

No. 24-1279

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

BRIAN HUSSEY,
Plaintiff-Appellant,

v.

CITY OF CAMBRIDGE; CHRISTINE ELOW, in her official capacity as
Commissioner of the Cambridge Police Department,

Defendants-Appellees,

BRANVILLE G. BARD, JR., in his individual capacity,

Defendant.

On Appeal from the United States District Court
for the District of Massachusetts
Case No. 1:21-cv-11868 / Hon. Angel Kelley

**EN BANC AMICUS BRIEF OF DR. ANDREW K. FOX IN
SUPPORT OF APPELLANT AND REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Dr. Andrew K. Fox is an individual citizen and Texas resident with no parent corporation or stockholders.

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IDENTITY AND INTEREST OF AMICUS CURIAE¹

Dr. Andrew K. Fox is an ordained minister, author, and businessman committed to serving God and his community. While pastoring a church in Kennewick, Washington, Dr. Fox served as a volunteer chaplain for the local police department. After a move to Austin, Texas, Dr. Fox pioneered a volunteer chaplaincy program with the Austin Fire Department.

Dr. Fox served as the volunteer Lead Chaplin there for eight years, offering pastoral care to all members of the Austin Fire Department on an equal basis. The Fire Chief commended Dr. Fox for offering vital support after a Fire Department member's sudden death. And the Fire Chief favored creating a paid chaplain position for him.

But this public service came to a screeching halt after a Battalion Chief discovered a blog Dr. Fox posted on his private ministry's website on his own time. Discussing current events from a historic-Christian perspective, Dr. Fox expressed his beliefs that God designed each person as male or female, that sex is immutable, and that males shouldn't compete against females in women's sports. The Battalion Chief alerted the Fire Department's LGBT Liaison to the blog, which

¹ No counsel for a party authored this brief in whole or in part. And no one other than amicus curiae and his counsel made any monetary contribution to fund the preparation or submission of this brief.

expressed views shared by millions of Americans. The liaison complained to management.

Dr. Fox met with the LGBT Liaison to hear and understand her concerns. But their respectful dialogue didn't end the matter. The liaison circulated printed copies of the blog to different fire stations and her friends, drumming up complaints. The Fire Chief conducted no investigation of the blog post's impact; he simply relied on the LGBT Liaison's say-so and ordered Dr. Fox to write an apology.

Dr. Fox drafted two apologies that explained the blog's purpose, expressed his desire to engage in healthy discussion, and expressed regret that some people were offended by his beliefs. But Dr. Fox could not recant his religious views. As a result, the Fire Chief terminated Dr. Fox from his position as volunteer Lead Chaplain, accusing him of failing to provide "a comforting and welcoming presence and service for any and all firefighters and Department employees."

Yet Dr. Fox provided compassionate chaplain services to everyone, including those who identify as LGBT. So Dr. Fox sued the City of Austin for, among other things, retaliating against his speech as a citizen on matters of public concern. *Fox v. City of Austin*, No. 1:22-cv-00835 (W.D. Tex. compl. filed Aug. 18, 2022). After the district court denied the city's motion for summary judgment and set Dr. Fox's speech-retaliation claim for trial, the parties reached a settlement.

Dr. Fox has a strong interest in this litigation because it closely resembles his own. Like Mr. Hussey, Dr. Fox was associated with a uniformed service, spoke as a citizen—on his own time—regarding a matter of public concern, and was punished with no meaningful investigation based on manufactured complaints. Unlike Mr. Hussey, Dr. Fox’s speech-retaliation claim was set for trial.

Dr. Fox submits this brief to ensure that public employees or volunteers—like him—can express their religious or political beliefs off-duty without fear of retribution. The First Amendment bars government from needlessly punishing ordinary employees for expressing views on hot-button topics outside work. That’s as true in Massachusetts as it is in Texas.

Dr. Fox urges the Court to reject the City of Cambridge’s effort to “prescribe what [is] orthodox in politics[] ... [or] religion,” *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (quotation omitted), by silencing certain views on public matters. Mr. Hussey’s “speech concerning public affairs ... is the essence of self-government.” *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citation modified). Millions of civil servants can’t be deprived of their right to speak on political or religious matters simply because their views offend someone. This Court should reverse and order summary judgment for Mr. Hussey.

SUMMARY OF THE ARGUMENT

Several principles limit *Pickering's* balancing test. Employees' speech on a matter of public concern is presumptively protected, and employers must show an adequate justification for censoring it. That justification must relate to disruption of employees' work or the operation of the government employer. To prevail, employers must show—at a minimum—reasonable ground to fear that serious disruption will result if speech is allowed. But the more directly an employee's speech relates to matters of public concern, the stronger the government's showing must be.

Factors that influence *Pickering* balancing fit into four categories: (1) the speech itself, (2) how the speech is expressed, (3) the employee's role, and (4) disruption of the employer's work. Speech that relates to an employee's job is generally protected, especially if the topic is a matter of public record. That conclusion is heightened if employees speak publicly outside the office on their private time, especially if they are rank-and-file employees with no policymaking role. And disruption is particularly unlikely if speech is directed externally to the public, rather than internally to the employer, because the First Amendment does not allow a heckler's veto.

At a minimum, the first, second, and fourth categories favor protecting Mr. Hussey's speech, and the third category is a wash. So the City failed to justify its censoring of Mr. Hussey's Facebook post that

opposed naming a federal police-reform bill after George Floyd. No factual dispute justifies a remand. The Court should refuse to engage in viewpoint discrimination against “offensive” views, overrule contrary circuit precedent, and order summary judgment for Mr. Hussey.

ARGUMENT

I. The free-speech inquiry for public employees.

Nearly 60 years ago, the Supreme Court established a balancing test for public employees’ free-speech claims. Before applying that balancing test, courts first examine whether an employee spoke “pursuant to his or her official duties.” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 527 (2022) (citation modified). If so, the claim fails because it concerns government speech. But if an employee spoke “as a citizen [on] a matter of public concern,” courts proceed to the balancing inquiry. *Id.* at 528 (quotation omitted). There, courts ask whether the government’s interests, “as an employer, in promoting the efficiency of [its] public services” outweighs the “employee’s speech interests.” *Id.* (quotations omitted).

Here, the parties agree that Mr. Hussey spoke as a citizen on a matter of public concern. The only question is how the “delicate balancing of” the City of Cambridge’s and Mr. Hussey’s “competing interests” in efficiency and expression plays out. *Id.* (quotation omitted).

This brief first describes principles that guide the balancing test and then categorizes factors that may tip the scales.

A. Four principles govern the balancing test.

The Supreme Court’s balancing test isn’t a free-for-all. Four principles govern its use. *First*, millions work for the government, and threatening their employment is “a potent means of inhibiting speech.” *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 574 (1968). So public “employees ... 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) (emphasis added). Because society benefits from public servants’ considered opinions, it’s “essential” that “many ... categories of public employees” are “able to speak out freely on [public] questions without fear of” punishment. *Id.* at 421 (quotation omitted).

So the default is speech protection. To overcome that presumption, government must show “an adequate justification for treating the employee differently from ... the general public.” *Id.* at 418; *accord Connick*, 461 U.S. at 150 (recognizing “the state’s burden [to] justify[]” its actions); *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 466 (1995) (“[G]overnment bears the burden of justifying its ... action.”).

Second, agencies can’t silence expression “because superiors disagree with [its] content,” *Rankin v. McPherson*, 483 U.S. 378, 384

(1987), or “viewpoint,” *Bd. of Cnty. Comm’rs, Wabaunsee Cnty. v. Umbehr*, 518 U.S. 668, 683 (1996). Speech is only proscribable if it “hampers public functions,” *Rankin*, 483 U.S. at 384, by “impact[ing] [an] employee’s public responsibilities” or interfering with a government office’s “effective operation.” *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 907–08 (2018) (quotation omitted). In other words, government’s “interest in limiting” employee speech must be “significantly greater than its interest in limiting a similar [statement] by ... the general public.” *Pickering*, 391 U.S. at 573.

Third, courts do not lightly “presume[]” that speech “impeded” an employee’s “proper performance” or “interfered with the [agency’s] regular operation.” *Id.* at 572–73. Employers must “show[],” usually with specific evidence, that disruption is real or impending. *Id.* Mere “speculation about serious harms” won’t do. *Nat’l Treasury Emps.*, 513 U.S. at 475. At a minimum, government must show “reasonable ground to fear that serious evil will result if ... speech is” allowed. *Id.* (quotation omitted); *accord Connick*, 461 U.S. at 152 (“disruption of the office” needn’t “unfold” before employers “act[]”).

Courts will defer “to the government’s reasonable view of its legitimate interests” and “predictions of harm.” *Umbehr*, 518 U.S. at 676, 678 (quotation omitted). But they also ensure that “First Amendment rights [are] not ... neglected.” *Id.* at 678. Agencies frequently lose because “[n]othing ... requires [courts] to uphold every

speech restriction the government imposes as an employer.” *Janus*, 585 U.S. at 916. That is especially true when government “discriminat[es] based on the viewpoint of [an employee’s] speech.” *Umbehr*, 518 U.S. at 683.

Finally, the government’s burden of justification heightens as an employee’s speech climbs the ladder of public concern. Public-issue speech “occupies the highest rung of ... First Amendment values, and is entitled to special protection.” *Connick*, 461 U.S. at 145 (quotation omitted). So the “more substantially” an employee’s speech “involves matters of public concern,” the “stronger [a] showing of government interests” is required for the employer to suppress it. *Lane v. Franks*, 573 U.S. 228, 242 (2014) (citation modified); *accord Connick*, 461 U.S. at 150 (“the state’s burden ... varies depending upon the nature of the employee’s expression”). And rightly so, as the Constitution exhibits “special concern” for “the right of citizens to participate in political [and religious] affairs.” *Connick*, 461 U.S. at 145.

B. Factors that may tip the scales.

In balancing, the Supreme Court considers various factors that weigh for or against censoring employees’ speech. Those factors fall into four general categories: (1) the speech itself, (2) how the speech is expressed, (3) the employee’s role, and (4) disruption of the employer’s

work. But not *everything* related to these categories is fair game. This brief outlines the relevant considerations below.

1. The speech itself

Analysis of the speech itself is limited. Once it's determined that speech occurred outside the scope of the employee's duties, protection is generally accorded to expression that isn't "false or erroneous," *Lane*, 573 U.S. at 242, or is at least "substantially correct," even if it is "critical in tone," *Pickering*, 391 U.S. at 570. And that protection is magnified the more the expression "involve[s] matters of public concern," *Connick*, 461 U.S. at 152, such as when the speech addresses "sensitive political [or religious] topics[]," *Janus*, 585 U.S. at 914.

That principle holds even if speech "concern[s] the subject matter of ... employment," *Garcetti*, 547 U.S. at 421, especially if the topic is a "matter[] of public record" that the employee has no "greater authority" to speak on "than any other" citizen, *Pickering*, 391 U.S. at 572. If agencies disagree, they can "easily ... rebut[]" an employee's speech by speaking themselves. *Id.* After all, "[t]he preferred First Amendment remedy [is always] more speech, not enforced silence." *Brown v. Hartlage*, 456 U.S. 45, 61 (1982) (quotation omitted).

To be sure, there are exceptions, but none apply here. For instance, "unnecessarily disclos[ing] ... sensitive, confidential, or privileged information" isn't protected. *Lane*, 573 U.S. at 242. Nor are "false statements about matters ... closely related to the day-to-day

operations of” an agency. It is practically impossible for the employer “to counter” such false statements “because of the [employee’s] presumed ... access to the real facts.” *Pickering*, 391 U.S. at 572.

Agencies may also bar speech that is “widely broadcast, linked to [the employee’s] official status ..., and designed to exploit [the] employer’s image.” *City of San Diego v. Roe*, 543 U.S. 77, 84 (2004).

2. How the speech is expressed

Certain factors related to “the manner, time, and place of the employee’s expression are relevant.” *Rankin*, 483 U.S. at 388. By “manner,” the Supreme Court means predominantly *method*—not tone. *Pickering*, 391 U.S. at 570 (“unequivocally reject[ing]” censorship based on its “critical ... tone”). If “a teacher speaks publicly,” it’s “generally [only] the *content* of his statements that [courts] must ... assess[.]” *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415 n.4 (1979) (emphasis added).

Generally, it makes no difference if an employee speaks publicly or privately, *id.* at 414 (labeling this factor as “coincidental”), or even criticizes “nominal superiors” they don’t work alongside, *Pickering*, 391 U.S. at 574. But personally “confront[ing] [an] immediate superior” poses a unique threat to government functions that renders “the manner ... in which [the message] is delivered” potentially relevant. *Givhan*, 439 U.S. at 415 n.4. Expression that requires either the

speaker or other employees “to leave [their] work” while on the clock is also suspect. *Connick*, 461 U.S. at 153.

Regarding time, speech on *private time* is more likely to be protected than speech during *work time*. *Accord Kennedy*, 597 U.S. at 530 (coach praying when employees “were free to attend briefly to personal matters”); *Nat’l Treasury Emps.*, 513 U.S. at 464 (employees who speak “in their spare time”); *Pickering*, 391 U.S. at 564 (employee “sen[t] a letter to a local newspaper” while off duty). That is true regardless of location, as “[e]mployee speech which transpires entirely on the employee’s own time[] and in non-work areas of the office[]” receives more favorable treatment than expression “at the office” during work time. *Connick*, 461 U.S. at 153 & n.13.

But place may still be relevant. Generally, speech outside the office is less likely to disrupt an agency’s “functioning” than speech “[in] the office.” *Connick*, 461 U.S. at 153; *cf. Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 190 (2021) (“When it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention.”). But this factor is “not dispositive.” *Garcetti*, 547 U.S. at 420. Employees spend much of their lives at the office and “do much of their talking” there. *Id.* So “[e]mployees in some cases may receive First Amendment protection for expressions made at work.” *Id.*; *accord Rankin*, 483 U.S. at 389–92 (protecting speech made in a constable’s office).

3. The employee's role

Roles and “responsibilities” matter. *Rankin*, 483 U.S. at 390. Government has much greater latitude to discipline “high-level employees” and those in “policymaking positions,” *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 70, 74 (1990), than it does “rank-and-file” workers who are “no more influential [] on policy” than thousands of others, *Nat'l Treasury Emps.*, 513 U.S. at 469, 471. That leeway extends to employees in “positions” that involve high degrees of “confidentiality,” including “close working relationships” that demand “personal loyalty and confidence” to function smoothly. *Pickering*, 391 U.S. at 570 & n.3.

Simply put, “[t]he burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee’s role entails.” *Rankin*, 483 U.S. at 390. Whether the employee has a “public contact role” is relevant, but the Supreme Court has never explained to what extent. *Id.* at 390–91.

4. Disruption of the employer's work

Legitimate speech restrictions avoid “disruption” to the “effective and efficient” provision of public services. *Connick*, 461 U.S. at 150, 152. Speech inside the workplace may “impede[]” an employee’s “performance” or obstruct an employer’s “regular operation.” *Rankin*, 483 U.S. at 388. Of particular concern is speech tied to “insubordination,” *Connick*, 461 U.S. at 151, or expression that otherwise “impairs discipline by

superiors or harmony among co-workers,” *Rankin*, 483 U.S. at 388. For example, speech “tied to a personal employment dispute” is more likely to prove disruptive than speech that is not. *Connick*, 461 U.S. at 148 n.8; *accord id.* at 153–54. But when employees’ speech isn’t “directed towards” direct supervisors or regular coworkers, “discipline” and workplace “harmony” aren’t significant concerns. *Pickering*, 391 U.S. at 569–70.

For speech outside the workplace, the Supreme Court has recognized that, in extreme instances, employees’ “public” speech may “discredit[] the office” they serve. *Rankin*, 483 U.S. at 389. Public declarations may be so outlandish as to indicate a “lack” of “general competence” to perform official “duties.” *Pickering*, 391 U.S. at 573 n.5. Or, in even rarer cases, widely broadcast expression may render it practically impossible for an agency to properly function, such as when an employee states he is a sheriff’s office employee and KKK recruiter on the local news. *Rankin*, 483 U.S. at 391 n.18 (citing *McMullen v. Carson*, 754 F.2d 936 (11th Cir. 1985)).

But government can’t punish *any speech* just because members of the public dislike it. When employees speak as citizens on public matters, their “protected speech” doesn’t “readily give way to a ‘heckler’s veto.’” *Kennedy*, 597 U.S. at 543 n.8 (quotation omitted). So it’s not sufficient to show that employees’ “ideas are ... offensive” to community members, *Street v. New York*, 394 U.S. 576, 592 (1969), or

even “stirred people to anger,” *Terminiello v. City of Chi.*, 337 U.S. 1, 5 (1949).²

Disagreement is par for the course in a nation that prizes “free and open debate” and democratic “decision-making.” *Connick*, 461 U.S. at 145 (quotation omitted). Tolerating “diverse expressive activities” is simply part of “liv[ing] in [our] pluralistic society.” *Kennedy*, 597 U.S. at 541 (quotation omitted). Even children must learn to “disapprove of what [others] say,” while “defend[ing] [their] right to say it.” *Mahanoy*, 594 U.S. at 190 (quotation omitted). So must adults who can vote and thus better appreciate the “right of [every] citizen[] to participate in political [or religious] affairs.” *Connick*, 461 U.S. at 145.

² *Accord Reges v. Cauce*, 162 F.4th 979, 1001 (9th Cir. 2025) (rejecting a heckler’s veto under *Pickering* and its progeny); *Oakes Farms Food & Distrib. Servs., LLC v. Adkins*, 154 F.4th 1338, 1348 (11th Cir. 2025) (same); *Jorjani v. N.J. Inst. of Tech.*, 151 F.4th 135, 143–44 (3d Cir. 2025) (same); *Melton v. City of Forrest City*, 147 F.4th 896, 903 (8th Cir. 2025) (same); *Noble v. Cincinnati & Hamilton Cnty. Pub. Library*, 112 F.4th 373, 383 (6th Cir. 2024) (same); *Pryor v. Sch. Dist. No. 1*, 99 F.4th 1243, 1252 (10th Cir. 2024) (same); *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 782–83 (9th Cir. 2022) (same); *Meriwether v. Hartop*, 992 F.3d 492, 510 (6th Cir. 2021) (same); *Harnishfeger v. United States*, 943 F.3d 1105, 1118 (7th Cir. 2019) (same); *Flanagan v. Munger*, 890 F.2d 1557, 1566 (10th Cir. 1989) (same); *Berger v. Battaglia*, 779 F.2d 992, 1001–02 (4th Cir. 1985) (same).

II. The balancing test's application here

Before any balancing, it's necessary to determine how substantially Mr. Hussey's speech involves matters of public concern. *Supra* p. 8. At issue here is Mr. Hussey's 23-word statement on a news article titled, "House Democrats reintroduce police reform bill named in honor of George Floyd." Mr. Hussey's comment said: "This is what it's come to ... 'honoring' a career criminal, a thief[,] and druggie ... the future of this country is bleak at best."

Regardless of whether one deems this speech to address federal legislation, police reform, or George Floyd, the answer is plain: Mr. Hussey's speech was directly related to "sensitive political topics" that "are undoubtedly matters of profound value and concern to the public." *Janus*, 585 U.S. at 914 (quotation omitted). So Mr. Hussey's speech receives "special protection," and the government must make a "stronger showing" to suppress it. *Connick*, 461 U.S. at 145, 152.

The City has not carried that burden, as illustrated by the four categories described above.

A. Mr. Hussey's truthful speech on a matter of public record merits full protection.

Mr. Hussey expressed a political opinion on police-reform legislation named in honor of George Floyd. As a police officer, Mr. Hussey's speech tangentially related to his employment. But that doesn't lessen his free-speech interests, as federal legislation is a

“matter[] of public record” that Mr. Hussey has no “greater authority” to speak on “than any other” citizen. *Pickering*, 391 U.S. at 572.

Otherwise, Marvin Pickering would have lost his case, and public employees would enjoy little speech protection. *Accord id.* at 566 (teacher opposed a school-district-proposed tax rate increase).

Mr. Hussey’s statement that George Floyd was “a career criminal, a thief[,] and druggie” is also true. The Minnesota Star Tribune, hardly a conservative bastion, confirmed that “[f]rom 1997 to 2009, Floyd had criminal convictions ... for felony robbery with a deadly weapon, theft[,] and multiple drug-related cases.” Andy Mannix & Liz Sawyer, *Fact checking right-wing media’s claims about George Floyd and Derek Chauvin*, The Minn. Star Tribune (May 21, 2025), <https://bit.ly/4aJZkIo>. So Mr. Hussey’s true political speech merits full protection.

Because Mr. Hussey “sp[oke] publicly,” not “[p]rivate[ly],” to an “immediate superior,” the tone of his speech is irrelevant. *Givhan*, 439 U.S. at 415 n.4. Some may disagree with Mr. Hussey’s political views and deem his language pejorative. But *Pickering* “unequivocally reject[ed]” that a “critical tone” lessens the protection accorded “comments on matters of public concern that are” publicly expressed and “substantially correct.” 391 U.S. at 570. Rightly so, for “one of the prerogatives of American citizenship is the right to criticize public men and measures,” even in “caustic” language. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51, 54 (1988) (citation modified). In other words,

“vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials” are time-honored and generally protected. *Rankin*, 483 U.S. at 387 (quotation omitted).

B. The manner, time, and place of Mr. Hussey’s expression support protecting his speech.

Mr. Hussey spoke on his *own* time, from his *own* phone, at his *own* home, to his *own* friends on a matter related to his *own* congressional representatives—without identifying himself as a Cambridge police officer. His speech didn’t occur at the office or during work time. In essence, Mr. Hussey spoke as a private citizen to his Facebook friends about a political issue that was important to him, as millions of citizens do every day. And Mr. Hussey deleted the post a few hours later when it received little interest. The manner, time, and place of Mr. Hussey’s speech posed no risk to the police department’s operations. So this category too supports protecting Mr. Hussey’s political expression.

C. Mr. Hussey’s role isn’t high-level or policymaking; it involves a degree of authority and is public-facing, rendering this category—at worst—a wash.

Mr. Hussey’s role as a police officer investigating drug crimes made him a “rank-and-file” member of the force who is “no more influential [] on policy” than thousands of officers across the nation. *Nat’l Treasury Emps.*, 513 U.S. at 469, 471. Still, officers actively involved in law enforcement exercise significant “authority” over their fellow citizens, and their job involves “public contact.” *Rankin*, 483 U.S.

at 390–91. So giving the City the benefit of the doubt, this category is a wash. And balanced scales don't justify the City's censorship of Mr. Hussey's political speech. *Supra* p. 6.

Yet there's good reason to think this category also favors protecting Mr. Hussey's expression of mainstream political views. *E.g.*, Jim Small & Laura Gomez, *Criminal justice reform group cuts ties with GOP lawmaker over George Floyd comments*, The Arizona Mirror (June 4, 2020), <https://bit.ly/46lRGml>; Andrew Binion, *Sheriff Simpson claps back at Rep. Kilmer's support of police reform bill*, The Kitsap Sun (Mar. 8, 2021), <https://perma.cc/4BUT-9PX6>; Other Voices, *Letter to the Editor: George Floyd didn't deserve to die, but he was no saint*, Cleveland.com (June 10, 2020), <https://bit.ly/4qRfvdc>.

Though a police officer's job is public-facing, there's no "prerequisite" that the officer "share the politics of" the community. *Noble v. Cincinnati & Hamilton Cnty. Pub. Library*, 112 F.4th 373, 385 n.5 (6th Cir. 2024). Nor could there be, as the public holds divergent political views, and agencies' "conditioning [of routine] hiring decisions on political belief" is unconstitutional. *Rutan*, 497 U.S. at 78.

Otherwise, citizens couldn't become police officers in Texas if they publicly advocated open borders. Police officers must neutrally enforce citizen's First Amendment rights. *Berger v. Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985); *accord Glik v. Cunniffe*, 655 F.3d 78, 82–88 (1st Cir. 2011). In turn, community members must respect officers' right to

Speak as private citizens on public matters. So here, the community must “regard [Mr. Hussey] as the member of the general public he seeks to be.” *Pickering*, 391 U.S. at 574.

D. Mr. Hussey’s speech is protected because the City showed no actual disruption, and its prediction of future disruption is baseless and unreasonable.

No actual or reasonable fact-based prediction of disruption supports censoring Mr. Hussey’s speech. The Supreme Court’s disruption inquiry focuses primarily on the employer’s *internal* operations. *Supra* Part I.B.4. In this case, there’s no suggestion that Mr. Hussey’s political speech *actually* impeded his job performance. Nor could there be, as the City subsequently promoted Mr. Hussey to Sergeant. Notably, the City never claims that Mr. Hussey’s speech was related to an employee grievance, threatened the chain of command, or impaired workplace harmony.

Instead, the City focuses on *external* factors—namely, a Facebook friend’s sending of Mr. Hussey’s post to the NAACP, resulting in complaints at a private meeting between City officials, two NAACP members, and a former mayor. Specifically, the NAACP members “appeared alarmed and concerned,” and the former mayor “expressed the view ... that the post called into question [Mr. Hussey’s] ability to serve in a biased-free manner.” Defs.-Appellees.En.Banc.Br.26 (quotation omitted). From such gripes, the City *predicts* that Mr. Hussey’s speech would “compromise the [police department’s] hard-won

community trust and undermine its longstanding efforts to build a reputation for treating ... drug users[] with respect.” *Id.* at 26–27.

There are at least four problems with this forecast. *First*, the Supreme Court allows censorship based on the *external* disruption caused by employees’ speech only in extreme circumstances. *Supra* Part.I.B.4. Mr. Hussey’s expression of a mainstream political viewpoint was neither “so without foundation as to call into question his fitness to perform his duties,” *Pickering*, 391 U.S. at 573 n.5, nor comparable to “active participation in an organization with a history of violent activity” like the KKK, *McMullen*, 754 F.2d at 940. So the general rule against “a ‘heckler’s veto’” by community members with differing views applies. *Kennedy*, 597 U.S. at 543 n.8 (quotation omitted).

Otherwise, the City could effectively require Mr. Hussey to agree with one political party’s platform. *E.g.*, Ed West, *How George Floyd became a martyr*, UnHerd (Apr. 22, 2021), <https://perma.cc/7A8C-B3ZC> (quoting Speaker Nancy Pelosi as saying, “Thank you George Floyd for sacrificing your life for justice ...”). But the exact opposite is true; agencies can’t base rank-and-file employment decisions “on political affiliation or support” without “impermissibl[y] infring[ing] on the First Amendment rights of public employees.” *Rutan*, 497 U.S. at 75.

Second, police officers swear “to protect and serve” all members of the community equally, regardless of their personal views. And there’s no reason to think that Mr. Hussey would break his oath. Certainly,

nothing about his political statement justifies “presum[ing]” that Mr. Hussey wouldn’t “proper[ly] perform[] ... his daily duties.” *Pickering*, 391 U.S. at 572. The City’s opposite conclusion is factually unsupported and objectively unreasonable. Community members may “assume the worst” about those with differing values. *Tandon v. Newsom*, 593 U.S. 61, 64 (2021) (per curiam) (quotation omitted). But the government can’t adopt their content- or viewpoint-based prejudices. *Accord Reed v. Town of Gilbert*, 576 U.S. 155, 163–64, 168–69 (2015).

Third, nothing in the record supports forecasting that Mr. Hussey’s post would be broadly read or have significant impact on the police department. Mr. Hussey had merely 600 Facebook friends, and his post was only up for a few hours, so few likely saw it. Tellingly, the post didn’t generate significant comments. The only reason three people voiced objections to the City was because one Facebook friend took a screenshot and forwarded it to the NAACP. And there’s no “snooper’s veto” when someone “uncovers otherwise secreted employee speech” and sends it to an advocacy organization to gin up complaints. *Harnishfeger v. United States*, 943 F.3d 1105, 1118 (7th Cir. 2019).

Last, the City asserts a loss of public confidence by those who “have committed felony crimes or have a substance use disorder.” Defs.-Appellees.En.Banc.Br.21 (quotation omitted). But that prediction is unfounded and implausible. There is no evidence that anyone with a significant criminal history or drug dependency saw Mr. Hussey’s post.

Moreover, on the streets, no one *expects* officers to sound like members of a Harvard debating society. What matters to “confidential informants” and “drug users” is how Mr. Hussey *treats* them, and whether he is *true to his word*. *Id.* at 24. They are exceedingly unlikely to care about Mr. Hussey’s online political commentary. And it’s unpersuasive for the City to claim otherwise.

In sum, this category also weighs in favor of protecting Mr. Hussey’s speech on a matter of “public policy.” *Rankin*, 483 U.S. at 387 (quotation omitted).

E. Mr. Hussey’s free speech claim prevails because, at a minimum, three out of four categories favor him, and the other results in a tie.

Using the four categories of factors outlined above, the balancing test is straightforward. Categories one (the speech itself), two (how the speech is expressed), and four (disruption of work) support Mr. Hussey. At best for the City, category three (the employees’ role) is a tie. So none of the categories weigh in the City’s favor, which means the City failed to show “adequate justification for treating [Mr. Hussey] differently from any other member of the general public.” *Garcetti*, 547 U.S. at 418. Consequently, the lower court’s judgment should be reversed.

This should come as no surprise. The disruptive potential of Mr. Hussey’s criticism of federal legislation is *much less* than Marvin Pickering’s letter to the editor opposing a tax increase proposed by his

public-school employer. *Pickering*, 391 U.S. at 568 (rejecting any “duty of loyalty to support his superiors in attaining the generally accepted goals of education”). And it pales in comparison to Ardith McPherson’s statement—at work in a constable’s office—welcoming the future assassination of the President of the United States. *Rankin*, 483 U.S. at 391 (finding the constable’s “concerns [were far] removed from the effective functioning of” his office).

III. **Answers to the Court’s other questions**

This brief has (1) shown that it’s *improper* to discount the value of speech on matters of public concern based on its derogatory tone, especially when that speech occurs outside the workplace, (2) explained the correct approach to *Pickering* balancing, and (3) applied the *proper* test to Mr. Hussey’s speech. Now it addresses two of the Court’s other questions about First Amendment jurisprudence generally, and the necessity of a remand.

A. Broader First Amendment jurisprudence confirms that speech doesn’t lose protection because others deem it mocking, derogatory, or offensive.

Pickering’s balancing test must accord with broader First Amendment jurisprudence, which establishes that speech doesn’t lose its value or protection simply because some deem it mocking, derogatory, or offensive. A fundamental canon is that “speakers ... know best both *what* they want to say and *how* to say it.” *Riley v. Nat’l Fed’n of the*

Blind of N.C., 487 U.S. 781, 791 (1988) (emphasis added). So there is no “[o]utrageousness” limit to acceptable “political and social discourse.” *Hustler Magazine*, 485 U.S. at 55. Instead, the maxim is that “offensive[ness]” is a reason to “protect[]” speech, not “suppress[] it.” *Id.* (quotation omitted) (emphasis added); accord *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (speech protection “shield[s] just those choices of content that” others deem “hurtful”) (quotation omitted).

Repeatedly, the Supreme Court has affirmed that “public debate” is protected, even if the speaker employs “insulting, and even outrageous, speech.” *Snyder*, 562 U.S. at 458 (quotation omitted). The overarching First Amendment concern is with government “becoming an instrument for the suppression of vehement, caustic, and sometimes unpleasant expression.” *Id.* (citation modified). That threat remains when the state acts as employer. *Berger*, 779 F.2d at 1002 (rejecting the notion “that offensive speech may properly be curbed by exerting ... leverage upon public employers”).

Though government may “address” real “problem[s]” caused by employees’ speech, *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 825–27 (2000), it must act “consistent with First Amendment principles.” *Id.* at 827. And “[t]he history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly.” *Id.* at 826. So courts can’t rig the scales against speech protection by dismissing offensive remarks as “not very

important.” *Id.* A “bedrock” First Amendment rule is that government can’t bar expression “simply because society finds [a particular] idea ... offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

In recent history, the Supreme Court has affirmed that “[s]peech may not be banned on the ground that it expresses ideas that offend.” *Matal v. Tam*, 582 U.S. 218, 223 (2017). And the Court clarified that “disapprov[ing] ... a subset of messages [the government] finds offensive” violates this ban. *Iancu v. Brunetti*, 588 U.S. 388, 393 (2019) (quotation omitted). Yet offense-based disapproval is *exactly what courts do* when they reduce the protection given speech they deem mocking, derogatory, or disparaging. So First Circuit precedent allowing such viewpoint discrimination is inconsistent with the Supreme Court’s jurisprudence and should be overruled. *Accord id.* (stressing that viewpoint discrimination is “presumptively unconstitutional” (quotation omitted)).

B. No remand is necessary.

The district court was right to conclude that “this case does not present a factual dispute which a jury need resolve.” *Hussey v. City of Cambridge*, 720 F. Supp. 3d 41, 62 (D. Mass. 2024). It just got everything else wrong.

Within the department, Mr. Hussey only “receive[s] messages of support from his peers in the police department.” *Id.* at 60. And outside the department, there is a total disconnect between complaints from

two NAACP members and a former mayor and the City's concern that Mr. Hussey's political comment harmed the department's ability to "build trust within communities where drug use was widespread." *Id.* at 61. The City doesn't suggest that NAACP members and a former mayor with "political clout" live in communities where drug use is a "serious challenge." *Id.* at 59, 61. So their views on the subject are hardly indicative. And the City presented "no evidence that any drug users" knew or cared about Mr. Hussey's speech. *Id.* at 60.

In other words, the City relied "on speculation alone to justify its actions"—the very thing the district court said it may not do. *Id.* at 56. There is no relevant evidence of disruption to balance on the City's side, let alone a genuine dispute of material fact. So no remand is necessary.

CONCLUSION

Because the City failed to meet its burden of justifying the censorship of Mr. Hussey's speech on matters of public concern, the Court should reverse and order summary judgment for Mr. Hussey.

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 29 and this Court's January 28, 2026, Order because the brief does not exceed 30 pages.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Word 365 using a proportionally spaced typeface, 14-point Century Schoolbook.

Dated: February 25, 2026

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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2026, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the CM/ECF system.

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