No. 25-672

# In the Supreme Court of the United States

KATE ADAMS,

*Petitioner*,

*v.*

COUNTY OF SACRAMENTO; SCOTT JONES, SHERIFF.

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

## BRIEF OF THE MANHATTAN INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF 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 the public interest."

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## INTEREST OF *AMICUS CURIAE*[1]

The Manhattan Institute (MI) is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. It has historically sponsored scholarship and filed briefs opposing regulations that either chill or compel speech.

MI files this brief because it believes that public-employee free speech should be highly protected. The current jurisprudential framework has been unable to properly account for the rapid expansion of communication technologies and emerging questions of speech rights. A government's valid restrictions of speech in its role as employer must be balanced against private speech rights, but the *Pickering* standard has been too subjective to clarify these questions thus far.

## SUMMARY OF ARGUMENT

In 2013, petitioner Kate Adams—an officer in the Sacramento County Sheriff's Department—sent a text message to a then-friend criticizing racist memes Adams had received from unknown third parties. Eight years later, those texts were used to push her to resign as chief of police under duress. Adams sued the county, in relevant part, for retaliation against her speech.

**1.** In 1968—39 years before the release of the iPhone—*Pickering v. Board of Education* introduced the basic framework by which this Court analyzes First Amendment claims that arise from adverse actions

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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.

against government-employee speech. 391 U.S. 563 (1968). The lower court here held that Adams's texts did not meet the *Pickering* threshold test and thus received no First Amendment protection—not even a balancing of the county's interest against Adams's speech rights. That result should be surprising on its face. Adams's texts should be either considered of "public concern" under a properly fashioned and uniform standard that applies to new technologies, or her speech should be considered private, off-duty speech that is protected by the First Amendment and therefore requires at least some balancing and justification of the government's purported interests.

Paraphrasing then-Massachusetts Supreme Court Justice Oliver Wendell Holmes, Jr., Adams apparently has a constitutional right to text about her distaste for racism, but she has no constitutional right to be the chief of police. *See McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892) ("The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."). While that approach to public-employee speech was discarded long ago, the Ninth Circuit has revived a version of it that is particularly harmful when applied to modern, speech-facilitating technologies.

The lower court's cramped view of "public concern" means that First Amendment protections for public-employee digital speech will hinge on many minute, fact-bound details—who was texted, what was precisely texted, how it was texted or posted. If Ms. Adams posted her thoughts in a public forum, such as a social media platform, the result could have been different. *See*, *e.g.*, *Melton v. Forrest City*, 147 F.4th 896 (8th Cir. 2025) (holding that controversial Facebook

posts about abortion—but thought by some to be about race—met the threshold for First Amendment protection). Or perhaps the majority would have protected her speech if she added a clarifying disclaimer, such as, "Racism is a problem in society, and this is unacceptable!" Or perhaps her speech would have been protected if she had added a link to an article discussing the problem of racism in society. Or what if she performed live shows in blackface to comment on racism, would her speech have been protected—or if she texted a video of that performance? *See Berger v. Battaglia*, 779 F.2d 992, 993 (4th Cir. 1985) (holding the "Baltimore Police Department could [not] condition the continued employment of one of its police officers upon his cessation of off-duty public entertainment performances in blackface that members of Baltimore's black community found offensive."). The law understandably gives great legal effect to words, but such hairsplitting should not determine First Amendment rights.

The Court should take this case to harmonize clearly disparate holdings across the circuits, as described ably in the petition. Looking at the range of circuit court opinions, it is difficult to find a unifying coherency that extends across the nation. Free speech protection should not depend on the circuit in which a government employee works.

**2.** Moreover, the Ninth Circuit majority treated the question of "public concern" as a threshold issue for whether Adams's texts were protected speech at all. This reasoning flips the analysis and regards the texts as presumptively unprotected unless they discussed a matter of "public concern" as narrowly defined by the court. This is true whether the speech concerns workplace issues or not, even though, as the dissent notes,

"our court has long defined 'public concern' broadly to include 'almost *any* matter other than speech that relates to internal power struggles within the workplace." *Adams v. Cty. of Sacramento,* 116 F.4th 1004, 1015 (9th Cir. 2024) (Callahan, J., dissenting) (quoting *Tucker v. State of Cal. Dep't of Educ.*, 97 F.3d 1204, 1210 (9th Cir. 1996)). Thus, if Adams texted "the Sacramento Kings should fire their head coach!" and was then dismissed because her boss disagreed, her speech would neither concern the workplace nor be presumptively protected because it doesn't meet the Ninth Circuit's definition of "public concern."

Something is wrong here. In the Ninth Circuit, government employees seemingly shed their First Amendment rights at the government-office gate unless they are discussing matters deemed to be of public concern in a very specific way. But, as Judge Callahan's dissent notes, Adams's private texts outside of work and workplace subject matter should be *more* protected than work-related speech. *Id.* at 1018 (Callahan, J., dissenting) ("In cases like this one, which involve no 'employment dispute[]' or 'employee grievance' to begin with, the absence of whistleblowing content or motivation says little about how interested the public might be in the subject of the speech—and therefore should not factor into the equation.").

The First Amendment is meant to restrict government from undermining freedom of speech in America. The *Pickering* test is the standard for balancing governmental interests in addressing speech potentially harmful to the workplace while protecting employees' Frist Amendment rights. But the application of this test in practice has been inconsistent, leading to unclear judgements and leaving certain basic elements of

free speech unprotected. Communications that would have once quickly disappeared and been forgotten are now saved forever. Brief text exchanges between colleagues can be saved and become part of an employee's permanent record. The expansion of methods of communication calls out for a clarification of speech rights.

The application of the *Pickering* standard beyond its bounds—to questions of speech unrelated to public employment duties, or at least mechanically to a question it was not created for—has left speech of a simply personal nature unprotected. The First Amendment emphatically protects the "individual's right to speak his own mind" *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943). Scholars have identified an original purpose of the First Amendment as seeking to protect the "well intentioned statements of one's thoughts"[2] and yet the mechanical application of *Pickering* has left Courts confused.

The Court should thus grant the petition to update how and when *Pickering* should be applied, especially at a time when potentially career-damaging communications are more common than ever.

## ARGUMENT

### I. MODERN TECHNOLOGIES CREATE NEW QUESTIONS THE *PICKERING* "PUBLIC-CONCERN" STANDARD HAS BEEN UNABLE TO ADDRESS UNIFORMLY

Smartphone technology has shaped societies in profound ways. Apart from the introduction of much faster communication worldwide, it has also made

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[2] Jud Campbell, *Natural Rights and the First Amendment*, 127 Yale L.J. 246 (2017).

relatively permanent records of everyone's dashed-off thoughts and quick reactions, ostensibly political or otherwise. People being "cancelled" for a text, a tweet, a social-media post, or a public video is a common occurrence in modern life, whether justified or not. Moreover, what is controversial and socially unacceptable changes quickly, with speech recently acceptable becoming quickly unthinkable now. *See*, *e.g.*, *Tropic Thunder* (DreamWorks, 2008) (featuring actor Robert Downey, Jr., performing in blackface).

*Amicus* does not comment on what should or shouldn't be controversial, or when people should experience adverse consequences for years-old speech. When it comes to adverse consequences from public employees' speech, however, this Court's jurisprudence under the *Pickering* standard should be modernized for current technologies and unified across the circuits. The modern speech environment allows texts from nearly a decade ago to resurface in a contentious employment dispute, texts that would be likely have been protected by the First Amendment if sent by Ms. Adams in the seven circuits that use the subject-matter rule as described in the petition. Pet. at 11–22. The reasoning in the majority opinion below highlights the convoluted and disjointed disagreement among the circuits on how to apply this Court's precedents. Millions of government workers in five circuits have uncertain protection for their private, non-work-related speech, and this Court should clarify the situation.

The Ninth Circuit's narrow definition of "public concern" has made an already difficult area of the law more unclear. Add in new communication technologies and the majority's strange view of public concern—essentially something that is more public than a text

and, in some sense, relevant to democratic governance—is inadequate for modern times. Seemingly, no text message would meet the standard, or maybe only a text message sent to a group of some unknown size. Small differences like this determine whether speech is protected in different circuits.

Especially in an age of political polarization, the Court should properly understand the First Amendment's relationship to new technologies. *See Riley v. California*, 573 U.S. 373 (2014) (describing how modern phones are "a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy."). The increase in adverse employment actions against employees who engage in controversial political expression speaks to a culture that is often not amiable to free speech.[3] As in the Court's Fourth Amendment jurisprudence, people do not expect to surrender their rights the moment they use a phone. Modern communications also call for clarifying how constitutional doctrine applies to new technologies.

Demonstrating both the permanence and easy shareability of modern technologies, images of Ms. Adams's texts were given to the local NAACP chapter, further exposing her to reputational harm.

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[3] *See*, *e.g.*, Rebecca Tan, *Maryland State Employee Fired After Supporting Kenosha Shooting Suspect Kyle Rittenhouse on Facebook*, Wash. Post (Aug. 30, 2020), https://perma.cc/CW29-38BS. *See also* Emily Ekins, *Poll: 62% of Americans Say They Have Political Views They're Afraid to Share*, Cato Inst. (July 22, 2020), https://perma.cc/Y8N2-4DSQ.

Pet. App. 90a-92a. Still, how society reacts to a story is different from how the government does.

As the Ninth Circuit summarized its understanding: "Speech that addresses the topic of racism *as relevant to the public* can involve a matter of public concern. However, speech that complains of only private, out-of-work, offensive individual contact by unknown parties does not." *Adams*, 116 F.4th at 1012 (cleaned up) (emphasis added). The significant words used here are "as relevant to the public," but the Ninth Circuit has placed itself at odds with seven other circuits in using a fine-toothed comb to determine that relevancy in private speech wholly removed from the employment context in both content and form.

The Ninth Circuit majority cites many *Pickering*-based rulings suggesting that "[a]lthough the speech's form is not always 'dispositive,' a speaker's 'narrow ... focus and limited audience weigh against [a] claim of protected speech.'" *Id.* at 1014 (quoting *Roe v. City & County of San Francisco*, 109 F.3d 578, 580 (9th Cir. 1997). *See also Desrochers v. City of San Bernardino*, 572 F.3d 703, 714 (9th Cir. 2009) (holding that an "internal employee grievance" at a police department was *not* a matter of public concern). Those cases help the majority conflate the form and content of Adams's texts. As the court wrote, "[w]hen 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*." *Adams*, 116 F.4th at 1014 (emphasis added). That sentence fully conflates form and context with content, as noted by the dissent. *Id.* at 1019 (Callahan, J., dissenting) ("But the public or private nature of the communication implicates

the *form* factor, not the content factor."). Moreover, those cases dealt with different technologies. In both *Roe* and *Desrochers* the "private" speech was official complaints filed through formal channels.

The majority focuses on communications with more public-facing, or public-relevant, content. Text messages are inherently private, raising the important issue of whether the Ninth Circuit would ever consider them to be of public concern. Further, when purportedly analyzing just the content (with context and form "weigh[ing] against" the content, as discussed *supra*), the majority's discussion of "public concern" reaches for a high standard. The opinion cites communications "fairly considered as relating to any matter of political, social, or other concern to the community" that are the "subject[s] of legitimate news interest." 116 F.4th at 1010 (quoting *Lane v. Franks*, 573 U.S. 228, 241 (2014). The majority also discusses communications of "broader social concern" that help "members of society" make "informed decisions about the operation of their government." *Id.* (quoting *McKinley v. Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983). That is some lofty language that most text messages would rarely reach.

Summing up its view of the law, the majority turns to a 35-year-old law review article by Professor Robert C. Post that focuses not on the public-employee speech doctrine and barely touches on the issue in a single footnote. That is odd given the prominence the majority gives the article, treating it as an accurate description of the meaning of "public concern" in this Court's public-employee speech cases. But Post's article is instead an attempt to discern the rationale behind this Court's opinion in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), and whether and why such offensive

speech is part of the "public discourse" protected by the First Amendment. Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 Harv. L. Rev. 601, 604 (1990) ("The purpose of this Article is to assess the justification and structure of the concept of public discourse that underlies these strong conclusions. It uses the *Falwell* decision as a specific focus for analysis."). Post's article discusses cases like *New York Times v. Sullivan* and others that deal with broad—and unquestionably public—discourse. He looks at speech "substantively relevant to the processes of democratic self-governance" and speech that is "about issues that happen actually to interest the 'public,' which is to say to 'a significant number of persons.'" *Id.* at 670, 672.

By prominently citing Post's article, the majority is asking whether and how a private text message about racism is like a potentially defamatory newspaper or magazine article. It is, to put it mildly, bizarre that the article is given such weight—any weight, really—in a case about text messages. "Are Ms. Adams's text messages like a *New York Times* or *Hustler* article?" is a strange question to cram into this case *sub rosa.*

Predictably, the majority finds that Ms. Adams's texts were not like a newspaper or magazine article. Sent as a personal commentary in a friendly exchange, they did not elevate public discourse—or even enter public discourse until later news coverage. Yet that doesn't put them beyond constitutional protection; if a private citizen were arrested for sending those texts, there would be a clear First Amendment problem, as Prof. Post would likely agree. Moreover, modern

technology makes Post's 35-year-old law review article on a different subject particularly irrelevant here.

It is also difficult to see how the majority below differentiated Adams's texts from the speech in *Hernandez v. City of Phoenix*, which was decided by the same court just two years earlier. 43 F.4th 966 (9th Cir. 2022). There, the Ninth Circuit protected social-media posts by a police officer that "sought to denigrate or mock" Muslims and Islam. *Id.* at 978. The majority distinguished *Hernandez* by citing how the posts there addressed more directly "political" concerns, such as government spending. *Adams*, 116 F.4th at 1012. In *Hernandez*, one post discussed government spending on "Muslim mortgages," while another discussed crime in Britain. *Hernandez*, 43 F.4th at 978. According to the majority below, such almost offhand mentions of things somewhat related to government policy made Hernandez's speech more a matter of "public concern." In addition to focusing on magic words, the majority emphasized the fact that the communications in *Hernandez* were public. *Adams*, 116 F.4th at 1012 ("In addition to their content, it was also significant in *Hernandez* that the statements were posted to his Facebook account[.]"). Yet, as the dissent pointed out, in a properly applied First Amendment analysis, "content is king." *Id.* at 1015 (Callahan, J., dissenting) (quoting *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 965 (9th Cir. 2011). Again, the majority is conflating content with context.

Content is indeed king, and that doesn't call for jurisprudential hairsplitting. Adams wrote, "some rude racist just sent this!", but if she had added "there should be better laws about this" would that have made it protected speech on a "public concern"? The

majority opinion implies such an absurd result: "We do not know who sent Adams the images, and she makes no allegation that the images were of note in her community, her job, or to the public. Nor does she suggest their circulation to her was the result of broader issues in the police department." *Id.* at 1013. It would be odd to put such things in a casual text, but Adams evidently could have appended "I guess such images are going around" to her texts to make them "of note in her community." That also would have been odd since her receipt of the images from a third party could be reasonably taken to mean that such images were already circulating in the community, which is certainly of note in "her job, [and] to the public." *Id*

In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Court reaffirmed the principle that public speech can have an elevated degree of First Amendment protection, but the fact that the speech there was made within the office (not publicly) was still not dispositive. The "controlling factor" that made the statements unprotected was that they were made pursuant to the employee's duties. *Id.* at 421. Here, no such factor is present, again demonstrating the problem with new communication technologies. It would be difficult to argue that Ms. Adams was engaged in official public duties when texting her co-worker privately. The Ninth Circuit presumably agrees that she was not performing public duties and yet used the very context and form of speech that made her comments *unrelated* to work as a reason to leave her speech unprotected. As Judge Callahan notes in her dissent, this is what makes this case unique and has left the *Pickering* standard unflexible and misapplied to texting.

## II. THE CURRENT JURISPRUDENCE AROUND THE *PICKERING* TEST IS UNCLEAR WHEN APPLIED TO PRIVATE, OFF-DUTY PUBLIC-EMPLOYEE SPEECH

Sacramento County couldn't pass a law prohibiting private citizens from texting and criticizing racist memes; that would be facially unconstitutional. That legal fact should be important here—as in all cases where government employees engage in private, off-duty speech that is deemed not to be of public concern. Government employees shouldn't have fewer rights than private employees in matters of off-duty, private speech that does not affect the workplace or the ability of the employee to carry out his or her duties. The Court should clarify that jurisprudence.

*Pickering* is a threshold test that "first requires determining whether the employee spoke as a citizen on a matter of public concern." *Garcetti*, 547 U.S. at 418. If the answer is "no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." *Id.* But even then, the restrictions "it imposes must be directed at speech that has some potential to affect the entity's operations." *Id.* "The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Id.* Private speech would receive no protection and no analysis of whether the speech has "some potential to affect the entity's operation." Here the Ninth Circuit concluded that Adams's speech was beyond the bounds of First Amendment protection.

Of course, when acting as an employer, the government has different interests than when acting as a

general sovereign. Those interests rightly animate the *Pickering* framework. But an overly demanding definition of "public concern," such as the one the Ninth Circuit used here, creates a large gap of unprotected speech. This gap leaves it unclear how courts should deal with countless situations like Adams's—or even more absurd hypotheticals.

For example, suppose a public employee texts a colleague, "I hate the Red Sox and I hate all Red Sox fans," in a workplace full of Red Sox fans, including all managerial positions. The text message was private and would almost assuredly not qualify as speech "on a public concern" under any of the circuit court tests. Nor was the speech about the workplace or workplace policies. Yet it is both unquestionably protected by the First Amendment if uttered by anyone privately *and* potentially disruptive to the workplace; don't underestimate the hatred between Red Sox and Yankees fans.

In a private, at-will employment context—absent other statutory, regulatory, and contractual protections—the employee could be fired for the text. The government, however, is constrained by the First Amendment, even as an employer. How should courts treat the firing of a public employee in this context?

The question contains at least two related subquestions: (1) if private, off-duty speech by a government employee is deemed not of public concern, should it still receive some First Amendment protection?; and (2) if the speech is protected, what burden does the government have in demonstrating that the speech would adversely affect the workplace? The second question is important in nearly every non-employment First Amendment case. When the government claims that restricting speech prevents harm, courts don't

usually just take it at its word. But protected speech can still be restricted if the government offers a good-enough reason. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976) (holding that certain campaign donations can be restricted to prevent corruption and the appearance thereof). That kind of balancing is absent here because Adams's texts received no First Amendment protection. The Ninth Circuit didn't even ask for the government's justifications, turning the county into an at-will employer when it comes to such speech.

The test for government-employee speech could be deferential to the government rather than applying a confusing public-concern test about when balancing applies at all. This could resemble the higher deference often given to prisons and schools when they restrict speech. A prisoner may have a presumptive First Amendment right to wear gang colors, but a prison has a good reason for restricting it. Similarly, Sacramento County *may* have a good reason for firing Ms. Adams even though her texts were presumptively protected by the First Amendment. But the court below didn't even get to that question.

Many cases have asserted the government's broad leeway as an employer. *See, e.g.*, *Waters v. Churchill*, 511 U.S. 661, 675 (1994) ("The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate."). Still, even though a private employer can fire an employee for offensively expressed sports allegiance, the government should be constrained by more than regulatory or statutory protections. Speech of the hypothetical Yankees fan—or of Ms. Adams—ought to receive

some level of protection. The *Pickering* standard itself is rooted in the idea that employees should not be forced to surrender all their First Amendment protections when they sign a government employment contract. What could be more integral to one's First Amendment protections than the right to speak about how racist speech is offensive?

The Second Circuit has articulated some of these issues:

> [M]echanically applying a categorical public concern test to off-duty speech unrelated to Government employment would lead to the somewhat anomalous result that the Government would have far *less* latitude to dismiss an employee for a *public* display . . . involving public concerns than it has for, say, speech that was uttered in the privacy of the employee's bedroom but was not on a matter of public concern.

*Locurto v. Giuliani*, 447 F.3d 159, 174–75 (2d Cir. 2006). And this Court has said that "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. *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) (quoting *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 465, 475 (1995)).

The language "far stronger than mere speculation" implies at least a balancing test. The simple two-question test—(1) Is the speech protected? If yes, (2) does the government have good, non-speculative reasons to restrict it?—is well-trod First Amendment ground. *City of San Diego v. Roe* is instructive here, both for

what this Court said and didn't say. That case concerned a police officer dismissed for selling explicit videos of himself online. The Court held that the videos were not of public concern. 543 U.S. at 84. But Mr. Roe had taken "deliberate steps to link his videos and other wares to his police work, all in a way injurious to his employer." *Id.* at 81. That made his "private" speech "detrimental to the mission and functions of the employer" such that he could be fired. *Id.* at 84.

But the holding is still unclear. Part of *Roe* looks like a balancing test for private speech of no public concern. Is "speech detrimental to the mission and functions of the employer" a category of unprotected speech, or is the speech protected by the First Amendment but the government still has ample reason to restrict it as an employer? The Court said in dicta that "[t]o require *Pickering* balancing in every case where speech by a public employee is at issue, no matter the content of the speech, could compromise the proper functioning of government offices," *id.* at 82, but it is unclear if balancing was used in *Roe*. The Seventh Circuit in *Locurto* highlighted the difficulties and uncertainty of applying this Court's precedents. There, "the closeness of a Government employee's off-duty, non-work-related speech to the heart of the First Amendment then becomes relevant as part of the *Pickering* balancing test, to be weighed against the Government's interest only *after* the Government meets its burden of identifying a reasonable potential for disruption." *Locurto*, 447 F.3d at 175 (emphasis original).

Perhaps the problem is that the word "public" in the "public-concern" test leads some circuits to apply the test very literally. The Ninth Circuit decision below treated the word very precisely, citing Professor

Post's statement that "public" means "a significant number of persons." Post, *supra*, at 672. That formulation would make private, off-duty speech very rarely protected, whether it disrupts the workplace or not. And that's what happened here. Other circuits, as described in the petition, take a different approach.

This state of affairs has left courts unsure where the line of First Amendment protection begins and ends. Some courts have assumed that private speech related to employment should not be protected—as in *Roe* or *Desrochers*—but should be protected when it is unrelated to job duties. *See, e.g.*, *Dible v. City of Chandler*, 515 F.3d 918, 927 (9th Cir. 2008) ("If we determined that Ronald Dible's activities were unrelated to his public employment, we would also have to apply a balancing test"); *Locurto*, 447 F.3d at 175 ("It is more sensible . . . to treat off-duty, non-work-related speech as presumptively entitled to First Amendment protection regardless of whether, as a threshold matter, it may be characterized as speech on a matter of public concern."); *Jean-Gilles v. Cnty. of Rockland*, 463 F. Supp. 2d 437, 450 (S.D.N.Y. 2006) ("If the plaintiff can demonstrate his speech centered on a matter of public concern—or if the plaintiff's speech concerned off-duty speech unrelated to his employment—the court must balance the parties' competing interests.").

What makes this situation even more confusing is that those courts, when they suggest that private speech might be protected, often argue that a *Pickering* balancing test would need to be invoked, when this test was specifically designed to balance free speech rights for public speech (related to public concerns) against government interests. Under a *Pickering* analysis, speech that is not of public concern receives much

less protection, even if it is somehow protected by the test. But *Roe* emphasized the disruptive nature of the private speech. In fact, the assumption of most courts is that even if private speech would be protected, government limitations on it would receive less scrutiny than speech of a public concern.

Many constitutional scholars believe that speech spoken as a citizen on matters that are not of a public concern should still be protected. *Pickering* itself was based on the premise that citizens should not have to abandon their speech rights when they come to work for the government. Professor Jud Campbell argues that the Founders' primary concern with the First Amendment was protecting "well-intentioned statements of one's thoughts," often referred to as the freedom of opinion, which the government could not punish absent direct harm to others. Campbell, *supra*, at 253. Ms. Adams's texts were a personal form of expression: the simple, sincere communication of one's views. And the Founders did not treat all public or political speech as categorically protected; indeed, harmful, misleading, or injurious speech (including some political speech) was considered regulable for the public good. But those categories of sometimes unprotected speech still receive a balancing of interests. The Court should clarify the status of speech spoken as a private citizen that does not touch on public concerns.

The mechanical application of *Pickering* has proven confusing. Of course, *Pickering* is a broad test that can be interpreted strictly or in a more subjective way. Some circuits have done that and used *Pickering* with other factors, such as the level of workplace disruption, the unfitness for the job, and the value of the speech. These many factors make *Pickering* a potentially

effective tool to handle the question of private speech, but greater clarity from the Court on how these factors are to be understood is needed.

## CONCLUSION

This case presents an important free-speech issue calling out for the Court's clarification. Government employees should not have different First Amendment rights depending on the circuit they work in.

For the foregoing reasons, and those stated in the petition, the Court should grant certiorari.

Respectfully submitted,

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