No. 24-355

In the Supreme Court of the United States

KARI MACRAE, *Petitioner*,

v.

MATTHEW MATTOS, ET AL.

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

BRIEF FOR *AMICUS CURIAE* PROTECT THE FIRST FOUNDATION SUPPORTING PETITIONER AND REVERSAL

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INTRODUCTION, SUMMARY AND INTEREST OF *AMICUS CURIAE*[1]

The proper First Amendment standard for reviewing a government's punishing an employee for pre-employment speech is an important and recurring issue. For the benefit of all current and prospective government employees, who make up a large share of the Nation's workforce, this Court should decide it now.

Diligent protection of pre-employment speech ought to be a straightforward proposition, particularly given the Court's already substantial protections for a government employee's speech *while* employed. Indeed, for decades, the Court has considered it "settled that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick* v. *Myers*, 461 U.S. 138, 142 (1983). Put differently, "citizens are not deprived of fundamental rights by virtue of working for the government." *Id.* at 147. In practice, and as the Court has explained, this has meant that, when government "employees are speaking as citizens about matters of public concern," they "must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Garcetti* v. *Ceballos*, 547 U.S. 410, 419 (2006). For speech made

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[1] This brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amicus curiae* or its counsel has made a monetary contribution toward the brief's preparation or submission. Counsel for all parties received timely notice of *amicus'* intent to file this brief.

by a current government employee, this Court requires courts to weigh the "balance between the interests of the [government employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering* v. *Board of Educ. of Twp. High Sch. Dist. 205,* 391 U.S. 563, 568 (1968). But such an indeterminate balancing test has no place in analyzing pre-employment speech.

Framed in *Garcetti*'s terms, this case asks whether government employers, to "operate efficiently and effectively," must have carte blanche to punish their employees not for what they are *now* saying, but for anything they have ever said—even before they were hired. If the First Amendment means anything in this context, the answer to that question must be no. An alternative holding would silence prospective government employees lest their speech, whenever it was made, could later be cited as a reason to destroy their careers. And, with the government playing a massive and growing role in the employment market, such a threat would be daunting.

Because of the injuries such a rule would visit upon present and prospective government employees, this case is important to *Amicus* Protect the First Foundation, a nonpartisan group dedicated to preserving First Amendment protections for all. *Amicus* is particularly concerned that, if allowed to fester, the First Circuit's decision will chill the speech of millions of Americans who work—or may later work—for governments around the country. Indeed, *Amicus* agrees with Petitioner (at 10-18) that the

decision below, which applied *Pickering*'s balancing test to Petitioner's pre-employment speech rather than the First Amendment standards that would otherwise apply to it, expanded *Pickering* far beyond what this Court has ever suggested is appropriate.

Amicus writes separately to note two points. First, *Amicus* shows that, if adopted broadly, the constitutional principle adopted by the First Circuit would mean that the pre-employment speech of nearly 15% of the Nation's workforce would become subject to *Pickering* balancing, not the strict scrutiny to which the speech was subject at the time it was first uttered. In practice, that would mean that fully protected speech could lose its protection with time—an untenable proposition.

Second, *Amicus* explains that, in a world where many people spend their lives online, a rule that anything they say there can later be the impetus for their termination from government employment would impose an unconscionable burden on the right to speak on issues of public concern: It would chill pre-employment speech at the front end and give a modified heckler's veto to bad actors at the back end.

To prevent these injuries to the free-speech rights of an ever-growing group of government employees, the Court should grant the petition and reverse the First Circuit's erroneous holding that *Pickering*'s balancing test, rather than strict scrutiny, applies to the pre-employment speech of the Nation's millions of government employees.

STATEMENT

The facts are straightforward: Hanover High School (Hanover) hired MacRae as a public schoolteacher in August 2021. App. 6a. Months before Hanover hired MacRae, MacRae, both in her personal capacity and in her capacity as a candidate for her local school board, shared and liked on her TikTok account several memes and videos addressing issues like gender dysphoria, immigration, and racism. App. 3a-5a.

Hanover did not know about MacRae's TikTok posts when it hired her. App. 6a-7a. Yet, soon after MacRae began teaching, her posts became a subject of controversy, including in several newspaper articles. App. 8a. Once Hanover learned of the TikTok posts and the controversy through the published articles, it placed MacRae on administrative leave pending an investigation. App. 9a. After a fourteen-day investigation, Hanover fired MacRae after concluding that "continuing [her] employment in light of [her] media posts would have a significant negative impact on student learning." App. 11a (alterations in original).

MacRae sued the superintendent, her principal, and the school district for her termination, ultimately losing in the district court. App. 11a-13a. On appeal, the First Circuit applied the framework for claims by public employees because, even though her speech occurred when she was a private citizen and candidate for public office, she was a public employee when terminated. App. 20a-23a. And the court concluded that the school's interest outweighed MacRae's interest in her First Amendment rights. App. 34a.

ADDITIONAL REASONS FOR GRANTING THE PETITION

I. The Question Presented Is Important Because the Government Workforce Vastly Expanded in the 20th Century.

This Court's swift resolution of the question presented is incredibly important given the ever-growing number of current and potential government employees and the fact that the government is increasingly supplanting the private sector in the national economy.

1. The 20th Century was a period of significant government growth where the "long-term trend" was "for government employment to grow faster than that of the private sector."[2] From 1920 to 1975, nonfarm government jobs "doubled" from 9.5% to 19.1%.[3] The percentage of government workers remained high even when considered together with the Nation's overwhelmingly private farmers. The 1960 census showed that, across all industries, of the 64.6 million people employed in the economy, 7.9 million, or 12.2%, worked for a government employer at any level.[4]

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[2] John T. Tucker, *Government Employment: An Era of Slow Growth*, Monthly Lab. Rev. 19 (Oct. 1981), https://tinyurl.com/bden3usc. The Monthly Labor Review is a publication of the Bureau of Labor Statistics. *Id.* at 25.

[3] *Id.* at 19.

[4] U.S. Dep't of Com., Employment Status, Weeks Worked, Occupation, and Industry for the Population of the United States: 1960, at 6 tbl. 86 (May 16, 1962), https://tinyurl.com/k4atjbne.

While the relative rate of government job growth slowed a bit in the late 1970s and again in the 1990s,[5] government employment has since picked up. Deloitte reports that since 2000, "the government workforce has been increasing steadily—13.3% over the years."[6] As of April 2024, "23.3 million people" held government jobs, reflecting "14.7% of the total payrolls in the economy."[7]

The number of government employees also continues to grow. In 2023 alone, "[s]tate government employment rose by 273,000," the "largest calendar-year percentage gain in employment * * * since 1968"—the year *Pickering* was decided.[8] And the "[f]ederal government added 85,000 jobs over the year, after adding 8,000 jobs in 2022."[9] And, for each new job, there are multiple applicants whose speech could be punished as part of the selection process—further amplifying the harms facing prospective government employees.[10]

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[5] See Tucker, *supra* note 2, at 19; Julie Hatch & Angela Clinton, *Job Growth in the 1990s: A Retrospect*, Monthly Lab. Rev. 3, 14 (Dec. 2000), https://tinyurl.com/3rryzmba.

[6] Patricia Buckley & Akrur Barua, *Jobs in Government Have Rebounded Since 2020—the Harder Part Will Be to Fill These Roles*, Deloitte Glob. Econ. Rsch. Ctr. (June 28, 2024), https://tinyurl.com/d43sb5na.

[7] *Ibid.*

[8] U.S. Bureau of Lab. Stat., Employment in Government Rose by 709,000 in 2023 (July 11, 2024), https://tinyurl.com/yzwewf73.

[9] *Ibid.*

[10] Neogov, *The Fragile Future of Recruitment: 2024 Public Sector Hiring Report* 2 (2024), https://tinyurl.com/yc57n3md ("On average, agencies receive 36 applicants-per-job.").

Resolution of the question presented will thus decide the First Amendment rights of roughly 15% of all current workers in the national economy and many more prospective government employees, not to mention countless applicants for government jobs who are never hired.

2. The impact of the question presented will also continue to expand with the ever-growing number of largely private industries in which the government is increasing its participation.

Fulton v. *City of Philadelphia*, 593 U.S. 522 (2021), is illustrative. There the Court addressed the free-exercise rights of a Catholic foster agency after Philadelphia tried to force the agency to certify same-sex couples for foster care contrary to its religious beliefs. As Justice Alito recognized, the conflict between the Catholic agency and the government only arose after "[s]tates and cities," who "were latecomers to this field," entered a space and started to perform a function that "private foster care agencies ha[d] been performing for decades" and "ha[d] not historically been * * * exclusively governmental." *Id.* at 617 (Alito, J., concurring in the judgment).

Besides foster services, healthcare is another area where the government is playing an increasingly outsized role. Just 50 years ago, public health insurance covered around 7.2% of all Americans while private health insurance covered nearly 80% of Americans.[11] As of 2022, public coverage covers 36.1%

[11] Robin A. Cohen et al., *Nat'l Health Stat. Reps., Health Insurance Coverage Trends, 1959–2007: Estimates from the National Health Interview Survey* 9 (2009), https://tinyurl.com/4n49veud.

of Americans.[12] As to education, private school students made up around 13.9% of the students between 5 and 18 in 1960,[13] compared to around 10% of the students in 2022[14]—a relative decrease in private school enrollment of around 28%.

The list goes on. As the government supplants more and more of what used to be private services, the number and percentage of government employees will increase in kind. And with that increase will come an expansion of the types of industries whose employees' pre-employment speech will now be subject to *Pickering* balancing if the First Circuit is not reversed or if its rule is adopted by other circuits.

3. The fact that more employees from more industries now face decreased speech protections is alarming. This Court has long considered a rule's potential scope when deciding whether to review that rule, and it should do the same now.

For example, in another case addressing speech protections for government employees, the Court expressed concern that the "widespread impact" of a rule with far less of a national sweep will "give[] rise to far more serious concerns than could any single

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[12] Katherine Keisler-Starkey et al., U.S. Census Bureau, *Health Insurance Coverage in the United States: 2022*, at 2 (Sept. 2023), https://tinyurl.com/ka7nmkhz.

[13] U.S. Dep't of Com., School Enrollment of the Population of the United States: 1960, at 5-6 tbl. 169 (Dec. 13, 1962), https://tinyurl.com/56b6h4ud (noting 5.6 million private school students and 34.8 million public school students).

[14] Katherine Schaeffer, *U.S. Public, Private and Charter Schools in 5 Charts*, Pew Rsch. Ctr. (June 6, 2024), https://tinyurl.com/3muk5pjt.

supervisory decision." *United States* v. *National Treasury Emps. Union*, 513 U.S. 454, 468 (1995). That case dealt with a statute that "broadly prohibit[ed] federal employees from accepting any compensation for making speeches or writing articles." *Id.* at 457. And it applied even "when neither the subject of the speech or article nor the person or group paying for it has any connection with the employee's official duties." *Ibid.* In addressing the statute, the Court concluded that the statute under review could apply to—at most—"1,680,516 workers between grades GS–1 and GS–15." *Id.* at 468 n.13.

Since this case involves a constitutional rule, not a statute, the potential for harm from the First Circuit's rule is significantly broader than the harm addressed in *Treasury Employees*. It will apply to all 23.3 million federal, state, and local government employees. And moving forward, speech that was fully protected when uttered will lose its protection if the speaker ever decides to work for the government—even if the speaker had no plans for government employment at the time of the offensive speech.

In fact, given its immediate adverse effect on the speaker's *prospects* for government employment, the rule effectively punishes (or at least threatens to punish) the speech even at the time it is uttered. The speech of private speakers will now—for practical purposes—be governed by *Pickering*—not the strict scrutiny that this Court applies to content and viewpoint discrimination in other contexts. See *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 642 (1994); *McCullen* v. *Coakley*, 573 U.S. 464, 478 (2014). That rule cannot be allowed to percolate further without chilling a tremendous amount of speech by private

citizens who might one day consider government employment.

II. If *Pickering* Were to Apply to Pre-Employment Speech, Much of Which Is Online, It Would Chill the Speech of All Potential Government Employees and Give a Heckler's Veto to Bad Actors.

Another reason to decide the question presented now is that a government employee's pre-employment speech—like all other speech—is easier than ever for bad-faith actors to find and use to punish unpopular government employees for their personal views. The government should not have an additional arrow in its censorship quiver allowing it to punish speech *after* it is uttered that it could not constitutionally have stopped or penalized in the first instance.

1. It is now easier than ever to track down an applicant's or employee's pre-employment speech, starting as early as one's teenage years. As Justice Gorsuch has recognized, "we [now] use the Internet to do most everything." *Carpenter* v. *United States*, 585 U.S. 296, 387 (2018) (Gorsuch, J., dissenting). As of 2021, "85% of Americans" told Pew Research that "they go online on a daily basis," including "31% who report [being] online almost constantly."[15] Those who are always online now face "a level of exposure we've

[15] Andrew Perrin & Sara Atske, *About Three-in-Ten U.S. Adults Say They Are 'Almost Constantly' Online*, Pew Rsch. Ctr. (Mar. 26, 2021), https://tinyurl.com/4ywvy7y6.

never dealt with before as human beings," akin to "the whole world ha[ving] its eyes on [them]."[16]

Often, this now-online speech deals with contentious issues of public concern. Earlier this year, for example, Pew reported that 59% of X users use the platform to "keep[] up with politics or political issues."[17] Substantial minorities of other social media sites also use their social media platform of choice to follow politics.[18] Of course, if such large numbers of social media users are turning to social media to keep up on politics, social media must be a place where politics and other viewpoints are discussed.

And politics is just one topic of discussion. Online, people share "more of their inner feelings, opinions, and sexuality than they would in person, or even over the phone."[19] These online conversations and discussions, and the resulting oversharing, leave a "relatively permanent" digital footprint that can be reviewed by *anyone* at any time.[20] A person's digital footprint, which includes the words and topics a

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[16] Thor Benson, *The High Cost of Living Your Life Online*, Wired (Oct. 3, 2022, 7:00 AM), https://tinyurl.com/wecnhcap.

[17] Colleen McClain et al., *How Americans Navigate Politics on TikTok, X, Facebook and Instagram*, Pew Rsch. Ctr. (June 12, 2024), https://tinyurl.com/yr4np44x.

[18] *Ibid.*

[19] Shayla Love, *When We Can Share Everything Online, What Counts As Oversharing?*, The Guardian (Jan. 25, 2024, 8:00 AM), https://tinyurl.com/3kepetsc (quoting Ben Agger, *Oversharing: Presentations of Self in the Internet Age* (2012)).

[20] *What Is a Digital Footprint? And How to Protect It from Hackers*, Kaspersky (last visited Oct. 26, 2024), https://tinyurl.com/jw27ta5n.

person discusses online, "determine[s] a person's digital reputation."[21] For example, an employer, including a government employer, can review a person's digital footprint "before making hiring decisions."[22] And a person's digital footprint can be reviewed by anyone seeking to "misinterpret[] or alter[]" the meaning of a person's words or photos to "caus[e] unintentional offense."[23]

While private reactions to, and consequences from, a potentially controversial digital footprint are inevitable (and often protected forms of free speech and association), the governmental consequences are governed by different standards. Neutrality, not viewpoint discrimination, is the watchword for most government conditions on employment and other public benefits. See, *e.g.*, *Reed* v. *Town of Gilbert*, 576 U.S. 155, 165-167 (2015). Furthermore, even from a government operations perspective, allowing past speech to influence current or future employment encourages people to attack government employees who have views, or make decisions, that they dislike. Such disgruntled persons will go searching through an employee's old social-media posts to find something—anything—that could be amplified to manufacture a firing offense.

2. If that is the risk future government employees will face, many will simply decide not to talk online at all. In *Treasury Employees*, this Court explained that a rule that would "chill[] potential speech before it

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[21] *Ibid.*

[22] *Ibid.*

[23] *Ibid.*

happens" raises significant First Amendment concerns. 513 U.S. at 468. And the First Circuit's decision to apply *Pickering* balancing to the speech of private citizens who later become government employees has just that effect. Such a rule, once known, will lead anyone considering government service to limit their constitutional expression to avoid its being used against them in future employment. The Free Speech Clause means little for public employees if its protections melt away once someone decides to enter public service.

Applying *Pickering* and its progeny to pre-employment speech would also give a retrospective heckler's veto to anyone who dislikes a particular message or viewpoint or even a particular government employee. Anyone familiar with *Pickering* would be able to use it against unfavored voices. After all, *Pickering*'s holding that the government need only show that disfavored speech was disruptive would incentivize would-be hecklers to dredge up an employee's prior speech—no matter how much time had passed since its utterance—and then generate the very disruption that would support an adverse employment action.

In other contexts, this Court has rejected rules like the First Circuit's that would "confer [such] broad powers of censorship * * * upon any opponent of * * * speech." *Reno* v. *ACLU*, 521 U.S. 844, 880 (1997). It should do so here as well. We now live in a world in which online "creators farm rage to get clicks" and "platforms don't care if the message is uplifting or toxic," but will "spread [a message] even further" if

"people are interacting with it."[24] While the First Amendment protects such intemperate speech, as well as private counter-speech and associational choices, the government's own response must be different.

For example, if the government could penalize its employees for views that it or hecklers dislike based on the thin "interest in operating efficiently without distraction or embarrassment by talkative or headline-grabbing employees," *Garcetti*, 547 U.S. at 430 (Souter, J., dissenting), it would be easy for a bad-faith actor to whip up outrage sufficient to penalize a government employee for disfavored speech from long ago. The Court should not sanction a rule that would so incentivize bad actors and chill the speech of aspiring government employees. The First Amendment requires more.

CONCLUSION

The decision below shows why using *Pickering* as a sword to punish government employees for things they said when they were private citizens could have enormous, nationwide consequences. The Court should grant the petition and reverse the First Circuit's contrary conclusion, thereby protecting the speech of an ever-growing number of present and prospective government employees.

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[24] Tanya Chen, *On TikTok, Creators Farm Rage to Get Clicks and Make Money. But It Can Be a Fast Race to the Bottom.*, Bus. Insider (Dec. 8, 2022, 3:00 AM), https://tinyurl.com/26k5efz3.

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