No. _____

IN THE

Supreme Court of the United States

KARI MACRAE,

Petitioner,

v.

MATTHEW MATTOS, *ET AL.*,

Respondents,

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Hanover Public Schools fired Petitioner Kari MacRae as a public-school math/business teacher because of hot-button political speech she had posted on social media before she was hired by the school district. The lower courts upheld her firing by applying the balancing test for employee speech first recognized in *Pickering v. Board of Education of Township High School District 205, Will County.*, 391 U.S. 563 (1968).

Since *Pickering*, the Court has sought to protect the First Amendment rights of public employees while ensuring government employers can perform their important public functions. The Court has applied the *Pickering* balancing test, which balances those competing interests, to employee speech at work or about work. The Court has not applied the test to speech that occurred prior to an employee's hiring and unrelated to the job. The First Circuit did, however. In doing so, it strayed from the Court's jurisprudence, created an unconstitutional condition, and has deprived private citizens of their free speech rights solely because they may decide to become public-school teachers in the future.

The question presented is:

Does the *Pickering* balancing test apply to unrelated, preemployment speech on matters of public concern?

PARTIES TO THE PROCEEDING

Petitioner Kari MacRae was the sole plaintiff and appellant below. Respondents Matthew Mattos, Matthew A. Ferron, and Hanover Public Schools were the defendants and appellees below.

STATEMENT OF RELATED PROCEEDINGS

This case is directly related to the following proceedings:

MacRae v. Mattos, No. 21-11917 (D. Mass. Sept. 25, 2023)

MacRae v. Mattos, No. 23-181 (1st Cir. June 28, 2024)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Kari MacRae submits this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the First Circuit.

OPINIONS BELOW

The First Circuit's decision is reported at 106 F.4th 122 and reproduced at App. 1a-35a. The district court's summary judgment decision is not yet available in the Federal Supplement but is available at 2023 U.S. Dist. LEXIS 170146 and 2023 WL 6218158 and reproduced at App. 36a-72a.

JURISDICTION

The First Circuit issued its opinion on June 28, 2024. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First and Fourteenth Amendments to the U.S. Constitution are reproduced at App. 73a-74a.

INTRODUCTION

For more than 50 years, public-school teachers have enjoyed free speech rights with limitations. *See Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cty.*, 391 U.S. 563 (1968). Those limitations are least restrictive when a teacher speaks as a private citizen on a matter of public concern. *See Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006) (citing *Connick v. Myers*, 461 U.S. 138, 147 (1983) ("Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government.") When a teacher speaks as a private citizen on a matter of public concern, her free speech

rights extend only as far as her interests in speaking outweigh the interests of the school district. *Id.* The Court has recognized that just like the teacher who has a compelling interest to freely speak on "political and social changes," *Lane v. Franks*, 573 U.S. 228, 236 (2014), the school district has an interest in "the effective and efficient fulfillment of their responsibilities to the public, including efficiency and integrity in the discharge of official duties and maintaining proper discipline in public service." *Id.* at 242 (internal citations omitted).

This balancing test, known as *Pickering* balancing, is both constitutionally consistent and reasonably practicable when the speech is either at work or about work. Every case decided by the Court under *Pickering* has concerned such speech. The Court has not decided a case in which a public employee spoke as a private citizen on a matter of public concern away from work and not about work. In such an instance, the speech—at least superficially—is still speech by a public employee. Although the Court will likely be called upon to decide what protections such speech demands, this is not that case.

Here, MacRae spoke as a private citizen on a matter of public concern before she applied to—let alone was hired by—Hanover Public Schools. Her speech was not at school because, obviously, it could not have been. Nor was it about the school district or its administrators, teachers, parents, or students. It was not even about the town. In fact, it is undisputed that MacRae's speech falls squarely within the Court's category of private speech on matters of public concern. App. 34a. Her speech added to the public

debate on immigration policy, racism, and gender identity.

Yet the First Circuit applied the *Pickering* balancing test because MacRae was eventually hired by the school district. Had MacRae not decided to become a public-school teacher, any adverse action taken by the government against her—such as arresting, fining, or revoking her license—would have been indisputably unconstitutional. Without a compelling interest, the government cannot punish a citizen for protected speech. *See Pickering*, 391 U.S. at 574; *Garcetti*, 547 U.S. at 417. Why should tens of millions of current and future public-school teachers like MacRae not have the same constitutional protections?

The Court should review and reverse the decision below and protect the free speech rights of all persons who aspire to become public-school teachers.

STATEMENT OF THE CASE

A. *Pickering* and Its Progeny Apply to Current Employee Speech.

Pickering is the seminal case addressing the First Amendment rights of public employees to comment on matters of public concern. The case concerned a school board that dismissed a high school teacher after the teacher—while employed by the school district—wrote a letter to a local newspaper criticizing the board's allocation of school funds. *Pickering*, 391 U.S. at 564-68. The teacher sued the school, asserting that his letter was protected speech under the First Amendment. *Id.* at 565. To determine whether the firing violated the teacher's

First Amendment rights, the Court sought to find a balance "between the interests of the [public 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." *Id.* at 568.

Since *Pickering*, each of the Court's First Amendment retaliation cases have concerned speech at work or about work. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 281-283 (1977) (teacher not rehired because he had shared an internal memorandum with a local radio station, had made obscene gestures to students, and had argued with other school employees); *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 411-413 (1979) (teacher fired for criticizing school policies and practices in a private conversation with the principal); *Connick*, 461 U.S. at 140-141 (assistant district attorney fired for circulating a questionnaire on internal office affairs within the workplace); *Rankin v. McPherson*, 483 U.S. 378, 379-380 (1987) (county clerical employee fired for remarking to another employee at the office, "If they go for him again, I hope they get him" after President Reagan was shot); *Waters v. Churchill*, 511 U.S. 661, 664 (1994) (nurse fired because of a conversation with a colleague that was overheard by other employees who reported the conversation to their supervisor); *City of San Diego v. Roe*, 543 U.S. 77, 78 (2004) (police officer fired for selling videotapes of himself engaging in sexually explicit acts while wearing the police department's uniform, for selling official police department uniforms and men's underwear on the

website, and for identifying himself as an employee of that police department on the website); *Garcetti*, 547 U.S. at 413-415 (deputy district attorney subjected to adverse employment actions for writing an internal memorandum to his supervisor regarding inaccuracies that he identified in an affidavit used to obtain a search warrant); *Lane*, 573 U.S. at 231-235 (community college administrator fired for his testimony at a criminal trial relating to the college); *Heffernan v. City of Paterson*, 578 U.S. 266 (2016) (police officer demoted because of the factually mistaken belief that the officer supported a particular mayoral candidate).

In addition, the Court in *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454 (1995) resolved a dispute concerning employee speech outside the typical *post-hoc* challenge to a disciplinary action. Certain federal government employees challenged the constitutionality of a federal statute prohibiting them from accepting compensation for speeches and articles. *Id.* at 461. The Court explained that the government's burden to justify the ban was heavier than the burden in the *Pickering* line of cases involving disciplinary action because the ban was a statutory restriction that chilled potential protected speech before it happened. *Id.* at 466. Because the ban implicated speech on matters of public concern unrelated to government employment, and which took place outside of the workplace, the ban could not be justified on the grounds of workplace disruption. *Id.* at 470. Nor had the government provided evidence that the ban, as applied to the plaintiffs' employment classification, furthered its other purported interests. *Id.* at 472-74. The statutory ban was therefore

unconstitutional as to the classification of employees. *Id.* at 477, 480.

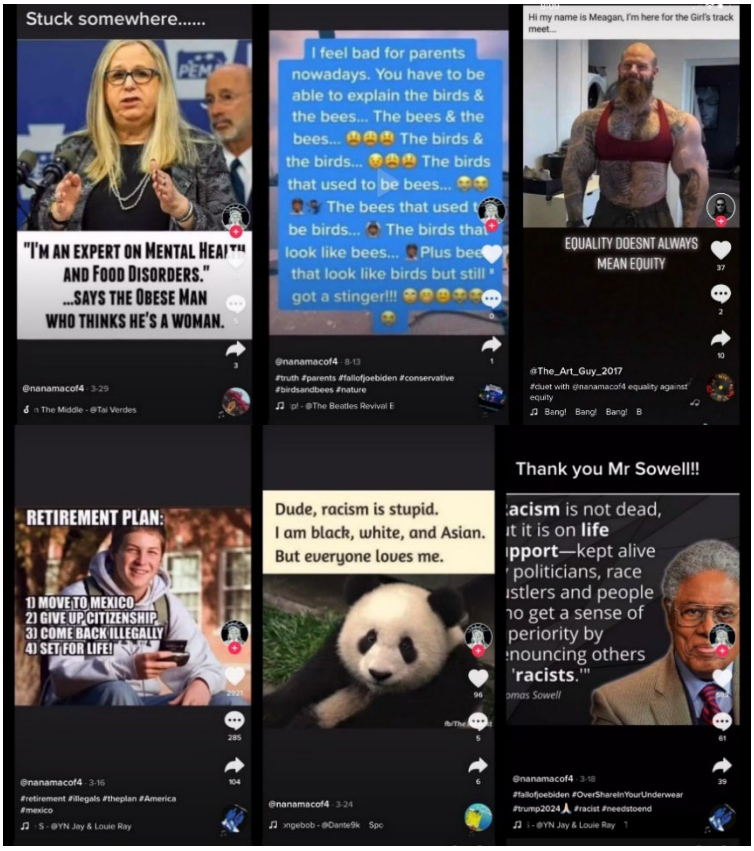
Most recently, the Court relied in part on *Pickering* and its progeny in deciding *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022). There, a high school football coach sued a school district after it suspended him for quietly praying at midfield after games. *Id.* at 514-520. Both parties agreed that the praying implicated a matter of public concern, and the Court determined that the coach did not pray pursuant to his official duties. *Id.* at 528-30.

In each of these cases, the Court was asked to balance the interest of the employee with that of the employer because of speech that occurred either at work or was about work. None of the cases concerned the type of speech at issue here.

B. MacRae Was Fired for Unrelated, Preemployment Speech on Matters of Public Concern.

In March 2021, Petitioner Kari MacRae, a resident of Bourne, Massachusetts, ran for a seat on the Bourne School Committee. App. 5a. She subsequently filed the necessary paperwork, and her name was placed on the May 2021 ballot. *Id.* On May 17, 2021, she won her election and was sworn in as a school committee member the next day. App. 6a.

Previously in March 2021, MacRae posted four memes to TikTok. App. 4a-5a. She posted another one in August 2021. *Id.* A sixth meme was posted by another TikTok user and referenced MacRae's username. *Id.* If other users searched for MacRae's username, that sixth meme would appear. *Id.*



In addition, on May 17, 2021 (election day), MacRae posted a campaign video on TikTok explaining why she ran for a school committee seat and the issues she hoped to address if she were to be elected. *Id.* All posts were made under the pseudonymous username "nanamacof4." *Id.* The "nanamacof4" profile did not identify MacRae by name. *Id.* Nor was it associated with her regular email address. Nor did it identify any of MacRae's past, current, or future employers. *Id.* In fact, had MacRae not used her pseudonymous TikTok account to post her campaign video, the public would have

most likely never learned that MacRae posted the memes in question. *Id.*

At the end of August 2021more than five months after she posted the first four memes and more than three months after she posted the campaign video– MacRae was hired as a math/business teacher at Hanover High School (a different school district from where she was a school committee member). App. 6a. The Cape Cod Times and the Boston Globe, in September 2021, wrote articles about MacRae's social media posts as they related to her elected position as a Bourne School Committee member. App. 8a-9a. None of the articles referenced Hanover Public Schools or that MacRae was a teacher at Hanover High School. *Id.*

After the articles were seen by Hanover High School Principal Matthew Mattos, Hanover Public Schools Superintendent Matthew Ferron, and Hanover Public Schools Curriculum Director Matthew Plummer, MacRae was placed on administrative leave, and a purported five-day investigation took place. App. 9a. During this period, no Hanover student nor any parent of a Hanover student raised concerns about MacRae with any Hanover Public Schools teacher, staff member, or administrator. App. 10a-11a. Nor did any teacher or administrator hear concerns from students or parents about MacRae. *Id.* Similarly, no teacher raised concerns about MacRae with any administrator during the five-day investigation. *Id.* Nonetheless, Ferron, Mattos, and Plummer fired MacRae on September 29, 2021. App. 11a.

C. The Lower Courts Applied *Pickering*.

MacRae sued Ferron, Mattos, and the school district (collectively "Hanover Public Schools") for violating her First Amendment rights. Discovery ensued, and Hanover Public Schools moved for summary judgment. Ap. 12a. Ruling against MacRae, the District Court concluded that Hanover Public Schools had adduced ample evidence of the potential for disruption, which justified MacRae's firing under the *Pickering* balancing test. App. 13a. The Court also found that Mattos and Feron had qualified immunity from suit. *Id.*

The First Circuit upheld the District Court's decision. App. 34a. The First Circuit concluded that because "significant weight [is] afforded to a government employer's reasonable prediction of disruption[,]" Hanover Public Schools "had an adequate justification for treating MacRae differently from any other member of the general public." App. 33a-34a. The First Circuit then went on to conclude, applying the *Pickering* balancing test, that the school district's interests outweighed MacRae's interests because MacRae's "social media posts became the subject of extensive media attention" in Bourne, Massachusetts and "some Hanover High students and teachers were aware of MacRae's posts and were discussing them." *Id.*

REASONS FOR GRANTING THE PETITION

I. The Petition Raises a Question of Exceptional Importance for Tens of Millions of Current and Future Public-School Teachers.

1. There are approximately four million public-school teachers in the United States.[1] There are also tens of millions of persons who aspire to be public-school teachers in the future. This case concerns whether those individuals have the same free speech rights as every other private citizen.

This question is not purely academic. It is real. Social media use is now ubiquitous and, for many users, begins as early as 12 years of age.[2] Further, "speech from our past is more accessible than ever." *Cleavenger v. Univ. of Oregon*, 2015 U.S. Dist. LEXIS 102972, **26-27, Case No. 13-cv-1908-DOC (D. Or. Aug. 6, 2015). Without the Court resolving this issue, future public-school teachers will have to choose between self-censoring and risking termination from their jobs at some undefined time in the future.

This issue is ripe for review because the First Circuit wrongly applied the *Pickering* balancing test to unrelated, preemployment speech. The court had

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[1] *Characteristics of Public School Teachers*, National Center for Education Statistics, Sep. 24, 2024, at 1, available at https://nces.ed.gov/programs/coe/indicator/clr/public-school-teachers#fr1.

[2] Jacqueline Howard, *Social media and kids: What age do they start?*, CNN, June 22, 2018, available at https://www.cnn.com/2018/06/22/health/social-media-for-kids-parent-curve/index.html).

four reasons for its application, all of which distorts the Court's intent in *Pickering*. App. 19a-20a. First, the court concluded the "tried-and-true mode of analysis for public employees" is appropriate because the case concerns "a government employer firing its public employee for their speech." App. 20a. Second, the court was concerned that by not applying the *Pickering* balancing test, the public employer's interests would not be considered. *Id.* Third, the court held that MacRae's speech did not require special consideration because it only occurred months, not years, before she was hired by Hanover Public Schools. App. 21a. Fourth, the court noted that it "located only two cases involving alleged First Amendment retaliation for pre-employment speech" and that both of those cases applied the *Pickering* balancing test. App. 22a.

Although each of these reasons are superficially appealing, they are not substantively convincing with the public's free speech rights at stake. Although MacRae was fired as a public-school teacher, she was not a public-school teacher when she posted the memes. Her speech at issue was not—nor could it have been—employee speech but rather private citizen speech. It is also irrelevant that the speech occurred months or years before she was hired by the school district. Either a private citizen has the unadulterated right to speak on matters of public concern or she does not. The right is fixed. It does not swing based on temporal proximity. Similarly, rights do not depend on the number of courts to have addressed an issue, especially if both of those cases were resolved by the district courts. Finally, although the court's concern for a public employer's interests is

real, such concerns may be addressed by applying the Court's precedent concerning unconstitutional conditions.

2. Before *Pickering*, the Court was faced with multiple cases concerning First Amendment activity and public employees, especially public-school teachers. In those cases, the Court recognized the unique role that teachers play within the community. It is indisputable that "[a] teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live." *Adler v. Bd. of Educ.*, 342 U.S. 485, 493 (1952). It is also indisputable that school administrators may "investigate the competence and fitness of those whom it hires to teach in its schools." *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 608-609 (2021). Each school district determines competence and fitness differently; however, the Court has held that the school may determine competence and fitness based on conduct outside the classroom because "[f]itness for teaching depends on a broad range of factors." *Beilan v. Bd. of Pub. Educ.*, 357 U.S. 399, 406 (1958). Still, the breadth of the school district's investigation into fitness and competence must not be so wide as to create an unconstitutional condition on private speech. *See Shelton v. Tucker*, 364 U.S. 479, 488 (1960) ("[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.").

In *Beilan*, the Court found those factors included "immorality, intemperance, cruelty, mental derangement and persistent and willful violation of

the school laws." 357 U.S. at 406. They also included "afterhours activity [by a teacher] in her husband's beer garden, serving as a bartender and waitress, occasionally drinking beer, shaking dice with the customers for drinks and playing the pinball machine[,]" and a teacher's "deliberate and insubordinate refusal to answer the questions of his administrative superior in a vitally important matter pertaining to his fitness." *Id.* None of those factors concern speech—let alone speech on matters of public concern. *Id*. at 405. As the Court emphasized:

> By engaging in teaching in the public schools, petitioner did not give up his right to freedom of belief, speech or association. He did, however, undertake obligations of frankness, candor and cooperation in answering inquiries made of him by his employing Board examining into his fitness to serve it as a public-school teacher.

Id. The Court's cases from the McCarthy era emphasize that public-school teachers do not forego their First Amendment protections simply because they became teachers. Any investigation into a prospective public-school teacher's private speech must be for the sole purpose of determining her competence and fitness for the position. *Shelton*, 364 U.S. at 488. This was true during the height of the McCarthy era and should remain so today. *See Connick*, 461 U.S. at 144-145; *see also Weiman v. Updegraff,* 344 U.S. 183 (1952); *Beilan*, 357 U.S. 399; *Shelton*, 364 U.S. 479; *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *United States v. Robel*, 389 U.S. 258 (1967).

Importantly, *Pickering* is rooted in these McCarthy era cases. *Connick*, 461 U.S. at 144. ("In all of these cases, the precedents in which *Pickering* is rooted, the invalidated statutes and actions sought to suppress the rights of public employees to participate in public affairs."). This line of precedent establishes that the Constitution does not authorize public employers to prevent or chill a citizen's right to participate in political affairs. *Id*. at 145. Prior to the 1960s, the concern was "subversion." *Id*. Today, public employers seek candidates that avow their social philosophies. If the candidate does not, they are neither fit nor competent. This cannot be what the Constitution stands for.

3. The basic principle underlying the McCarthy era cases applies to speech, even though those cases concerned a loyalty pledge, oath, or membership and association disclosure. When the government acts—whether through affirmative legislation or after-the-fact retaliation—in response to First Amendment-protected activity, such action must be narrowly tailored to achieve a compelling interest. *Kennedy*, 597 U.S. at 525 ("[T]his Court will find a First Amendment violation unless the government can satisfy 'strict scrutiny' by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest."). In the public employment context, the compelling interest is whether the employee is competent and fit for the position. *See Branti* v. *Finkel*, 445 U.S. 507, 518 (1980). School administrators can only account for unrelated, preemployment speech if that speech shows that the private citizen is not competent or fit

to be a public-school teacher. If the speech relates to "any matter of political, social, or other concern to the community," it will be difficult to show that such speech has any bearing whatsoever on competence or fitness. *Connick*, 461 U.S. at 146. Most often, such speech will be unequivocally protected by the Court's unconstitutional conditions doctrine.

The First Circuit ignored this line of cases and focused exclusively on *Pickering* and its progeny, which justify the limited scope of a private citizen's rights when she becomes a public-school teacher as a necessary condition of her employment. Certainly, public school administrators must have the ability to effectively provide an education to their students. But the *Pickering* balancing test cannot apply to unrelated, preemployment speech on matters of public concern without straying from the Court's precedent concerning private speech. This is demonstrated by how the First Circuit balanced the competing interests of MacRae and the school district.

The First Circuit held that MacRae's interest in speaking as a private citizen on matters of public concern before she was hired to teach at Hanover High School was outweighed by the school district's "interest in preventing disruption to the learning environment." App. 33a-34a. The court also held that no actual disruption was necessary. App. 28a. All that was needed was a reasonable prediction of disruption, and such disruption included media attention stirred up by educators in a neighboring town as well as "some" students and teachers "discussing" MacRae's posts at Hanover High School. App. 33a-34a.

By allowing Hanover Public Schools to fire MacRae based on that response to unrelated, preemployment speech alone amounts to a heckler's veto—contrary to this Court's warnings. *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970) (internal quotations and citations omitted) ("[U]nder our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."). Whether some members of the public are offended by MacRae's speech has nothing to do with whether she is a fit and competent teacher. As the Court has said, albeit in a different context:

> [A] function of free speech under our system of government is to invite dispute. It may best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (internal citations omitted). The First Circuit's view that

MacRae's unrelated, preemployment speech would lead to a disruption—*i.e.*, members of the public may discuss the memes and their meaning—is exactly what the First Amendment protects. Just because MacRae became a public-school teacher months after posting the memes on social media does not discount the protected nature of her speech.

The *Pickering* balancing test also demands a court to assign value to the speech itself. Here, the First Circuit gave less protection to MacRae's social media posts because it found the memes to be "mocking, derogatory, and disparaging." App. 26a. However, "speech concerning public affairs is more than self-expression; it is the essence of self government." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). "Accordingly, speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Id.* Even speech that may be deemed offensive is protected. *Matal v. Tam*, 582 U.S. 218, 223 (2017) ("Speech may not be banned on the ground that it expresses ideas that offend"). Indeed, "the proudest boast of our free speech jurisprudence is that we protect the freedom to express the thought that we hate." *Id.* at 246 (cleaned up). This is especially true in the context of education. "To endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry." *Lee v. Weisman*, 505 U.S. 577, 590-591 (1992). In other words, it is precisely because MacRae's speech was perceived by some to be "mocking, derogatory, and disparaging" (App. 26a) that it requires First Amendment protection. "The

Court should not [] gloss over [] decades of jurisprudence and the centrality of First Amendment freedoms in our lives because it is confronted with speech it does not like and because a government employer fears a potential public response that it alone precipitated." *Pappas v. Giuliani*, 290 F.3d 143, 154 (2nd Cir. 2002) (Sotomayor, J. dissenting). Thus, the *Pickering* balancing test should not apply to private speech on matters of public concern that occurred prior to a teacher's hiring and unrelated to the job.

II. This Case Presents an Ideal Vehicle To Protect Unrelated, Preemployment Speech on Matters of Public Concern.

With no facts in dispute, this case presents a purely legal question of exceptional importance: does *Pickering* balancing apply to unrelated, preemployment speech on matters of public concern?

There is no dispute that MacRae's memes communicated matters of public concern. App. 34a. There is also no dispute that the memes were unrelated to Hanover Public Schools, its administrators, teachers, parents, or students. App. 3a and 26a. Nor is there any dispute that MacRae posted the memes before she was employed by the school district. App. 3a.

There is also no dispute that Hanover Public Schools fired MacRae because of her unrelated, preemployment speech on matters of public concern. App. 11a. There is also no dispute that the school administrators fired MacRae because they believed the existence of MacRae's social media posts would cause a disruption at Hanover High School. App. 27a.

Nor is there a dispute that the district and appellate courts employed the *Pickering* balancing test to determine that Hanover Public Schools did not violate MacRae's free speech rights when it fired her. App. 24a-25a. All that is in dispute is whether the *Pickering* balancing test applies in this situation. This case could not be a more perfect vehicle for the Court to determine the rights of the tens-of-millions aspiring teachers who are participating in public affairs and the four million public-school teachers who spoke on matters of public concern before they were employed.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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