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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Page(s)

Reply Brief for the Petitioner 1

Argument 2

I. The Courts of Appeals Are Intractably Divided 2

II. The Question Presented Is Important And Warrants Review In This Case 6

Conclusion 10

TABLE OF AUTHORITIES

Cases Page(s)

Alston v. Town of Brookline,
997 F.3d 23 (1st Cir. 2021) 4

Alves v. Bd. of Regents of the Univ. Sys. of Georgia,
804 F.3d 1149 (11th Cir. 2015) 5

Berger v. Battaglia,
779 F.2d 992 (4th Cir. 1985) 4

Bresnahan v. City of St. Peters,
58 F.4th 381 (8th Cir. 2023) 3

City of San Diego v. Roe,
543 U.S. 77 (2004) 6

Connick v. Myers,
461 U.S. 138 (1983) 4, 6

Dambrot v. Central Michigan University,
55 F.3d 1177 (6th Cir. 1995) 5

Davignon v. Hodgson,
524 F.3d 91 (1st Cir. 2008) 2

Dixon v. Kirkpatrick,
553 F.3d 1294 (10th Cir. 2009) 4

Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31,
585 U.S. 878 (2018) 2

Jorjani v. New Jersey Inst. of Tech.,
151 F.4th 135 (3d Cir. 2025) 4

MacRae v. Mattos,
145 S. Ct. 2617 (2025) 8

Melton v. City of Forrest City, Arkansas,
147 F.4th 896 (8th Cir. 2025) 3

Pappas v. Giuliani,
290 F.3d 143 (2d Cir. 2002) 3, 4

Cases—Continued Page(s)

Reuland v. Hynes,
460 F.3d 409 (2d Cir. 2006) 3

Schneiter v. Carr,
148 F.4th 438 (7th Cir. 2025) 4

Snyder v. Phelps,
562 U.S. 443 (2011) 2

Stand With US Ctr. for Legal Just. v. Massachusetts Inst. of Tech.,
158 F.4th 1 (1st Cir. 2025) 7

Tao v. Freeh,
27 F.3d 635 (D.C. Cir. 1994) 4

Terrell v. University of Texas System Police,
792 F.2d 1360 (5th Cir. 1986) 5

United States v. Nat'l Treasury Emps. Union,
513 U.S. 454 (1995) 6

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This case warrants certiorari. The Ninth Circuit indefensibly held that speech criticizing racism does not satisfy the "content" prong of this Court's "content, form, and context" test for determining whether speech is on a matter of public concern. That holding departs from this Court's precedent and deepens a circuit split that restricts the speech rights of millions of government employees nationwide. Those rights must be protected; the split must be sutured.

Respondents press no credible arguments against review. They do not dispute importance, do not credibly deny the circuit conflict, do not claim further percolation is necessary, do not argue this case is a bad vehicle, and openly embrace the Ninth Circuit's incredible holding that Ms. Adams's speech warrants no First Amendment protection at all. As Judge Callahan recognized in dissent, and numerous *amici* confirm, the doctrinal errors and harmful effects of the Ninth Circuit's ruling warrant this Court's urgent attention. The petition should be granted.

ARGUMENT

I. THE COURTS OF APPEALS ARE INTRACTABLY DIVIDED

Respondents claim the 7-5 circuit conflict over the application of the matter-of-public concern test is "overstated." Opp. 7. But respondents misapprehend the conflict, characterizing it as a dispute over whether "'controversial subject matter alone' is sufficient to establish public-concern status." Opp. 7. That is mistaken. The circuits are split over whether speech about controversial subject matter inherently satisfies the "*content*" prong of the "content, form, and context" test. Courts on one side hold that speech involving controversial subjects—such as race, discrimination, or abortion—always satisfies *at least* the content prong of the public-concern inquiry; courts on the other side hold that such speech does not qualify unless it is framed to influence public debate or advance a broader policy critique.

That split matters because "content is king." Pet. App. 34a; *see, e.g.*, *Davignon v. Hodgson*, 524 F.3d 91, 101 (1st Cir. 2008) ("If the employee's speech is on a topic that would qualify, 'on the basis of its content alone' as a matter of inherent public concern, we needn't inquire further into the 'form and context' of the expression."). And punishment for speech on "controversial subjects" almost always "plainly violates" the First Amendment. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 892, 913-14 (2018).

Respondents fail to say anything illuminating about *that* split because they misunderstand it. They observe that every court in the split applies the "content, form, and context" rule, and "[i]ndeed, none of the circuits hold that only subject matter counts." Opp. 7-11. But of course every court uses that test—this Court's cases require it. *Snyder v. Phelps*, 562 U.S. 443, 453-54 (2011). The conflict

is not over whether to apply the test; it is over whether speech on controversial subjects inherently clears the "content" hurdle of that test. On that question, the circuits are split 7-5.

A. Take the circuits on the long side of the split. The four cases that respondents deign to discuss all hold that speech on the topic of race plainly meets the content prong of the public-concern test. The Eighth Circuit cases are unmistakable on this point. In *Bresnahan v. City of St. Peters*, the Eighth Circuit held on the content prong that "the content of the video"—a cartoon of a police officer shooting himself in the groin—"suggests that Bresnahan's speech involved a matter of public concern." 58 F.4th 381, 385 (8th Cir. 2023). And in *Melton v. City of Forrest City, Arkansas*, the Eighth Circuit explained that, with respect to the content prong, "there is no dispute that race and abortion are matters of 'political, social, or other concern to the community.'" 147 F.4th 896, 902 (8th Cir. 2025). Respondents spend pages explaining that the Eighth Circuit applied the "content, form, and context" test in these two cases. That point was never in dispute and misses the issue entirely. Opp. 8-10.

The Second Circuit cases are equally clear. *Contra* Opp. 10. In *Reuland v. Hynes*, the Second Circuit explained, with respect to the content prong, that "Reuland's statement addressed the crime rate in Brooklyn. We have previously held that crime rates are inherently a matter of public concern." 460 F.3d 409, 418 (2d Cir. 2006); *id.* ("Certainly crime is 'a matter of political, social, or other concern to the community.'"). And in *Pappas v. Giuliani*, while the majority "assume[d] without deciding that Pappas's mailings constituted speech on a matter of public concern," 290 F.3d 143, 146 (2d Cir. 2002), the dissenting judge explained that the speech was plainly on a matter of public concern because "issues of race relations are 'inherently of public

concern,'" *id.* at 154 (Sotomayor, J., dissenting) (quoting *Connick v. Myers*, 461 U.S. 138, 148 n.8 (1983)).

The other cases on the long side of the split—none of which respondents discuss—are similarly unmistakable in holding that speech that "tackles matters of race" is "inherently of public concern." *Jorjani v. New Jersey Inst. of Tech.*, 151 F.4th 135, 141 n.7 (3d Cir. 2025) (citation omitted); *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."); *see also Schneiter v. Carr*, 148 F.4th 438, 447 (7th Cir. 2025); *Berger v. Battaglia*, 779 F.2d 992, 993, 999 (4th Cir. 1985); *Tao v. Freeh*, 27 F.3d 635, 639-40 (D.C. Cir. 1994).

B. The cases on the short side of the conflict are equally unambiguous in reaching the *opposite* conclusion on the content prong: Speech's content does not qualify as on a matter of public concern unless framed to influence public debate or advance a broader policy critique. Respondents acknowledge that the Ninth Circuit adopted this approach in this case. *See* Opp. 6 (explaining that the Ninth Circuit correctly held against Ms. Adams on the content prong because her speech was merely an "expression of frustration about racist memes she received").

The other circuits on the short side of the split emphatically hold the same. Courts on the short side do not characterize speech that "tackles" or "discusses" race as "inherently" a matter of public concern, they instead declare that speech about racism and discrimination warrants protection only when made with some specific purpose such as publicly protesting policies or practices or igniting the public interest. *See, e.g.*, *Dixon v. Kirkpatrick*, 553 F.3d 1294, 1303-04 (10th Cir. 2009) ("Serious complaints about discrimination can certainly be a matter of public concern, but the record reveals

discussion of nothing more than a few stray comments. None of the issues . . . generated any press coverage, nor were they related to any legislative concerns."); *Alves v. Bd. of Regents of the Univ. Sys. of Georgia*, 804 F.3d 1149, 1166-68 (11th Cir. 2015) (complaint that supervisor "treated 'staff of color'" differently from "white-identified staff" did not meet content prong because the "*purpose*" of the speech was not to raise issues of public concern (citation omitted)); *Dambrot v. Central Michigan University*, 55 F.3d 1177, 1189 (6th Cir. 1995) (coach's repeated use of the N-word was not speech on a matter of public concern because it did not have as its "purpose influencing or informing the public debate"); *see also Terrell v. University of Texas System Police*, 792 F.2d 1360, 1362-63 (5th Cir. 1986) (similar regarding complaints of harassment).

Without citing or discussing any of the cases on the short side of the conflict, respondents mistakenly assert that "[n]one of these courts, including the panel in this particular case, set forth [a] 'motive' test." Opp. 11. The cases themselves disprove that statement. *See, e.g.*, *Alves*, 804 F.3d at 1166-68. So too does respondents' own brief, where they admit that "[t]he Ninth Circuit . . . concluded that . . . [Ms. Adams's] speech did not amount to commentary on a broader public issue." Opp. 11. In other words, the Ninth Circuit saw no motive to provide public commentary, and so held that the content of Ms. Adams's speech was not related to a matter of public concern.

* * * * *

Respondents' unsupported assertion that there is no circuit conflict rests on a mischaracterization of both the governing test and the cases that apply it. Courts on one side hold that speech involving controversial subjects—such as race, discrimination, or abortion—always satisfies at least the *content* prong of the public-concern inquiry; courts on the other hold that such speech does not qualify

unless it is framed to influence public debate or advance a broader policy critique. That disagreement is explicit, entrenched, and often outcome-determinative. This is precisely the kind of disagreement over the meaning of a federal constitutional standard that Rule 10(a) exists to address. Respondents' effort to deny it—without engaging the cases on the short side of the split and contrary to their own description of the decision below—only underscores the need for this Court's review.[1]

Respondents suggest that different outcomes in these cases merely reflect "the highly fact specific inquiry required" under *Connick v. Myers*, 461 U.S. 138 (1983). Opp. 10. But the facts are materially indistinguishable. Regardless, what drives the divergent outcomes lies in how the circuits apply *Connick*: The Eighth Circuit (and six others) look to the speech's subject matter to analyze content; the Ninth Circuit (and four others) look to its motive.

II. THE QUESTION PRESENTED IS IMPORTANT AND WARRANTS REVIEW IN THIS CASE

A. The question in this case is exceptionally important, a fact respondents do not dispute. A veritable armada of *amici* confirms its breadth and urgency. These

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[1] Respondents fail to address the petition's alternative argument: Even assuming petitioner's speech did not involve a matter of public concern, the panel erred in holding that it receives *no* First Amendment protection at all. Pet. 26-28. That silence speaks volumes. 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.'" *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) (quoting *United States v. Nat'l Treasury Emps. Union (NTEU)*, 513 U.S. 454, 475 (1995)). When speech occurs off duty and outside the workplace, the government's interest as an employer falls to its nadir. *See NTEU*, 513 U.S. at 470.

leading free-speech organizations and prominent public-interest institutions sound the alarm that the Ninth Circuit's rule strips First Amendment protection from speech about controversial subjects—like race and discrimination—that lie at the heart of public debate. Respondents provide *no* response.

The decision below stifles speech on a massive scale. As law-enforcement *amici* warn, when expression on controversial topics can be stripped of all constitutional protection, uncertainty alone "stifles officers' speech," deterring even candid conversations about racism, discrimination, and other controversial subjects. LELDF *Amicus* Br. at 1. The Ninth Circuit's rule transforms ordinary private speech into a professional hazard—encouraging silence not because speech is disruptive, but because it is risky.

The chilling effect radiates beyond law enforcement. The public-concern test informs how courts weigh First Amendment protections for *all* Americans, even outside the public employment context. *See, e.g.*, *Stand With US Ctr. for Legal Just. v. Massachusetts Inst. of Tech.*, 158 F.4th 1, 12 (1st Cir. 2025) (protestor speech entitled to "special protection" because on "matter of public concern" (citation omitted)). So the Ninth Circuit's rule reduces *everyone's* speech rights

No one shoulders that burden more than public employees. The public-concern test dictates the First Amendment rights of more than 23 million Americans employed by federal, state, and local governments—roughly *one in seven* American workers. CATO *Amicus* Br. at 21. Under the Ninth Circuit's test, speech on controversial subjects by all of those public employees now falls into a constitutional dead zone unless it is explicitly motivated by some greater purpose to affect public policy or ignite public interest.

That flips the First Amendment "on its head." *Id.* at 14. It relegates government employee speech to an "inferior constitutional category." FALA *Amicus* Br. at 2. Instead of treating speech as presumptively protected, it renders speech presumptively *unprotected* unless an employee has motives sufficiently high-minded and righteous to deserve some protection. And it is merely *some* protection. This is all just to have the *opportunity* to get to *Pickering* balancing, where many government employees lose anyway.

Still, the move from less protection to *no* protection is significant. As *amici* warn, it revives the long-discarded premise that a public employee "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." Manhattan Inst. *Amicus* Br. at 2-3.

Modern technology amplifies the stakes: Employee speech can now travel, persist, and spread far beyond what *Pickering* and *Connick* contemplated. Today's cancel culture—and this very case—proves that "government employers may find it convenient to attempt to restrict disfavored or unpopular speech in the name of preventing disruption." *MacRae v. Mattos*, 145 S. Ct. 2617, 2621 (2025) (Thomas, J., statement respecting the denial of certiorari) (cleaned up). In light of modern communications technologies, the Ninth Circuit's rule effectively makes every government employee vulnerable to termination for an email—inappropriate or not—on a controversial subject sent ten years in the past.

B. The decision below also leaves lower courts without guidance. By making First Amendment protection turn on whether speech was sufficiently outward-facing, advocacy-oriented, or framed to "ignite public interest," the Ninth Circuit invites judges to engage in *ad hoc* assessments of a speaker's motives, tone, and imagined audience—often at the pleading stage. As *amici* explain, that approach makes constitutional

protection hinge on "minute, fact-bound details," Manhattan Inst. *Amicus* Br. at 2-3, and ensures inconsistent results even on materially identical facts. This Court's intervention is needed not only to resolve the circuit split, but to announce a rule that lower courts can apply coherently and predictably.

The Ninth Circuit's rule is especially pernicious because it leaves judges with wide discretion to deny First Amendment protection based on speculative inferences about intent drawn from the pleadings—before discovery, and without the *Pickering* balancing this Court's cases require. This is a case in point—the Ninth Circuit resolved this case at the pleading stage by construing Ms. Adams's motives against her, concluding that her speech reflected only "exasperation" rather than commentary on racism. The Ninth Circuit's rule invites early dismissal of employee-speech claims nationwide based on judges' subjective characterizations of a speaker's motives.

C. Respondents do not dispute that this case offers the Court an ideal vehicle to resolve the question presented. This case ended on a motion to dismiss and the facts are undisputed. The Ninth Circuit decided the public-concern question as a pure matter of law. The test applied below was outcome determinative. No alternative grounds complicate the posture. This case gives the Court a straightforward opportunity to clarify how the public-concern test applies to government employee private speech on controversial subjects like race.

* * * * *

The Court should resolve this issue now. Given the depth of the current split, further percolation would not aid the Court's consideration of the issues. Respondents raise no argument that this issue is unripe for review. The Court should grant certiorari to restore the basic principle that citizens have a First Amendment right to

speak about controversial subjects, even when they work for the government.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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