No. 25-819

In the Supreme Court of the United States

JEANNE HEDGEPETH,
Petitioner,
v.
JAMES A. BRITTON, ET AL.,
Respondents.

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

AMICUS CURIAE BRIEF OF THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

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INTEREST OF AMICUS CURIAE[1]

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute also files lawsuits and submits amicus briefs to fulfill its mission. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3).

SUMMARY OF THE ARGUMENT

This case comes down to whether mere offense creates a disruption in school. It does not. "Speech cannot be . . . punished or banned, simply because it might offend a hostile mob." *Forsyth Cnty., Ga.* v. *Nationalist Movement*, 505 U.S. 123, 134–35 (1992). When the mob is comprised almost exclusively of individuals with no connection to the school, these words are even more salient. And the First Amendment must remain strong when the teacher speaks outside of the school.

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus curiae made any monetary contribution toward the preparation or submission of this brief. Counsel timely provided the notice required by Rule 37.2.

The First Amendment's default is to offer speakers broad protections. When the speaker is a public employee, governments can assert limited control. See generally *Pickering* v. *Bd. of Ed. of Tp. High Sch. Dist. 205, Will Cnty., Illinois*, 391 U.S. 563, 568 (1968). But to function properly, *Pickering* and its balancing must give speech robust protection. "[E]ngaging in *Pickering* balancing is not like performing rational basis review, where we uphold government action as long as there is some imaginable legitimate basis for it." *Kinney* v. *Weaver*, 367 F.3d 337, 363 (5th Cir. 2004). Rather, "*Pickering* unmistakably states . . . that the state's burden in justifying a particular discharge varies depending upon the nature of the employee's expression. Although such particularized balancing is difficult, the courts must reach the most appropriate possible balance of the competing interests." *Connick* v. *Myers*, 461 U.S. 138, 150 (1983).

The Seventh Circuit here, and other circuits previously, improperly balanced those interests. The resulting "test" is imprudently deferential to the state and allows employers to limit free speech based on passion or prejudice. Thus, the Court should grant certiorari to clarify the scope of *Pickering* balancing, particularly what constitutes a substantial disruption.

ARGUMENT

I. The First Amendment protects public employees' right to speak on matters of public concern as a private citizen.

"Free Speech is a human right. It is the free expression of thought that is the essence of being human. . . . It is the natural condition of humans to speak. . . . As such, it is not the creation of the Constitution, but rather embodied in that document." Jonathan Turley, *The Indispensable Right: Free Speech in the Age of Rage* 23 (Simon & Schuster 2024). Americans cherish the right to speak. They protect that right jealously, "not to achieve the potential of the democratic system, but the fulfillment of one's own potential. Free speech remains one of humanity's most essential impulses, and the Constitution captured that essentiality in the First Amendment." *Id.* at 49–50. Because free speech is an inherent human desire and a natural right, the Court has stated that "the purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969).

Schools, too, are a marketplace for ideas. *Tinker* aptly affirmed that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker* v. *Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969). Surely, the marketplace of ideas is even stronger outside those gates. Cf. *Mahanoy Area Sch. Dist.* v. *B.*

L. by & through Levy, 594 U.S. 180, 189 (2021) (noting "three features of off-campus [student] speech that often, even if not always, distinguish schools' efforts to regulate that speech from their efforts to regulate on-campus speech"). But the Seventh Circuit's opinion in this case undermines Hedgepeth's ability to express personal opinions beyond the schoolhouse gate.

One key factor in *Pickering* balancing is whether the employee is speaking as an employee or as a private citizen. See *Lane* v. *Franks*, 573 U.S. 228, 240 (2014). Ultimately, an employee "speaks as a citizen whenever the speech is neither an employment grievance nor speech that owes its existence to the employee's professional duties." Ofer Raban, *The Free Speech of Public Employees at a Time of Political Polarization: Clarifying the* Pickering *Balancing Test*, 60 Hous. L. Rev. 653, 661 (2023) (citing *Lane*, 573 U.S. at 240). Thought of differently, speech outside the scope of one's work receives much greater protection than speech within that scope. See *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 527–531 (2022). When a public employee speaks about issues beyond the scope of his or her employment, the employee is not speaking for the employer. *Id.* For instance, no one would understand a teacher who wears a "Team Canada" hockey jersey to a bar to be saying that her school hopes Team USA will lose in the Olympics!

So too here. Schools must recognize that teachers' opinions are not necessarily those of the school. Schools need to be very cautious before disciplining teachers for speaking outside of the school—indeed, while on summer vacation—about topics beyond their scope of employment. Otherwise, teachers not only

would feel the need to self-censor constantly but would also always be looking over their shoulders, waiting for a "gotcha" moment when someone is triggered or offended.

II. The government's interest in regulating speech is limited to instances where the speech causes *actual* disruption—not hurt feelings.

Pickering balancing requires a court to balance "the interests of the teacher, 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*, 391 U.S. at 568. In other words, schools cannot discipline teachers, carte blanch, to regulate speech anytime "efficiency" is lackluster. Rather, *Pickering* "unmistakably" states that the "state's burden in justifying a particular discharge varies depending upon the nature of the employee's expression." *Connick*, 461 U.S. at 150. Significantly, *the state* has the burden of justifying its actions. And "expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey* v. *Brown*, 447 U.S. 455, 467 (1980)). So, the school must show that the employee's speech substantially interfered with the government employer's ability to function. See *Connick*, 461 U.S. at 150; *Riley's Am. Heritage Farms* v. *Elsasser*, 32 F.4th 707, 725 (9th Cir. 2022) (adopting the substantial disruption standard); *Marquez* v. *Turnock*, 967 F.2d 1175, 1179 (7th Cir. 1992) (citing the substantial disruption standard).

Here, the Court can emphasize that speech like Hedgepeth's, which relates to "important matters of public concern," Pet. App. 13, deserves the highest First Amendment protections, even if it conveys an unpopular, or even egregious, opinion. "The First Amendment protects expression, be it of the popular variety or not." *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 660 (2000). Although "[c]ourts are usually barred from evaluating the merit of speech when calibrating its constitutional protections," *Pickering* is an exception. Raban, *supra*, at 674.

Under *Pickering*, "courts accord greater weight to the employee's side of the scale the greater the social value of the speech in question. The main reason for this departure is that the employee's side represents not only the employee's interest in speaking but also the public's interest in hearing." *Id.* at 675; see also *Dodge* v. *Evergreen Sch. Dist. #114*, 56 F.4th 767, 782 (9th Cir. 2022). That is where Hedgepeth finds herself. She commented on incidents that dominated every cable news channel, consumed social media, and, along with the pandemic, defined the 2020 summer. *2020 Events*, History, https://tinyurl.com/History-2020-events (last visited Feb. 9, 2026). Further, statements made outside one's workplace receive greater First Amendment protections than those made in the workplace. See *Rankin* v. *McPherson*, 483 U.S. 378, 388–89 (1987).

Still, that leaves unanswered the question of what constitutes a disruption—especially when it is supposedly caused by out-of-work statements? For one, the disruption must be "actual, material and substantial." *Riley's Am. Heritage Farms*, 32 F.4th at

725 (citation omitted). Here, circuit court cases are illuminating and often turn on whether the employee's speech inhibits his or her ability to fulfill professional duties.

The Second Circuit has held that a high school teacher's membership in a pedophile association created a substantial disruption when almost 60 parents threatened to withdraw their students from the school, and the students held a "300–400 person assembly . . . where a majority of the 30–40 students who spoke opposed [the teacher's] continued employment." *Melzer* v. *Bd. of Educ. of City Sch. Dist. of City of New York*, 336 F.3d 185, 190–91, 198–99 (2d Cir. 2003). There, the outrage emanated from within the school and took up time during the school day. Equally important, the students—children—would have had a legitimate concern about their teacher's apparent sexual attraction towards the children that he was teaching. See *id.* at 198–99.

By contrast, the bulk of the complaints the school received about Hedgepeth's speech came from people with no connection to the school and the entire ordeal occurred during summer break—classes were undisturbed. Pet. at 8. Only one teacher submitted a comment about Hedgepeth's speech, and that message supported Hedgepeth. *Id.* Also by contrast, Hedgepeth's comments were political in nature—which does not create the same concerns that a possible pedophile teacher might (and apparently did).

Similarly, the Third Circuit sided with a school district that fired a teacher after she made a blog post "in which she made a number of derogatory comments about her own students," and their parents. *Munroe* v. *C. Bucks Sch. Dist.*, 805 F.3d 454, 457 (3d Cir. 2015), *as amended* (Oct. 25, 2019). The court reasoned that "invective directed against the very persons that the governmental agency is meant to serve could be expected to have serious consequences for the performance of the speaker's duties and the agency's regular operations." *Id.* at 474. Thus, the potential for disruption outweighed the teacher's First Amendment rights. *Id.* at 467. While Hedgepeth's statements may have offended some students or parents, they did not rise nearly to the level of "invective." Pet. at 8–9. More importantly, Hedgepeth's posts were not addressed to, about, or in any way related to her students. Where the plaintiff in *Munroe* exhibits contempt for her students and their parents, that is not the case for Hedgepeth, and she cannot be punished for hurt feelings.

In another case, the Seventh Circuit found that a substantial disruption did and would continue to occur when a male guidance counselor wrote and published a relationship advice book for women. *Craig* v. *Rich Tp. High Sch. Dist. 227*, 736 F.3d 1110, 1113 (7th Cir. 2013). The book was filled with "sexually provocative themes and use[d] sexually explicit terminology," and the counselor thanked his students in the introduction. *Id.* at 1113, 1115. Not only did the book upset parents and students, but the court acknowledged that many students, especially female students, would "feel uncomfortable seeking advice from [the counselor] given his professed inability to

refrain from sexualizing females." *Id.* at 1120. Thus, his speech disrupted his ability to do his job. *Id.* The same cannot be said for Hedgepeth's students. Although one student complained that "Hedgepeth made some uncomfortable post and comments" and that it was "unsettling that there is a teacher who thinks like this at a school I attend," Pet. at 8–9, there is a stark difference between a teacher expressing political views—unpopular with some—and a teacher publicly expressing sexually charged statements that are likely to, and in fact did, disturb the very students he is supposed to counsel. The latter affects one's ability to do the job; the former does not.

* * *

If disagreement with personal views qualified as a disruption, every student who dislikes a teacher could get that teacher fired by claiming offense over that teacher's social media post and persuading others to join a protest. Allowing overly broad regulation of a teacher's off-campus, private citizen speech could result in chilling nearly all speech that the teacher could engage in. See *Mahanoy Area Sch. Dist.*, 594 U.S. at 189 ("[R]egulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day.").

Hedgepeth's speech is not on the same level as any of the above cases and the reported "disruption" does not match up either. The Court's disruption test is murky, and the Court should clarify it. The disruption portion of the *Pickering* test should require an analysis of whether the employee's out-of-school speech disrupts students' in-school learning and

whether that speech affects the employee's ability to fulfill the employee's job requirements. Cf. *Tinker*, 393 U.S. at 513 (requiring student speech to "materially disrupt[ ] classwork or involve[ ] substantial disorder or invasion of the rights of others").

III. This case is an effective vehicle for the Court to clarify *Pickering* and reaffirm public employees' First Amendment rights.

In 2026, there is no shortage of confusion about the First Amendment's limits. And with the continued rise of social media, speech on matters of public concern is more readily and widely distributed. More than ever, the Court's clarification is necessary both to correct the Seventh Circuit and to prevent other circuits from repeating the same mistakes. As Justice Thomas put it last term in another *Pickering* case, "[t]his case is the latest in a trend of lower court decisions that have misapplied [the Court's] First Amendment precedents in cases involving controversial political speech." *MacRae* v. *Mattos*, 145 S. Ct. 2617, 2620 (2025) (statement of Thomas, J., respecting denial of certiorari) (listing cases throughout the country). While *MacRae* addressed whether *Pickering* applies, not how it should be applied, this case allows a direct examination on the application of *Pickering* and how to clarify it. See *id.* at 2618 (statement of Thomas, J., respecting denial of certiorari) ("Because her petition for a writ of certiorari does not squarely challenge the First Circuit's application of that framework, I agree with our decision to deny it.").

Social media is here to stay. Approximately 73% of Americans, 253 million people, use social media. Gail Baines, *What percentage of Americans use social media?*, Soax (May 8, 2025), https://tinyurl.com/45evj6nh. At the same time, efforts to censor posts, based on claims of misinformation or "hate speech," are increasing. *Free Speech and Social Media*, FIRE, https://tinyurl.com/free-speech-and-social-media (last visited Feb. 9, 2026). The Nation in general, and public employees in particular, need clarification on the issues presented herein. This case provides an excellent vehicle to teach courts how to properly apply *Pickering*. The facts of this case illustrate the tension between suppressing speech based on a heckler's veto and protecting out-of-school speech that does not actually disrupt the learning environment or undermine the employee's ability to fulfill his or her job.

Misapplying *Pickering* by treating administrative inconveniences and complaints about differences of opinion as disruptions strips public employees of their First Amendment protections. It also opens the door for public employers to expel workers who hold views that do not align with those of the government employer, but in no way impact the employee's work. Thus, the Court must "make clear that public employers cannot use *Pickering-Garcetti* balancing generally or unsupported claims of disruption in particular to target employees who express disfavored political views." *MacRae*, 145 S. Ct. at 2621 (statement of Thomas, J., respecting denial of certiorari).

CONCLUSION

The First Amendment is only as strong as the tests that defend it. Permitting courts to treat *Pickering* as a weak test deflates the First Amendment for millions of public employees. Public employees—who rely on the government for their livelihood and are particularly vulnerable to coercion—are entitled to strong First Amendment protections. The Seventh Circuit's application of *Pickering* washed away those protections for Hedgepeth. Thus, the Court should grant the petition.

Respectfully submitted,

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February 11, 2026