

No.

In the Supreme Court of the United States

KATE ADAMS, PETITIONER,

v.

COUNTY OF SACRAMENTO; SCOTT JONES, SHERIFF.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents a clear, recognized, and entrenched conflict over the First Amendment rights of public employees: whether speech made as a private citizen about controversial subjects—speech long understood to lie at the core of public concern—always receives at least some level of First Amendment protection, or instead loses all protection when it is not expressed in a manner intended to engage in public debate or advocacy.

In the decision below, a split Ninth Circuit panel held, over a dissent by Judge Callahan, that a public employee’s off-duty speech about racist imagery was not speech on a matter of public concern because it “complain[ed] of only private, out-of-work, offensive individual contact” and did not “protest generally applicable ‘policies and practices’ she ‘conceived to be racially discriminatory in purpose or effect.’” Pet. App. 11a. It thus was not, as the Court put it, “framed in a manner calculated to ignite that public interest.” Pet. App. 13a.

That holding deepens an intractable 7-5 circuit split over how courts determine whether speech addresses a matter of public concern. Seven circuits hold that speech on controversial subjects like racism is always speech on a matter of public concern because of its subject matter. Five—including now the Ninth—hold that such speech loses all First Amendment protection unless expressed in a way courts later deem sufficiently public-facing or advocacy-oriented.

The question presented is:

Whether public employee speech, made as a private citizen and about a controversial subject, loses all First Amendment protection unless the speech is intended “to ignite th[e] public interest.”

RELATED PROCEEDINGS

U.S. District Court for the Eastern District of California:

Adams v. Cty. Of Sacramento, et al.,
No. 2:22-cv-01499-WBS-CSK (Mar. 27, 2023)
(order dismissing complaint)

U.S. Court of Appeals for the Ninth Circuit:

Adams v. Cty. of Sacramento, et al.,
No. 23-15970 (Sept. 9, 2024) (published decision
affirming dismissal)

Adams v. Cty. of Sacramento, et al.,
No. 23-15970 (Jul. 9, 2025) (amended published
decision and order denying petition for rehearing
en banc)

Supreme Court of the United States:

Adams v. Cty. of Sacramento, et al.,
No. 25A362 (Oct. 3, 2025) (application for
extension of time to file a petition for certiorari
granted by Justice Kagan)

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The initial decision of the United States Court of Appeals for the Ninth Circuit is reported at 116 F.4th 1004 (9th Cir. 2024). The Ninth Circuit's decision amending its prior opinion and denying rehearing and rehearing *en banc* (Pet. App. 1a-35a) is reported at 143 F.4th 1027 (9th Cir. 2025). The order of the United States District Court for the Eastern District of California dismissing the First Amendment and conspiracy claims in the First Amended Complaint is reproduced at Pet. App. 36a-41a and is unreported. The district court's earlier dismissal order is reproduced at Pet. App. 42a-58a and is unreported. The Ninth Circuit's order granting permission to appeal under 28 U.S.C. § 1292(b) is reproduced at Pet. App. 59a. The district court's order certifying its dismissal for interlocutory appeal is reproduced at Pet. App. 60a-64a.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 9, 2024. The court of appeals denied a timely petition for panel rehearing and rehearing *en banc* in an amended decision issued on July 9, 2025. On September 30, 2025, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including December 6, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,

or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This case presents a square conflict over an important and recurring question of First Amendment law: whether public employee speech about controversial subjects—speech long understood to “occup[y] the highest rung of the hierarchy of First Amendment values,” *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 913-14 (2018)—receives at least some First Amendment protection when the employee speaks as a citizen on her own time, or instead loses all First Amendment protection unless it is expressed in a manner later deemed sufficiently public-facing or advocacy-oriented.

In the decision below, a divided Ninth Circuit panel held that petitioner Kate Adams’s off-duty criticism of racist imagery—sent privately in a text exchange between friends a decade before her termination—was not speech on a matter of public concern because it was not “framed in a manner calculated to ignite th[e] public interest.” Pet. App. 13a (quoting *Morris v. City of Colorado Springs*, 666 F.3d 654, 663 (10th Cir. 2012)).

The panel did not dispute that Adams was speaking as a private citizen and not pursuant to her official duties. Nonetheless, it concluded that her speech received no First Amendment protection at all. In doing so, the Ninth Circuit aligned itself with a minority bloc of five circuits that condition constitutional protection for citizen speech on the *goal* of the expression, rather than its *subject*. Seven circuits take the opposite view, holding that speech on controversial subjects like racism is always speech on a matter of public concern precisely because of its subject matter. Judge Callahan dissented, explaining that the

majority’s approach “invent[ed] a new set of requirements for satisfying the content factor based on Tenth Circuit cases and a 30-year-old law review article” thereby stripping public employees of First Amendment protection for off-duty communications on topics of profound public import. Pet. App. 29a.

This case warrants the Court’s review. The conflict is clear, acknowledged, and deeply entrenched. Every regional court of appeals has taken a side. Seven circuits hold that citizen speech addressing controversial subject matter like racism—one of the most salient issues in American public life—is categorically speech on a matter of public concern. Five circuits, including now the Ninth, have adopted the contrary rule: that such speech receives no First Amendment protection unless it is, in hindsight, intended as public commentary. Further percolation is pointless. This circuit conflict is longstanding and widespread, the arguments have been fully aired; the lower courts are firmly divided; and there is no realistic prospect that the split will resolve on its own.

The question presented is of paramount legal and practical significance. The *Pickering* framework governs the speech rights of millions of public employees nationwide. Its baseline inquiry—whether the employee’s citizen speech addresses a matter of public concern—determines whether *any* First Amendment protection attaches at all. Public employees can hardly conform their conduct to the Constitution if the level of protection their private expression receives varies drastically by circuit and turns on judicial assessments of whether their off-duty speech was sufficiently “calculated to ignite” public interest. Pet. App. 13a. As this case illustrates, the stakes are high: in the seven circuits following this Court’s subject-matter approach, Adams’s private text messages about racist imagery would have received First

Amendment protection. In the Ninth Circuit, they received none.

Because this case cleanly presents an entrenched and consequential constitutional conflict, and because the decision below flouts decades of this Court’s First Amendment jurisprudence, the petition should be granted.

A. Legal Background

Before turning to the circuit conflict, it helps to take a brief step back. Public-employee speech doctrine is a thicket of threshold inquiries and balancing tests, and the labels matter. Whether an employee spoke as a citizen or pursuant to her official duties, whether her speech addressed a matter of public concern, and when the government may discipline such speech—each is governed by a distinct line of this Court’s cases. A short account of that framework makes clear both what this case is about and why the Ninth Circuit’s approach cannot be squared with this Court’s precedents.

Start with first principles. Public employees do not “surrender” their First Amendment rights by accepting government employment. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605-06 (1967). A State “cannot condition public employment on a basis that infringes” those rights. *Connick v. Myers*, 461 U.S. 138, 142 (1983). The First Amendment protects “the people” regardless of their employment status. U.S. Const. amend. I. At the same time, the government, acting as employer rather than sovereign, has interests “in regulating the speech of its employees that differ significantly” from those it holds when regulating the citizenry at large. *Pickering v. Board. of Education*, 391 U.S. 563, 568 (1968).

Over several decades, the Court has translated those general principles into a structured framework. The first inquiry asks whether the employee was speaking as a

citizen or pursuant to official duties. Speech “made pursuant to [an employee’s] official duties” does not receive First Amendment protection. *Garcetti v. Ceballos*, 547 U.S. 410, 421-22 (2006). A person hired to speak for the government cannot complain when the government dictates what she can say. But when the employee speaks in her capacity as a private citizen, the First Amendment kicks in and we proceed to the second inquiry.

The second inquiry asks whether the employee’s citizen speech addressed a matter of public concern. Speech touches on a matter of public concern when it can “be fairly considered as relating to any matter of political, social, or other concern to the community,” *Connick*, 461 U.S. at 146, or when it is “a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public,” *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004) (per curiam). To answer that question, courts look to the “content, form, and context” of the speech. *Connick*, 461 U.S. at 147-48. And this Court has made clear—again and again—that content is the lodestar, because “speech on matters of public concern is at the heart of the First Amendment’s protection.” *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011) (cleaned up).

When the employee speaks as a citizen on a matter of public concern, the analysis moves to the final step: the balancing prescribed by *Pickering*. Under that framework, the government does not violate the First Amendment as long as sufficient interest in workplace efficiency and effective public service justifies restricting the employee’s speech. *Pickering*, 391 U.S. at 568; *Garcetti*, 547 U.S. at 418-19.

One further principle threads through these cases. This Court has recognized that the government’s interests as employer are at their nadir when an employee speaks off duty, on her own time, and on topics unrelated to her work. In that circumstance, the government is

“unable to justify” restrictions on the familiar grounds of workplace disruption. *United States v. Nat’l Treasury Emps. Union* (“*NTEU*”), 513 U.S. 454, 470 (1995). Thus, “when government employees speak or write on their own time on topics unrelated to their employment,” the First Amendment applies robustly—absent a justification “far stronger than mere speculation.” *San Diego*, 543 U.S. at 80 (quoting *NTEU*, 513 U.S. at 475).

B. Factual and Procedural Background

Petitioner Kate Adams joined the Sacramento County Sheriff’s Department in 1994 and then became Chief of Police for the City of Rancho Cordova in March 2020. Pet. App. 65a-110a. On New Year’s Eve 2013, during a casual text exchange with a personal friend and fellow Department employee, petitioner forwarded two offensive racist images she had received from unidentified senders. Pet. App. 82a-83a. She introduced the images by stating, “Some rude racist just sent this!”, to which her colleague replied, “That’s not right.” Pet. App. 83a. Petitioner then added, “Oh, and just in case u [sic] think I encourage this ...,” though the record contains only a partial screenshot of the exchange produced by the County during its later investigation; petitioner no longer possesses the full messages, which were never made public. Pet. App. 83a.

In 2021, after petitioner reported misconduct by a fellow employee, that employee provided the County with partial printouts of the 2013 texts, omitting petitioner’s contemporaneous statements condemning the images. Pet. App. 74a-82a. The investigation shifted from the reported misconduct to petitioner’s nearly decade-old private speech. Pet. App. 81a-82a.

In September 2021, the Department informed petitioner that her private 2013 texts warranted discipline and offered her the choice to resign or face termination. Pet. App. 88a-90a. Department officials explained that a

public termination could spark a “media circus” damaging to the Department, while resignation would resolve the matter quietly. Pet. App. 88a-90a. Petitioner resigned under duress. Pet. App. 88a-90a.

In March 2022, anonymous copies of the 2013 images—lacking petitioner’s accompanying condemnatory comments—were sent to a local NAACP chapter. Pet. App. 90a-92a. The NAACP issued an open letter describing the images, which the Sacramento Bee soon reported, drawing public scrutiny and causing reputational harm to petitioner. Pet. App. 90a-92a.

In August 2022, petitioner sued Sacramento County, Sheriff Scott Jones, and unnamed defendants in the U.S. District Court for the Eastern District of California. Pet. App. 6a, 66a. Among other claims, she alleged that the County retaliated against her for protected speech in violation of the First Amendment, along with a related conspiracy claim. Pet. App. 6a, 66a.

The district court dismissed the First Amendment retaliation and conspiracy claims, holding that petitioner’s texts did not address a matter of public concern and were private speech unrelated to her official duties. Pet. App. 40a-41a. The court certified its order for interlocutory appeal under 28 U.S.C. § 1292(b), and a Ninth Circuit motions panel granted permission to appeal. Pet. App. 59a.

On September 9, 2024, a divided Ninth Circuit panel affirmed in a published opinion. *Adams v. County of Sacramento*, 116 F.4th 1004 (9th Cir. 2024). Petitioner sought panel rehearing and rehearing *en banc*. On July 9, 2025, the Ninth Circuit denied both, issued an amended opinion, and ordered that no further petitions would be entertained. *See* 143 F.4th 1027 (9th Cir. 2025) (amended opinion); Pet. App. 3a.

The panel majority held that petitioner’s off-duty, private text messages did not “constitute[] ‘a matter of legitimate public concern’” under *Pickering*. Pet. App. 3a. Applying the “content, form, and context” test, the majority concluded that none of the three factors supported treating the messages as involving a matter of public concern. Pet. App. 9a, 14a, 16a. The majority’s analysis focused heavily on the “form” and “context” of the speech—its private nature, its limited audience, and its absence of “heightened public attention”—in determining that the speech fell outside the category of public-concern expression. Pet. App. 14a-16a.

But even on the content prong, the majority held that petitioner’s speech was not on a matter of public concern. Pet. App. 9a-14a. The court reasoned that her text criticizing the racist imagery reflected only personal “exasperation,” not public commentary. Pet. App. 11a. According to the majority, the messages failed the content test because they were not “framed in a manner calculated to ignite that public interest.” Pet. App. 13a (quoting *Morris*, 666 F.3d at 663). Notwithstanding that the images depicted racist imagery, the panel squarely held that “[t]he substance of the images themselves does not alter the *Pickering* content analysis.” Pet. App. 12a. That they were about a controversial public issue was “irrelevant”; they were not “newsworthy,” not “substantively relevant to the processes of democratic self-governance,” and “not of interest to the general public, nor a significant number of persons.” Pet. App. 11a-13a (cleaned up). Sharing them therefore did not merit any First Amendment protection. Pet. App. 14a.

Judge Callahan dissented. The majority’s approach to the public-concern inquiry, she wrote, “invent[s] a new set of requirements for satisfying the content factor based on Tenth Circuit cases and a 30-year-old law review

article,” and departs from both Ninth Circuit and Supreme Court precedent. Pet. App. 29a-30a. She emphasized that petitioner’s texts were sent off duty, outside the workplace, years before any employment dispute, and did not concern internal workplace grievances—facts that should make it *easier*, not harder, to treat the speech as addressing matters of public concern. Pet. App. 19a-20a, 27a-28a, 33a.

On the core question whether petitioner’s speech addressed a matter of public concern, Judge Callahan firmly rejected the majority’s motive requirement. “[C]ontent is king,” Pet. App. 34a, and petitioner’s texts—criticizing racist imagery—unquestionably touched on an issue “of social or political concern to some segments of the general public,” falling within the category of speech this Court has repeatedly described as lying at the heart of the First Amendment. Pet. App. 35a; *see* Pet. App. 27a. The majority’s refusal even to reach *Pickering* balancing, she warned, effectively “deprive[s] public servants of all First Amendment protection in such circumstances” by withholding protection from ordinary off-duty speech that happens not to be cast as public advocacy. Pet. App. 18a, 35a. Petitioner’s speech should have been treated as citizen speech on a matter of public concern, and the burden should have shifted to the County to justify its discipline under *Pickering*. Pet. App. 35a.

REASONS FOR GRANTING THE PETITION

The question presented warrants this Court’s review. The decision below deepens a mature and acknowledged circuit conflict over how courts decide whether public-employee speech addresses a matter of public concern. Every regional circuit has taken a position, and those positions now lead to different constitutional outcomes for identical speech. The Ninth Circuit’s rule—denying protection to citizen speech unless it is framed in a manner calculated to ignite public interest—conflicts with the

subject-matter approach applied in seven circuits. Moreover, even if the Ninth Circuit is correct that the speech here is not on a matter of public concern, its holding that the speech is nonetheless entitled to no First Amendment protection of any kind cannot be squared with this Court's recognition that off-duty, non-work speech receives stronger First Amendment protection than speech at work, not weaker. This issue is recurrent and unquestionably significant to millions of public employees in federal, state, and local government, and this case is the ideal vehicle to resolve it.

**I. THE CIRCUITS ARE SHARPLY DIVIDED OVER
WHEN PUBLIC EMPLOYEE SPEECH
ADDRESSES A MATTER OF PUBLIC CONCERN**

The decision below further cements a significant circuit split over how courts should apply the “public concern” test. That conflict is at once square and indisputable: the courts of appeals have confronted the same issue, come out differently, and done so because they fundamentally disagree about how to apply this Court's test.

“[T]he majority of circuits” reject the Ninth Circuit's view. *Reuland v. Hynes*, 460 F.3d 409, 418 (2d Cir. 2006). They hold that “the speaker's motive is not dispositive as to whether an employee's speech relates to a matter of public concern.” *Id.* (collecting cases); *see also Sousa v. Roque*, 578 F.3d 164, 173 (2d Cir. 2009) (“[W]e reaffirm today our holding in *Reuland*: a speaker's motive is not dispositive in determining whether his or her speech addresses a matter of public concern.”); *Azzaro v. Cnty. of Allegheny*, 110 F.3d 968, 978-80 (3d Cir. 1997) (“respectfully declin[ing]” to join those circuits that treat an employee's “primary purpose” as dispositive of whether speech is on a matter of public concern). As Judge Callahan observed below, the panel majority “invent[ed] a new set of requirements for satisfying the

content factor based on Tenth Circuit cases and a 30-year-old law review article.” Pet. App. 29a.

The division is clean and acknowledged. Every regional court of appeals has taken a side, and they now apply two competing visions of the “public concern” test.

- Seven circuits (the First, Second, Third, Fourth, Seventh, Eighth, and D.C. Circuits) apply a *subject-matter rule*: they ask whether the content of the employee’s speech “relat[es] to any matter of political, social, or other concern to the community,” and hold that speech about race is therefore inherently speech on a matter of public concern.
- Five circuits (the Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits) apply a *motive rule*: they look beyond the subject of the speech to its perceived “point,” “purpose,” or “framing,” and deny First Amendment protection where, in hindsight, the employee did not present her speech in a way courts deem sufficiently public-facing or advocacy-oriented.

The stark division over this fundamental question of free speech rights is untenable. Public employees face vastly different free speech rights under the federal constitution depending on what state or locality employs them and thus where the suit is litigated. And now that the split has reached 7-5, with two sides firmly dug in on their respective rules, the hope of the split resolving itself has vanished. The conflict is mature and ready for this Court’s review. Definitive guidance over how courts should apply the public concern test, particularly as it regards speech on controversial issues, is overdue. The circuit conflict is undeniable and entrenched, and it should be resolved by this Court in this case.

The disarray in the courts of appeals is stripping public employee First Amendment rights nationwide. It leads to wildly divergent outcomes across Circuits for similarly situated employees. It hands public employee’s federal speech rights over to the arbitrary whims of geography. And, in cases like this one, it makes a mockery of this Court’s promise that public employees do not “surrender” their constitutional right to free speech by virtue of their employment. This Court’s review of this question is desperately wanted.

A. Seven Circuits—the First, Second, Third, Fourth, Seventh, Eighth, and D.C. circuits—decisively reject the Ninth Circuit’s requirement that speech must be sufficiently public-facing or advocacy-oriented to qualify as speech on a matter of public concern. These circuits determine whether speech is on a matter of public concern by looking to its raw subject matter. They have used their approach to squarely hold that speech about *race* specifically is protected as speech on matters of public concern—without looking to whether the speaker intended it as advocacy or public debate.

1. The Ninth Circuit’s rule squarely conflicts with the settled law in the Eighth Circuit. *Melton v. Forrest City*, 147 F.4th 896 (8th Cir. 2025), exemplifies the Eighth Circuit’s rule. The Eighth Circuit in *Melton* confronted the identical question presented here: whether a public employee’s message about race was a “comment[] upon [a] matter[] of public concern.” *Id.* at 902 (citation omitted). A unanimous panel held that it was solely because the subject of race is a “matter[] of political, social, or other concern to the community.” *Id.* (citation omitted).

In *Melton*, the plaintiff “reposted a black-and-white image on Facebook that depicted a silhouette of a baby in the womb with a rope around its neck.” *Id.* at 900.



While “[h]is intent was to convey that he was ‘anti-abortion,’” others complained that the post was racist as “it looked like a noose around the neck of a black child,” and the caption—“I can’t breathe”—“was associated with the protests surrounding George Floyd’s death.” *Id.* The post sparked a “huge firestorm” of criticism from “angry city-council members and citizens,” and the plaintiff was fired. *Id.* at 901 (citation omitted). The plaintiff sued, alleging unlawful First Amendment retaliation.

The Eighth Circuit held that the plaintiff’s First Amendment claim was entitled to go to a jury. *Id.* at 900. On its way to that holding, it addressed the “threshold issue[]” of whether the plaintiff was “speaking as a citizen on a matter of public concern” when he posted the image. *Id.* at 902 (citation omitted). The Court concluded that he was speaking as a citizen because he had “posted the image to his personal page on his own time.” *Id.* It then determined that there could be “no dispute” about whether his message was on a matter of public concern

because the speech’s subject matter (“race and abortion”) “are matters of political, social, or other concern to the community.” *Id.* (citation omitted).

The Eighth Circuit’s decision in *Melton* followed naturally from its earlier decision in *Bresnahan v. City of St. Peters*, 58 F.4th 381 (8th Cir. 2023). There, a police officer shared a clip from the animated television series “Paradise PD” on a private text thread with other police officers around the time of the George Floyd protests. *Id.* at 383. The cartoon depicted a black police officer shooting himself with the caption “another innocent black man shot by a cop.” *Id.* at 385.



Screenshot from the Paradise PD Episode “Black and Blue”

Other officers in the thread complained and the officer was forced to resign. *See id.* at 384. He sued alleging First Amendment retaliation. The Eighth Circuit held that “the content of the video suggests that [the] speech involved a matter of public concern” *Id.* at 385. The Eighth Circuit reasoned that the cartoon implicated both the Black Lives Matter movement and the media’s treatment of police shootings, and thus “relate[d] to a[] matter of political,

social, or other concern to the community.” *Id.* (citation omitted).

b. The Ninth Circuit’s rule also squarely conflicts with the established law in the Second Circuit. In *Reuland*, a Brooklyn district attorney sued his employer alleging First Amendment retaliation. The attorney was demoted and forced to resign following his remarks in an interview with New York Magazine that Brooklyn was “the best place to be a homicide prosecutor” because it had “more dead bodies per square inch than any place else.” *Reuland*, 460 F. 3d at 411-12. “[P]rominent politicians” and the District Attorney took issue with the attorney’s quote as it painted their efforts to reduce crime in a bad light, leading to the attorney’s demotion and resignation. *Id.* at 412. The Second Circuit held that the attorney’s remarks were on matters of public concern. It rejected the argument that the speech was not entitled to protection simply because they were not framed in a manner calculated to “address[] a matter of public concern.” *Id.* at 415; *see id.* at 417. The court instead looked past the attorney’s “motive,” to the subject matter of his speech. *Id.* at 418. Because his statement’s subject matter “addressed the crime rate in Brooklyn,” and because “crime rates are inherently a matter of public concern,” his statement was protected speech. *Id.*

In *Pappas v. Giuliani*, 290 F.3d 143 (2d Cir. 2002), the court applied that same framework to speech about race. There, the court confronted the question of “whether a municipal police department may, without violating the First Amendment’s guarantee of freedom of speech, terminate a police officer by reason of the officer’s anonymous dissemination of bigoted racist anti-black and anti-semitic materials.” *Id.* at 144. Officer Pappas was a New York City policeman that was fired after he mailed “offensive racially bigoted materials” to another police department. *Id.* at 144-45. The majority simply

“assume[d]” that his “mailings constituted speech on a matter of public concern” and held that New York City lawfully fired him under *Pickering*’s balancing test. *Id.* at 146. Then-Judge Sotomayor wrote separately and affirmed that the panel’s assumption was “correct” under the Second Circuit’s precedent which holds that “[i]ssues of race relations are ‘inherently of public concern.’” *Id.* at 154 (Sotomayor, J., dissenting) (citation omitted). This was true even though the case involved a “scenario of an employee speaking on issues of race relations entirely unrelated to his job.” *Id.* at 156 (Sotomayor, J., dissenting).

c. The law in the Ninth Circuit is also in square conflict with settled law in the Third Circuit. In the Third Circuit, so long as “[t]he content of speech . . . addresses a social or political concern of the community” it “implicat[es] significant First Amendment concerns.” *Gorum v. Sessoms*, 561 F.3d 179, 187 (3d Cir. 2009); *accord id.* (holding that if the speech at least “touch[es] on broad social or policy issues,” its content weighs in favor of constitutional protection (citation omitted); *Watters v. City of Philadelphia*, 55 F.3d 886, 892 (3d Cir. 1995) (“The content of [plaintiff’s] speech *on its face* appears to address a matter of significant public concern.” (emphasis added)).

The decision in *Jorjani v. New Jersey Institute of Technology*, 151 F.4th 135 (3d Cir. 2025) shows just how engrained that rule is in the Third Circuit. Jason Jorjani taught philosophy at the New Jersey Institute of Technology. During his time there he “formed the Alt Right Corporation,” that, among other things, “argued that ‘human racial equality’ is a ‘left-wing myth.’” *Id.* at 138. Jorjani was also secretly taped during a conversation at a pub in which he predicted that “[w]e will have a Europe, in 2050, where the banknotes have Adolf Hitler, Napoleon Bonaparte, Alexander the Great. And Hitler

will be seen like that: like Napoleon, like Alexander, not like some weird monster, who is unique in his own category.” *Id.* at 139 (citation omitted). When that recording became public, the Institute’s President condemned him to the rest of the faculty and placed him on paid leave. *Id.* The Institute began an investigation into his activities and eventually refused to renew his contract. *Id.* at 139-40. Jorjani sued, alleging First Amendment retaliation.

It was so obvious under the Third Circuit’s caselaw that Jorjani’s speech touched on matters of public concern that even after the parties agreed that it did, the Third Circuit *still* went out of its way to “join” the parties’ agreement. *Id.* at 141 & n.7. The panel recited *Connick*’s formulation that “speech relating ‘to any matter of political, social, or other concern to the community’ is one that involves matters of public concern.” *Id.* at 141 n.7. It then held that “Jorjani’s speech easily falls within those bounds because it tackles matters of race, which although carries the potential to be inflammatory, is speech *inherently* of public concern.” *Id.* (emphasis added) (citation omitted).

d. Ninth Circuit law similarly conflicts with the law in the First, Fourth, Seventh, and D.C. Circuits as well, all of which look to the raw subject matter of the speech at issue before holding that speech related to racial matters is inherently on a matter of public concern. *See, e.g., Alston v. Town of Brookline*, 997 F.3d 23, 48 (1st Cir. 2021) (“[P]rotest[ing] racial discrimination” is “inherently’ a matter of public concern,” and to say otherwise “is little more than gaslighting.”); *Berger v. Battaglia*, 779 F.2d 992, 993 (4th Cir. 1985) (police officer’s “off-duty” performances at bars, clubs, and taverns while “in blackface makeup and a black wig,” held protected as on a matter of public concern); *Schneiter vs. Carr*, 148 F.4th 438, 447 (7th Cir. 2025) (“agree[ing]” that public

employee’s Facebook posts containing racially charged memes were on matters of public concern); *Tao v. Freeh*, 27 F.3d 635, 639 (D.C. Cir. 1994) (finding “no difficulty concluding that [plaintiff] has met her burden of showing that her complaint about racial discrimination was protected speech”).

3. In direct conflict with these circuits the Fifth, Sixth, Tenth, and Eleventh Circuits, and now the Ninth, take the opposite approach. For these circuits, it is not enough that the subject matter of the speech simply touches on a matter of public concern; rather, the “purpose,” “direction,” “point,” “intent,” “function,” “core,” or “framing” of the speech must be to inform the public on a matter of public concern.

a. As Judge Callahan explained in her dissent below, in the Tenth Circuit speech is not on a matter of public concern unless it is “framed in a manner calculated to ignite that public interest.” *Morris*, 666 F.3d at 663; *see also, e.g., Leverington v. City of Colorado Springs*, 643 F.3d 719, 727 (10th Cir. 2011) (“In order for a public employee’s speech to be ‘of public concern,’ it is not always enough that its *subject matter* could in certain circumstances, be the topic of a communication to the public that might be of general interest. What is actually said on that topic must itself be of public concern.”).

The Tenth Circuit applied that approach in *Dixon v. Kirkpatrick*, 553 F.3d 1294 (10th Cir. 2009), to speech criticizing racism. In *Dixen*, a former employee of the Oklahoma Board of Veterinary and Medical Examiners sued the Board for firing her for speaking to her personal veterinarian about the Board’s participation in a dogfighting investigation. The employee raised several issues to the veterinarian, including her belief that the investigation was an improper use of the Board’s resources. *Id.* at 1299. She also criticized the lead investigator for having “made racist and sexist remarks.”

Id. at 1299-1300. The Tenth Circuit held that while her conversations about “the supposedly improper use of [the Board’s] resources to investigate the dogfighting ring involved matters of public concern,” “none of the other subjects” did, including her criticism of the investigator’s racist remarks. *Id.* at 1303

b. The Eleventh Circuit has the same rule. In *Alves v. Board of Regents of the University System of Georgia*, 804 F.3d 1149 (11th Cir. 2015), the court considered “whether a written grievance by five university employees alleging mismanagement by their supervisor which preceded their termination is entitled to First Amendment protection.” *Id.* at 1153. That grievance alleged racial discrimination, including treating “staff of color” differently than “white-identified staff.” *Id.* at 1157; *see id.* at 1166.

The court held that the grievance was unprotected because it was not on a matter of public concern. The court looked not to “whether the public would be interested in the *topic* of the speech at issue,” but “whether the *purpose* of the employee’s speech was to raise issues of public concern.” *Id.* (emphasis modified) (cleaned up). It acknowledged that the grievance “may touch up against matters of public concern,” but ultimately found the speech unprotected because “it [was] not directed to such concerns.” *Id.* at 1167.

c. The Sixth Circuit similarly requires that the “point” and “purpose” of the speech at issue must be to ignite public concern in order to merit First Amendment protection. In *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995), the Sixth Circuit refused to find that a football coach’s racist locker-room speech was on a matter of public concern. The “proper inquiry,” the Sixth Circuit held, “[i]s not [into] what might incidentally be conveyed by the fact that the employee spoke in a certain way, but the *point* of the speech in question.” *Id.*

at 1187 (cleaned up). “The court must ask *to what purpose* the employee spoke.” *Id.* (emphasis added). After finding that the coach’s speech was “intended to be motivational” only, it held that it was not “on a matter of public concern.” *Id.* at 1187-88 (citation omitted).

d. The Fifth Circuit has the same stringent rule. In *Terrell v. University of Texas System Police*, 792 F.2d 1360 (5th Cir. 1986), a police chief fired an officer after reading the officer’s secret diary, which criticized the chief. *Id.* at 1361. The Fifth Circuit explained its view that “[b]ecause almost anything that occurs within a public agency *could* be of concern to the public, we do not focus on the inherent interest or importance of the matters discussed by the employee.” *Id.* at 1362. “[T]he mere fact that the topic of the employee’s speech was one in which the public might or would have had a great interest is of little moment.” *Id.* The officer was “not terminated for speaking ‘as a citizen upon matters of public concern,’” because he “made no effort to communicate the contents of the notebook to the public,” and all of his writings “were a wholly intragovernmental concern.” *Id.* at 1362-63.

The Fifth Circuit applied this approach in *Gibson v. Kilpatrick*, 838 F.3d 476 (5th Cir. 2016), to hold that a police chief’s lawsuit against the mayor alleging First Amendment retaliation and discrimination was not, itself, speech on a matter of public concern. The Fifth Circuit explained that the “content” must be “define[d]” by the “function[]” that the speech served. *Id.* at 482-83. So although the public may be interested in “how the mayor treats the police chief,” “the content of [plaintiff’s] suit was a matter of private concern” because “[a]t its core” it was “an internal grievance.” *Id.* at 484-85 (citation omitted).

Similarly, in *Graziosi v. City of Greenville Mississippi*, 775 F.3d 731 (5th Cir. 2015), a police officer posted a series of messages on Facebook criticizing her

chief's leadership, including his decision to not "send a representative to the funeral" of another officer that was recently killed. *Id.* at 734. The Fifth Circuit acknowledged that her posts started by addressing subjects that "can be 'fairly considered as relating to any matter of political, social, or other concern to the community,'" but then found that it "devolved into a rant," that was "akin to an internal grievance, the content of which is not entitled to First Amendment protection." *Id.* at 738.

e. The Ninth Circuit has now embraced that same motive requirement, placing it squarely alongside the Fifth, Sixth, Tenth, and Eleventh Circuits. The decision below places the Ninth Circuit firmly on the minority side of the divide. The panel did not dispute that petitioner spoke as a private citizen, off duty, and outside the workplace. Nor did it dispute that the speech concerned racist imagery—precisely the kind of controversial social subject the majority of circuits treat as inherently of public concern. Instead, the panel held that petitioner's speech received no First Amendment protection because it was not "framed in a manner calculated to ignite th[e] public interest." Pet. App. 13a (quoting *Morris*, 666 F.3d at 663). In the panel's view, petitioner's personal motive to express "exasperation" at receiving racist images, rather than a desire to broadly condemn racism, rendered the speech unprotected. Pet. App. 11a.

That is the minority rule in its purest form. Like the Fifth, Sixth, Tenth, and Eleventh Circuits, the Ninth Circuit conditioned constitutional protection not on the subject of the speech, but on its perceived "point," "purpose," or "framing." Under that approach, even speech on profoundly controversial social issues loses all First Amendment protection unless a court later deems that the employee framed her speech in a manner sufficiently "calculated" to engage in public debate or advocacy.

That holding squarely deepens the 7-5 conflict. There is no dispute about the facts, the legal question, or the standard the Ninth Circuit adopted. The decision applies the purpose rule expressly and without qualification. And it does so in a context—off-duty citizen speech about racism—where the disagreement with the majority subject-matter rule is at its sharpest.

4. Resolving the entrenched 7-5 split here would not only restore uniformity on a recurring question, but also provide much-needed doctrinal clarity in an area where courts and commentators have struggled for decades. Jurists have long recognized that applying the public concern test is “notoriously difficult.”¹ As this Court has said multiple times “the boundaries of the public concern test are not well defined.” *Snyder*, 562 U.S. at 452 (quoting *San Diego*, 543 U.S. at 83). Scholars and commentators have similarly recognized the doctrinal “confusion” in this area.² The Court’s intervention would

¹ See, e.g., Pet. App. 19a (Judge Callahan explaining “[t]he public concern test is a notoriously difficult one to apply”); *Zen Grp., Inc. v. Agency for Health Care Admin.*, 80 F.4th 1319, 1330 (11th Cir. 2023) (“Whether speech and petitions by government employees and contractors constitute matters of public concern can be difficult to discern.”); *Ohlson v. Brady*, 9 F.4th 1156, 1158 (9th Cir. 2021) (“often ... difficult to draw the line”).

² See Merrick T. Rossein, *Employment Discrimination Law and Litigation* § 25:27 (2025) (calling “[p]ublic concern” “a nebulous legal concept often defined by circular cross-references”); see also Mary-Rose Papandrea, *The Free Speech Rights of Off-Duty Government Employees*, 2010 *BYU L. Rev.* 2117, 2145-50 (2010) (discussing “[t]he doctrinal confusion surrounding the public concern inquiry”); Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 *Nw. U. L. Rev.* 1007, 1008-09, 1026-27 (2005) (explaining the Supreme Court “has not been able to articulate clear guidelines for lower courts to follow in deciding which employee speech should be protected” and there is “little predictability as to whether speech will be deemed of public concern”); Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First*

bring needed clarity to a foundational First Amendment doctrine and ensure that public employees nationwide receive consistent protection for their off-duty speech on controversial subjects.

* * * * *

The circuits have adopted two incompatible conceptions of what it means for public-employee speech to address a matter of public concern. The decision below places the Ninth Circuit firmly and expressly on the minority side of that divide. A more consequential split on such a basic threshold First Amendment question is hard to imagine. The depth and breadth of the conflict confirm that the issue is recurrent and outcome-determinative. The Court should resolve it.

II. THE DECISION BELOW IS WRONG

A. The panel’s conclusion that petitioner’s criticism of racist imagery did not address a matter of public concern is irreconcilable with this Court’s precedents and with the principles that animate the *Pickering/Connick* framework. As Judge Callahan explained, “content is king,” and petitioner’s speech—condemning racist imagery—“unquestionably,” Pet. App. 28a n.3, “touche[d] on a topic of social or political concern to some segments of the general public,” placing it squarely within the heartland of First Amendment protection, Pet. App. 34a-35a (cleaned up); see *Janus*, 585 U.S. at 913-14.

Amendment Category, 59 Geo. Wash. L. Rev. 1, 3 (1990) (explaining that the introduction of the “public concern” concept subjected public employee speech to the “vagaries of judicial line-drawing” which “should condemn the entire undertaking”); Ailsa W. Chang, Note, *Resuscitating the Constitutional “Theory” of Academic Freedom: A Search for a Standard Beyond Pickering and Connick*, 53 Stan. L. Rev. 915, 941 (2001) (calling the public concern requirement “a confusing hurdle”).

That conclusion follows directly from *Connick*. See *Reuland*, 460 F.3d at 418; see also *Sousa*, 578 F.3d at 173. *Connick* held that speech addresses a matter of public concern when it can “be fairly considered as relating to any matter of political, social, or other concern to the community.” 461 U.S. at 146. The Court thus made clear that the inquiry turns primarily on the content of the speech, not its form or the speaker’s motive. *Id.* at 147-48; see also *Snyder*, 562 U.S. at 454. This Court developed the public-concern requirement to screen out internal workplace grievances and disputes “of personal interest” to the employee. *Connick*, 461 U.S. at 147. Petitioner’s texts—sent off duty, years before any employment dispute, discussing racist imagery—are the opposite of what *Connick* sought to exclude. As Judge Callahan emphasized, her speech “do[es] not fall in the realm of workplace grievances” and was “wholly unrelated to her job or her employer.” Pet. App. 19a.

The conclusion also follows directly from *Rankin v. McPherson*, 483 U.S. 378 (1987). In *Rankin*, a clerical employee privately remarked that she hoped that if assassins targeted the President again she “hope[d] they [would] get him.” 483 U.S. at 381-82. This Court held that the remark “plainly dealt with a matter of public concern” because it was made during a conversation “addressing the policies of the President’s administration.” *Id.* at 386. The Court did not ask whether the statement was intended as advocacy, whether it was intended to inform public debate, or whether the speaker sought to “ignite” public interest. It was enough that the subject of the speech was a matter of political or social concern.

That conclusion also follows from *Snyder* which applied the content prong by asking whether “[t]he ‘content’” of the signs at issue in the case “relates to broad issues of interest to society at large, rather than matters of ‘purely private concern.’” 562 U.S. at 454 (quoting *Dun*

& Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759 (1985)). Their content was of public interest because “the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import.” *Id.*

Here, the subject of petitioner’s speech—racist imagery—is unquestionably a matter of political and social concern. Under *Rankin*, that ends the analysis. Indeed, petitioner’s texts are far easier to classify as public-concern speech than the remark in *Rankin*. Petitioner’s messages expressly condemned racist images; they did not require any inferential leap to identify the topic as one of public significance. As Judge Callahan put it, speech on racism “is unquestionably a matter of public import.” Pet. App. 28a n.3.

The Ninth Circuit majority reached the opposite conclusion only by misreading a sentence in *Rankin*. The panel quoted *Rankin*’s statement that “[t]he inappropriate or controversial character of a statement is irrelevant” to whether it addresses a matter of public concern, 483 U.S. at 387, and treated that language as if the Court had said that the controversial *subject* of the speech is irrelevant. Pet. App. 11a-12a. No one reading *Rankin* could draw that conclusion. *Rankin* did not hold that the public-concern inquiry ignores whether the speech concerns a controversial public issue. It held only that the “character” of the remark, its *form* or *tone*, does not matter—i.e., a statement does not lose First Amendment value because it is “inappropriate” or “controversial” to say one hopes an assassin takes the President’s life. The Ninth Circuit turned that principle on its head, using *Rankin* to diminish the public significance of petitioner’s criticism of racist imagery precisely because the texts themselves were, in the

panel's view, uncontroversial. *See* Pet. App. 11a-13a. That reading is not just mistaken, it is the inverse of what *Rankin* held.

The decision below mixed the speech's "form" and "context"—its private nature, its limited audience, and petitioner's failure to cast it as public commentary—into the content prong. But those are separate prongs that have their own role in the public concern analysis. *Snyder*, 562 U.S. at 454

Judge Callahan captured the point: By conditioning protection on whether the employee's speech is "framed in a manner calculated to ignite th[e] public interest," Pet. App. 13a (quoting *Morris*, 666 F.3d at 663), the Ninth Circuit adopted a rule foreign to the *Pickering/Connick* framework and flatly inconsistent with this Court's cases. Under this Court's precedents, petitioner's condemnation of racist imagery—an issue of enduring social and political concern—falls squarely within the category of speech entitled to First Amendment protection. The panel's contrary conclusion reflects a fundamental misapplication of *Connick* and *Rankin*, collapses content into form, and limits the scope of speech on matters of public concern in a way this Court has never endorsed.

B. Even assuming the panel were correct that petitioner's speech did not involve a matter of public concern, it erred in concluding that as a result it receives no First Amendment protection at all. This Court has recognized that when public employees "speak or write on their own time on topics unrelated to their employment," the Constitution affords protection "absent some governmental justification 'far stronger than mere speculation.'" *San Diego*, 543 U.S. at 80 (quoting *NTEU* 513 U.S. at 475). The underlying principle is straightforward: when speech occurs off duty and outside the workplace, the government's interest as an employer is at its nadir. *NTEU*, 513 U.S. at 470. That is especially

so where, as the panel held, the speech is of no public concern. In those circumstances, the First Amendment's protections *increase*—they do not disappear entirely as the panel held.

This Court has never applied *Pickering* and *Connick* to a purely private, off-duty exchange between friends that is concededly unrelated to work. The cases applying that framework have involved workplace grievances, employee conduct directed at co-workers or supervisors, or public commentary by employees whose speech bore some connection—however tangential—to official responsibilities. *See, e.g., Pickering*, 391 U.S. at 564 (letter to newspaper about school funding); *Connick*, 461 U.S. at 140-41 (internal questionnaire about workplace policies); *Lane v. Franks*, 573 U.S. 228, 231-33 (2014) (public testimony about fraud); *Waters v. Churchill*, 511 U.S. 661, 664-65 (1994) (speech among co-workers in the workplace). The panel's extension of the public-concern threshold to off-duty, private speech unrelated to work creates precisely the “anomalous result[s]” some lower courts have warned against: the government has more power to discipline private, off-duty conversations of no public interest than it does to regulate public employee advocacy that unquestionably touches on political issues. *Locurto v. Giuliani*, 447 F.3d 159, 174-75 (2d Cir. 2006).

NTEU points the other way. There, this Court held that when the government regulates the off-duty speech of its employees, the government must justify its restriction with more than speculation, because the risk of workplace disruption is attenuated. 513 U.S. at 470. The panel majority's rule—holding that off-duty speech on matters of no public concern receives *no* protection—cannot be reconciled with that principle. It creates a First Amendment gap in which private, off-duty conversations fall entirely outside constitutional scrutiny simply

because they are not “public-facing.” That gap finds no support in this Court’s decisions.

Because petitioner’s speech involved off-duty citizen expression with no workplace nexus, it should have been treated as presumptively protected. The panel’s contrary rule is inconsistent with *NTEU*, with the basic structure of *Pickering*’s balancing framework, and with the First Amendment’s protection of citizen speech outside the workplace.

III. THIS CASE IS THE IDEAL VEHICLE TO RESOLVE AN ENTRENCHED CONFLICT OVER PUBLIC EMPLOYEES’ CORE SPEECH RIGHTS

The question presented is of obvious legal and practical importance. The circuit conflict now spans twelve courts of appeals, with two firmly opposed approaches to a foundational First Amendment inquiry. The definition of “public concern” is the threshold that determines whether public employees receive any constitutional protection from employer retaliation for their off-duty speech. Millions of federal, state, and local government employees depend on a clear and uniform rule. Yet today, constitutional protection for the same off-duty speech on controversial subjects varies by geography alone.

1. The practical importance of the question presented is substantial. The public-concern standard governs teachers, police officers, corrections officers, professors, and countless other government employees at the federal, state, and local levels. When the standard differs across circuits, so do the speech rights of those employees. As it stands a police officer in the Eighth Circuit will receive constitutional protection for writing a controversial message about race while an identical officer in the Ninth Circuit will receive none. Such disparities undermine the uniform operation of the First Amendment in an area where clarity is indispensable.

Members of this Court have recognized the urgency of safeguarding public employees' speech rights. See *MacRae v. Mattos*, 145 S. Ct. 2617, 2620 (2025) (Thomas, J., statement respecting denial of certiorari) (explaining how often “government employers may find it convenient to attempt to restrict disfavored or unpopular speech in the name of preventing disruption”) (cleaned up); see also *Kennedy v. Bremerton School Dist.*, 586 U.S. 1130, 1132-1133 (2019) (statement of Alito, J., respecting denial of certiorari) (expressing concern about the Ninth Circuit's approach to public-school employees' free-speech rights).

Modern communication technologies make the need for clarity even more acute. They have transformed how speech is created, stored, and accessed, raising “a raft of public policy issues” far beyond those contemplated when *Pickering* and *Connick* were decided. *Moody v. NetChoice, LLC*, 603 U.S. 707, 716 (2024). Off-duty speech that once would have vanished is now preserved indefinitely and can be reviewed years later by a public employer. In this environment, uncertainty about the public-concern standard creates substantial risk for employees who speak about controversial issues—precisely the speech the First Amendment traditionally protects most strongly.

The question presented is especially important because public-employee speech about controversial subjects is among the most *valuable* speech in our society. Government employees are often the individuals “most likely to have informed and definite opinions” on matters of public importance and are uniquely positioned to shed light on the functioning of government institutions. *Pickering*, 391 U.S. at 572. The First Amendment protects such speech, in part, because it enables the government to better serve the public by ensuring that citizens who work for the government are not discouraged from speaking on matters about which they have special

knowledge. *Lane*, 573 U.S. at 236. A rule that declines to treat off-duty speech on controversial subjects as speech on a matter of public concern risks depriving the public of precisely the information that the First Amendment is designed to encourage. *Id.* Citizens would much rather know what public servants actually believe about controversial topics than have them conceal their beliefs.

2. The legal significance of the issue is equally profound. The public concern requirement already sits uneasily alongside the Court’s other First Amendment precedents. The Court has emphasized for decades that there is no hierarchy of First Amendment importance where some speech is entitled to more protection than other speech because it is more important. “The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. . . . Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.” *United States v. Stevens*, 559 U.S. 460, 470-72 (2010); *Cohen v. California*, 403 U.S. 15, 25 (1971) (similar); *Winters v. New York*, 333 U.S. 507, 510 (1948) (similar). The restrictive minority approach to public-employee speech—conditioning protection on whether a court later believes the employee conveyed her views in a manner “calculated” to ignite public interest—cannot be reconciled with these principles. Allowing such a fractured and inconsistent body of doctrine to persist threatens coherence across the Court’s First Amendment jurisprudence.

3. This case is the ideal vehicle to resolve this Circuit conflict. The facts are undisputed. The speech occurred off duty, outside the workplace, and in petitioner’s capacity as a private citizen. The Ninth Circuit decided the public-concern question as a pure matter of law on the pleadings and expressly adopted the minority rule that

conflicts with the rule applied in seven other circuits. No alternative grounds complicate the posture. This case cleanly presents the question and offers the Court a straightforward opportunity to clarify how the public-concern test applies to modern, off-duty speech on controversial subjects like race.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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