No. 25-672

IN THE
Supreme Court of the United States

KATE ADAMS, PETITIONER,

V.

SACRAMENTO COUNTY, CALIFORNIA, ET AL.

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

BRIEF OF FIRST AMENDMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

GARY S. EDINGER
Benjamin, Aaronson,
Edinger & Patanzo, P.A.
305 N.E. 1st Street
Gainesville, FL 32601

BENJAMIN GRUENSTEIN
Counsel of Record
ALEXANDER BREINDEL
EMILY MILLER
Cravath, Swaine & Moore LLP
Two Manhattan West
375 Ninth Avenue
New York, NY 10001
(212) 474-1000
bgruenstein@cravath.com

Counsel for Amicus Curiae

January 9, 2026

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The First Amendment Lawyers Association (FALA) is a nonpartisan, nonprofit bar association of attorneys throughout the United States and elsewhere whose practices emphasize the defense of freedom of speech and of the press. Since its founding, FALA's members have been involved in many of the nation's landmark free expression cases, including cases before this Court. *See*, *e.g.*, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (successful challenge to Child Pornography Prevention Act); *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803 (2000) (successful challenge to "signal bleed" portion of Telecommunications Act). In addition, FALA has a tradition of submitting *amicus curiae* briefs, including to this Court, on issues pertaining to the First Amendment. *See*, *e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 584 U.S. 617 (2018); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014).

SUMMARY OF ARGUMENT

This Court developed the *Pickering* balancing test to weigh a government employee's interest in speaking on matters of public concern against the government's interest in maintaining an efficient workplace, thereby calibrating the degree of

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in any part and that no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution to fund its preparation and submission. *Amicus curiae* timely notified counsel of record for all parties of *amicus curiae*'s intent to file this brief in accordance with Supreme Court Rule 37.2.

constitutional protection afforded to this type of speech. Within this framework, this Court has made clear that government employee speech need not be conveyed publicly to qualify as speech on a matter of public concern. Private speech has therefore long merited First Amendment protection because the First Amendment safeguards the ability to test, refine and develop ideas free from compelled exposure or governmental scrutiny. At the same time, private speech also typically poses less risk of workplace disruption, further weakening the government's justification for regulating it under *Pickering*.

Here, however, the Ninth Circuit treated the private nature of petitioner's speech—text messages criticizing racist memes—as reason to deny her constitutional protection. The court relied on the private nature of petitioner's speech at each step of the public concern analysis to downplay the fact that the memes promoted racism and that petitioner's speech condemned it. By deciding that petitioner's speech was not of public concern on the basis that it was expressed privately, the Ninth Circuit demoted private speech to an inferior constitutional category, contradicting this Court's settled precedents. Whether petitioner chose to speak privately or publicly—an increasingly blurred distinction in modern digital communications—should not determine whether her speech addressed a matter of public concern.

As petitioner has demonstrated, this case provides an ideal vehicle to resolve a mature and acknowledged circuit conflict related to how courts decide whether government employee speech addresses a matter of public concern, and in

particular, whether it must be intended "to ignite [the] public interest." Pet. 9. In addition to resolving that circuit split, this case presents an opportunity for the Court to correct the Ninth Circuit's decision disfavoring privately expressed speech and to reaffirm this Court's prior precedents that the First Amendment protects speech communicated privately. This is particularly important in the modern digital age, where social media apps can be used one moment to communicate among small groups of friends and the next with the public more broadly, often independent of the content of the communications.

ARGUMENT

I. Government Employee Speech Is Entitled to First Amendment Protection When It Relates to a Matter of Public Concern, Even When It Is Communicated in Private.

This Court established the legal standard for determining whether a government employee's speech is protected under the First Amendment in *Pickering v. Board of Education*, 391 U.S. 563 (1968). In *Pickering*, the Court held that, in the context of government employee speech, the First Amendment requires a balancing between the interests of the employee "as a citizen, in commenting on matters of public concern" and the government's interest "in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568. In *Connick v. Myers*, the Court subsequently established a threshold requirement that the employee speech must address a "matter of public concern" to receive First Amendment protection. 461 U.S. 138, 144–47 (1983). In order to determine whether the employee's

speech satisfies this threshold, courts must examine its "content, form, and context," *id.* at 147–148, and consider "all the circumstances" of the expression, *Snyder v. Phelps*, 562 U.S. 443, 454 (2011).

This Court has made clear that government employee speech on a "matter of public concern" receives First Amendment protection regardless of whether the speech is made in public or in private. In *Givhan v. Western Line Consolidated School District*, this Court considered whether a public school teacher could be fired based on private conversations she had with her principal in which she expressed concern that the school's policies and practices violated a federal desegregation order. 439 U.S. 410 (1979). In a unanimous opinion authored by then-Associate Justice Rehnquist, the Court held that its decisions in *Pickering* and subsequent cases "do not support the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly." *Id.* at 414.

The Court affirmed this principle in *Rankin v. McPherson*, in which it held that a public clerical employee could not be fired for commenting, after hearing about an assassination attempt against the President, that "[i]f they go for him again, I hope they get him." 483 U.S. 378, 380 (1987). The Court focused on whether the employee's speech satisfied the public concern test and explicitly rejected the view that the private nature of the statement—namely, that it was made "during a private conversation with a co-worker"—deprived the employee of First Amendment protection under *Pickering*. *Id.* at 393, 386 n.11 ("The private nature of the statement does not, contrary to

the suggestion of the United States . . . vitiate the status of the statement as addressing a matter of public concern.").

This Court's protection of private speech in *Givhan* and *Rankin* reflects the value that the First Amendment attaches to all speech, no matter how widely it is disseminated. The First Amendment protects not only the right to share information and ideas in public, but also "the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). This protection endures because governmental intrusion into private expression can chill the emergence and development of ideas before they are ready for public expression. *See*, *e.g.*, Jennifer M. Kinsley, *Private Free Speech*, 58 U. Louisville L. Rev. 309, 324 (2020) ("People are more likely to exercise their right to free speech when protected by the belief that their expression will remain private . . . ."); Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 Vand. L. Rev. 1295, 1347 (2010) ("Surveillance and interference can threaten the generation of new and potentially unpopular ideas, which can benefit from nurturing and testing before they are ready to be disclosed publicly."). Because privacy plays a vital role in fostering free thought, the protection of private speech is not peripheral to the First Amendment's aims but rather is "a necessary precondition to the creation of expression" itself. Kinsley, *supra*, at 324.

These First Amendment interests are even more pronounced in the context of government employee speech, where private expression often poses little risk to workplace efficiency, yet is uniquely vulnerable

to retaliation. Under *Pickering*, the government's interest in regulating employee speech arises from its interest "in promoting the efficiency of the public services it performs"—not from any generalized power to police employee communications. 391 U.S. at 568. Accordingly, this Court's *Pickering* balancing analysis has focused on factors such as whether speech "impedes the performance of the speaker's duties or interferes with the regular operation of the [government employer's] enterprise." *Rankin*, 483 U.S. at 388.

Privately expressed speech poses little risk of such workplace disruption. *See id.* at 389 (considering the fact that the speech "took place in an area to which there was ordinarily no public access" as evidence that the government employer's workplace efficiency was not disturbed). The Court recognized this in *United States v. National Treasury Employees Union*, where it invalidated restrictions on government employee speech that occurred largely outside the workplace, explaining that it was "unable to justify" such limits on the basis of the "immediate workplace disruption" concerns animating *Pickering*. 513 U.S. 454, 470 (1995). In short, where private speech is concerned, the government's interest in regulating employee speech is at its nadir, while the employee's interest in privately expressing, testing and developing new ideas without fear of reprisal is at its apex.

Privately expressed speech thus occupies an important space both within First Amendment doctrine generally and within the government-employee speech framework in particular. Consistent with that understanding, this Court has made plain that privately expressed speech receives no less

protection under the First Amendment than speech made in public. Thus, as discussed in the next section, the Ninth Circuit erred when it denied petitioner her First Amendment rights because her speech was shared privately.

II. The Ninth Circuit's Ruling Conflicts With This Court's Decisions Guaranteeing First Amendment Protection to Government Employees, Even for Private Speech.

Despite this Court's clear precedent protecting privately expressed government employee speech, the court below repeatedly relied on the private nature of petitioner's text messages to conclude that her speech did not address a matter of public concern. In examining the "content" of the speech, the court relied on the fact that petitioner communicated through private texts to infer that the message she intended to convey was exasperation about receiving racist spam messages, rather than disgust with the messages themselves. And, in analyzing the "form and context" of the speech, the court found that the fact that the texts were intended for a limited audience further confirmed that they did not address a matter of public concern. Notably, the court did so in the context of an interlocutory appeal of a motion to dismiss. Rather than accept petitioner's description of her speech as decrying racism, as required on a motion to dismiss, both the district court and the court of appeals characterized her speech in a manner contrary to the complaint based on the private nature of her text messages.

The court of appeals correctly began its analysis by examining the content of petitioner's speech, but

misconstrued both the message conveyed by the images sent to petitioner and the message that she conveyed about those images. As the court described the images, one "depicted a white man spraying a young black child with a hose and contained a superimposed offensive racial epithet," and the other "included an image of a comedian, with superimposed text containing an offensive racial slur." Pet. App. 4a. Petitioner sent the images to two co-workers, who were also friends, writing to one: "Some rude racist just sent this!!" Pet. App. 4a.

The court found that these "texts and [the] distribution of the images speak only of [petitioner's] exasperation at being sent the images, which is an issue of personal—not public—concern." Pet. App. 11a. The court correctly noted that speech of personal interest usually concerns "'personal employment dispute[s]' or 'complaints over internal office affairs,'" Pet. App. 10a (*citing Hernandez v. City of Phoenix*, 43 F.4th 966, 977 (9th Cir. 2022)) and that these types of speech were not at issue here, *see* Pet. App. 5a ("The record is clear that the messages were intended for a purely private audience of several friends in the context of private, social exchanges during 'a friendly, casual text message conversation.'"). Thus, the court based its conclusion that petitioner's text messages were of personal interest on the fact that she both privately received the offensive images and then privately conveyed her disgust about them. *See* Pet. App. 11a ("Whether she was *privately* sent offensive, racist images outside the workplace, without more, is not a matter of public concern within the meaning of *Pickering*.") (emphasis added); *see also* Pet. App. 12a ("Something more than discussing an offensive racial

comment, communicated *in a private text*, is required for speech to involve a matter of public concern.") (emphasis added).

However, the fact that petitioner received and sent these images using private channels is not a basis to construe petitioner's message as personal exasperation about receiving these images rather than as "condemning racist images," as she alleged in her amended complaint. Pet. App. 28a (Callahan, J., dissenting). In fact, the court offered no basis—other than the fact that petitioner received these images privately from an anonymous sender—to narrowly construe her statement forwarding the images on and labeling the sender as a "rude racist" as "speech that complains of only *private, out- of-work*, offensive individual contact" rather than "[s]peech that addresses the topic of racism as relevant to the public." Pet. App. 11a (emphasis added); *see* Pet. App. 13a (quoting *Leverington v. City of Colorado Springs*, 643 F.3d 719, 727 (10th Cir. 2011)) ("A statement does not attain the status of public concern simply because its subject matter could, *in different circumstances*, have been the topic of a communication to the public that might be of general interest.") (emphasis added) (cleaned up).

The court further found that the images themselves were not a "subject of legitimate news interest." Pet. App. 12a. Focused on the fact that these images were sent privately, *see* Pet. App. 12a ("When made, the texts involved a *private* matter—her receipt of offensive images transmitted by an anonymous sender") (emphasis added), the court ignored that these images were "memes," which are typically widely disseminated, *see* Amy Adler & Jeanne C.

Fromer, *Memes on Memes and the New Creativity*, 97 N.Y.U. L. Rev. 453, 478 (2022) (explaining that memes are "one of the most commonly created, shared, and consumed types of expression" and are "paradigmatic of contemporary cultural expression"). That these memes were, in this instance, sent privately to petitioner rather than publicly broadcast does not alter the nature of their content. *See Givhan*, 439 U.S. at 413–14. But the court's myopic determination that the subject matter was only "*private* forwarded offensive messages" rendered petitioner's speech "not of interest to the general public." Pet. App. 13a (emphasis added).

The court also relied on the private nature of petitioner's speech when concluding that "the form and context—private social texts to a co-worker—weigh against finding her texts addressed a matter of public concern." Pet. App. 14a; *see also* Pet. App. 16a ("The form and context of the communications confirm our conclusion that [petitioner's] private texts were only meant to convey a personal grievance about receiving offensive private texts to her friends in the course of social conversation, not to comment on a matter of public concern."). That petitioner's "messages were not posted on social media, nor otherwise made readily discoverable by anyone other than those to whom they were directed," Pet. App. 5a, should not bear on whether the messages themselves expressed a matter of public concern. This is especially true in the modern age of digital communication, where speakers can, with the press of a button, choose to send messages to select recipients, to share with a broader group of friends or to disseminate to all users of a social media app.

Whether speech addresses a message of public concern should not turn on the medium through which it is shared.

As Judge Callahan correctly recognized in her dissenting opinion, the majority "emphasiz[ed] the private form of the texts to downplay their content." Pet. App. 26a n.2 (Callahan, J., dissenting). The court found it "evident" that petitioner "received private offensive texts and complained about receiving them privately to two friends." Pet. App. 15a; *see also* Pet. App. 15a ("When speech is directed to a limited audience, and a conversation personal rather than political in nature, the form and context factors weigh against concluding that the speech addresses a matter of public concern."). The court underscored the private nature of petitioner's texts to buttress its dubious conclusion that the content of the speech did not address a matter of public concern.

Relying on the private nature of petitioner's messages to draw this conclusion about their content is inconsistent with this Court's precedents. While the private context of speech can help inform the analysis of its content, it cannot render its subject matter of purely personal concern. For example, in *Connick*, this Court analyzed whether several questions on a questionnaire distributed among co-workers in a district attorney's office addressed a matter of public concern. 461 U.S. at 147–48. Taking into account the content, form and context of the questions, the Court concluded that all but one did not address a matter of public concern because the questions did not "seek to inform the public" about practices of the district attorney's office, nor did they "bring to light" potential wrongdoing in the office. *Id.* at 148. The Court thus

considered the purely internal distribution of the questionnaire to bolster its determination that "the questionnaire, 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.*

But the Court also found that one question—distributed internally on the same questionnaire—did "touch upon a matter of public concern" because it addressed fundamental employee rights. *Id.* at 149. So context helped illuminate the content of certain questions but was not determinative as to whether any individual question touched on a matter of public concern. *See also Rankin*, 483 U.S. at 386–87 (considering "context" of statement made during private conversation and finding that speech "plainly dealt with a matter of public concern").

The court below erred in relying on the private nature of petitioner's speech to find that it was not of public concern. It did so both in determining that the content of the speech was not of public concern because it was expressed privately and by reinforcing that determination based on the private context of the speech. Although context may be appropriately considered in determining whether speech is of public concern, this Court's precedents show that it is not determinative, but rather one factor among others to be considered. The court thus disregarded this Court's instruction that a government employee's right to discuss matters of public concern "is not forfeited by her choice of a private forum." *Connick*, 461 U.S. at 148 n.8.

In concluding that petitioner's speech did not address a matter of public concern, the court below

avoided the *Pickering* balancing test altogether, an inquiry on which petitioner was well positioned to prevail. As explained above, private speech like petitioner's poses little risk of disrupting or interfering with orderly government operations. *See Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (finding that government employer restrictions "must be directed at speech that has some potential to affect the entity's operations."). Rather than acknowledge that petitioner's speech had strong potential to override the limited government interest at stake, the court below foreclosed any balancing analysis because of the medium in which the speech occurred.

This case thus presents a worthwhile opportunity for this Court to reaffirm its prior cases and confirm that protections long afforded to private speech apply to modern digital communications no matter the size of the intended audience. This is an issue that is likely to recur given the prevalence of text messaging and social media communications, and their permanence. Whether a message is shared with just a few friends or broadcast to the world can turn on a keystroke, and often does not depend on (or reflect) the content of the message being sent.

Social media platforms allow users to create communities; sometimes those users discuss personal matters with other members of the community, sometimes they discuss matters of particular relevance to the community and sometimes they discuss matters that would be considered of interest to the general public. While speech of a purely private nature disseminated over social media would not satisfy the *Connick* public concern test, it is difficult to draw a line between matters discussed over these

channels that are clearly of public concern and other non-private matters. Such line drawing is made even more difficult by the fact that communications over social media are often cryptic (and intentionally so), and courts are not well suited to discern the content of the communications conclusively at the motion to dismiss phase. Given the importance of the *Pickering* balancing test to protecting First Amendment rights, it is critical that courts applying *Connick* not foreclose that analysis through questionable threshold interpretations of the communications themselves.

CONCLUSION

Amicus curiae respectfully urges this Court to grant the Petition.

January 9, 2026

Respectfully submitted,

BENJAMIN GRUENSTEIN
Counsel of Record
ALEXANDER BREINDEL
EMILY MILLER
Cravath, Swaine & Moore LLP
Two Manhattan West
375 Ninth Avenue
New York, NY 10001
(212) 474-1000
bgruenstein@cravath.com

GARY S. EDINGER
Benjamin, Aaronson,
Edinger & Patanzo, P.A.
305 N.E. 1st Street
Gainesville, FL 32601

Counsel for Amicus Curiae