No. 24-1274

IN THE

Supreme Court of the United States

R. MICHAEL CESTARO,

Petitioner,

v.

CLARISSA M. RODRIGUEZ, IN HER INDIVIDUAL AND OFFICIAL CAPACITY AS CHAIR OF THE NEW YORK STATE WORKERS' COMPENSATION BOARD, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF

RICHARD LIAM SULLIVAN
Counsel of Record
LAW OFFICE OF
RICHARD L. SULLIVAN
6558 4th Section Road, #195
Brockport, NY 14420
(307) 250-2462
richardlsullivan@msn.com

120624

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

RELATED PROCEEDINGS

Petitioner submits this supplemental brief, pursuant to Rule 15.8 of this Court's Rules, to call the Court's attention to *Hussey v. City of Cambridge*, 2025 U.S. App. LEXIS 20858 (1st Cir. Aug. 15, 2025). *Hussey*, it is submitted, illustrates that the defects in the Second Circuit's understanding in this matter are shared by the First Circuit (among others), highlighting how badly courts have strayed in this area of the law, on which this Court has said little in the half-century since deciding *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Mt. Healthy v. Doyle,* 429 U.S. 274 (1977).

Hussey is likely to come before this Court on a petition for certiorari this term.[1] In such event, Petitioner respectfully submits *Cestaro* and *Hussey* would be appropriate companion cases, utilized to restore order and consistency in *Pickering-Garcetti* pattern First Amendment retaliation claims through the proposed clarifications set forth in the Petition and herein.

1. A petition for *en banc* review of the First Circuit's August 15th decision in *Hussey* was filed on August 29, 2025. I attest that counsel for plaintiff in that matter has informed me that, should *en banc* review be denied, as is likely, a petition to this Court would certainly follow.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Page

Cited Authorities

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

The Petition suggests two rules by which the Court could restore much-needed order in First Amendment retaliation cases involving government as employer. First, clarity and uniformity could be achieved by requiring courts to address the threshold questions whether the speech was made as a private citizen and on a matter of public concern, in every case, before weighing the speech's disruptive effect or addressing whether the speech caused the sanction.[2] Clarification is needed that the latter questions can only be coherently asked once the nature and scope of the constitutionally-protected activity is *defined*, through the threshold inquiries. Second, contrary to the Second Circuit's jarring misconception, the plaintiff need not prove, in addition to causation, that the defendant subjectively disagreed with the ideas expressed in the speech. The defendant's subjective intent only becomes relevant when needed to substantiate causation.

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2. If the *Mt. Healthy* question – whether the sanction would have been imposed anyway – is distinct from the causation inquiry, it is a third such subsequent question (which obviously must be asked only after the threshold questions delineate what was or was not protected speech). The Petition proceeds from the view that the whole *Pickering* landscape could be simplified by construing *Mt. Healthy* simply as setting the quantum of causation – i.e., "but-for" causation ("the simple and traditional standard," established "whenever a particular outcome would not have happened 'but for' the purported cause," *see generally Bostock v. Clayton Cnty.*, 590 U.S. 644, 656 (2020) [internal quotations and citations omitted]) – rather than representing a separate affirmative defense.

ARGUMENT

1. The scope and value of the speech must be determined in the threshold inquiries in all *Pickering* cases

On June 30, 2025, two weeks after the Petition here was filed, this Court declined to review the First Circuit's decision in *MacRae v. Mattos*, 106 F.4th 122 (1st Cir. 2024). The concurrence criticized the First Circuit's misapplication of *Pickering* balancing, in that the lower court penalized the plaintiff for the tone of her political Tik-Tok posts. *See* Thomas, J., statement in concurrence with denial of certiorari, *MacRae v. Mattos*, No. 24-355 at *2 (June 30, 2025). Noting "a trend of lower court decisions that have misapplied our First Amendment precedents in cases involving controversial political speech," including "a concerning number [arising] in the context of the *Pickering-Garcetti* framework," the concurrence cautioned that "[i]f left unchecked, this number will likely increase," *id.* at *5.

As if on cue, within weeks the First Circuit doubled down on its "vulgarity penalty," so characterized by a lone dissenting justice, in *Hussey v. City of Cambridge*, 2025 U.S. App. LEXIS 20858 (1st Cir. August 15, 2025). In *Hussey*, the plaintiff, a police officer, was disciplined for criticizing on Facebook a police reform bill honoring George Floyd, who plaintiff called "a career criminal, a thief and druggie." *Hussey* at *4. Affirming summary judgment for defendants based on *Pickering* balancing, the court proclaimed (echoing *MacRae*): within the First Circuit, political speech made "in a mocking, derogatory, and disparaging manner" is accorded less weight in the [*Pickering*] balancing test. *Id.* at *15.

Here, the Petition anticipated that, just as failure to perform the threshold inquiries in *Cestaro* tainted the subsequent *Mt. Healthy* analysis,

> [t]he same failure prior to application of the *Pickering* analysis would mean that, when the court goes to weigh the likelihood of workplace disruption against the constitutional value of the speech, no matter how well calibrated the scale, the material on one side of the scale having been improperly measured, the result will be tainted

(*Pet.* At 24). I.e., correct quantification of the scope and value of the constitutionally-protected activity results from the threshold inquiries. On this score, Petitioner submits that, if the speech was as a private citizen on a matter of public concern, the "value" of that speech is immutably set, a brass calibration weight of the heaviest cast (the "highest rung on the hierarchy of First Amendment values," *Connick v. Myers*, 461 U.S. 138, 145 (1983), its value unyielding to the delicate sensibilities of any heckler, employer, or judge (or any combination thereof). Variation occurs at the opposite end of the *Pickering* scales, in the unique case-specific circumstances bearing on workplace disruption. Improper quantification of the constitutional value of the speech, in the threshold inquiries, occurred in *Hussey*, as it did in *Cestaro*.[3]

Reading *Cestaro* in light of *Hussey* and *MacRae*, the Second Circuit effectively imposed its own "vulgarity penalty" on Petitioner by its odd misapplication of

3. To date, no judge has ever ventured an opinion whether Michael Cestaro's speech on the train was made as a private citizen on a matter of public concern.

Mt. Healthy.[4] Where the First Circuit penalized police officer Brian Hussey for speech it found offensive by piling the perceived offensiveness onto the (wrong side of) the *Pickering* scales, the Second Circuit penalized workers' comp judge Michael Cestaro by parsing out the ways it felt his speech was rude, and simply declaring those aspects of the speech to be "other conduct" for *Mt. Healthy* purposes, floating unmoored somehow from the speech itself. The availability of such a "vulgarity penalty," dubious in origin and nebulous in application, unmoors these cases from the Constitution.[5]

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4. The Second Circuit, historically cognizant of its mandate within the hub of American media and culture, developed an appropriately robust First Amendment jurisprudence. *See, e.g., United States v. Amodeo*, 71 F.3d 1044 (2d Cir. 1995); *United States v. Quattrone*, 402 F.3d 304 (2d Cir. 2005). Dismay at the attempt by First Circuit justices to scrawl an offensiveness asterisk onto the Constitution (a "carveout" for "controversial, offensive, or disfavored views," *L. M. v. Town of Middleborough,* 145 S. Ct. 1489, 1493 (May 27, 2025) [Alito, J., dissenting from the denial of certiorari]) may be grudgingly foreborne considering New England's Puritan heritage (not to slight founding-era Bostonians like Samuel Adams ["If ye love wealth better than liberty, the tranquility of servitude better than the animating contest of freedom [...] *Crouch down and lick the hands which feed you*" – speaking in Philadelphia on August 1, 1776, on matters of public concern. *See* https://en.wikisource.org/wiki/American_Independence]). That trend is more difficult to swallow (for this New Yorker anyway), coming out of the city that produced Lenny Bruce, Paul Robeson, I. F. Stone, Floyd Abrams and Ai Weiwei, whose very lifeblood is free expression (a place "[i]deas are regarded - and respected - as the most basic commodity of all" [*see* David Frost, *Mad for Manhattan*, at https://www.nytimes.com/1984/11/04/magazine/mad-for-manhattan.html]).

5. *See also Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1324 (11th Cir. 1989) (the speech "was rude and

2. Other courts share the Second Circuit's misapprehension that subjective intent is an affirmative element of a *Pickering* claim

As the Petition proposes, clarification is required from this Court that subjective intent is not an independent element of a *Pickering* type First Amendment claim. Instead, with certain exceptions,[6] subjective intent only becomes relevant when it helps the plaintiff prove

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insulting. Although [plaintiff] possessed a constitutional interest in expressing his view on a matter of public importance, the insulting nature of his words gives his speech an element of personal as opposed to public interest"). "Offensiveness" – a "vulgarity penalty" – diminishes the constitutional value of the speech in the First Circuit, renders the speech "other conduct" for *Mt. Healthy* purposes in the Second and even, in the Eleventh, jams up the threshold inquiry of whether the speech was made as a private citizen.

6. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (cited in *Crawford-El*) involved First Amendment retaliation, but couched within a conspiracy framework; subjective intent was a theme in *Waters v. Churchill*, 511 U.S. 661 (1994) because, unlike *Cestaro* and *Hussey* where the speech is forever preserved in amber via social media, there was dispute about what was actually said; *Heffernan v. City of Paterson*, 578 U.S. 266 (2016) is interesting: there, the government defendants mistakenly believed facts which, if true, would have rendered their actions a violation of the plaintiff's First Amendment rights. Petitioner respectfully submits that, if *Heffernan* was correctly decided, that case only expands the availability of redress and does nothing to narrow it in any case where a Constitutional violation actually occurred (*see fn.* 9 below).

causation.[7] The Second Circuit's mistaken assumption in this regard is actually fairly common, yet is rarely stated explicitly. It lurks instead in the background, a shadow element of the claim, further clouding the already turbid *Pickering* waters.

Hussey is again helpful, because its First Circuit precedents state the erroneous assumption explicitly. In *Mihos v. Swift*, 358 F.3d 91, 104 (1st Cir. 2004) (*see Hussey* at *10), the court declares:

> [c]ertain constitutional violations, including First Amendment retaliation claims, include defendant's motivations as a foundational element of the tort: Mihos's First Amendment retaliation claim "has no meaning absent the allegation of impermissible motivation"

Mihos at 104, *citing Acevedo-Garcia v. Vera-Monroig*, 204 F.3d 1, 11 (1st Cir. 2000). *Acevedo-Garcia* cites this Court's ruling in *Crawford-El v. Britton*, 523 U.S. 574 (1998), revealing *Crawford-El* as one source of the idea that subjective intent is an element of the claim.

But, *Crawford-El* holds no such thing. Surveying the landscape after its earlier "objectification" of qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the *Crawford-El* Court clarified that *Harlow* was not so far reaching as to remove subjective intent where it was

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7. As to *Cestaro,* even if subjective intent is an element a plaintiff must prove, the holding below would still constitute a gross error, warranting this Court's clarification that, where causation is *entirely clear*, subjective intent can be *inferred* from the fact that the speech *caused* the sanction (*see Pet.* * 19, *fn.* 7).

an inherent part of the claim anyway. The Court mused on the "wide array of different federal law claims for which an official's motive is a necessary element," listing discrimination claims, Eighth Amendment claims, and "termination of employment based on political affiliation in violation of the First Amendment, as well as retaliation for the exercise of free speech or other constitutional rights." *Id.* at 585-86. But, while racial discrimination is a prototypical example of a claim requiring subjective intent, even there intent can sometimes be inferred, as in disparate impact cases; likewise Eighth Amendment cruel and unusual punishment claims often, but not always, include a subjective intent element; *see Harmelin v. Mich.*, 501 U.S. 957 (1991). As to First Amendment retaliation, *Crawford-El* simply cited *Pickering* itself, which says nothing about subjective intent. *Id.* at 585, *fn.* 9. Plainly, this passage in *Crawford-El*[8] is *dicta*, simply stating the uncontroversial principle that some claims require subjective intent.

Petitioner submits that the greater source of confusion is the encroachment, over time, of the *McDonnell Douglas* burden shifting scheme into First Amendment "retaliation" claims. It is perhaps understandable that a court approaching a *Pickering* case may grab hastily for the standard employment law toolkit. But, the *McDonnell Douglas* burden shifting framework (designed "to compensate for the fact that direct evidence of intentional discrimination is hard to come by," *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) [O'Connor, J., concurring]), is the wrong tool for *Pickering*. An

8. In *Crawford-El*, a First Amendment retaliation case, subjective intent was certainly relevant, precisely because causation was the major disputed question.

employer's subjective intent is inherent in Title VII, per the text of the statute ("a plaintiff must prove that the defendant intentionally discriminated against him because of a protected trait," *see* 42 U.S.C. § 2000e-2(a)(1), but not in the First Amendment.[9]

A recent Michigan case gives the Sixth Circuit's rendering of the elements a plaintiff must establish:

> (1) [plaintiff] was engaged in protected conduct; (2) an adverse action was taken against him that would deter a person of ordinary firmness from engaging in that conduct; and (3) the adverse action was motivated, at least in part, by the protected conduct. Moreover, a plaintiff must be able to show that the exercise of the protected right was a substantial or motivating factor in the defendant's alleged retaliatory conduct

Parks v. Rewerts, 2025 U.S. Dist. LEXIS 117363, *23-24 (W. Dist. Mich., June 20, 2025).[10] Tracing the citations backwards

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9. Petitioner submits that, as foreshadowed in *fn.* 6 of this tawny-covered brief, the primary interest of the First Amendment is the personal right of the speaker (as that of the Second is the personal right of the gun owner), rather than an interest in circumscribing illicit government motive or overreach (*see Heffernan*), or of society in general in exposure to a broad range of ideas. *See generally* Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 423-27 (1996).

10. In this excerpt from *Parks*, a weird tension follows the word "Moreover". Is what follows a fourth prong containing an unspoken element? Second thoughts about the causation standard just stated in prong three? Courts usually lay out black-letter elements of these First Amendment claims without much issue, though numbering or combining them somewhat differently. Where courts dabble in the

from *Parks* leads to *Lewis v. ACB Bus. Servs.*, 135 F.3d 389, 406 (6th Cir 1998). There, the Sixth Circuit conflated, in extending *McDonnell Douglas* to Equal Credit Opportunity Act claims, Title VII cases specifically with "retaliation-based employment claims" generally.[11] A full briefing of this issue would reveal, Petitioner submits, that other circuits have similarly welded the *McDonnell Douglas* fuselage onto "employment retaliation" vehicles generally, whether similar to Title VII or not, importing a hidden subjective intent requirement into *Pickering* First Amendment cases. Turbulence has inevitably resulted.[12]

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notion that subjective intent is an element of the claim, however, that idea is concealed amid dense thickets of scholarly analysis of precedent. From the perspective of a humble practitioner: it should not be this complicated. The Second Circuit at oral argument asked for evidence the defendants subjectively disagreed with my client's opinions on COVID masking. Upon taking the reins shortly after Ameer Benno, Esq., filed the complaint, it simply never crossed my mind to beat the bushes in discovery for evidence of the defendants' opinions about COVID masking. Why should it have, where causation between speech and sanction is so plainly made out? Jury Instructions available from various Circuits (the 3rd, 5th, 7th, 8th, 9th, and 11th Circuits) never identify subjective disagreement with the speech as part of the plaintiff's burden. In many courts, then, subjective intent functions as a shadow element in these claims, to be whipped out arbitrarily from a billowy black sleeve, like a fifth ace. *Cestaro* represents the rare opportunity to call out the trick, as (summary judgment having been granted on *Mt. Healthy* grounds, despite causation being established to an apodictic certainty) the other four aces already lie face up on the table.

11. "Because the history suggests reviewing ECOA claims of discrimination using the same framework and burden allocation system found in Title VII cases, we adapt the burden allocation framework used in retaliation-based employment claims to Lewis's ECOA claim." *Lewis* at 406 (emphasis added).

12. If causation is objective under *Mt. Healthy*, as the Petition proposes is the best and most straightforward course,

CONCLUSION

The operative legal facts in *Cestaro* and *Hussey* are the same: a public employee spoke in his private life about matters of public concern. In both, the plaintiff was sanctioned because his employer found his manner or tone offensive. Both cases ended in summary judgment, on *different* grounds, because a judge also found the plaintiff's words offensive.[13] These circumstances reflect

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a burden-shifting scheme complicates matters for no purpose. If *Mt. Healthy* burden-shifting is meant for the purpose of getting to the defendant's subjective intent, however, it nevertheless suffers the same defects as does *McDonnell Douglas*, as discerned in the dissent in *Hittle v. City of Stockton*, 145 S. Ct. 759, 763, *fn.* 3 (Mar. 10, 2025) (Thomas, J., dissenting from the denial of certiorari). The instant case does not, of course, present an appropriate vehicle to "clarify what role – if any" the *McDonnell Douglas* burden-shifting scheme, fabricated in a legal laboratory "out of whole cloth," "ought to play in Title VII litigation," *Hittle* at 760, even if further contact tracing bears out Petitioner's lab leak hypothesis, that *McDonnell Douglas* transmitted a subjective intent requirement into *Pickering* cases. Should this Court later revisit *McDonnell Douglas*, having addressed in *Cestaro* a similar, and comparably inefficient and confusing, burden shifting scheme may provide important groundwork. In other words, as to the "enormous confusion" *McDonnell Douglas* has "spawn[ed]," *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 494, 380 U.S. App. D.C. 283 (CADC 2008), *Cestaro* may help stop the spread.

13. The speech in *Cestaro* and *Hussey* is remarkably innocuous – in both cases, well within the mainstream of public discourse – compared with truly abhorrent speech afforded the highest Constitutional value (and thoroughgoing judicial rigor) in decades past. *See Snyder v. Phelps*, 562 U.S. 443, 451-452 (2011) and *Rankin v. McPherson*, 483 U.S. 378, 387 (1987) (both cited in the *MacRae* concurrence at *3); *see also Pappas v. Giuliani*, 290 F.3d 143, 154 (2d Cir. 2002) (Sotomayor, J., dissenting) ("[t]o be

a metastasizing intolerance of disfavored political speech in the broader culture – unchecked, or even advanced, by courts, in a legal landscape elastic to the point of arbitrariness.[14] This Court's intervention is required.

Respectfully submitted,

Richard Liam Sullivan
Counsel of Record
Law Office of
Richard L. Sullivan
6558 4th Section Road, #195
Brockport, NY 14420
(307) 250-2462
richardlsullivan@msn.com

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sure, I find the speech in this case patently offensive, hateful, and insulting. The Court should not, however, gloss over three decades of jurisprudence and the centrality of First Amendment freedoms in our lives because it is confronted with speech it does not like"; "First Amendment protection does not hinge on the palatability of the presentation; it extends to all speech on public matters, no matter how vulgar or misguided").

14. The undersigned acknowledges erroneously citing *Gooden v. Neal*, 17 F.3d 925, 928 (7th Cir. 1994), reading the lower court's holding which the Seventh Circuit reversed as the holding of the Seventh Circuit itself. The intended point stands: there is a "diverse hodgepodge of approaches" in this area (*see* Pet. *17, *fn.* 5).