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 IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the First Circuit correctly apply the well-established First Amendment retaliation framework set forth in *Garcetti* and *Pickering* as it was applied to a public school teacher's termination where her pre-employment social media posts contradicted her employer's mission statement and values, thereby causing the significant potential for disruption to teaching and learning?

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INTRODUCTION

In this matter, the Petitioner, Kari MacRae, asks the Court to upend decades of settled First Amendment precedent and in its place adopt an entirely new retaliation standard - one that completely disregards any governmental interest whatsoever - all premised on a fundamental mischaracterization of the record below. That is, the Petitioner was not terminated from her position as a public school teacher for social media posts that were *unrelated* to her employment as expressed time and again throughout the Petition. Quite to the contrary, as the District Court and First Circuit both held, the social media posts in question directly contradicted her public school district employer's mission statement and values of belonging and inclusivity. Further, in its application of the *Pickering* balancing test, which requires consideration of the time, place and manner of any speech at issue, both the lower courts and numerous others around the nation have concluded that pre-employment speech may be a basis for adverse action against a public employee. Petitioner's desire to have the Court articulate a new bright-line standard for pre-employment speech applicable to only public school teachers is an inflexible and illogical proposition premised upon a factual record that does not otherwise support such a far-reaching approach. The First Circuit's decision is in harmony with *Garcetti* and *Pickering* progeny and for which there no Circuit split or even precedential discord exists on this issue.

STATEMENT OF THE CASE

THE PETITIONER IS TERMINATED FOR DISRUPTIVE SPEECH THAT DIRECTLY CONTRADICTS THE SCHOOL DISTRICTS MISSION STATEMENT AND VALUES

The Respondent, Hanover Public School District's mission is committed to ensuring a safe learning environment based on respectful relationships. App. 10a-11a. It's Core Values, as demonstrated by a document issued to all staff, emphasizes the importance of collaborative relationships and respect for human differences. *Id.* The Petitioner, Kari MacRae's speech, directly contradicted the District's mission and values, leading to her termination.

After holding several teaching positions since 2015, the Respondent Hanover Public School District hired the Petitioner to work as a high school math and business teacher beginning on September 1, 2021. App. 3a-6a. Notably, as she well understood, the Petitioner's classes included numerous African-American and LGBTQ+ students. App. 6a-7a.

At varying times in the months before her hire, the Petitioner liked, shared or posted six different memes on a private TikTok account under the username "NanaMacof4". *Id.*

These included, as described in the decision by the First Circuit:

- A photo of Dr. Rachel Levine, the United States Assistant Secretary for Health and a

transgender woman, with text that reads: "'I'm an expert on mental health and food disorders.' . . . says the obese man who thinks he's a woman."

- A text display that reads: "I feel bad for parents nowadays. You have to be able to explain the birds & the bees . . . The bees & the bees . . . The birds & the birds . . . The birds that used to be bees . . . The bees that used to be birds . . . The birds that look like bees . . . Plus bees that look like birds but still got a stinger!!!. . ."

- A photo of a muscular, bearded man wearing a sports bra with text at the top that reads: "Hi my name is Meagan, I'm here for the Girl's track meet." The photo then includes additional text at the bottom that reads: "Equality doesn't always mean equity."

- A photo of a young and (presumably) white American man with text that reads: "Retirement Plan: 1) Move to Mexico 2) Give up citizenship 3) Come back illegally 4) Set for life!"

- A photo of a panda bear with text that reads: "Dude, racism is stupid. I am black, white, and Asian. But everyone loves me."

- A photo of Thomas Sowell with a quote that reads: "Racism is not dead, but it is on life support -- kept alive by politicians, race hustlers and people who get a sense of

> superiority by denouncing others as 'racists.'" The photo then includes additional text at the top that reads: "Thank you Mr Sowell!!"
> *Id.*

In 2021, the Petitioner ran unchallenged and ultimately successfully for a seat on the School Committee of the town where she resided, in Bourne, Massachusetts. App. 5a. On election day, May 17, 2021, the Petitioner posted a video to her "NanaMacof4" TikTok account in which she discussed aspects of her election platform and beliefs. *Id.*

On August 25, 2021, the Bourne School Committee received a letter from a "concerned citizen" about the Petitioner's Tik Tok posts. App. 7a. On September 1, 2021, the Committee met in executive session and determined that the Petitioner's TikTok posts violated the core values of the school district and would have a public resolution at its next meeting to further address the issue. *Id.* On September 15, 2021, the Bourne School Committee was informed, "that the social media posts directed at the LGBTQ+ population had circulated and staff and students were very upset." App. 7a-8a. The Bourne Educators Association voted unanimously to take a public position against the Petitioner's posts. App. 8a. Soon afterwards, on September 17, 2021, a local newspaper published an article that discussed the Petitioner's TikTok posts and community reaction to them. *Id.*

On September 20, 2021, a District administrator, Matthew Plummer, became aware of the news article and controversy in Bourne when a

teacher brought it to his attention, concerned about the negative impact it would have on students. App. 8a-9a. Following a meeting that morning with District Superintendent, Matthew Ferron, and Petitioner's Building Principal, Matthew Mattos, the District placed the Petitioner on paid administrative leave pending an investigation into the matter. App. 9a. It took little time for the posts to begin circulating among Hanover's students as, within a day, the Vice President of Hanover Teacher's Union overheard students talking about them. *Id.*

On September 22, 2021, the Bourne School Committee held another meeting and heard public comment about the Petitioner's TikTok posts. App. 9a-10a. Although omitted by the Petition, numerous individuals spoke out at the meeting against the TikTok posts including a transgender student who spoke about the harm to himself and other transgender students that they caused. App. 9a-10a. Similarly, Petitioner's facts ignored that other speakers quoted statistical data regarding the elevated risk of suicide among LGBTQ+ and African American youth. *Id.* For her part, the Petitioner apologized not for the social media posts but, instead, for the media attention that had been brought to the Bourne Public Schools and Committee. *Id.* TikTok, however, took a different view of the Petitioner's posts and deleted her "NanaMacof4" account based on "community standard violations" caused by the posts. App. 11a.

The Hanover Superintendent, Ferron, watched the meeting online as part of the District's investigation into the posts. *Id.* The Hanover Principal, Mattos, subsequently interviewed the

Petitioner also as part of the investigation process and, during it, provided the Petitioner with a copy of the District's Mission Statement, Beliefs and Core Values. App. 10a-11a. Although ignored by Petitioner, this document contained a list of District beliefs, including, "[e]nsur[ing] a safe learning environment based on respectful relationships." *Id.* The Core Values included, "[c]ollaborative relationships and [r]espect for human differences." *Id.* During the interview, the Petitioner agreed that media coverage of the posts would be "widespread among students and staff," answering that she, "agreed that there were probably some students and staff that were aware of it." *Id.* Stated differently, the Petitioner herself acknowledged the disruption happening and yet to come to teaching and learning as a result of her posts.

At the conclusion of the investigation and following input from Plummer, Ferron and Mattos decided to terminate the Petitioner's employment based on concern that the TikTok posts would have a negative impact on staff and students alike. App. 11a. On September 29, 2021, the District provided the Petitioner with notice of her termination, indicating that, "continuing [her[employment in light of [her] social media posts would have a significant negative impact on student learning" at the high school. *Id.*

The Lower Courts Correctly Applied *Garcetti* and *Pickering*, the Relevant and Established Precedent

The Petitioner initiated her one-count First Amendment retaliation complaint against the District, Ferron and Mattos on November 29, 2021.

App. 41a. In its decision dismissing the case at summary judgment, the District Court applied the well-established three-party inquiry in governing, "whether an adverse employment action against a public employee violates her First Amendment free speech rights." *Decotiis v. Whittemore*, 635 F.3d 22, 29 (1st Cir. 2011). App. 44a-45a. The District Court expressly rejected Petitioner's urging, as it does now, for the adoption of a new standard for pre-employment speech, primarily reasoning that such a standard completely fails to account for the governmental interest. App. 45a, *quoting*, *Cleavenger v. Univ. of Oregon,* No. CV 13-1908-DOC, 2015 WL 4663304 at *10-12 (D. Or. Aug 6, 2015). That interest, the Court further reasoned, is assessed by using a flexible standard that demonstrates exactly why a bright line rule between speech that is pre-employment and otherwise is completely unnecessary, namely, that a governmental interest preventing disruption is balanced against the *time*, place and manner of the employee's speech. App. 47a. (emphasis added) Significant weight is given to an employer's prediction of disruption that would be caused by such speech. App. 48a. Further, contrary to Petitioner's wishful assertion that the speech in question is "unrelated" to her employment, the District Court explicitly held otherwise, that the memes in question in fact contravened the mission statement and values of the District. App. 65a, 68a. The court held that the District's concerns regarding the posts were "directly tied to a risk of disruption in student learning" as the posts could make students feel unsafe, unwelcome or otherwise distracted from learning. *Id.* Further, the court made clear that the increasing media coverage of the controversy over the

posts in Bourne was more than an adequate basis for the District to predict that the posts would cause a significant loss to teaching and learning time. *Id.*

In its decision also upholding summary judgment for the Respondents, the First Circuit explicitly rejected Petitioner's request that the "nuanced Garcetti framework" should not apply to her First Amendment retaliation claim and articulated several reasons why. App. 18a-20a. First, the court reasoned, that the facts of the case demonstrate that the District's termination of the Petitioner was "inexorably linked" to her public employment, placing the matter squarely within the *Garcetti* framework. App. 20a. Stated differently, this is not, as Petitioner would contend, a case in which the Petitioner's speech was neither about her work or made at work – in fact, the nature of the speech was directly tied to and in conflict with the District's mission statement and values. The speech was, as a result, the basis for disruption to teaching and learning. Second, echoing the District Court, the First Circuit reasoned that adopting the standard urged by Petitioner provided no consideration of the important governmental interests articulated in *Garcetti*. *Id.* Third, the First Circuit tore apart the Petitioner's far reaching and hypothetical argument that the circumstances of her termination were somehow akin to firing an employee for speech made decades earlier. *Id.* To the contrary, the court emphasized that the *Pickering* balancing test weighed in favor of the close temporal relationship between the posting of the memes and her employment, Petitioner's reaffirmation of her support for the memes during the Bourne controversy and the media storm all of it caused. *Id.* The court explained that the application of the *Garcetti*

framework neatly aligns with decisions involving the balancing of a governmental interest with an employee's pre-employment speech. App. 22a-23a. If anything, the First Circuit emphasized that there is a unity rather than a conflict among the nations courts in applying *Garcetti*. *Id.*

REASONS FOR DENYING THE PETITION

1. There is No Conflict Among the Circuits Regarding the Question Presented

Petitioner urges the Court to fashion an entirely new First Amendment retaliation standard. There is, however, no conflict in the law or among the Circuit courts requiring such an extreme and unsupported measure. To the contrary, decisions that have considered pre-employment speech, time and again, applied the *Garcetti* and *Pickering* approach, purposefully adaptable and eminently logical as it is. Both the District Court and First Circuit decisions in this matter do not conflict with any other circuit opinion.

As the First Circuit noted, courts that have had the occasion to address[1] the issue have applied the *Garcetti* and *Pickering* analytical framework to speech made *before* entering public employment. *See, e.g.*, *Riel v. City of Santa Monica*, No. CV 14-04692, 2014 WL 12694159 (C.D. Cal. Sept. 22, 2014)

[1] Given the relatively small amount of reported cases involving pre-employment speech, (especially on social media despite the prevalence of social media platforms for decades), Petitioner's claim that this case stands as some kind of exemplar for a larger problem is manufactured inflation.

(explicitly citing and applying the *Pickering* / *Garcetti* framework to analyze a newspaper article critical of the town that plaintiff wrote before public employment as a public affairs officer); *Cleavenger v. Univ. of Or.,* No. CV 13-1908, 2015 U.S. Dist. LEXIS 102972, 2015 WL 4663304 at*6 (D. Or. Aug. 6, 2015) (applying a framework that mirrors that of *Pickering* / *Garcetti* to a law school speech opposing giving police officers tasers made by plaintiff before public employment as a police officer); *Christopher v. City of Chicago,* No. 20-CV-2716, 2022 U.S. Dist. LEXIS 225900, at *10-11 (N.D. Ill. 2022) (applying the *Pickering* / *Garcetti* framework to a failure to hire retaliation claim following a complaint made regarding hiring practices made before employment). These decisions demonstrate that the *Garcetti* framework and malleable *Pickering* balancing test can and do account for pre-employment speech precisely because they include consideration of factors such as the time, place and manner of speech, regardless of when or how it is made. That courts were applying this same kind of standard even before *Garcetti* underscores the importance of not having a bright line rule precisley because of its flexibility. *See Andrade v. City of San Antonio*, 143 F. Supp. 2d 699, 715 (W.D. Tex. 2001) (decided *before Garcetti* but applying a framework similar to *Pickering* / *Garcetti* to analyze a retaliation claim involving a lawsuit against defendant fire department filed before public employment).

The existing framework is also nuanced and flexible enough that it can be applied to speech made after or between public employment. *See Mitchell v. Grady County Crim. Justice Auth.*, No. 10-CV-1121, 2012 U.S. Dist. LEXIS 77093, at *16-18 (W.D. Okla.

2012) (although the speech was eventually determined to be made "pursuant" to plaintiff's role as a public employee, the *Pickering* / *Garcetti* framework was used to analyze a non-payment of wages retaliation claim involving comments regarding issues at the jail plaintiff was employed at made after being terminated from public employment); *Humphrey v. Fulk,* No. 4:20-CV-001158, 2021 U.S. Dist. LEXIS 175066, at *10 (E.D. Ark. 2021) (although the speech was eventually determined to not have been made prior to employment (as it was made during employment at *another* Chief of Police position) the *Pickering* / *Garcetti* framework was used to analyze a retaliation claim involving statements allegedly made *before* public employment); *Tiger v. Powell,* No. 21-CV-01892, 2022 U.S. Dist. LEXIS 165184, at *35-36 (D. Colo. 2022) (although the speech was eventually determined not to be of "public concern," the *Garcetti* framework was used to analyze a retaliation claim (i.e., not hiring plaintiff) involving a complaint that a public employee called plaintiff a derogatory name during a previous public employment). Thus, several Federal Circuits agree that the *Pickering* / *Garcetti* framework is *flexible* and can accommodate speech made at various different times in relation to public employment. There is no conflict about the use of this standard. Petitioner's claim that a new standard is needed due to the ubiquity of social media is as overstated as it is undercut by the facts of this case. The Petitioner chose to reaffirm her belief in and view of TikTok posts when they became a point of controversy. She put this issue squarely into the hands of the District. It is not as though the District cherry-picked her posts from yesteryear and made

them an issue. The only scenario involving those circumstances is a hypothetical one. The facts of the case are as settled as the analytical framework around them. There is no factual or legal disagreement to resolve.

This Case Is an Exceptionally Poor Vehicle to Decide the First Question Presented

The factual record in this case, large pieces of which are effectively ignored by Petitioner, demonstrate a fallacy in an underpinning of their argument and, more generally, why the *Pickering* balancing test is as effective as ever for all manner of speech. First, the speech in question was not "unrelated" to Petitioner's employment of work. There is no question that the TikTok memes violated the District's core values and mission statement, as found by both the District Court and First Circuit. That the speech occurred before her employment does not mean that it was still entirely connected to her employment or the very nature of her teaching position. That alone destroys Petitioner's premise that the speech in question somehow acts as a standout among all other pre-employment speech cases.

The timing and circumstances of the memes also proved the reasonableness of the District's prediction of disruption to teaching and learning. The school had received information that parents and students were upset by Petitioner's posts and newspapers publicized the speech. Petitioner chose not to delete her posts and, instead, doubled down on their message at a Bourne School Committee

meeting.[2] The school's prediction of disruption was not "mere speculation," as it had both a supported foundation and a lack of contradictory evidence. *Thompson v. Cent. Valley Sch. Dist. No. 365,* No. 2:21-CV-00252, 2024 U.S. Dist. LEXIS 145988, at *15-16 (E.D. Wash. Aug. 15, 2024) (citing *Brewster v. Bd. of Educ. Of Lynwood Unified Sch. Dist.,* 149 F.3d 971, 979 (9th Cir. 1998)). *See also Moser v. Las Vegas Metro. Police Dep't,* 984 F.3d 900, 909 (9th Cir. 2021) (citing *Craig v. Rich Twp. High Sch. Dist. 227,* 736 F.3d 1110, 1119 (7th Cir. 2013).

This case also is a poor vehicle for the first question presented because in seeking a standard that omits any governmental interest in regulating speech, the Petitioner ignores that said interest was a critical factor of both the District Court and First Circuit's reasoning, finding and affirming summary judgment for the Respondents, respectively. The Pickering balancing test is a fundamental weighing of, on the one hand, the interests of the employee as a citizen commenting upon matters of public concern and, on the other, the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees on the other. *Davignon v. Hodgson*, 524 F.3d 91, 100 (1st Cir. 2008) (*quoting Pickering v. Board of Education of Township High School District 205, Will County,* 391 U.S. 563, 568, (1968)). Critically, in analyzing the "interest of the State," factors that a court may

[2] There is an irony in that the Petitioner reaffirmed her speech and recognized the disruption her posts caused to teaching and learning, yet Petitioner uses these same facts to project an employer's use of a so-called Heckler's Veto. This is an entirely hypothetical argument that is no way grounded in the facts of this case.

consider include "the manner, time, and place in which [the speech] was delivered," *Connick v. Myers,* 461 U.S. 138, 153 (1983); *Rankin v. McPherson,* 483 U.S. 378, 388 (1987). It is because of the *balancing* of these different interests and factors that the *Pickering* / *Garcetti* framework was explicitly designed for a case such as the one at hand.

CONCLUSION

The Court should deny the Petition.

Respectfully submitted,

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