No.

In the Supreme Court of the United States

EMILY M. ODERMATT,

PETITIONER,

v.

AMY WAY, ET. AL.,

RESPONDENTS.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, consistent with the First Amendment and *Pickering*, the government's ability to remove a valuable financial benefit on the basis of the beneficiary's exercise of free speech exceeds the speaker's exchange or performance of public services on behalf of the government?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Emily Marie Odermatt respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Second Circuit (Pet. App. 1a- 8a) is unpublished. The opinion of the U.S. District Court for the Eastern District of New York is reported at 188 F. Supp. 3d 198 (E.D.N.Y., May 25, 2016).

JURISDICTION

The opinion of the U.S. Court of Appeals for the Second Circuit was decided on June 1, 2017 and a timely petition for rehearing and rehearing en banc was filed and was denied on July 14, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case involves the question: in the context of what kind of relationship does the public employment speech doctrine begin?

Petitioner graduated from college on June 30, 2013 and accepted a position with the 2013 cohort of the New York City Teaching Fellows, a postgraduate education and training program run by the New York City Department of Education. As a part of the program, petitioner attended graduate school with no tuition costs, received financial aid in the form of a stipend, completed modules and workshops required of the Teaching Fellows, and independently searched for a full time teaching job. Despite completing all of her academic activities completely and on time, on the first day of the summer program, petitioner was removed by e-mail, which was authored by defendant-appellee Amy Way. In relevant part, Way stated that petitioner had demonstrated unprofessional conduct which caused her to be removed from the Fellows program. Petitioner

contends this statement refers to earlier comments by another defendant, who instructed petitioner to stop authoring "negative comments" about the Fellows program, including comments about lack of a graduate school curriculum, recently hired faculty, a "cult" of personality amongst older students who were attending the same degree program, and about the negative impact of charter school philosophies on district public schools whom she had encountered during a Fellows event.

Petitioner contends, and defendant-appellees have stated, that Fellows were not guaranteed a full time teaching position by virtue of their admission into the Teaching Fellows program. Petitioner has also provided documents indicating that Fellows were required to conduct their search for a position outside of the hours of summer activities required of Fellows, and were thus job applicants independent of the Fellows program. Despite no guarantee of a job, required participation in full time graduate school work, and no responsibilities to perform a job on behalf of the New York City Teaching Fellows or any job function as a teacher at the time of her removal, defendant-appellees argued to the District Court that Petitioner should be treated like a public employee for the purposes of determining that the *Pickering* balancing test should apply. The District Court granted defendant's motion to dismiss on plausibility grounds, stating that "Plaintiff [] could not allege facts suggesting that her removal was prompted by protected speech," but decided that even assuming plausibility had been shown, the *Pickering* test would not favor the petitioner.

Petitioner appealed the dismissal to the Second Circuit Court of Appeals, both as to the determination against her about plausibility and as to the use of both the *Pickering* balancing test and the *Tinker* test by the District court. Petitioner feels strongly that the *Pickering* balancing test was inappropriate given her full time student status, and that the case should not be treated

like that of a public employee for the sake of the *Pickering* balancing test due to the inability of the court to articulate any responsibilities other than those she was required to complete as a student. She instead believes that the *Tinker* test articulated by the District Court was the correct test, and requested a remand for consideration under same.

The Second Circuit agreed with petitioner that her removal was plausibly connected to her speech, but disagreed with the petitioner and wrote that that she should be treated like a public employee under the *Pickering* balancing test, only. Deciding that the defendant-appellees had an interest in efficiency, the Second Circuit articulated the Teaching Fellows program was designed "to recruit and prepare high quality, dedicated individuals to become teachers who can raise student achievement in the New York City classrooms that need them most," quoting the Teaching Fellows' mission. Even after admitting that the circumstances were confusing, the panel declined to analyze the case under the student standard articulated by *Tinker*, saying that they found it "to be without merit," and used the *Pickering* test to find that although, "her speech was undoubtedly protected against some kinds of governmental interference, she was not protected from retaliation *in the employment context* on account of such speech." (emphasis added)

This petition followed.

REASONS FOR GRANTING THE WRIT

In denying more expansive protections to petitioner and using the public concern test to burden the evaluation of her speech, the Second Circuit applied a more onerous test than was necessary given the plaintiff-appellant's

lack of ongoing job responsibilities or other commercial relationship. This broader application of the public concern test conflicts with the precedents of all but one other court of appeals which has considered other non-employee First Amendment retaliation claims using the *Pickering* test. Specifically, seven courts of appeals - the First, Third, Fifth, Sixth, Eighth, Ninth and Tenth Circuits - have limited the *Pickering* balancing test and its progeny to those cases brought by public employees and similarly situated independent contractors, like in *Board of County Commissioners, Wabaunsee County v. Umbehr,* 518 U.S. 668, 685 (1996), and have resisted urges by government entities in other relationships to extend the public concern test outside of its original scope. In contrast, the Second and Seventh Circuits have reached outside of the employment relationship to demand that claimants without job responsibilities or a commercial relationship who bring lawsuits demanding protection for their speech demonstrate that their speech is related to matters of public concern before the Court affords the speaker protection from retaliation. This reach outside of the employment relationship also conflicts with the holdings of this Court regarding the governmental interests on which the public concern test was founded, see *Waters v. Churchill*, 511 US 661, 674-675 (1994) and the First Amendment protections afforded to students.

In summary, the petition should be granted to provide uniformity among the courts of appeals - the Second, Seventh, First, Third, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits - that are split over whether there should be a requirement to evaluate speech by non-employees using the public concern standard as was established in *Pickering v. Board of Education,* 391 U.S. 563.

I. The Second Circuit's Application Of *Pickering* Conflicts With The Precedents Of Other Courts Of Appeals.

The Second Circuit's application of the *Pickering* test to evaluate retaliation claims other than those made by employees and independent contractors with commercial relationships with the government conflicts with the precedent in the First, Third, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits.

1. The First Circuit's case of *Campagna v. Massachusetts Department of Environmental Protection*, 334 F.3d 150 (2003), is an example of a case where, like this instance, the plaintiff-appellant had a dual relationship with the government - including an employment relationship - and the *Pickering* test was declined. Paul Campagna was an engineer for the Massachusetts Department of Environmental Protection (DEP) and was an independent, after-hours septic system inspector who was DEP-certified. After routinely being passed over for "less qualified, but more politically connected" candidates in the DEP, Campagna left and took a job with the federal government. *id* Shortly thereafter, the DEP announced a position to which Campagna applied, but was rejected. He sued the DEP claiming that he was entitled to preferential hiring because of his veteran status. The state court agreed, demanding that the DEP hire Campagna unless a better qualified veteran applied to the same opening. The DEP appealed because they disagreed that Campagna was qualified, but they later settled and Campagna worked for the DEP in another capacity.

As a part of his after-hours business as a septic system inspector, Campagna was hired to upgrade the system of a home which had previously been evaluated by

another inspector, who had failed it. Campagna disagreed with the determinations made by the first inspector, and advised the city's board of health to reevaluate the system. The board then notified the DEP, which sent an employee, Cabral, and a third inspector to review the findings. Cabral and the third inspector agreed with the first inspector, failing the system because of high groundwater, and initiated an administrative proceeding against Campagna for violations of state regulations regarding his work inspecting the home. A judge found all but a minor violation unfounded, and that Campagna had been subjected to a different standard than other inspectors, who had made similar mistakes but had not been accused of violations.

Campagna thereafter sued the DEP, alleging retaliatory action and that the enforcement action violated his right to petition the government. The First Circuit reviewed the District Court's dismissal of Campagna's case, which claimed that Campagna's petitions failed to "implicate[] matters of public concern." *id* The First Circuit disagreed with the usage of the *Pickering* test. Citing the Sixth Circuit's decision in *Gable v. Lewis,* 201 F.3d 769 (6th Cir. 2000), the First Circuit noted that the "facts of this case are complicated by Campagna's dual roles as a DEP employee and a DEP-certified inspector" but that the "DEP took action against Campagna in his capacity as a private inspector, not as a DEP employee," and so "the reason for the test is missing in the present case — maintaining order in the governmental workplace — the [public concern doctrine] should not be applied here." *id* at 771

The facts are similar in this case as in Campagna's case, but the outcome is different: the petitioner here was a participant in the New York City Teaching Fellows program, which is the program from which she was

removed. The defendant-appellee, Amy Way, removed plaintiff from her participation in the Fellows program by stating that petitioner was "no longer eligible to remain a ... Fellow as a result of [her] failure to meet the requirements of the Fellows program." The Fellows program also explicitly stated that Fellows are not employed therein; the 2013 Pre-Service Training Handbook said, "Fellows are employed by NYCDOE and not the NYC Teaching Fellows program." As such, petitioner was not an employee of the Fellows program and the relationship within which petitioner alleges she was retaliated was not an employment relationship.

Campagna's First Circuit appeal informs this case to the extent that it ties together what the standard for First Amendment retaliation should be and what the role of the person who is claiming retaliation is. Despite having an employee's and a citizen's relationship with the government, the retaliation claim he brought was not tied to the citizen-employee spectrum of public employee free speech cases from *Pickering*, because the retaliation did not occur in the context of an employee's role serving the public. Applying this same standard to Teaching Fellows, petitioner should not have been asked to meet the citizen-employee public concern test derived from *Pickering* because she was not retaliated against within an employment relationship. There was no, in the words of the Second Circuit in this instance, "employment context" involved in the retaliation. Because petitioner was not employed by the Teaching Fellows program, the "reason for the test" was missing, and the public concern analysis would not apply in the First Circuit. Thus, the same case in the Second Circuit and the First Circuit would have resulted in different outcomes.

2. Although the Sixth Circuit's decision in *Gable v. Lewis, supra* was illustrative to the First Circuit in

deciding its standard in *Campagna*, it is not the only Sixth Circuit precedent to cabin *Pickering* to public employees. An example of another, similar decision declining to apply the public concern test is *Jenkins v. Rock Hill Local School District,* 513 F.3d 580 (2008). Jenkins was a public school mother who required assistance in ensuring that her daughter, Shanell, a diabetic, received insulin shots during school hours. After Jenkins believed the school was uncooperative in administering insulin shots to her daughter, Jenkins contacted the school superintendent, the school board, and the Ohio Coalition for Children with Disabilities. As a result of her outreach, Jenkins was told that the school was not responsible for her daughter's medical care, that she should enroll her daughter in a different school, and that her daughter could not come back to school. Jenkins then contacted the U.S. Department of Education's Office of Civil Rights, the Ohio Department of Education, a county commissioner, and members of the School Board, after which the school superintendent let Shanell back into school. However, the superintendent thereafter threatened to involve the Department of Job and Family Services, stating that "you contacted the Office of Civil Rights and got an investigation started, so I figured I'd start one of my own." The situation escalated with Family Services and with the Department of Education until Jenkins' daughter was homeschooled for medical reasons, with a tutor provided by Rock Hill. However, Shanell's tutor stopped three months short of the academic year, and the next year Shanell was transferred to another school district.

Jenkins, as a public school parent, sued the school district for retaliation in violation of the First Amendment. The District Court assessed her First Amendment retaliation claim while adjudicating Rock Hill's successful motion for summary judgement, stating

that her "speech was not constitutionally protected because it did not touch upon a matter of public concern." The Sixth Circuit reversed; the Court discussed that "[t]he public concern test originated in *Pickering* ... and *Connick v. Myers*, 461 U.S. 138 ... *Connick* was expressly limited to government employees and based solely on the need to balance the free speech rights of government employees with the government's needs as an employer" and that "[t]he Supreme Court has used the public concern test in situations analogous to public employment, where free speech rights must be balanced against the need to effectively manage a governmental entity," citing the examples like the independent contractor from *Umbehr*. The Sixth Circuit further explained, "Beyond those limited extensions, applying 'the public concern test outside the public employment setting would require us to rend it from its animating rationale and original context.' *Van Deelen,* 497 F.3d at 1156-57" Using the prior precedent in *Gable v. Lewis, supra,* the court noted that defendants' argument that "the public concern test should have applied" was wrong, and specified that the *Gable* panel had rejected such an argument because "the public concern test is not applicable to petitioning activity outside the public employee context." *id*

It is nothing but clear that, in the Sixth Circuit, repeated precedent limits the public concern test to employment-type relationships and to no other types. Like in Campagna's case, Jenkins was not a public employee; she was a parent and the public services being denied to her daughter were the responsibility of another party - the school nurse, Marsha Wagner - at whom retaliatory efforts were not aimed. Because the benefits of a publically subsidized education for her daughter, Shanell, and not the benefits of employment were withheld, the public concern test was not applicable.

Additional parallels between this case and Jenkin's case ought to be compelling. Like Jenkins' case, the benefit being withheld by school administrators is not public employment or a continued contract, but a taxpayer subsidized education. Like Jenkins' case and Campagna's case, this case involves retaliation that does not occur in between government and employee or contractor, and not in the course of employment duties. As such, the "government's needs as employer" would not transfer into cases "outside the public employment setting." *id* Because the *Jenkins* and *Gable* cases represent clear precedent in the Sixth Circuit requiring that only employees and contractors and no other governmental beneficiaries like public school students and their parents be held to the public concern requirement, there is a difference of opinion between the Second Circuit and the Sixth Circuit.

3. Another Court of Appeals that has considered whether the relationships before them were "analogous to an employment relationship" when deciding whether to use the *Pickering* test for those that do not have a "direct salaried employment relationship" with the government is the Fifth Circuit in *Blackburn v. City of Marshall, Texas*, 42 F. 3d 925 at 932 (1995) In this example, the Court asked whether the First Amendment rights of a towing and wrecking service owner and operator should be evaluated based on the *Pickering* balancing test, and the Fifth Circuit decided that it should not. The basis on which the Fifth Circuit decided that *Pickering* was not the applicable test was that the owner and operator did not have a "quasi-employment relationship like that in the medical staff privileges cases," referring to *Caine v. Hardy*, 943 F.2d 1406, 1415-16 (5th Cir. 1991) (en banc), and *Smith v. Cleburne County Hosp.*, 870 F.2d 1375 (8th Cir.). The doctors in the medical staff cases had applied

for privileges at their respective institutions, and in exchange had been required to "perform[] rotating emergency room coverage, attend[] regular medical staff meetings," *Smith* at 1377, and had patients who were "under Dr. Caine's care." In contrast, the plaintiff-appellant in *Blackburn* was merely in "a group of local wreckers ... available on call to receive requests for towing from the police dispatchers." *id* at 930

Blackburn is parallel to this case because the Fifth Circuit did not find "a direct salaried employment relationship," or one that was "analogous to an employment relationship," *id* at 932, and thus treated the plaintiff-appellant under a more liberal standard derived from the Supreme Court's decision in *Perry v. Sindermann,* 408 U.S. 593 (1972). As the Fifth Circuit described it, the *Perry* standard is that: "It is well established that 'even though a person has no `right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.' *Perry*" *id.*

Unlike the medical staff privileges cases but like *Blackburn,* this instance regards a professional prior to practice, before licensure, and who was not under any obligation to perform public services in exchange for the benefits of the Fellows program, but who is nevertheless treated like a public employee. Like in *Blackburn,* the government here is providing an opportunity that could lead to the petitioner's performance of public services, but that opportunity to be of public service was not explicitly guaranteed in exchange for the governmental benefit; only eligibility was developed. Teaching Fellows who

received stipends and tuition remission for their graduate classes in the summer semester of 2013 were not guaranteed employment as a public school teacher for the 2013-2014 academic year; only their eligibility was established, assuming that they could demonstrate required competencies like those tested for on the state-required exams and that they received the required passing summer grades in their Master's degree classes. It would be unreasonable to claim that summer Fellows were analogous to public school teachers, and much more accurate to compare them to the graduate student-teachers with whom many Fellows shared their summer classes. Because Fellows' academic responsibilities and benefits were independent from any potential, future employment as teachers, the public concern standard developed for public employees would not be applicable in the Fifth Circuit, as it was in the Second Circuit. For those reasons, there is a disagreement over whether to apply the public concern requirement to the retaliation claims of those who are eligible to work for the government, but are not engaged in an employment or contractual relationship.

4. The Tenth Circuit has also said that the public concern test is limited to public employees. In their decision in *Van Deelen v. Johnson*, 497 F.3d 1151 (2007), the Court considered the case of a taxpayer burdened by the *Pickering* test. Van Deelen was a homeowner in Douglas County, Kansas, and his home suffered from several natural disasters shortly after he purchased it. After Van Deelen sued the government about a nearby culvert that he alleged was a factor in flooding his property, the County and City paid him damages and replaced the offending culvert with a bridge; thereafter, Van Deelen dropped the lawsuit. In the following years, Van Deelen brought eight administrative appeals against the County in order to challenge the overvaluation of his

home during annual increases to his taxes. The Court found that "bad blood" set in as a result of his appeals.

During a subsequent meeting with Mr. Johnson, the County Appraiser, and Mr. Miles, an appraiser in Mr. Johnson's office, Van Deelen claimed that Miles said that "[t]oday you get payback for suing us" and demanded the presence of local law enforcement, Deputy Flory, to "intimidate him in retaliation for his lawsuits and appeals and to deter him from bringing future appeals." *id* at 1154 Both efforts were apparently successful, because Van Deelen cancelled his Kansas Board of Tax Appeals hearing in November 2005, citing the threat of violence, and began his First Amendment lawsuit in the U.S. District Court for the District of Kansas. The District Court found that Van Deelen's lawsuits and administrative remedies related to his tax assessments were not constitutionally protected because they did not implicate matters of public concern. They cited that Van Deelen's claims were "aimed only at advancing [his] financial interest and achieving only redress for [his] private grievances." *id* at 1155 The Tenth Circuit disagreed with the District Court, saying that "Because of the government's need to maintain an efficient workplace in aid of the public's business, the Supreme Court has long recognized that 'the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.' *Pickering*" at 568. It continued, "The public concern test, then, was meant to form a sphere of protected activity for public employees, not a constraining noose around the speech of private citizens." Citing a Third Circuit case, *Eichenlaub v. Township of Indiana,* 385 F. 3d 274 (3d Cir. 2004), the Tenth Circuit called it a mistake to apply *Pickering* to a broader context because it would, "quite mistakenly 'curtail a significant body of free expression

that has traditionally been fully protected under the First Amendment," *id* at 282.

The Tenth Circuit's decision in Van Deelen's appeal again calls to attention the role of the speaker who is asking for the protections of the First Amendment. The free speech doctrine, according to the Tenth Circuit, is a semi-permeable membrane only surrounding "claims brought by government employees — but its scope reaches no further." *supra* at 1156. Like in *Campagna*, speakers who are not speaking within their role as employees[1] and who are not in the service of the government are emboldened to speak with the broader protections of the First Amendment.[2] The difference between the instances when the public concern test is used and when it is not is the "government's need to maintain an efficient workplace in aid of the public's business." *Van Deelen* at 1156 This is echoed in Supreme Court precedent: highlighting the argument that the government may still need to serve as a manager with independent contractors, the majority noted that "its interests as a public service provider, ... are potentially implicated." *Board of Commissioners, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668 (1996) at 678

The Second Circuit in this instance did not analyze the extent to which the Appellee's relationship conferred any responsibility to their Fellows to provide public services or to have an efficient workplace in aid of the public's business. The Second Circuit's attention was instead cast on the mission of the Teaching Fellows program to "recruit and prepare" Fellows who might become teachers. Fellows themselves, however, were not

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1 See *Waters* v. *Churchill,* 511 U. S. 661, 674 (1994), "Government employees are often in the best position to know what ails the agencies for which they work."

2 See also *Van Deelen* at 1156, "But a private citizen exercises a constitutionally protected First Amendment right *anytime* ... the First Amendment does not pick and choose its causes. The minor and questionable, along with the mighty and consequential, are all embraced."

tasked with recruiting any member of the public to become teachers. Fellows were not tasked with interacting with the public at all, an aspect of context which bears on the First Amendment analysis, even in the case of employees.[3] As a result, the Second Circuit ignored the precedent that considers the difference between the government's interest in efficiency and the "efficiency of the public services it performs through its employees" *Pickering, supra,* at 568, when it looked to the mission of the Fellows program. This is a consideration which would have been determinative in the Tenth Circuit, and thus the courts of appeals have different qualifiers as to which cases are evaluated by the public concern requirement.

5. The Third Circuit case, *Eichenlaub v. Township of Indiana, supra,* to which the Tenth Circuit refers expands upon the limited circumstances in which the government has interests as a public employer. *Eichenlaub* is a case about a family of developers who had several disputes with the Township of Indiana regarding to which development codes and regulations their residences and nurseries were subjected. After David Eichenlaub spoke out at a citizen's forum, and was thrown out, he and his family members contended that they were thereafter subject to retaliation. In adjudicating his complaint, the District Court decided that "the speech in question related to private matters, rather than matters of public concern, and, therefore, was unprotected by the First Amendment." *id* The Third Circuit reversed as to the retaliation claim, saying that the District Court had read its precedent in a way that was overbroad. The court noted that, "[t]he 'public concern' test was formulated by

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[3] See *Rankin v. McPherson,* 483 U.S. 378, 383 (1987) "McPherson's duties were purely clerical. Her work station was ... in a room to which the public did not have ready access ... Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, **not because it hampers public functions** but simply because superiors disagree..." (emphasis added)

the Supreme Court in addressing speech restrictions placed by governmental entities on their own public employees" and said that the two instances in which it should be used were when, first, "acting as an employer, the government has some authority to impose conditions upon those who seek jobs," and, second, "[w]hen someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her." *id* Deciding that the Eichenlaub family did not match either criteria, the Third Circuit decided that the "public/private concern distinction ha[d no] role to play regarding speech outside the public employment setting" and reversed. *Id* They explained: "What is pivotal, though, is that these cases do not involve retaliation by government bodies against citizens who are not employed by the government (and who, incidentally, cannot be viewed as having limited their speech as a condition of voluntary employment)." *id*

The Second Circuit in this instance did not engage in an analysis of either instance before applying the public concern test. In the first instance, the public concern test would not have been called for since Teaching Fellows is not acting as an employer, as is stated in the Pre-Service Training manual. Additionally, the Teaching Fellows program did not accept job applications from Fellows; Fellows were instructed to apply individually and independently to public schools throughout New York City, and were told that the leadership teams (such as principals, assistant principals, and directors) would receive, consider, and accept or reject Fellows' employment applications. As a result, the first instance would not have applied to Fellows' participation in the pre-service program had the Second Circuit used it; it only might apply to retaliation that occurred in the scope

of their job applications for full-time positions as teachers in district public schools and in the context of the relationship between the Fellow and the school leadership team. Mutual acceptance of a teaching position between the Fellow and the district school leadership team would constitute the "voluntary employment" necessary to begin the employment relationship and, as a result, the public concern test.

The second instance is similarly inapplicable. Fellows were not paid a salary; benefits for participating in the summer program were financial aid in the form of full tuition remittance and nontaxable stipends for completion of academic activities which were distributed at three stages of the summer program. Additionally, and most notably, Fellows did not exchange these financial benefits for the responsibility to operate any governmental agency or part thereof, effectively or otherwise. As a result, the second instance is inapplicable. Having found neither a job applicant within the Fellows program nor a paid public servant, the Second Circuit should not have found that the public concern test was applicable to the petitioner. Using the *Pickering* test in this instance puts their decision in contrast with the Third Circuit who, having not answered yes to either instance, would not have applied the *Pickering* standard.

6. The Ninth Circuit collected and implemented the cases from other circuits regarding the limitations on the *Pickering* balancing test in *Carepartners v. Lash way,* 545 F.3d 867 (2008). Carepartners was a company which managed several boarding homes for elderly, semi-ambulatory or non-ambulatory residents in Washington. Because of acquisitions and changing regulations, several of their facilities were surveyed by the Resident Care Services department of the Washington State Department of Social and Health Services (DSHS). As a result,

Carepartners was fined and one location, Alderwood, had its license revoked. In response, Carepartners appealed the survey's conclusions and its owner lobbied members of the state legislature. The Ninth Circuit characterized the appeal as "critical of DSHS" and noted that the Carepartners owner, Kilkelly, circulated an e-mail to his representatives titled, "Example of DSHS inflexibility in applying the existing rules -- choosing control over whats [sic] best for public policy[.]" *id*

Thereafter, two more Carepartners run facilities were surveyed and conditions were imposed on their licenses regarding fire safety and the number of semi-ambulatory people whom they could have as residents. After Kilkelly and his representatives attempted to contact DSHS to install a sprinkler system and were unsuccessful, the Director of Resident Care Services at the DSHS, Pat Lashway, suspended the license of one of Carepartners' facilities and halted admissions of new residents. Carepartners challenged the suspension and brought a federal lawsuit claiming, among other things, that they were retaliated against because of their free speech and petitions for a redress of grievances.

The Ninth Circuit adjudicated the case on an interlocutory appeal after the District Court denied qualified immunity to the defendants during a motion for summary judgement. As to the First Amendment claims, the court decided that "Kilkelly's lobbying efforts, advocacy regarding interpretation of the building codes, and his statements to the [p]ress are protected by his right to free speech." The court then considered the assertion made by the State employees that the "two criteria applicable to the evaluation of a public employee's speech-based retaliation claims should apply generally to First Amendment retaliation claims by regulated entities: first, that the speech at issue address a matter of public

concern; and, second, that even if that speech addresses a matter of public concern it survive what is known as the Pickering balancing test." *id* Defendants based their argument on *Tennessee Secondary School Athletic Association v. Brentwood Academy,* 551 U.S. 291, a Supreme Court case which had applied Pickering balancing to a private school's efforts to recruit student athletes in violation of rules it to which agreed when joining the association.

The Ninth Circuit issued a rejection of the defendant's arguments, citing as evidence that the Pickering balancing test was written for employees and contractors, including sweeping citations to the Supreme Court's cases in *Garcetti*, *Connick*, *Umbehr,* and *Pickering* itself. They explained:

> We note that the public concern requirement and the *Pickering* balancing test have their genesis in the Supreme Court's attempts to *expand,* not reduce, the public employees' speech rights.... These criteria represent the culmination of years of decisions that whittled away the "unchallenged dogma . . . that a public employee had no right to object to conditions placed upon the terms of employment-- including those which restricted the exercise of constitutional rights.... The Court's intent was to safeguard public employees' rights to speak on matters of public concern.

As support for the idea that circuit history was consistent as to the outer bounds of applying *Pickering* other circumstances, the Ninth Circuit cited the Third Circuit's decision in *Eichenlaub, supra,* the Sixth Circuit's decision in *Jenkins, supra,* the Tenth Circuit's decision in *Van Deelen, supra,* the First Circuit's decision in *Campagna, supra,* and - most notably - two Second Circuit cases which had not used the public concern requirement for claims made by plaintiffs who were not an employee or

contractor working for the government: the first was in the context of retaliation claims made by a nursing home which alleged that state and federal regulators had retaliated against it in response to speech about regulations (*Carepartners, supra,* at 881, footnote 11, citing *Beechwood Restorative Care Ctr. v. Leeds,* 436 F.3d 147, 151-52 (2d Cir. 2006)) and the second was an "alleged retaliation claim against a prisoner for having sought public assistance benefits." (*Carepartners, supra,* at 882, citing *Friedl v. City of New York,* 210 F.3d 79, 87 (2d Cir. 2000))

The Ninth Circuit's analysis is also helpful because it explains its rejection of the extension of the *Pickering* test to non-employees. Responding to defendant's citation to the application of *Pickering* to the speech by Brentwood Academy, the Ninth Circuit decided that neither a specific, contractual condition not to speak out nor a relationship that is "analogous to the public employee context" was shown by State defendants. *Carepartners, id* In absence of this kind of voluntary surrender of specific speech rights, the court decided that *T.S.S.A.A. v. Brentwood Academy, supra,* should not apply.

The Ninth Circuit's case correctly acknowledges how other courts of appeals would have reasoned in order to resolve the First Amendment issue in this petitioner's favor. Under the precedent of all of the aforementioned circuits, an analysis would have been undertaken to determine if the petitioner's relationship resembled that of a public employee and, finding that it did not, asked if it contained any contractual conditions limiting free speech. Since Fellows were under no contractual conditions limiting certain subject areas of speech like Brentwood was under anti-recruiting rules, and since the Fellows program did not require that Fellows "promot[e] the efficiency of the public services," *Carepartners, supra,*

at 880, citing *Umbehr, supra*, the *Pickering* balancing test would not have been used and the retaliation claim would not have considered whether a matter of public concern was discussed.

7. The Eighth Circuit was the most recent to hold that the public concern requirement is limited to public employees in *L.L. Nelson Enters. v. County of St. Louis*, 673 F.3d 799 (2012). Nelson was a principal for a moving business, L.L. Nelson Enterprises, which moved out the personal property of tenants whose landlords had evicted them. L.L. Nelson Enterprises would receive new business when landlords with evicted tenants called the sheriff's office for a referral to a moving company, and the landlords would in turn hire a moving company off the list read to them by a deputy sheriff. In exchange for their placement in the referral list, L.L. Nelson Enterprises initially participated in a kickback scheme where deputy sheriffs funneled eviction business to private moving companies in exchange for cash payments. However, between 2003 and 2004, L.L. Nelson Enterprises expressed reluctance about and began to withdraw its participation in the scheme, after which Nelson reported the scheme to authorities and testified in federal court against the deputy sheriffs in a prosecution brought by the United States Attorney's Office for the Eastern District of Missouri. As a result of ceasing participation in the kickback scheme and participating in the prosecution, Nelson claimed that other deputy sheriffs decreased her placement in the referral list and warned evictees to move out their property one day before the eviction, in an effort to "put Landlords Moving out of business." *id* As a result, Nelson lost business and its business was rerouted to other competitors on the list.

When Nelson sued the officers who remained employed by the sheriff's office for retaliation, the

defendants replied by categorizing that her retaliation claim only involved a matter of private concern and not public concern. The Eighth Circuit held that the distinction was irrelevant because, "Landlords Moving was not a public employee or contractor and did not have an analogous relationship that would call for limiting protection under the First Amendment to speech on matters of public concern," *id*, citing as support for its choice of standard and its conclusion the Fifth Circuit's case of *Blackburn v. City of Marshall, supra.* Explaining its decision further, the Eighth Circuit described that, "the County did not employ personnel to remove property from buildings subject to eviction orders, but rather permitted property owners 'to hire their own private moving contractors' to assist in executing eviction orders." Because the employment relationship existed between landlords and the moving company, the relationship between Nelson and the sheriff's office was not analogous to a direct employment relationship between government employers or contractors.

The indirect relationship characterized in Nelson's case is similar to the case in this instance. As described above, district school leadership teams and not Teaching Fellows administrators engaged Fellows in the hiring process. Teaching Fellows' rosters were not employee rosters; they were merely eligibility rosters from which some Fellows could be hired but based on which the benefit of employment was not guaranteed. Although Teaching Fellows administrators had similar incentives to continue the program, as did the deputy sheriffs who were receiving kickbacks, in order to ensure that members of their roster were hired by district school leaders - especially to legitimize the funds spent to provide tuition subsidies and stipends and to ensure that Fellows became and remained "teachers who can raise student achievement" -, Fellows administrators were not engaged

in hiring their own Fellows and Fellows were thus not employed as personnel within the Teaching Fellows program. As a result, the "employment context" described by the Second Circuit is misplaced as to which government agents are acting as employers and which standard should be applied to Teaching Fellows administrators and participants. Proper selection of between whom the employment relationship exists which triggers the *Pickering* test is thus inconsistent between the Second Circuit and the Eighth Circuit.

II. The Second Circuit's Holding Conflicts With This Court's Precedents

Certiorari also is warranted because the Second Circuit's decision is contrary to Supreme Court precedent regarding the history of and rationale for the public employee speech doctrine and the protections on student speech.

1. Although the Court of Appeals relied on this Court's decision in *Garcetti*, its decision did not take into account that treating someone like a public employee for the sake of *Pickering* balancing is dependent upon both sides exchanging more limits on the employee's freedom of speech for the employment relationship from which the employee would benefit. The opinion in *Garcetti* ascribed that: "When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." *Garcetti v. Ceballos*, 547 U.S. 410 (2006) It further noted, "[t]he Court's decisions, then, have sought ... to respect the needs of government employers attempting to perform their important public functions." *id*

The importance of the government's ability to manage the public services that it performs through its employees with limitations on employee speech was established decades before *Garcetti*: in its 1994 decision in *Waters v. Churchill,* the Supreme Court took great pains to compare the power of government generally and as employer, pointing to the government's need to select and retain employees who would pursue their agency's goals in exchange for their salaries. Justice O'Connor wrote that,

> The restrictions discussed above are allowed not just because the speech interferes with the government's operation. Speech by private people can do the same, but this does not allow the government to suppress it.
>
> Rather, the extra power the government has in this area comes from the nature of the government's mission as employer. ... **When someone who is paid a salary so that she will contribute to an agency's effective operation** begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her...
>
> The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated ... to a significant one when it acts as employer. 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. (emphasis added)

Waters stands for the idea that the relationship between the government as employer and its employee is different from the relationship between government and private citizen because that the government is entrusting employees and not private citizens with the responsibility to achieve its goals in exchange for the employee's salary. Employees are governmental mouthpieces and hands, and can be used to achieve the goals of the agencies for which they work without employers needing to expend the time for which they have paid facilitating a robust debate.

This idea is also consistent with Supreme Court precedent regarding the use of federal funds that are targeted towards the proliferation of one message over the other, wherein the Court wrote that "the government is not denying a benefit to anyone, but is ... insisting that public funds be spent for the purposes for which they were authorized." *Rust v. Sullivan*, 500 U.S. 173 (1991) Having paid for speech and deeds that promote the government's operation, the government is entitled to ensure that its agents are consistent with their mission within the limits of their role as employer.

That the Second Circuit in this instance determined that the public concern test is applicable is erroneous because it mistakes the agents in whom the trust of the government's pursuit of its goals is placed on the wrong party, petitioner. Defendant-appellees, who were administrators of the Teaching Fellows program and government employees, were responsible for ensuring that the agency for which they worked, "recruit[ed] and prepar[ed] high quality, dedicated individuals to become teachers." The Petitioner showed, and the District Court found, that what was required of Fellows was that they be a "participant in pre-service training," and be "a student," neither of which were services to the public. Petitioner had not been tasked with being a mouthpiece for the government, as no condition to proliferate a certain message was placed on the remission of tuition for her summer classes or the receipt of her stipends. Not even the promise that petitioner might become a teacher "who can raise student achievement in the New York City classrooms that need them most" was exchanged for the tuition remission and financial benefits of the Fellows program, as both her stipend and her tuition costs were distributed to petitioner without the condition that she work as a teacher and occurred before she was even licensed as a teacher. Thus, the transaction outlined in

Waters which triggers the public concern test is not found in this case: the petitioner is not correctly placed along the "spectrum [of unconstitutional conditions precedents] from government employees, whose close relationship with the government requires a balancing of important free speech and government interests, to ... users of public facilities... and recipients of small government subsidies," *Umbehr, supra,* at 680, and she should not be evaluated by the *Pickering/Garcetti* balancing test. As such, the usage by the Second Circuit of the public concern requirement has completely derailed from Supreme Court precedent.

2. Another aspect of the Second Circuit's analysis that conflicts with Supreme Court precedent is the timeliness of the application of *Pickering* balancing. The application of the public concern test is limited to those retaliation claims where the plaintiff has a "a pre-existing commercial relationship," *Umbehr* at 685, with the government. The status of the relationship between the government and the litigant claiming retaliation has factored into the context of the speech. See, *Connick v. Myers* 461 U.S. 138, 153 (1983), "the context in which the dispute arose is also significant.... Myers acknowledges that it is no coincidence that the questionnaire followed upon the heels of the transfer notice." See also, *Givhan v. Western Line Cons. Sch. Dist.*, 439 U.S. 410 (1979), "[w]hen a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message, but also by the manner, time, and place in which it is delivered."

Considering the status of the relationship of the speaker to the government before deciding the First Amendment standard would also be in perfect parody with this Court's precedent in school speech cases, such as

the *Tinker* case proposed by the District Court. *Tinker v. Des Moines Independent Community School Dist.*, 393 U. S. 503, and its progeny like *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260 (1988) and *Bethel School District No. 403 v. Fraser* 478 U.S. 675 (1986) have required the court to consider whether there "is censorship of expression that arises in the context of 'expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school," *Kuhlmeier* at 281. When the student's speech owes its existence to the school curriculum, as in *Kuhlmeier*, or to a school sponsored event, as in *Fraser,* the protection against censorship or retaliatory discipline is at its lowest because the government has an interest in ensuring that its resources and time are dedicated to the mission of public schools to pursue "legitimate pedagogical concerns" without "risk of substantial disruption." *Morse v. Frederick*, 551 U.S. 393 (2007) Aside from those times when speech conflicts with those concerns, students "may express [their] opinions, even on controversial subjects like the conflict in Vietnam." *id*

In both the student and the employee cases, the strength of a First Amendment case peaks at times when the person is expressing his or her own beliefs, and wanes at the time when his or her speech owes its existence to the government. It was for this reason that speech that owes its existence to job duties in *Garcetti, supra*, was entitled to no protection by the First Amendment because, "[i]t simply reflects the exercise of employer control over what the employer itself has commissioned or created." Similarly, student cases where the publication is and is not produced with the control of school administration receives differing levels of protection. Compare *Papish v. Board of Curators of Univ. of Mo.,* 410 US 667, "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off

in the name alone of 'conventions of decency" with *Hazelwood Sch. Dist. v. Kuhlmeier, supra*, "a school may, in its capacity as publisher of a school newspaper ... 'disassociate itself," not only from speech that would 'substantially interfere with [its] work . . . . but also from speech that is... vulgar or profane, or unsuitable for immature audiences. A school must be able to set high standards for the student speech that is disseminated under its auspices." *id*

In summary, the precedent of the Supreme Court considers whether speakers who bring claims for retaliation owe their opportunity to speak to a benefit bestowed by government, like in the case of a school publishing a student newspaper or speaking through an employee, or whether they do not, like a student wearing an armband or an employee publishing a letter to the editor, *Pickering, supra*, when determining whether claims are evaluated based on the public concern requirement. Employees, by virtue of their employment relationship, are assumed to be engaged in performing the public services with which their government employer has tasked them and, as such, have exchanged their broader First Amendment protections for the financial and interpersonal benefits associated with government employment. They necessarily have the "imprimatur" of the government by virtue of being hired into an official capacity in which they represent the government to the public as they perform their services for the public. When beneficiaries may not necessarily speak with the "the imprimatur of the school," *Kuhlmeier*, *supra*, then their speech is their own and cannot be the basis of retaliation.

Ignoring any nexus to the public functions performed by plaintiffs when analyzing the ability of non-employees to exercise their free speech rights strikes at the heart of the First Amendment, including, as here, "the

right to criticize public officials [which] is clearly protected by the First Amendment." *Jenkins* at 588 Because public officials can interact with the general citizenry about their personal affairs in the course of their public responsibilities, careful consideration should be given to situations where the relationship between speaker and government in question is only an imitation of, and not identical to, the public employee standard. The Second Circuit decided that Petitioner be treated "as an employee" on the basis that the mission of the Fellows program was "to recruit and prepare high quality, dedicated individuals to become teachers who can raise student achievement." The Court does not, however, elaborate on the way that Petitioner was tasked with "the efficient provision of public services," because the facts would neither support that the Petitioner was tasked with any services to the public, nor was Petitioner under any obligation to provide any service at all during pre-service training. The titular implications alone of the summer program being "pre-service" should have rendered the requirements of *Pickering* balancing unnecessary: because petitioner's speech occurred prior to the first day of the training, she in no way qualified to serve as a government employee. Petitioner was not trained to do a teacher's job of translating curricular goals and expressing them as classroom lessons; she was not empowered to speak on behalf of anyone or anything but herself. In summary, petitioner was undeserving of the requirement to demonstrate that her speech relate to a matter of public concern, which has been a "constraining noose," *Van Deelen, supra*, around her claim that she was engaged in constitutionally protected activity based on which she was illegitimately removed from the Fellows program.

In order to align with the correct circumstances within which her speech occurred and on whose behalf it occurred, adjudication under the Supreme Court's student

free speech cases, like the *Tinker* case proposed by the District Court, is necessary. This alignment would resolve the mistaken use of the public employee context to a non-employee, align the petitioner's speech to her role as a taxpayer subsidized graduate school student and not a government mouthpiece, and bring together the varied treatments that claimants have received throughout different courts of appeals under one uniform standard for when to use the public concern test: the hiring standard. Adjudication under any other standard would harm the lines of reasoning behind each of the kinds of the Supreme Court's cases regarding unconstitutional conditions and leave in place the noose around the neck of First Amendment rights.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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