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

REPLY BRIEF FOR PETITIONER

MICHAEL BEKESHA
Counsel of Record
JUDICIAL WATCH, INC.
425 Third Street, S.W.
Suite 800
Washington, DC 20024
(202) 646-5172
mbekesha@judicialwatch.org

Counsel for Petitioner

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INTRODUCTION

In her petition, Kari MacRae demonstrates how the First Circuit's unprecedented use of the *Pickering* balancing test for unrelated, preemployment speech on matters of public concern will erode the free speech rights of the four million public-school teachers and the tens-of-million aspiring teachers. *Amici* highlights how the First Circuit's ruling, if unreviewed, will negatively affect any citizen who is or seeks to be a public employee at the federal, state, or local level. For these reasons alone, the Court should review and reverse the decision below.

Hanover Public Schools' opposition also highlights why the Court should review the First Circuit's ruling. As the school district describes it, the law is clear: the *Pickering* balancing test allows school administrators to fire a teacher if they do not like the teacher's speech, even if that speech occurred before the teacher was employed by the school and was not about the school district or its administrators, teachers, parents, or students. If that novel test were to survive, private citizens who decide to become public school teachers will no longer have the same free speech rights as their fellow citizens.

I. The Petition Raises a Question of Exceptional Importance Concerning Unrelated, Preemployment Speech on Matters of Public Concern.

Whether the *Pickering* balancing test applies to unrelated, preemployment speech on matters of public concern is a question of exceptional importance. Hanover Public Schools, in its

opposition, suggests otherwise. Each reason put forth by the school district is without merit.

1. Hanover Public Schools asserts that there is no circuit split on the issue. Opp. at 9. MacRae has not suggested one exists because the appellate court's ruling is one of first impression. No other court has applied the *Pickering* balancing test to speech that was not about work. In fact, some of the cases cited by Hanover Public Schools concerned speech about the employer.

In *Riel v. City of Santa Monica*, the plaintiff was hired as the city's spokesperson responsible for managing "all activities related to public information, intergovernmental relations, . . . and City Council support." No. CV 14-04692, 2014 U.S. Dist. LEXIS 207663, *3–4 (C.D. Cal. Sep. 22, 2014). The city fired the plaintiff after discovering an article she wrote prior to employment criticizing the city's transparency with the public. *Id.* at 4. The city also discovered that before hiring the plaintiff, the plaintiff contributed to a "hit piece" against a current city councilmember whom the plaintiff was expected to work with in her position. *Id.* at 5.

In *Christopher v. City of Chicago*, the plaintiff applied for the city's Emergency Crew Dispatcher position after his termination from a different city position years earlier. No. 20-cv-2716, 2022 U.S. Dist. LEXIS 225900, *2 (N.D. Ill. Dec. 15, 2022). On the application, the plaintiff briefly explained that he was fired after he questioned the city's hiring practices. *Id.* The city reviewed the plaintiff's file and discovered that the official reason for his termination was due to misconduct relating to an argument with

his supervisor. *Id*. at 7. After this discovery, the city did not hire the plaintiff. *Id*. at 7–8. In response to the plaintiff's retaliation claim, the court found that his earlier speech made *during* his employment with the same employer "contain[ed] no indication of any motivation related to furthering the public interest in preventing politically discriminatory or patronage-related hiring practices by the city." *Id*. at 12.

In *Andrade v. City of San Antonio*, the court applied the "public concern" test because the challenged speech occurred when the plaintiff, then an applicant to the city's fire department, challenged the department's hiring practices in court. 143 F. Supp. 2d 699, 715 (W.D. Tex. 2001). Pending temporary injunctions, the plaintiff was placed in the department's training program as a probationary employee despite "reasons exist[ing] for [his] rejection." *Id*. at 705, 718. After the suit concluded and probationary employees were held to be "at will" employees, the department terminated the plaintiff for the same reasons his application was originally flagged. *Id*. at 705.

In *Cleavenger v. University of Oregon*, the plaintiff was hired as an officer for the university police department. No. CV 13-1908, 2015 U.S. Dist. LEXIS 102972, *1–2 (D. Or. Aug. 6, 2015). The plaintiff was terminated, and in his retaliation claim against the department, he pointed to several instances of speech including a school speech he gave years ago opposing the department's use of tasers. *Id*. at 19–20.

In *Mitchell v. Grady County Crim. Justice Auth*., it appears more likely that the speech occurred

during employment, since the plaintiff notes in her complaint that her speech occurred between January and February 2010, and the plaintiff did not return to work until after she had already been terminated in late February 2010. Compl. ¶ 16, No. CIV-10-1121, 2012 U.S. Dist. LEXIS 77093, *3 (W.D. Okla. June 4, 2012). Regardless, the court found that the plaintiff's speech complaining of her employer's compensation discrepancies, safety concerns, lack of training, lack of equipment, and state regulatory compliance issues were "made pursuant to her role as a jail supervisor," and thus unprotected. *Id*. at 19.

In *Humphrey v. Fulk*, the plaintiff was appointed Chief of Police for the City of Little Rock after previously serving as Chief of Police in a different jurisdiction. No. 4:20-CV-001158, 2021 U.S. Dist. LEXIS 175066, *7–10 (E.D. Ark. Sep. 15, 2021). The plaintiff was "well known for the institutional reforms he brought to the [department] from which he came," and believed his colleagues were retaliating against him for his earlier statements expressing his policing philosophy. *Id*. at 9–10. The court concluded that the plaintiff's statements in his prior position were not protected because he was "acting as a public employee making statements pursuant to his official duties" as chief of police. *Id*. at 10. Had his earlier position not been the same as his current position, the court's analysis may likely have been different.

In *Tiger v. Powell*, the challenged speech occurred during the plaintiff's earlier employment with the city. No. 21-cv-01892, 2022 U.S. Dist. LEXIS 165184 (D. Colo. Sep. 13, 2022). In his previous position, the plaintiff confronted his supervisor about the supervisor's use of an inappropriate nickname

before the plaintiff eventually quit. *Id*. at 2. When the plaintiff later applied for a different position with the city, his application was denied because of his "negative employment history with a prior law enforcement entity." *Id*. at 3. The plaintiff accused the city of retaliation over a conversation he had with a different department. *Id*. at 35. The court found that the plaintiff's speech was unprotected because he was a public employee at the time of the challenged speech and his speech concerned internal personnel disputes and working conditions. *Id*. at 36–38.

The cases cited by Hanover Public Schools all concern speech about work. Here, MacRae's speech was not about work. It was not about the school district or its administrators, teachers, parents, or students. It was not about the curriculum or the district's policies. It was not even about the town. MacRae's speech added to the national public debate on immigration policy, racism, and gender identity. The First Circuit's decision was the first of its kind.

2. Hanover Public Schools asserts that MacRae's speech was related to the school district. Speech that is "about work" must be related to the workplace, however. As the Tenth Circuit has noted, speech that is "unrelated to any internal functioning of the" government employer is not about work. *Flanagan v. Munger*, 890 F.2d 1557, 1562 (10th Cir. 1989). MacRae's speech was not related to the internal functions of Hanover Public Schools. Nor does the school district say that it was. The school administrators instead assert that her speech was about school because it "contravened the mission statement and values of the District." Opp. at 7.

Bluntly, any private speech could contravene a value as opaque as "collaborative relationships and respect for human differences." Opp. at 6. For example, social media posts by a diehard New York Yankees fan who happens to be a Massachusetts public-school teacher about how her baseball team of choice is better than the Boston Red Sox could run afoul of collaborative relationships in a Massachusetts school. Similarly, any discussion about hot button political issues by a public-school teacher could lead to a belief that the teacher does not respect human differences. For example, a devout Catholic parent may believe that a teacher who posts on social media about how she escorts patients into a Planned Parenthood clinic on Sundays does not respect human differences. "About work" or "related to work" must mean more than what Hanover Public Schools asserts. *Pickering* cannot be so broad that it sweeps private speech under the school district's disciplinary purview because the speech, which is unrelated to the school district or the teaching position, abstractly conflicts with the broader mission of the district. If the First Circuit's interpretation is kept, school administrators may interpret a teacher's private pre-employment speech that expresses any viewpoint as possible grounds for termination.

3. Hanover Public Schools argues that the Court should not hear this case because balancing governmental interests is fundamental. Opp. at 11. In making such an argument, the school district seems to forget that *Pickering* is the exception, not the rule. When the government acts—whether through affirmative legislation or after-the-fact retaliation—in response to First Amendment protected activity,

such action must be narrowly tailored to achieve a compelling interest. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022) ("[T]his Court will find a First Amendment violation unless the government can satisfy 'strict scrutiny' by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest."). An exception however has been made for speech by an employee. But the exception has no place when the speech took place prior to employment and is not about work.

Regardless, whether the Court adopts the *Pickering* balancing test or another standard that considers the government's interest is not a reason to deny the petition. In addition, MacRae proposes that the correct standard is one previously adopted by the Court and accounts for a school's interest in whether a prospective teacher is competent and fit for the job. As the Court has made clear, any investigation into a prospective public-school teacher's private speech must be for the sole purpose of determining her competence and fitness for the position. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). This was true during the height of the McCarthy era and should remain so today. *See Connick v. Myers*, 461 U.S. 138 (1983); *see also Weiman v. Updegraff,* 344 U.S. 183 (1952); *Beilan v. Bd. of Pub. Educ.*, 357 U.S. 399 (1958); *Shelton*, 364 U.S. 479; *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *United States v. Robel*, 389 U.S. 258 (1967).

In the public employment context, generally the compelling interest is whether the employee is competent and fit for the position. *See Branti* v. *Finkel*, 445 U.S. 507, 518 (1980). School

administrators may account for unrelated, preemployment speech if that speech shows that the private citizen is not competent or fit to be a public-school teacher. If the speech relates to "any matter of political, social, or other concern to the community," it will be difficult to show that such speech has any bearing whatsoever on competence or fitness. *Connick*, 461 U.S. at 146. Most often, such speech will be unequivocally protected by the Court's unconstitutional conditions doctrine.

II. This Case Is the Ideal Vehicle Concerning Unrelated, Preemployment Speech on Matters of Public Concern.

Hanover Public Schools fabricates facts and misconstrues the case's procedural posture to argue that this case is not an ideal vehicle for the Court to determine whether *Pickering* balancing applies to unrelated, preemployment speech on matters of public concern.

First, Hanover Public Schools repeats its assertion that the speech was related to the school district. Opp. at 12. However, the speech was not made at school because, obviously, it was made months before MacRae was employed by Hanover Public Schools. App. 3a. Nor was the speech about the school district or its administrators, teachers, parents, or students. App. 25a. MacRae's speech was about national, hot button issues of immigration policy, racism, and gender identity. *Id*. To say the speech was related to the school district is false.

Second, Hanover Public Schools asserts that "the school had received information that parents and students were upset by" MacRae's speech. Opp. at 12.

This assertion is not based in fact. As the First Circuit noted, "While some teachers [] were concerned about MacRae's TikTok posts and some students were aware of the posts and discussed them at school, there is no evidence in the record that [Hanover Public Schools] received calls or complaints from students, parents, or community members." App. 27a.

Third, Hanover Public Schools once again asserts that the Court should not grant MacRae's petition because any framework concerning unrelated, preemployment speech on matters of public concern must take the government's interest into account. Whether the Court will uphold the First Circuit's decision is not a reason to deny MacRae's petition, however. At this stage, the question is whether the Court should review the appellate court's ruling. Because there are no facts in dispute and both the district and appellate courts employed the *Pickering* balancing test to determine that Hanover Public Schools did not violate MacRae's free speech rights when it fired her (App. 24a-25a), this case could not be a more perfect vehicle for the Court to determine the rights of the four million public-school teachers (or the tens-of-millions aspiring teachers) who spoke (or will speak) on matters of public concern before they were (or are) employed.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

MICHAEL BEKESHA
Counsel of Record
JUDICIAL WATCH, INC.
425 Third Street, S.W.
Suite 800
Washington, DC 20024
(202) 646-5172
mbekesha@judicialwatch.org

Counsel for Petitioner

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