Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.

Garcetti, 547 U.S. at 418-19 (citation omitted). When accepting public employment, an individual "by necessity must accept certain limitations on his or her freedom," but "[t]he First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Id*. at 419. When employed and "speaking as citizens about matters of

public concern, [employees] must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Id.*

The government's added authority arises only by virtue of the employment relationship and extends only to certain expression occurring during that relationship, *i.e.*, "[w]hen [employees] speak out." *Id.* Prior to an individual's becoming an employee, a government employer lacks authority to leverage the *possibility* of a future employment relationship to restrict that person's free speech rights as a private citizen. Pre-employment, the individual neither holds a position of public trust nor is in position to directly affect "the efficient provision of public services" through her speech activity. *Id.* at 418. The government employer, therefore, has no right to restrict or punish such pre-employment expressive activity any more than it has the power to "prevent[] or 'chill[]' [government employees] by the fear of discharge from joining political parties and other associations that certain public officials might find 'subversive.' " *Connick v. Myers*, 461 U.S. 138, 145 (1983); *Wieman v. Updegraff*, 344 U.S. 183 (1952) (holding that a State cannot require employees to take an oath denying past affiliations with the Communist party); *Cafeteria and Rest. Workers Union, Local 473 v. McElroy*, 367 U.S. 886 (1961) (concluding that the government cannot deny employment for prior membership in a particular

party); *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589 (1967) (rejecting New York's attempt to bar public employment based on an individual's membership in a "subversive" organization).

Ignoring these precedents, the First Circuit adopted a literal reading of *Garcetti*'s first inquiry—"whether the employee spoke as a citizen on a matter of public concern." 547 U.S. at 418. MacRae was an employee of a public school who spoke (by posting memes and a campaign video) as a citizen on matters of public concern. That was all the panel required—a current government employee's expression on a matter of public concern regardless of when that speech was made. *MacRae*, 106 F.4th at 136. The timing of the expression was irrelevant; MacRae spoke at some point, and months later that speech threatened to disrupt the school's operations. *Id.* at 134 (concluding that *Pickering* applies because "the allegations at issue here involve a government employer firing its public employee for their speech").

Whether *Pickering* applies to pre-employment speech, however, cannot be determined simply by noting that MacRae engaged in speech on a matter of public concern at some point during her political campaign. The timing of the speech is the central—and novel—question, a question *Pickering* and *Garcetti* never addressed given that the speech

activity in those cases was made by government employees while employed. The panel's cursory analysis, therefore, begs the question, assuming what needs to be proven—that *Pickering* extends to an employee's pre-employment statements. Moreover, a careful review of the First Amendment principles underlying the government-as-employer doctrine shows that the First Circuit's analysis is inconsistent with *Pickering*, which provides government officials with a narrow grant of authority to regulate employee speech made during the government employer-employee relationship. *Connick*, 461 U.S. at 151 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring in part)) (describing the government's " 'prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the workplace, foster disharmony, and ultimately impair the efficiency of an office or agency.' ").

As *Garcetti* explained, the First Amendment permits government employers to exercise "control over their employees' words and actions" in certain situations because "[w]hen [public employees] speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions." 547 U.S. at 419. The government's power is cabined by its

special interests as an employer: "The government 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." *Waters*, 511 U.S. at 675. Not surprisingly, then, the scope of the government's authority depends on the nature of the employee's particular job: "The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails." *Rankin v. McPherson*, 483 U.S. 378, 390 (1987). Stated differently, the employer's "heightened interests" relate only to "controlling speech made by an employee *in his or her professional capacity*." *Garcetti*, 547 U.S. at 422 (emphasis added). Accordingly, "[w]hen someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her." *Waters*, 511 U.S. at 675.

The upshot of all this is that, contrary to the First Circuit's holding, *Pickering* applies to only three types of expression that an employee might make while working for the government: speech that (1) is about a private matter; (2) relates to her job duties; or (3) is on a matter of public concern and, therefore,

is subject to *Pickering* balancing. *Pickering*, 391 U.S. at 568 (balancing "the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services that it performs through its employees"). As an employer, the government has relatively broad authority over the first two categories of employee speech. *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (*per curiam*) (noting that "*Pickering* did not hold that any and all statements by a public employee are entitled to balancing"). If an employee engages in expressive activity that is not a matter of public concern, the government employer generally can regulate her speech. As *Connick* explained:

> when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, … a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

461 U.S. at 147; *Harris v. Quinn*, 573 U.S. 616, 653 (2014) ("Under [*Pickering* and later cases], employee speech is unprotected if it is not on a matter of public concern (or is pursuant to an employee's job

duties)."); *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 386 (2011) (same).

Similarly, if the employee's expressive activity is related to her responsibilities within the organization, the government employer generally has the authority to restrict her speech:

> [W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.... Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.

Garcetti, 547 U.S. at 421-22; *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."). The contrast with pre-employment speech is stark. Restricting pre-employment speech infringes on First Amendment

freedoms because at the time of the speech the employee was a private citizen and had no official duties, thereby moving such speech outside of the *Pickering* framework.

Pickering balancing is triggered only when an employee makes statements on matters of public concern that do not trace back to her professional duties: "[e]mployees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government." *Garcetti*, 547 U.S. at 423; *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 466 (1995) ("*NTEU*") ("[W]e have applied *Pickering*'s balancing test only when the employee spoke '*as a citizen* upon matters of public concern' rather than '*as an employee* upon matters only of personal interest.' ") (citation omitted). Of course, non-employees who make statements on matters of public concern receive full First Amendment protection, a protection that is not forfeited by accepting government employment. *Connick*, 461 U.S. at 142 ("[I]t has been settled that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression."); *Lane*, 573 U.S. at 231 ("Almost 50 years ago, this Court declared that citizens do not surrender their First

Amendment rights by accepting public employment.").

Consequently, if the speech at issue was not made in the context of the government employer-employee relationship, *Pickering* simply does not apply: "In *Pickering* and a number of other cases we have recognized that Congress may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large." *NTEU*, 513 U.S. at 465. Why? Because when a citizen, who is not employed by the government, speaks, she does so as a citizen only. Her expression has "no official significance" and "b[ears] similarities to [expression engaged in] by numerous citizens every day." *Garcetti*, 547 U.S. at 422. Having no employment relationship with the person at the time of the speech, the government employer cannot restrict or punish her expression *ex post*—regardless of the impact her pre-employment speech might have on the efficiency of the public services provided.

Consider an example. In *Cohen v. California*, this Court held that the First Amendment safeguarded Cohen's right to wear a linguistically colorful jacket in the corridors of a courthouse. 403 U.S. 15 (1971). Suppose that a public school subsequently hires Cohen, who, emboldened by his prior Supreme Court victory, wears the same jacket to his new job. School officials repeatedly instruct

him to remove the jacket. He refuses and is ultimately dismissed. In this situation, Cohen has no First Amendment claim because this Court has "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.

Now suppose that after being hired Cohen neither wears his jacket at school nor engages in such colorful language with students, parents, or other school employees; he simply does his job and does it well. The government entity subsequently discovers, after several complaints from parents lead to a kerfuffle, that Cohen is the person from the famous case and dismisses him for his pre-employment expression. In this hypothetical, Cohen's pre-employment jacket-wearing provides no basis for the school's firing him:

> [The government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This

> would allow the government to "produce a result which [it] could not command directly." Such interference with constitutional rights is impermissible.

Perry, 408 U.S. at 597 (quoting *Speiser*, 357 U.S. at 526).

While a school district has "the right … to investigate the competence and fitness of those whom it hires to teach in its schools … [based] on a broad range of factors," *Shelton v. Tucker*, 364 U.S. 479, 485 (1960), *Pickering* confers no authority to dismiss a teacher for political expression that was fully protected when made pre-employment: "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940). As this Court explained in *Houston Cmty. Coll. Sys. v. Wilson*, " '[a]s a general matter,' the First Amendment prohibits government officials from subjecting individuals to 'retaliatory actions' after the fact for having engaged in protected speech." 595 U.S. 468, 474 (2022) (quoting *Nieves v. Bartlett*, 587 U.S. 391, 398 (2019)). The school can no more punish MacRae for her pre-employment speech than it could for her pre-employment political associations. *Shelton*, 364

U.S. at 485-86 ("To compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech and a right, which like free speech, lies at the foundation of free society.").

Unfortunately, Hanover School officials did just that, terminating MacRae based on "concern[] about the potential negative impact MacRae's social media posts would have on staff and students." *MacRae*, 106 F.4th at 130. And the First Circuit upheld her dismissal, expanding *Pickering*'s limited grant of government authority in the employment context to encompass pre-employment political speech. In so doing, the First Circuit "sets [this Court's] First Amendment jurisprudence on its head," *Republican Party of Minn. v. White*, 536 U.S. 765, 781 (2002), by allowing government employers to exert influence over "[t]he role that elected officials play in our society" even though that role "makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *Wood v. Georgia*, 370 U.S. 375, 395 (1962); *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) ("It is simply not the function of government to 'select which issues are worth discussing or debating' in the course of a political campaign.") (citation omitted).

MacRae ran for a seat on the Bourne School Committee to stop, what she viewed as, the Committee's "push[ing its] agenda" on students

regarding "hot-button political issues, such as gender identity, racism, and immigration." *MacRae*, 106 F.4th at 128, 137. The Committee disagreed with her views, highlighting "a difference of opinion between [MacRae] and the [Committee] as to the preferable manner of operating the school system, a difference of opinion that clearly concerns an issue of general public interest." *Pickering*, 391 U.S. at 571. While Hanover school officials were free to have their own positions on such issues:

> whether a school system [should pursue a specific agenda] is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question free and open debate is vital to informed decision-making by the electorate.… Accordingly, it is essential that [teachers] be able to speak out freely on such questions without fear of retaliatory dismissal.

Id. at 571-72. Given that MacRae was *not* employed by Hanover when she engaged in public expression, she spoke only "as a member of the general public." *Id.*

To the extent Hanover disagreed with MacRae's views or those views caused unrest after she began teaching, the school "could easily have" responded to MacRae through its own statements on such issues "via a letter to the … newspaper or otherwise." *Id* at 572. The school also could have implemented curricular changes to address particular topics that MacRae's campaign raised. What the school could not do was dismiss her for her pre-employment political speech even if that speech upset or offended some members of the community:

> [S]peech [on a matter of public concern] is entitled to "special protection" under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Indeed, "the point of all speech protection ... is to shield just those choices of content that in someone's eyes are misguided, or even hurtful."

Snyder v. Phelps, 562 U.S. 443, 458 (2011) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989) and

Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 574, (1995)). Just as "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books," school officials should not be allowed to dismiss teachers for pre-employment political statements with which the officials disagree. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 872 (1982); *W.V. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that schools cannot "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion"). Despite the broad protection afforded expression, the First Circuit permitted the school to discipline a teacher for her prior expressive activity. Only this Court can determine the proper scope of First Amendment protection afforded pre-employment speech under *Pickering* and the First Amendment.

II. Allowing government employers to punish pre-employment speech will impermissibly chill the expression of millions of current and future government employees.

As *Pickering* recognized, "it is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech." 391 U.S. at 574; *Waters*, 511 U.S. at 669 ("Speech

can be chilled and punished by administrative action as much as by judicial processes; in no case have we asserted or even implied the contrary."). If MacRae can be fired for making controversial or insensitive pre-employment remarks (as judged by whomever is leading a school at a given time), then so can millions of other people who currently serve (or hope to serve) our Nation as government employees. Consequently, the impact the First Circuit's mistaken interpretation will have on free speech is staggering given that more than 14,100,000 people live within the First Circuit.[2] In 2020, 684,200 of these people worked for federal, state, and local governments in Maine, Massachusetts, New Hampshire, and Rhode Island.[3] If *MacRae* is not reconsidered, all current government employees confront the threat of dismissal for statements they made pre-employment. Any of the remaining 13,415,800 individuals in the First Circuit who may seek

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[2] Annual Estimates of the Resident Population for the United States, Regions, States, District of Columbia and Puerto Rico: April 1, 2020 to July 1, 2023 (available at www2.census.gob/programs-surveys/popest/tables/2020-2023/state/totals/NST-EST2023-POP.xlsx)

[3] States Where the Most People Work for the Government, 24/7 Wall St. (June 4, 2021) (available at https://247wallst.com/special-report/2021/06/04/states-where-the-most-people-work-for-the-government-4/?tpid=890318&tv=link&tc=in_content

government employment at some point must be cautious about what they say, write, or post about political and social issues because a government entity might claim that their pre-employment speech subsequently disrupted its operations. Moreover, the 22,100,000 or more people who work for federal, state, and local governments across the country,[4] including the roughly 3,525,397 who are public school teachers,[5] must be wary in case they ever decide to take a similar position in the First Circuit or other courts adopt the First Circuit's broad view of *Pickering*, which the panel contends has already happened in California and Oregon. *MacRae*, 106 F.4th at 135 (discussing *Riel v. City of Santa Monica*, 2014 WL 12694159 (C.D. Cal. 2014) and *Cleavenger v. University of Oregon*, 2015 WL 4663304 (D. Or. 2015)).

The chilling effect on speech is almost palpable. As the current election cycle illustrates, the American public is deeply divided on a wide range of issues, including the "hot-button political issues, such as gender identity, racism, and immigration"

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[4] Total number of government employees in the Unites Dates from 1982-2022 (available at https://www.statista.com/statistics/204535/number-of-government-employees-in-the-us/)

[5] How Many Teachers Are in the U.S.? (Jan. 11, 2023) (available at https://www.weareteachers.com/how-many-teachers-are-in-the-us/).

about which MacRae spoke. *MacRae*, 106 F.4th at 137. Allowing public schools to dismiss teachers for pre-employment speech on such important political topics whenever school officials—or a vocal group of students and parents—disagree would not only encourage a heckler's veto, but also would force would-be teachers (or other government employees) to remain silent on controversial social or political issues:

> [T]he pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy. Public exposure, bringing with it the possibility of public pressures upon school boards to discharge teachers who belong to unpopular or minority organizations, would simply operate to widen and aggravate the impairment of constitutional liberty."

Shelton, 364 U.S. at 486-87; *Button*, 371 U.S. at 433 ("[First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.").

This case illustrates the danger to uninhibited and robust discussion. MacRae's political views and postings became known when a "concerned citizen,"

unhappy with MacRae's beliefs, complained about her posts. *MacRae*, 106 F.4th at 128. Suddenly, her new colleagues on the Committee called an executive session and determined that her beliefs violated "core values" of the school system. *Id.* They also decided to "have a public resolution" and to require a "more formal statement" from MacRae. *Id.* Others with different views on gender identity, immigration, and race relations expressed their concern, and the Bourne Educators Association "voted unanimously 'to make a public statement against the comments made by' MacRae." *Id.* at 129. If all of that were not enough to cause anyone considering a government job to forswear making statements on controversial issues, the Committee held a public meeting during which community members both attacked and supported MacRae. *Id.* at 129-30. After learning about her campaign speech, Hanover officials decried her posts and then fired her because of her political statements. *Id.* at 136.

The problem is that the First Amendment was adopted to safeguard such expression: "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."

Stromberg v. California, 283 U.S. 359, 369 (1931); *Garrison*, 379 U.S. at 74-75 ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."). And "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton*, 364 U.S. at 487. The First Circuit's "unwarranted inhibition upon the free spirit of teachers … has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers." *Id.* Disagreements over difficult social and political issues are inevitable in a free society committed to robust, open discussion, *Cohen*, 403 U.S. at 24, but the First Amendment safeguards a candidate's right to inform voters about her positions and beliefs nonetheless:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification …, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of

> the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).

The First Circuit's opinion is directly at odds with these principles, fashioning a novel rule under which "would-be critics of official conduct [or social policies] may be deterred from voicing their criticism, … tend[ing] to make only statements which 'steer far wider of the unlawful zone,' " and, in the process, "dampen[ing] the vigor and limit[ing] the variety of public debate. [Such a] rule is inconsistent with the First and Fourteenth Amendment." *N.Y. Times*, 376 U.S. at 725-26 (citation omitted); *San Diego*, 543 U.S. at 82 (describing how, if public employees are precluded from commenting on their government employers' operations, "the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it.") (citation omitted). To ensure that all are free to participate in the marketplace of ideas, the First Amendment protects not only the right of school officials and parents to label MacRae's speech as contrary to the school's values, harmful, denigrating, transphobic,

homophobic, and racist, but also her right to engage in such expression: "Indeed, 'malicious,' 'seditious,' and other such evil-sounding words often have been invoked to punish people for expressing their views on public affairs. Fining men or sending them to jail for criticizing public officials not only jeopardizes the free, open public discussion which our Constitution guarantees, but can wholly stifle it." *Garrison*, 379 U.S. at 80 (Black, J., concurring).

This Court has recognized the chill that government regulation of speech can cause. *Thornhill*, 310 U.S. at 97 ("The power of the licensor … is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion."). Allowing public schools to punish teachers for pre-employment expression threatens the speech of a broad swath of would-be government employees in the same way, causing speakers to be cautious and to avoid talking about controversial topics:

> [The Founders] knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds

> repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law-the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) (quoted in *N.Y. Times*, 376 U.S. at 270, and overruled on other grounds by *Brandenberg v, Ohio*, 395 U.S. 444 (1969)). Review, therefore, is warranted to prevent the chilling effect that the First Circuit's opinion will have on the speech rights of those living and working in the First Circuit. *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

CONCLUSION

As this Court warned in *Rankin*, "[v]igilance 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 employees' speech." 483 U.S. at 384. This case demands such vigilance. The First Circuit has adopted an expansive view of *Pickering*, giving government employers the ability to punish the pre-employment speech of employees, even political speech made during a campaign. Such a broad grant of authority is inconsistent with *Pickering*, which confines a government employer's power to the regulation of speech made during the government employer-employee relationship. Moreover, many non-governmental employees, confronted with the possibility of being terminated in the future for pre-employment statements on controversial topics, are apt to steer far clear of any polarizing topics. *Pickering*, 391 U.S. at 574 (recognizing that "the threat of dismissal from public employment is … a potent means of inhibiting speech"). Review is necessary, therefore, to determine the proper scope of *Pickering* and to avoid the chilling effect the First Circuit's opinion will have on present and future government employees.

Respectfully submitted,

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