No. 25-672

# 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*

## BRIEF OF CATO INSTITUTE AS AMICUS CURIAE SUPPORTING PETITIONER


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## QUESTION PRESENTED

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."

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## INTEREST OF AMICUS CURIAE

The Cato Institute ("Cato") was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, issues the annual Cato Supreme Court Review, and files *amicus* briefs with the courts. This case interests Cato because it concerns the right to freedom of speech, which is essential to individual liberty. The panel's decision allows the government to punish individuals for constitutionally protected speech. This Court's precedents make clear that the First Amendment guards against such unjustified intrusions on an individual's freedom of speech, particularly where, as here, the government lacks a compelling interest. Cato urges this Court to grant the petition, resolve the critically important question presented, and reverse the judgment of the Ninth Circuit.*

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* Pursuant to this Court's Rule 37.2, counsel for Cato Institute notified counsel of record for both parties of its intent to file this brief on December 29, 2025, more than ten days before the deadline for this brief. No party or counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. *See* Sup. Ct. R. 37.6.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves an unjustified restriction of a government employee's nondisruptive, off-duty, non-work-related speech. In 2013, Kate Adams, a government employee, received two unsolicited, offensive, and racist images from an unknown sender. *See* Pet. App. 4a. One image "depicted a white man spraying a young black child with a hose and contained a superimposed offensive racial epithet." *Id.* The other showed a comedian with an offensive racial slur superimposed. *Id.* Ms. Adams complained to two of her friends about this offensive spam, stating in a private text message to one of them, "Some rude racist just sent this!!" Pet. App. 4a-5a. Ms. Adams did not send those messages at work. Her speech was not about her duties as a public employee. Nor did she post the speech on social media or otherwise broadcast it to a wide audience. Pet. App. 5a. The speech was simply part of "a friendly, casual text message conversation." *Id.*

Eight years later, the Rancho Cordova Police Department forced Ms. Adams to resign as punishment for this speech. It did so even though there is no allegation that Ms. Adams's speech interfered in any way with her or the Department's duties. The Ninth Circuit then upheld the Department's action, reasoning that Ms. Adams's speech was unprotected because her private texts did not comment on a matter of public concern. Pet. App. 8a-9a.

That was error. Ms. Adams's speech plainly commented on a matter of public concern—racism. And even if it didn't, it would be personal, nondisruptive. non-work-related speech. But the Department

proffered no compelling justification—in fact, it gave no justification at all—for firing Ms. Adams for her personal, nondisruptive, non-work-related speech.

The First Amendment provides formidable protections against government restrictions on speech. Indeed, "only a *compelling* state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." *National Association for Advancement of Colored People v. Button*, 371 U.S. 415, 438 (1963) (emphasis added).

In the context of public employment, "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). Thus, the government's interests as an employer can, under limited circumstances, justify restricting government employees' speech. But "a citizen who works for the government is nonetheless a citizen." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). Government employees do not "relinquish the First Amendment rights they would otherwise enjoy" when they accept public employment. *Pickering*, 391 U.S. at 568. "[A] state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers*, 461 U.S. 138, 142 (1983).

To "reconcile the employee's right to engage in speech and the government employer's right to protect its own legitimate interests in performing its mission," courts apply a three-part balancing test to analyze government restrictions on employee speech.

*City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam). *First*, the court must ask whether the employee was speaking as a citizen or pursuant to official duties, because official speech is not entitled to First Amendment protection. *Garcetti*, 547 U.S. at 421-22. *Second*, if the employee was speaking as a citizen, the court asks whether the speech addressed a matter of public concern—whether it "relat[es] to any matter of political, social, or other concern to the community," *Connick*, 461 U.S. at 146, or is "a subject of general interest and of value and concern to the public," *Roe*, 543 U.S. at 83-84. *Third*, if the employee spoke as a citizen on a matter of public concern, the court must balance the speaker's interest against "the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (quoting *Pickering*, 391 U.S. at 568). The government's interest will not "prevail over the free speech rights of the public employee" where the government's concern is "removed from the effective functioning of the public employer." *Id.* at 391. In every case, "[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech." *Id.* at 384.

Importantly, this Court has never held that the public-concern test defines the outer limits of a public employee's First Amendment rights. Indeed, a public employee's right to speak without fear of retaliation extends much further than just to political commentary or social criticism. It reaches most off-duty, non-work-related speech that an individual makes outside the workplace. That kind of speech is critical to a free

society, because the "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). The government's interests as an employer in regulating such non-work-related speech are at their nadir, because such speech is unlikely to "interfere[] with the efficient functioning of the office." *Rankin*, 483 U.S. at 389. When it comes to speech that "does not involve the subject matter of government employment and takes place outside the workplace, the government is unable to justify" restrictions upon it "on the grounds of immediate workplace disruption." *United States v. National Treasury Employees Union*, 513 U.S. 454, 470 (1995).

**I.** The Ninth Circuit misinterpreted the public-concern test.

**A.** This Court's precedents make clear that the touchstone of the public-concern inquiry is the subject matter of the speech in question. The question is always whether the subject matter the speech addresses is a "matter of political, social, or other concern to the community." *Connick*, 461 U.S. at 146. So when an employee expressed hope that an assassination attempt on the President would be successful, for example, her speech addressed a matter of public concern because it was made to criticize the public policy of the presidential administration. *Rankin*, 483 U.S. at 381, 386-87. Similarly, an employee's questionnaire asking coworkers whether they felt pressured to work on political campaigns was on a matter of public concern, because whether government employees "are pressured to work in political campaigns is a matter of interest to the community." *Connick*, 461 U.S. at 149. In contrast, a police officer's homemade salacious

videos depicting himself stripping off his uniform were not on a matter of public concern, because they did not similarly comment on a matter of interest to the community. *Roe*, 543 U.S. at 78, 84.

**B.** The Ninth Circuit failed to apply this straightforward test to Ms. Adams's speech. Had it done so, it would have recognized that her speech plainly commented on a matter of public concern—racism. Instead, the court below imposed bespoke requirements that find no support in this Court's precedents. The Ninth Circuit found that Ms. Adams's speech was not "truly interest[ing]" to the public rather than asking whether it commented on a *subject* of interest. *See* Pet. App. 10a. The court defined the subject of Ms. Adams's speech with blinders on, describing the subject as "private receipt of offensive messages," without considering the logical next step of the racist content of those offensive messages. Pet. App. 13a. And the court improperly imported the analysis of the form and context of Ms. Adams's speech into its analysis of the content of that speech. Pet. App. 11a-13a. In doing so, the court gave undue weight to the fact that Ms. Adams's speech was not calculated to ignite public interest. But Ms. Adams's motive is not relevant to the question of whether her speech touched on a subject of public concern.

**II.** The Ninth Circuit's rule creates the anomalous result where an employee's private, off-duty speech is entitled to *no* First Amendment protection, even though the government has the least interest in regulating that kind of speech.

**A.** The public-concern test reflects the reasonable assumption that a government employer has an interest in regulating the workplace and its

employees' work-related speech. In that context, the public-concern test serves to determine when the public also has an interest in the employee's work-related speech, and so indicates when courts must be on alert to balance those competing interests. Applying the public-concern test as a threshold barrier to protection for off-duty, non-work-related speech, by contrast, does not serve this purpose. Indeed, it has the backwards effect of elevating the government's interest in regulating speech where that interest is, in actuality, at its lowest. And it downgrades the default strict-scrutiny protections that ordinarily apply when the government seeks to impose content-based restrictions on speech. *See Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015). That makes no sense.

**B.** Instead, off-duty, non-work-related speech should presumptively be entitled to First Amendment protection, and the government should not be able to restrict it without a compelling interest that is more than "mere speculation." *National Treasury Employees Union*, 513 U.S. at 475. But that's exactly what the Ninth Circuit's rule entails. Here, the Police Department retaliated against Ms. Adams for her private speech, despite the fact that it was entirely unrelated to her employment and had absolutely no effect on the workplace. This Court's precedents do not permit that kind of unjustified restriction on personal speech.

**III.** This question presented is important. More than 23 million Americans work in government roles, and the Ninth Circuit's rule makes it all too easy for the government to inhibit their private speech. What's more, the need for strong First Amendment safeguards is even more acute in the current political climate. Polls show that many Americans feel afraid to speak their minds, and that nearly a third worry

that they could face adverse employment consequences if their political opinions became known. No one should be afraid of government retaliation for their private, off-duty, non-work-related speech.

The Court should grant Ms. Adams's petition.

## ARGUMENT

### I. The decision below is wrong, because it unduly narrows the scope of the public-concern test.

This Court has often repeated that speech addresses a matter of public concern if it "relat[es] to any matter of political, social, or other concern to the community." *Connick*, 461 U.S. at 146. Public concern is a wide-reaching concept. It doesn't ask what the speaker's motive was, if the speaker intended to reach a wide audience, or whether the speech provided interesting insight on the matter in question. Any commentary on a subject of public concern will do, from the mundane to the controversial, because "the First Amendment protects an individual's right to speak his mind" no matter whether the speech is "sensible" or "deeply 'misguided." *303 Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023). Under this test, it is plain that Ms. Adams's text messages were speech on a matter of public concern, because they expressed disapproval of racism—a subject that is indisputably of concern to the community.

The Ninth Circuit strayed from this straightforward test to deny Ms. Adams vital First Amendment protections. It found that Ms. Adams's speech was not entitled to protection because the public would not "be truly interested" in what she had to say. Pet. App. 10a. It defined the subject-matter of Ms. Adams's speech with blinders on, focusing only on the fact that Ms.

Adams received offensive messages without considering their offensive content. It allowed the form and context of Ms. Adams's speech to bleed into the analysis of the speech's content. And it gave undue weight to the fact that Ms. Adams did not make her speech in public. All of that was error.

### A. The public-concern test is focused on the subject of speech, not the motive behind it.

This Court's precedents make clear that the public-concern test turns primarily on the subject matter of the speech.

In *Connick*, the Court explained that speech addresses a matter of public concern if it can "be fairly considered as relating to any matter of political, social, or other concern to the community." 461 U.S. at 146. There, a district attorney's office fired an attorney for distributing a survey to her coworkers asking about their satisfaction with various office policies after she was reassigned to another division against her will. *Id.* at 140-41. The Court explained that the majority of her speech did not address a matter of public concern. *Id.* at 147-48. That's because most of the questions were "mere extensions of [the employee's] dispute over her transfer," and were not otherwise "of public import." *Id.* at 148. Indeed, as the Court explained, the survey, "if released to the public," "would convey no information at all other than the fact that a single employee is upset with the status quo." *Id.* By contrast, one question on the employee's survey did "touch upon a matter of public concern"—she asked whether other employees felt pressured to work for political candidates not of their own choice. *Id.* at 149. Because that sort of official pressure "constitutes a

coercion of belief in violation of fundamental constitutional rights," the question addressed an issue of "demonstrated interest in this country." *Id.*

Although *Connick* stated that "form" and "context" are relevant to the public-concern inquiry, the analysis makes clear that content is paramount. *Id.* at 147-49. At bottom, the public-concern test is intended to weed out general workplace grievances and matters of "personal interest," because "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Id.* at 149. But for speech relating to matters "of political, social, or other concern to the community," "it is essential that public employees be able to speak out freely without fear of retaliatory dismissal." *Id.* at 146, 149. Thus, the touchstone of the public-concern inquiry remains the content of an employee's speech.

*Rankin*, 483 U.S. at 381, reflects this principle. There, a clerical employee in a constable's office had a conversation with a coworker, who was also her boyfriend, after hearing about an attempt to assassinate the President of the United States over the office radio. While on duty in a room to which there was no public access, she complained to the coworker that the President had been cutting back Medicaid and food stamps, and that she hoped a second assassination attempt would be successful. *Id.* The Court held that this statement was "plainly" on a matter of public concern, because it "was made in the course of a conversation addressing the policies of the President's administration." *Id.* at 386. The Court did not consider the form or context of the employee's comment—that she said it privately to her boyfriend and not in an advocacy-oriented manner, while on-duty at her job. *Id.*

at 381. What mattered was that the subject of the speech "criticiz[ed] public policy," and so was on a matter of public concern. *Id.* at 387.

The Court followed the same approach in *Roe*, 543 U.S. at 78. There, an off-duty San Diego police officer sold custom homemade videos on eBay showing himself stripping off a police uniform and masturbating. He also sold official police equipment, including San Diego Police Department uniforms. *Id.* The Court began by reiterating that the subject of speech is the predominant factor in determining whether it addresses a matter of public concern: "[P]ublic concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication," even when made in "private remarks." *Id.* at 83-84. The Court held that the officer's speech did not qualify as a matter of public concern, because it was not on a matter "of concern to the community." *Id.* at 84-85. Like the speech in *Connick*, the officer's "activities did nothing to inform the public about any aspect of [his employer's] functioning or operation." *Id.* at 84. And unlike the speech in *Rankin*, the officer's speech did not comment "on an item of political news." *Id.* In short, what mattered most to the Court's analysis was whether the subject of the speech was a matter of political or social interest.

### B. The Ninth Circuit erred by misconstruing the content of Ms. Adams's private speech and placing too much emphasis on the motive behind it.

Rather than apply the straightforward subject-matter test, the Ninth Circuit crafted a convoluted test for discerning whether the content of Ms. Adams's

speech addressed a matter of public concern. In doing so, it took an unduly restrictive view of the subject matter of her speech, collapsed the inquiry of context and form into the content prong of the *Connick* test, and myopically focused on the private nature of Ms. Adams's speech. That was error.

**1.** The court misapplied the law when it examined the content of Ms. Adams's speech.

The Ninth Circuit claimed that the "focus" of the content-prong within the public-concern inquiry is whether the public "is likely to be truly interested in the particular expression." Pet. App. 10a. But that's not the test. The question is not whether the particular speech is itself interesting. The question is whether the speech is about "a subject of general interest and of value and concern to the public." *Roe*, 543 U.S. at 83-84. Speech addressing a matter of public concern is protected, whether or not it is independently interesting or valuable. Indeed, this Court has explained that all manner of speech addressing a matter of public concern is protected, even if it is "vehement, caustic" or "unpleasantly sharp"—or, in this case, not particularly newsworthy. *Rankin*, 483 U.S. at 387. Ms. Adams's speech addressed racism—a subject that is indisputably of public concern—and so her speech is protected, whether or not her commentary on racism is itself "truly interest[ing]" to the public. Pet. App. 10a.

The court myopically defined the subject matter of Ms. Adams's speech as "private receipt of offensive messages." Pet. App. 13a. The Ninth Circuit's characterization glosses over the fact that Ms. Adams's speech plainly condemned the racist content within those messages. To be sure, Ms. Adams's speech did

acknowledge receipt of offensive messages—"Some rude racist *just sent this*!!" Pet. App. 4a (emphasis added)—but it also condemned the messages—"Some *rude racist* just sent this!!," *id.* (emphasis added). Plus, she added, "in case u [sic.] think I encourage this … ," suggesting that she was not encouraging this kind of racist messaging. *Id.* Ignoring the plain subject matter of the offensive messages Ms. Adams received was an unjustified error.

The court also improperly imported analysis of the form that Ms. Adams's messages took into the content analysis. It stated that her messages "speak only of her exasperation at being sent the images" in "private communications to her friends"—as opposed to being shared on a forum "where 'any member of the general public could view'" them. Pet. App. 11a-12a. And it reasoned that her speech was not "framed in a manner calculated to ignite that public interest." Pet. App. 13a. But again, this Court's precedents have never treated the form or motive behind private speech as relevant to the question of what subject matter that speech addresses, and whether that subject is of public concern.

**2.** The court compounded its errors in considering the form and context of Ms. Adams's speech.

When it finally turned to properly consider the other public-concern factors—form and context—the court emphasized that "[s]tatements made in public"—such as "posting images online"—"weigh in favor of a finding that the matters discussed were 'of public concern.'" Pet. App. 14a. Because Ms. Adams's texts "evince nothing more than a casual private conversation among friends," the court concluded that her texts "express her personal adverse reaction at being sent

the imagery, instead of advancing societal political debate," and so the speech was not "of public concern." Pet. App. 16a. But again, the Ninth Circuit moved the goalposts. This Court's cases do not impose a "made in public" requirement for speech to be of public concern. Pet. App. 14a. Indeed, this Court has previously held that purely private speech can still be of public concern. *See Rankin*, 483 U.S. at 387.

## II. The Ninth Circuit's rule would create the anomalous result where private, off-duty speech is entitled to no protection—and the government would have the ability to restrict it without any limitations—whether or not the speech affects the work environment.

The anomalous results the Ninth Circuit's rule produces confirm that the court erred in failing to protect Ms. Adams's speech. That rule turns free-speech law on its head, providing individuals with zero protection for their private, off-duty, non-work-related speech, even though the government has the least interest in regulating that purely personal speech. Indeed, the only other category of speech for which the government employer's ability to regulate is so unlimited is speech that occurs pursuant to an employee's official duties—where the government's interests are at their zenith. It simply makes no sense to treat off-duty speech and speech made pursuant to one's official duties as equivalently unguarded by the First Amendment. That explains why the Ninth Circuit's rule finds no support in this Court's precedents.

Even if Ms. Adams's purely private, off-duty, non-work-related speech were not on a matter of public concern, it must still be presumptively entitled to

First Amendment protection, and the government cannot restrict it without a compelling interest. This Court has consistently held that the government needs a compelling interest to restrict citizens' speech. It has also held that the First Amendment protects mundane and high-minded speech alike. In light of those precedents, the public-concern test cannot be construed as a threshold barrier to First Amendment protections for private speech, especially when, as here, the government has failed to articulate any sort of justification for restricting the speech.

**A.** As this Court has explained, "when government employees speak or write on their own time on topics unrelated to their employment, the speech can have First Amendment protection, absent some governmental justification 'far stronger than mere speculation' in regulating it." *Roe*, 543 U.S. at 80. Indeed, by default the government cannot impose content-based restrictions on this purely personal speech without satisfying strict scrutiny—meaning the "restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 576 U.S. at 171. Yet under the Ninth Circuit's rule, the government can restrict an employee's off-duty, non-work-related speech regardless of whether doing so "promot[es] the efficiency of the public services [an employer] performs through its employees" or otherwise serves a government interest. *Pickering*, 391 U.S. at 568. That makes no sense, and it contradicts this Court's precedents to boot.

**1.** The public-concern test reflects a reasonable assumption that the government generally has an interest as an employer in controlling its workplace environment and employees' work-related speech. In that context, the test reasonably requires an employee

to show affirmatively that her speech is addressing a matter of public interest. When an employee satisfies that burden, it shows that the public also has an interest in the employee's work-related speech, and courts must balance that interest against the government's interest as an employer. As Judge Calabresi explained, "[t]he public concern inquiry, developed within the context of on-the-job expressive activity, was intended to provide heightened protection to workplace speech that was close to the First Amendment's core." *Locurto v. Giuliani*, 447 F.3d 159, 174 (2d Cir. 2006).

For off-duty speech unrelated to the speaker's employment—like Ms. Adams's private text messages here—it does not make sense to apply the public-concern test as a threshold barrier to First Amendment protection. That's because "[t]he less [an employee's] speech has to do with the office, the less justification the office is likely to have to regulate it." *Eberhardt v. O'Malley*, 17 F.3d 1023, 1027 (7th Cir. 1994). It is simply not reasonable to assume that the government has a strong interest in suppressing off-duty, non-work-related speech. And doing so would produce anomalous results, as this case illustrates. "[M]echanically applying a categorical public concern test" to Ms. Adams's off-duty, non-work-related speech "would lead to the somewhat anomalous result that the Government would have far *less* latitude to dismiss an employee for a *public* display of racism"—such as if Ms. Adams had posted racist memes on Facebook—"than it has for, say, speech that was uttered" in private, like Ms. Adams's private, off-duty, non-work-related text messages here. *Locurto*, 447 F.3d at 174-75. But, if anything, the government has less of an interest in regulating private speech, and more of an

interest in regulating public-facing speech, because the latter is more likely to "ha[ve] a detrimental impact on close working relationships," "impede[] the performance of the speaker's duties or interfere[] with the regular operation of the enterprise." *Rankin*, 483 U.S. at 388.

**2.** The Ninth Circuit's application of the public-concern test as a threshold limitation on the protection of off-duty, non-work-related speech finds no support in this Court's precedents.

Start with *Connick*, which introduced the public-concern test and applied the test to work-related speech. As explained (at 9-10), *Connick* distinguished between speaking "as a citizen upon matters of public concern"—which was protected—and speaking "as an employee upon matters only of personal interest"—which was not. 461 U.S. at 147. That is, the only matters of "personal interest" *Connick* addressed were those related to the speaker's employment.

*Connick*'s reasoning for imposing the public-concern threshold was based on the government's interests as an employer in employees' work-related speech. In finding that the government was entitled to fire the employee in *Connick*, the Court emphasized that the employee's speech was calculated to advance her position in "a personal employment dispute." *Id.* at 148-49, 148 n.8. The government thus had the right to restrict it as her employer because "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Id.* at 148-49.

The Court's decisions since *Connick* have likewise applied the public-concern test to speech that is either at work or related to work. In *Rankin*, the employee

made a comment to a coworker while in the office. 483 U.S. at 381-82. In *Roe*, a police officer used his personal eBay account to sell pornographic content of himself stripping off his police uniform, and "took deliberate steps to link his videos and other wares to his police work." 543 U.S. at 78-79, 81. In both cases, the speech was at least related to the employee's employment.

**B.** Off-duty, non-work-related speech should presumptively be entitled to First Amendment protection, and the government should not be able to restrict that speech without a compelling interest, whether it satisfies the public-concern test or not.

Where, as here, the employee's speech takes place away from work and has no relation to work, the employee's speech should presumptively be protected, no matter whether it is of public concern, and the government should have to justify any restrictions upon it. As this Court has consistently held, "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." *Button*, 371 U.S. at 438. Allowing the Ninth Circuit's contrary approach to persist would be contrary to this Court's "responsibility to ensure that citizens are not deprived of fundamental rights by virtue of working for the government." *Connick*, 461 U.S. at 147. In short, the Ninth Circuit's approach contravenes the Supreme Court's repeated rejection of "the proposition that a public employee has no right to a government job and so cannot complain that termination violates First Amendment rights, a doctrine once captured in Justice Holmes' aphorism that although a policeman 'may have a constitutional right to talk politics … he has no constitutional right to be a policeman.'" *O'Hare Truck*

*Service, Inc. v. City of Northlake*, 518 U.S. 712, 716-17 (1996) (quoting *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517 (Mass. 1892)).

Just because an employee's private, off-duty, non-work-related speech is not of public concern does not mean that it is entitled to no First Amendment protection because the First Amendment protects mundane and high-minded speech alike. The government may not—without a compelling reason—"deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration." *Citizens United v. Federal Election Commission*, 558 U.S. 310, 341 (2010). As this Court recently explained, "the First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply 'misguided.'" *303 Creative*, 600 U.S. at 586.

Thus, even where private speech is not of public concern, a government employer needs a compelling reason to restrict it. As Judge Posner has explained, an "employer could not fire" an employee for "protected expression [having] nothing to do with the employee's job or with the public interest in the operation of his office" without "a *reason*—something that might rebut the presumption of privilege." *Eberhardt*, 17 F.3d at 1026-27. Put differently "[t]he employer could not *gratuitously* punish [an employee] for exercising freedom of speech." *Id.*

But that's exactly what the Ninth Circuit's rule entails. Here, the Rancho Cordova Police Department has not even bothered to explain how Ms. Adams's privately complaining off-duty about receiving an anonymous racist text affected its interests. Yet the

Ninth Circuit's rule allows the government to punish Ms. Adams's speech all the same. Nevermind that it occurred off site, in private communications, and was entirely unrelated to her employment. Permitting the unjustified restriction of such personal speech is contrary to decades of Supreme Court precedent affirming that the government may not arbitrarily deny First Amendment freedoms, even to public employees. *See, e.g.*, *Button*, 371 U.S. at 438; *Pickering*, 391 U.S. at 568.

The Ninth Circuit attempted to avoid the repercussions of its ruling by insisting that it was not deciding whether the public-concern test applies as "'a necessary threshold' for off-duty, non-work-related speech." Pet. App. 8a n.1. But it nonetheless "proceed[ed] on the assumption that the 'public concern' standard as applied to workplace speech is applicable" to Ms. Adams's non-work-related speech. *Id.* The consequence of that assumption is a binding ruling that deprives off-duty, nondisruptive, non-work-related speech of all First Amendment protection unless it is expressed in a way that is intended "to ignite th[e] public interest"—whatever that means. Pet. App. 13a. That illogical consequence shows why the Ninth Circuit's answer to the question presented must be wrong—despite the court's effort to shield its assumption and reasoning in a footnote.

**III. The question presented is important.**

The decision below arbitrarily denies millions of government employees nationwide of important constitutional protection over their private communications.

The government's status as a prolific employer makes it all too easy for it to inhibit a great deal of

protected speech, which is why the courts must remain vigilant to protect the First Amendment interests at stake. More than 23 million Americans work in civilian roles for federal, state, or local governments. *See* Federal Reserve Economic Data, *All Employees, Government*, Federal Reserve Bank of St. Louis, https://fred.stlouisfed.org/series/USGOVT (last updated Dec. 16, 2025) (citing data from U.S. Bureau of Labor Statistics). "Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech." *Rankin*, 483 U.S. at 384.

What happened to Ms. Adams is a case in point. Superiors at the Rancho Cordova Police Department did not like the contents of her private, off-duty, non-work-related speech, so they decided to punish her for it, despite there being no allegation that her speech interfered with "the efficiency of the public services [the government] performs through its employees," *Pickering*, 391 U.S. at 568, nor any other compelling government interest in restricting her speech, *Button*, 371 U.S. 438. But "a citizen who works for the government is nonetheless a citizen" and "[t]he First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens,"—including their freedom of speech. *Garcetti*, 547 U.S. at 419.

The need to police government restrictions on employee speech is even more acute in the current political climate. It does not take an empirical study to know that free speech has come under attack in America, as more and more people feel the need to

self-censor their opinions to avoid the risk of retaliation. But in case there were any doubt, a 2020 Cato survey found that 62% of Americans felt that the political climate prevented them from saying things they believe because others might find their opinions offensive. Emily Ekins, *Poll: 62% of Americans Say They Have Political Views They're Afraid to Share*, Cato Institute (July 22, 2020), https://www.cato.org/survey-reports/poll-62-americans-say-they-have-political-views-theyre-afraid-share. And, as relevant here, nearly a third (32%) of employed Americans were worried that they could miss out on career opportunities or risk losing their job if their political opinions became known in the workplace. *Id.* Interestingly, that feeling is indiscriminate across the political spectrum, with 31% of liberals, 30% of moderates, and 34% of conservatives worried that their political views could harm their employment.

The Ninth Circuit's rule will only foster further self-censorship and chilling of protected speech. This Court should step in to ensure that government employees are able to exercise their First Amendment freedoms in their private communications, off-duty, about non-work-related topics, without fear of arbitrary retaliation by their government employers.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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