No. 25-819

In the Supreme Court of the United States

JEANNE HEDGEPETH,

Petitioner,

v.

JAMES A. BRITTON, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Dated: March 11, 2026

QUESTION PRESENTED

The question presented is:

Whether and in what circumstances public employers may discipline employees based on their expression of controversial views while off the job.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and 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, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

Cato's interest in this case arises from its mission to prevent government overreach and preserve the protection of constitutional rights. The First Amendment prohibits the government from abridging freedom of speech, and the speech of teachers outside the workplace should enjoy the full scope of that protection.

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[1] Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

Jeanne Hedgepeth taught at Palatine High School—a public high school—for over 20 years. Pet. Br. 6. In the summer of 2020, she was fired for comments she made on her personal Facebook page. *Id.* The death of George Floyd triggered a nationwide debate, and Hedgepeth was fired because she participated in it. Some of her comments likely were "vehement, caustic, [or] unpleasantly sharp," *cf. N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), but they nonetheless occurred "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *Id.* Hedgepeth distanced her online remarks from her public employment: She did not accept friend requests from current students, she did not make her Facebook page open to the public, and she did not identify herself as a Palatine High School employee on social media. Pet. Br. 6; Pet. App. 15. Moreover, she posted her comments during summer break, while she was more than 1,000 miles from her workplace. Pet. Br. 1. Nevertheless, the school district fired her that summer, claiming that her comments damaged the district's reputation and her "effectiveness as a teacher." Pet. App. 5.

In 2021, Hedgepeth filed suit in federal court under 42 U.S.C. § 1983, alleging the violation of her First Amendment rights. *Id.* at 28. The Seventh Circuit applied its version of the employee-employer balancing test from *Pickering v. Board of Education*. *Id.* at 13. *Pickering* understands the government's interest to comprise efficiency and teachers' proper performance of their duties. 391 U.S. 563, 568 (1968). Yet the Seventh Circuit impermissibly imported the public's

reaction to her speech into the government's side of the balancing test, holding that it was this reaction that justified her firing, even though her comments were made off-duty, privately, and while school was not in session. Pet. App. 12.

The Seventh Circuit's decision exemplifies "a trend of lower court decisions that have misapplied [this Court's] First Amendment precedents in cases involving controversial political speech." *MacRae v. Mattos*, 145 S. Ct. 2617, 2620 (2025) (Thomas, J., dissenting from denial of certiorari). Lower courts, like the Seventh Circuit, now regularly invert the *Pickering* balancing test, granting minimal protection to off-duty speech unrelated to employment when the protection for such speech should be at its maximum. The public employee speech doctrine is thereby drained of much of its power, leaving teachers and other public employees unable to vindicate their rights.

The decision below also engages in some "viewpoint discrimination of its own." Pet. Br. 2. Hedgepeth was not fired when she used an obscenity in the classroom in 2019; rather, she was fired shortly after she made comments on her private Facebook page in 2020. Pet. App. 2–3. Context shows that Hedgepeth was fired for her views, not the way she expressed them. And viewpoint discrimination triggers strict scrutiny in every context. It should be prohibited in the "*Pickering-Garcetti* context as elsewhere." *MacRae*, 145 S. Ct. at 2620. To the extent that *Pickering* supports viewpoint discrimination in balancing government and employee interests, that opinion must be overruled. Otherwise, lower courts will continue to conflate audience hostility to an employee's speech with

disruption—a misapplication of law that constitutionalizes the heckler's veto.

The classroom is the cradle of democratic values. Social media subjects teachers to constant scrutiny from students, parents, and the government. And now the government expects schoolteachers to preside over and foster a distinctive "marketplace of ideas," *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967), while denying them robust free speech rights in their personal lives. The First Amendment is one of "our most precious freedoms," *id.*, and its surrender cannot be a condition of employment. This Court should intervene to ensure that schoolteachers and other public employees are afforded the rights they are entitled to under the Constitution.

ARGUMENT

I. THE FIRST AMENDMENT REQUIRES STRONG PROTECTIONS FOR PUBLIC EMPLOYEES.

The First Amendment protects the people from government restrictions on speech. U.S. CONST. amend. I. But despite this Court's mandate that "a citizen who works for the government is nonetheless a citizen," *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006), teachers in public schools often face restrictions on their First Amendment rights—even off campus. The protections for public employees' speech adopted in *Pickering* and its progeny have eroded with time, leaving lower courts confused as to whether and how this line of cases applies. Because freedom of speech is "the matrix, the indispensable condition, of nearly every other form of freedom," that erosion should end. *See Palko v. Connecticut*, 302 U.S. 319, 327 (1937). This

Court should intervene to ensure that lower courts apply *Pickering* correctly and consistently.

A. Since *Pickering*, the Free Speech Rights of Public Employees Have Diminished.

The First Amendment did not always protect public employees. At the dawn of the twentieth century, the popular view was that public employees "may have a constitutional right to talk politics, but [have] no constitutional right" to a job. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892) (Holmes, J.). This Holmesian perspective persisted until this Court recognized that public employees do not surrender their constitutional rights as a condition of employment. *See Pickering*, 391 U.S. at 563. But since *Pickering*, the protection of public employee speech has waned. In this context, "[t]he decisions interpreting and applying the First Amendment, after many complications and much controversy, have ended up pretty much back where they began"—that is, modern decisions that ostensibly rest on *Pickering* have now ended up pretty much mimicking the nineteenth-century norms of *McAuliffe*. George Rutherglen, *Public Employee Speech in Remedial Perspective*, 24 J.L. & POL. 129, 129 (2008). That is especially alarming as government grows and more people become public employees. As a higher percentage of the population become public employees, the "threat to public discourse [thereby] becomes greater and more ominous." *Id.*

Pickering concerned the employment rights of a teacher who was fired for sending a letter to a newspaper that criticized the school board. *Pickering*, 391 U.S. at 566. This Court unequivocally rejected the idea that "teachers may constitutionally be compelled to

relinquish" their First Amendment rights. *Id.* at 568. But to square those rights with the needs of the government as employer, the Court determined that the speaker's interest had to be balanced against "the interest of the state, as an employer, in promoting the efficiency of the public services." *Id.*

This Court held that this balancing test weighed in favor of strong speech rights. The teacher prevailed: his speech interest was "so great" that it outweighed the school's interest in workplace efficiency. *Id.* at 573. He prevailed even though his comments were publicly critical of and offensive to the school board, factually inaccurate, and directed at his "nominal superiors." *Id.* at 566–67, 571, 574. The balancing test used here demonstrates *Sullivan*'s "profound national commitment" to political speech, 376 U.S. at 270, which cannot be superseded without strong government justification.

Sadly, the *Pickering* test has been watered down almost since its inception; its protection of First Amendment rights is now sharply limited. Beginning with *Connick v. United States*, this Court has erected additional barriers to the vindication of public employees' speech rights. 461 U.S. 138 (1983). In *Connick*, the Court held that *Pickering* balancing only applies to "matters of public concern," thus excluding certain types of speech from First Amendment protection. *Id.* at 145. Similarly, in *Garcetti v. Ceballos*, the Court shrunk the category of protected speech again by excluding comments "made pursuant to official responsibilities" from First Amendment protection. *Garcetti*, 547 U.S. at 424.

Additionally, in *Waters v. Churchill*, the Court tipped the scales of the *Pickering* balancing test. 511

U.S. 661 (1994). There, this Court allowed the government to take facts as it "reasonably found them." *Id.* at 677. What this means in practice is that "so long as it relies on the reasonable belief of its managers," the government "determines what its interests are." Rutherglen, *supra*, at 136. In effect, this allows the government to be the judge in its own case: the doctrine allows the employer to put a thumb on the scale, resulting in "less protection for a fundamental constitutional right than the law ordinarily provides for less exalted rights." *Waters*, 511 U.S. at 695 (Stevens, J., dissenting). Furthermore, even if the terminated employee's interest is found to outweigh the government's, subsequent caselaw requires that employee to prove that the speech was a "motivating factor" in the firing. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

Taken together, these obstacles have transformed *Pickering* into "a mere shell of its original incarnation." Anthony N. Moshirnia, *The* Pickering *Paper Shield: The Erosion of Public School Teachers' First Amendment Rights Jeopardizes the Quality of Public Education*, 16 B.U. PUB. INT. L.J. 313, 330 (2007). Instead of favoring speech rights, lower courts now "defer broadly—often decisively—to the government employer's need for disciplinary discretion." Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1, 4 (1987); *see Connick*, 461 U.S. at 152 ("a wide degree of deference to the employer's judgment is appropriate"). Public employees who pursue their First Amendment rights now seek a tiny oasis within a barren desert: A "constricted range of speech" is protected, but it is surrounded by desolate terrain where employees "rarely prevail on their First Amendment claims."

Rutherglen, *supra*, at 131. "Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969). Unfortunately, because of the erosion of public employees' free speech, teachers have become subordinates first and citizens second.

B. *Pickering*'s Erosion Jeopardizes Off-Duty Speech.

"Even before the explosion of social media and resultant litigation, lower federal courts struggled to apply Supreme Court precedent to cases involving public-employee speech." Watt Lesley Black Jr. & Elizabeth A. Shaver, *The First Amendment, Social Media, and Public Schools: Emergent Themes and Unanswered Questions*, 20 NEV. L.J. 1, 15 (2019). The rules for off-duty speech—speech outside the workplace that is unrelated to employment—have become particularly cryptic. *See* Mary-Rose Papandrea, *The Free Speech Rights of Off-Duty Government Employees*, 2010 BYU L. REV. 2117, 2139 (2010). When the boundaries of fundamental rights are vaguely defined, they lose their force. This Court's intervention is needed to restore clarity and consistency in the realm of public employee speech protections.

Pickering protected "comments on matters of public interest *in connection with* the operation of the public schools" where speakers work. *Pickering*, 391 U.S. at 568 (emphasis added). The opinion did not address private work-related speech, on-duty speech about matters unrelated to employment, or off-duty speech completely divorced from the workplace. *See, e.g.*, *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415–16 (1979) (holding that speech between employee and

employer does not lose First Amendment protection because it is communicated privately); *Rankin v. McPherson*, 483 U.S. 378, 388–89 (1987) (protecting speech unrelated to employment that occurs at work).

For years after *Pickering*, cases continued to involve speech that "took place on the job, or was about the job, or both." Cynthia Estlund, *Harmonizing Work and Citizenship: A Due Process Solution to a First Amendment Problem*, 2006 SUP. CT. REV. 115, 116 (2006). In those contexts, the government's interest in regulating speech was more readily apparent. But lower courts have struggled to apply *Pickering* to factual scenarios that extend beyond its original context.

This Court's decisions after *Pickering* provide insufficient guidance. Whether the *Pickering* framework "applies—or should apply—in cases involving off-duty expression, especially when the expression is not work related" remains unclear. Papandrea, *supra*, at 2119. In *United States v. National Treasury Employees Union*, the Court struck down honoraria bans for public employees. 513 U.S. 454 (1995). That opinion resulted from an overbreadth challenge, and its scope was therefore obscure: More precisely, the opinion made it "difficult to determine with certainty what standard applies" to off-duty expression. Papandrea, *supra*, at 2132. The Court's treatment of this issue in *City of San Diego v. Roe* was similarly unhelpful. 543 U.S. 77 (2004) (ruling for the employer when a police officer posted lascivious videos to his Craigslist). There, the Court summarily ruled for the employer without applying *Pickering* balancing at all. *Id.* at 82. That result is puzzling, implying as it does that speech that is more distant from the workplace has more recently become entitled to the least amount of protection.

After *Roe,* the Ninth Circuit suggested that whether the public concern threshold applied to comments unrelated to employment was unclear. *Dible v. City of Chandler*, 515 F.3d 918, 927 (9th Cir. 2008) ("[T]he Supreme Court did not exactly say that the public concern threshold must be considered"). The Tenth Circuit, on the other hand, determined that the public concern test did not "logically extend" to speech that is "neither at work nor about work." *Flanagan v. Munger*, 890 F.2d 1557, 1562 (10th Cir. 1989).

Once the public concern threshold is avoided or satisfied, confusion continues to abound. While most courts have ostensibly applied *Pickering*, they have not reached consensus about what weight to give the employee's interest. Some lower courts have held that the motivation for speaking, or the value of speech itself, is relevant. *See Pereira v. Comm'r of Soc. Servs.*, 733 N.E.2d 112, 120 (Mass. 2000); *Cahill v. O'Donnell*, 75 F. Supp. 2d 264, 272 (S.D.N.Y. 1999). Others have considered even more intangible features, such as tone, in weighing an employee's interest. Pet. Br. 30, *see MacRae*, 145 S. Ct. at 2620.

"[T]he proper outcome" under *Pickering* is "bound to be in the eye of the beholder." *Bennet v. Metro Gov't*, 977 F.3d 530, 554 (6th Cir. 2020); *see* Pet. Br. 26. But excess subjectivity in both the rules and their application is untenable in a framework that affects millions of Americans. This Court said in *Roe* that the government justification must be "far stronger than mere speculation" when regulating off-duty speech unrelated to employment. *Roe*, 543 U.S. at 80. Lower courts have not been attentive to that command. When the unpredictability of the current framework makes it difficult to know what is prohibited, the result is pre-

emptive self-censorship. *See* Emily McNee, *Disrupting the* Pickering *Balance: First Amendment Protections for Teachers in the Digital Age*, 97 MINN. L. REV. 1818, 1834 (2013). That is an unstable foundation for a fundamental constitutional right.

This Court has repeatedly emphasized "that 'precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.'" *Keyishian*, 385 U.S. at 604 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.* That narrow specificity is needed here. This Court should intervene to make the public-employee speech doctrine—particularly, its implications for off-duty speech unrelated to employment—clear.

C. Off-duty Speech Unrelated to Employment Should be Afforded the Most Weight in a Proper *Pickering* Balancing.

The confusion surrounding *Pickering* allows public employers to punish constitutionally protected speech with minimal judicial scrutiny. It also creates an anomaly: Private, off-duty speech is entitled to the *least* amount of protection, even though the government's own interest is then at its weakest. Despite contrary instructions from this Court, lower courts routinely defer to government interests that are weak and speculative. *See Roe*, 543 U.S. at 80. If a balancing test must be used, it should reflect the nature of the test in *Pickering*—that is, it should weigh in favor of the public employee, not the government.

But the decision below is one of several that have drifted far away from *Pickering*'s principles.

Hedgepeth made several political comments on her private Facebook account. Pet. Br. 1. She posted these comments during summer break, when she was on vacation over 1,000 miles away from her school. *Id.* As the Seventh Circuit noted, they were clearly of public concern. Pet. App. 9. Not only were her comments off-duty and off-premises, they were completely unrelated to her job. Pet. Br. 1. It's hard to imagine a scenario where the government's interest as employer could be lower.

Such facts, under *Pickering,* should be given significant weight in court. Instead, the Seventh Circuit gave them minimal consideration while according great deference to the school district. Pet. App. 14–15. The Court deemed Ms. Hedgepeth's comments as "not *devoid* of constitutional value," *id.* (emphasis added), but found them insufficient to outweigh the government's interest. *Id.* In reaching that conclusion, it relied in part on a previous Seventh Circuit case, *Eberhardt v. O'Malley*, 17 F.3d 1023 (7th Cir. 1994). There, the court stated that "less serious, portentous, political" speech receives less weight. *Id.* at 1026. The Seventh Circuit read this to mean that Ms. Hedgepeth's speech required only "lighter justification" from the government for its suppression to be appropriate. Pet. App. 10–11. But *Eberhardt* also notes that "[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*, 17 F.3d at 1027. By ignoring this proviso, the Seventh Circuit's analysis inverts *Pickering* by deferring to the school district's attempt to silence Hedgepeth's off-duty speech.

"This is strange jurisprudence indeed." *Waters*, 511 U.S. at 688 (Stevens, J., dissenting). The private, off-

duty political speech of public employees that is unrelated to employment deserves the pinnacle of First Amendment protection—not its nadir. Employees like Hedgepeth must nonetheless fight an uphill battle to vindicate their rights, while the government faces few burdens in justifying its censorship. The Constitution demands the opposite: a strong presumption *against* the government when our fundamental rights are at stake. Indeed, *Pickering* originally embodied that principle. This Court should grant certiorari to ensure that off-duty speech receives the most weight in *Pickering* balancing.

II. TO THE EXTENT *PICKERING* PERMITS GOVERNMENT EMPLOYERS TO ENGAGE IN VIEWPOINT DISCRIMINATION, IT SHOULD BE OVERRULED.

Viewpoint neutrality lies at the heart of the First Amendment. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). That principle has as much force in the "*Pickering-Garcetti* context as elsewhere." *MacRae*, 145 S. Ct. at 2620. Regrettably, lower courts routinely factor viewpoint into the *Pickering* balancing test—an "illicit" factor in other First Amendment doctrines. *Id.* The *Pickering* framework cannot support viewpoint discrimination. If it does, it must be clarified or overruled. Otherwise, this Court gives its blessing to the heckler's veto as a legal standard.

A. A Proper First Amendment Framework Cannot Tolerate Viewpoint Discrimination.

There is no greater evil in First Amendment jurisprudence than viewpoint discrimination. It "appears to trigger strict scrutiny in every context in which it occurs." R. Randall Kelso, *Clarifying Viewpoint Discrimination in Free Speech Doctrine*, 62 IND. L. REV. 355, 356 (2019). The prohibition on viewpoint discrimination means that the government cannot "restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). The categorical ban on viewpoint discrimination has been affirmed time and time again by this Court. *See, e.g.*, *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828–29 (1995); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641–42 (1994); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). This is because viewpoint discrimination is "uniquely harmful to a free and democratic society." *NRA of Am. v. Vullo*, 602 U.S. 175, 187 (2024).

But there is potential tension between viewpoint neutrality and *Pickering* balancing. This Court previously stated that *Pickering*'s balancing test may involve an examination of "the content of [a teacher's] statements" to determine if they interfere with the schools. *Givhan*, 439 U.S. at 415 n.4. The Court in *Rankin* noted that there is *some* egregious speech that will injure the public interest. *Rankin*, 438 U.S. at 391 n.18. These statements consider content, but they do not give lower courts license to engage in viewpoint discrimination. Nonetheless, many have.

Lower courts may be tempted to engage in viewpoint discrimination because it is "precisely the

individual's view on a topic that raises the government's concern that speech is interfering" with its interest. Kelso, *supra*, at 424. But not every concern the government may have is legitimate. The government has a legitimate interest in workplace efficiency, but it must remain viewpoint-neutral in asserting that interest. It cannot rely on that interest to silence disfavored views selectively while tolerating speech that aligns with its own "institutional viewpoint." *MacRae*, 145 S. Ct. at 2620.

Viewpoint discrimination is as odious in matters of public employment as elsewhere. It already triggers strict scrutiny in public employment in other contexts. *See Rutan v. Republican Party*, 497 U.S. 62, 65 (1990) (applying strict scrutiny in the context of the First Amendment right of association). Furthermore, the Court noted in *Pickering* that "the threat of dismissal from public employment is . . . a potent means of inhibiting speech." *Pickering*, 391 U.S. at 574. Thus, "[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse" because they "disagree with the content of the employee's speech." *Rankin*, 483 U.S. at 384. Nonetheless, lower courts have not heeded those instructions. *See* Pet. App. 17; *MacRae*, 145 S. Ct. at 2620–21; *Porter v. Bd. of Trs. of N.C. State Univ.*, 72 F.4th 573, 595–97 (4th Cir. 2023) (Richardson, J., dissenting) (noting that "dissenting voices" should not be silenced because there is "discord or even outright hostility" among professors).

No matter what any observer thinks of Hedgepeth's speech, viewpoint discrimination cannot be reconciled with the proper application of the First Amendment. The presumption against viewpoint discrimination "is

of such importance to our constitutional order" that this Court has applied it even to categories of speech that "do not enjoy full First Amendment protection." *L.M. v. Town of Middleborough*, 145 S. Ct. 1489, 1493 (2025) (Alito, J., dissenting from denial of certiorari). Nonetheless, in the realm of *Pickering* balancing, some lower courts appear to have granted viewpoint discrimination a status it does not deserve. "This treatment of viewpoint discrimination is peculiar to *Pickering* balancing cases." Kelso, *supra*, at 425. This Court should clarify that *Pickering* is incompatible with viewpoint discrimination. Nonetheless, if this Court determines that *Pickering*'s balancing doctrine is somehow compatible with viewpoint discrimination, then *Pickering* should be overruled—so that public employees will no longer be forced to surrender their constitutional rights upon acceptance of a government job.

B. Conflating Audience Hostility with Disruption Constitutionalizes the Heckler's Veto.

When viewpoint discrimination is accepted as a legitimate part of a *Pickering* analysis, the heckler's veto is the unlovely consequence. When the public reacts negatively to speech, the government characterizes it as causing *internal* workplace disruption. But it is "a necessary cost of freedom" to "endure speech [we] do not like." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 575 (2011). "Within the universe of the First Amendment, listener disapproval seldom provides a valid basis for restricting speech." Randy J. Kozel, *Business Courts and Parity: A Theory of Public Employee Rights*, 53 WM. & MARY L. REV. 1985, 2018 (2012). Nor can such disapproval justify restricting the speech of public employees.

A particular viewpoint cannot be censored simply because the public finds it disagreeable. *See Snyder v. Phelps*, 562 U.S. 443 (2011). "Listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992); *see* R. George Wright, *The Heckler's Veto Today*, 68 CASE W. RES. L. REV. 159, 163 (2017). Speech cannot "be punished or banned, simply because it might offend a hostile mob." *Forsyth*, 505 U.S. at 135. In fact, it is a "*function* of free speech under our system of government [] to invite dispute." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (emphasis added). The First Amendment "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Id.* Both *Pickering* and *Tinker* show that public dissatisfaction cannot curtail speech with only a vague relation to public schools.

Ignoring these principles invites "government employers . . . to 'restric[t] . . . disfavored or unpopular speech in the name of preventing disruption.'" *MacRae*, 145 S. Ct. at 2621 (quoting *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 786 (9th Cir. 2022)). The Court warned against this very danger in *Rankin*. *See* 483 U.S. at 385. Regrettably, the Seventh Circuit is allowing public outcry to masquerade as workplace disruption.

Ms. Hedgepeth's comments were made off-duty, during summer break, and over 1,000 miles from the workplace. Pet. Br. 1. Nevertheless, the Seventh Circuit found this speech to be disruptive to the school. Pet. App. 16. It determined that "ongoing discussions" and the public's "strong negative reaction" qualified as "severe internal disruption." *Id.* at 12 (quoting *Melzer*

v. Bd. of Educ., 336 F.3d 185, 198 (2d Cir. 2003)). Conversely, the court found the support that some members of the community expressed for Ms. Hedgepeth to be of little or no weight. *Id.* at 16. Ultimately, the Seventh Circuit would permit the school district to "adopt an institutional viewpoint on the issues of the day and then, when faced with a dissenting employee, portray this disagreement as evidence of disruption." *MacRae*, 145 S. Ct. at 2620.

Regrettably, the Seventh Circuit's analysis skates over *Pickering*'s definition of disruption—namely, behavior that impedes "the teacher's proper performance of his daily duties in the classroom" or interferes with "the regular operation of the schools." *Pickering*, 391 U.S. at 572. The lower court's analytical mistake reduces the First Amendment rights of public employees to a vanishing point: If Ms. Hedgepeth's private Facebook comments—made during summer break and over a thousand miles from the workplace—constitute disruption, it's hard to imagine what wouldn't.

"We must have freedom of speech for all or we will in the long run have it for none." *Wieman v. Updegraff*, 344 U.S. 183, 193 (1952) (Black, J., concurring). The First Amendment prohibits the government from abridging speech. "That provision means what it says." *Tinker*, 393 U.S. at 513. It is wrong to allow the government to hide behind claims of "disruption" because of negative public reaction: That is an end run around the law that, among other things, constitutionalizes the heckler's veto. Today the target is speech that some see as distasteful, but what is popular today may be seen as distasteful tomorrow. The First Amendment prevents the government from favoring or disfavoring viewpoints. This Court should intervene and

ensure that the right to speak is "wholly free" before it is "wholly lost." *Wieman*, 344 U.S. at 193.

III. PROTECTING TEACHERS REINFORCES DEMOCRATIC VALUES AND IMPROVES EDUCATION.

Teachers shape how the next generation engages with democratic life. *See Wieman*, 344 U.S. at 196. Their duty is to "foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens." *Id.* Our schools have long depended on students being "trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Keyishian*, 385 U.S. at 603 (quoting *United States v. Assoc. Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)). But while we try to instill these values in our youth, the government simultaneously suppresses their instructors. This undermines educational and democratic values; it teaches students that controversial speech deserves censorship, not debate.

Being a teacher has never been easy. But social media has made it more difficult, as it enables "students and parents to scrutinize [teachers] at all times." Amy W. Estrada, *Saving Face from Facebook: Arriving at a Compromise Between Schools' Concerns with Teacher Social Networking and Teachers' First Amendment Rights*, 32 T. JEFFERSON L. REV. 283, 283 (2010). That spotlight has resulted in "numerous firings" for social media posts made on personal time. Mary-Rose Papandrea, *Social Media, Public School, Teachers, and the First Amendment*, 90 N.C. L. REV. 1597, 1607 (2012). Teachers across the ideological spectrum have been fired for off-duty posts. *See, e.g.*, Tyler Kingkade, *Educators fired for posting about*

Charlie Kirk's death sue to get their jobs back, NBC NEWS (Sept. 24, 2025);[2] Angie Leventis Lourgos, *West Chicago teacher put on leave after social media post supporting ICE draws anger from parents, community*, CHICAGO TRIB. (Jan. 27, 2026).[3] These posts may often "fall short of refined social or political commentary," *Snyder*, 562 U.S. at 454, but it is essential that the First Amendment protects them. When speech provokes public outcry and thereby strains our commitments to constitutional principles, adherence to those principles becomes more important.

In *New York Times Co. v. Sullivan*, this Court described our "profound national commitment" to the idea that "debate on public issues should be uninhibited, robust, and wide-open." 376 U.S. at 270. Everyone is entitled to participate in such debate—even schoolteachers. The freedom they are entitled to is of "transcendent value to us all and not merely to the teachers concerned." *Keyishian*, 385 U.S. at 603. Students receive a curious lesson in citizenship when they see that their teachers are subject to gag rules. After all, it's difficult to foster open-minded exchange when those same "conditions . . . are denied to [teachers]." *Wieman*, 344 U.S. at 183.

The danger is significant. Over 22 million people work for federal, state, and local governments. *Total Number of Government Employees in the United States from 1982 to 2023*, STATISTA (July 2024).[4] In practice, that means a large number of Americans are accorded second-class First Amendment rights. The public benefits when it hears from teachers, who are often "the

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[2] Available at https://tinyurl.com/yjeb723f.
[3] Available at https://tinyurl.com/3zz8tzdk.
[4] Available at https://tinyurl.com/2pf9my4t.

members of a community most likely to have informed opinions" on matters of public debate. *Pickering*, 391 U.S. at 572. When teachers in public schools become second-class citizens, it harms the quality of education our students receive. Teacher attrition is growing as millions leave or choose not to enter the workforce. Moshirnia, *supra*, at 313. "By stripping public employees of First Amendment liberties . . . the courts undermine the nation's desire to provide high quality education to public school students." *Id.* at 314.

Censorship in schools not only shuts the door on robust debate, it chills the speech of millions of Americans. "As a Nation, we have chosen a different course." *Snyder*, 562 U.S. at 461. This Court should grant certiorari to ensure that public educators are accorded their appropriate role in our nation's culture of robust debate and free speech. It is scandalous to deny schoolteachers their rights—especially because they are supposed to model the exercise of those rights as citizens.

CONCLUSION

For these reasons and those described by Petitioner, this Court should grant the petition.

Respectfully submitted,

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Dated: March 11, 2026