No. 23-1817

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

KARI MACRAE

Plaintiff-Appellant,

v.

MATTHEW MATTOS; MATTHEW A. FERRON; HANOVER PUBLIC SCHOOLS

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

APPELLANT KARI MACRAE'S REPLY BRIEF

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INTRODUCTION

Defendants-Appellees Matthew Mattos, Matthew A. Ferron, and Hanover Public Schools (collectively "Hanover Public Schools") argue this case as though it is a run-of-the-mill First Amendment employment-retaliation case. It is not. Plaintiff-Appellant Kari MacRae was fired not because of speech she engaged in while a Hanover Public Schools employee or even because of speech she may have engaged in while she was an employee. She was fired for pseudonymously posting memes months before becoming a Hanover Public Schools teacher. In addition, the memes did not specifically relate to the school district, the administrators, or students. The memes concerned national debates on immigration policy, racism, and gender identity.

Because of the uniqueness of the facts in this case, MacRae raised four issues that this Court has not had the opportunity to resolve. Each of the issues was presented to and resolved by the District Court. The assertions by Hanover Public Schools to the contrary are simply wrong. The issues presented below and currently before this Court are:

1. The First Amendment employment retaliation standard does not apply to unrelated, preemployment speech. *See* Opening Br. at 5-9; Supplemental Appendix ("SA") 17-18; and Joint Appendix ("JA") 528-529.

2. A government employer's mere prediction of disruption is insufficient

to outweigh an employee's interest in engaging in political speech. *See* Opening Br. at 10-14; SA 18-19; and JA 541, 545.

3. The reasonableness of a government employer's prediction of disruption is a question for a jury. *See* Opening Br. at 14-15; SA 15-16; and JA 539-542.

4. Hanover Public Schools' prediction of disruption was not reasonable. *See* Opening Br. at 15-19; SA 13-19; and JA 539-542.

ARGUMENT

Hanover Public Schools' intemperate brief does not fully engage with the issues before this Court. It rests its arguments on the District Court opinion without providing any substantial reason why the court was correct. For that reason alone, the District Court's ruling should be reversed, and the case should be remanded for further proceedings.

I. The First Amendment Employment Retaliation Standard Does Not Apply to Unrelated, Preemployment Speech.

Hanover Public Schools does not dispute that neither this Court nor any other Circuit Court has held that the First Amendment employment-retaliation standard applies to unrelated, preemployment speech. Nor could it. As far as MacRae is aware, no such case exists.

Instead, Hanover Public Schools simply asserts that this Court in *Decotiis v. Whittmore* has resolved the question. On the contrary, the speech in *Decotiis* took

place while the plaintiff "was working under contracts with three" government entities. 635 F.2d 22, 27 (1st Cir. 2011). In addition, the plaintiff spoke through official channels such as communicating with "parents of children she was treating" and "post[ing] a notice in her office[.]" *Id*. at 28. Moreover, the content of the speech concerned whether the government entities she was working with were "in compliance with state and federal law." *Id*. Here, MacRae pseudonymously posted the memes months before she was employed by Hanover Public Schools. She also did not communicate directly with the Hanover community. She posted the memes on TikTok. In addition, the content of her speech did not specifically concern Hanover Public Schools. It concerned public debates on national topics. *Decotiis* simply does not resolve the question of whether the First Amendment employment retaliation standard applies to unrelated, preemployment speech. If anything, it reinforces the reasons why the *Decotiis* standard should not apply here.

Hanover Public Schools also suggests that *Cleavanger v. University of Oregon*, Case No. 13-cv-01908-DOC, 2015 U.S. Dist. LEXIS 102972 (D. Or. Aug. 6, 2015) does not support MacRae's position. This too is mistaken.[1] As the

[1] Hanover Public Schools' reliance on *Riel v. City of Santa Monica*, Case No. 14-cv-04692-BRO, 2014 WL 12694159 (C.D. Cal. Sept. 22, 2014), is also misplaced. There, the plaintiff was hired to be the city's Communications and Public Affairs Officer. The city subsequently fired her because it learned that the

defendants stated in its motion for summary judgment, the plaintiff brought two claims. *See* Defendants' Motion for Summary Judgment in *Cleavanger v. University of Oregon*, Case No. 13-cv-01908-DOC, ECF No. 82 (D. Or.), filed on June 11, 2015, at 2. First, the plaintiff asserted a "public employee" claim "for alleged violations of his First Amendment rights based on speech he made while an employee of the University of Oregon." *Id*. at 10. With respect to this claim, the defendants stated that the relevant test was *Garcetti/Pickering* and their progeny. *Id.* at 11. Second, the plaintiff asserted a "private citizen" claim "based on speech he made in 2008 while a law student." *Id*. at 26. With respect to that claim, the defendants asserted, "A private citizen asserting a First Amendment violation under 42 U.S.C. § 1983 by a public official must prove: '(1) he has an interest protected by the First Amendment; (2) the defendant's actions were motivated or substantially caused by his exercise of that right; and (3) defendant's action effectively chilled the exercise of his First Amendment right.'" *Id*. at 28. The *Cleavanger* court resolved these two claims as brought by the plaintiff and argued by the defendants, and, in doing so, the court concluded that a First Amendment claim may lie if a plaintiff is fired for preemployment speech. 2015 U.S. Dist.

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plaintiff previously was publicly critical of not only the city but its communications program specifically. On a motion to dismiss, the court found that the plaintiff sufficiently pled her claims and that the defendant was not entitled to qualified immunity. It did not resolve the unique questions of law at issue here.

LEXIS 102972 at **25-29.

As the *Cleavanger* court noted, the private citizen retaliation test should be used for unrelated, preemployment speech because it best protects individuals from "rampant self-censorship." *Id*. at 29. Stated another way, if a government employer can easily fire employees for unrelated, preemployment speech, individuals would essentially have a lifetime muzzle on them. It is likely that no person would engage in public debate on important issues if she believed those words could very well prevent her from attaining government employment at any time in the future. As this Court reaffirmed in *Barton v. Clancy*, "[r]etaliation, though it is not expressly referred to in the Constitution, is nonetheless actionable because retaliatory actions may tend to chill individuals' exercise of constitutional rights." 632 F.3d 9, 23 (1st Cir. 2011) (internal quotation marks and citations omitted). Or, as the U.S. Supreme Court stated in *Perry v. Sindermann*:

> For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.

408 U.S. 593, 597 (1972). If the District Court's ruling were to stand, MacRae and individuals like her would be penalized for speaking on issues of public concern

prior to even being hired by government employers, and individuals who may want to be employed by the government one day would be inhibited from engaging in constitutionally protected speech out of fear of reprisal. For these reasons, this Court should adopt the *Najas Realty* test, which requires a plaintiff to prove that she engaged in constitutionally protected activity and that she was fired because of it, for First Amendment retaliation claims based on unrelated, preemployment speech.

II. Even if *Pickering* Balancing Applies, the District Court's Decision Should Be Reversed.

Without conceding that the District Court applied the proper test to her First Amendment retaliation claim, MacRae asserts, in the alternative, that the court erred with respect to three additional issues.

A. A government employer's mere prediction of disruption is insufficient to outweigh an employee's interest in engaging in political speech.

In her opening brief, MacRae demonstrates how the District Court erred by finding that Hanover Public Schools' mere prediction of disruption was sufficient to outweigh MacRae's interest in engaging in preemployment, political speech. Opening Br. at 10-14. Hanover Public Schools' response and its defense of the District Court's decision are puzzling. It cites a string of cases concerning speech that took place during employment. None of the cases concerns preemployment speech. One of the cases that Hanover Public Schools attempts to rely on is

Bonnell v. Lorenzo, 241 F.3d 800 (6th Cir. 2001). *Bonnell*, however, concerned speech that took place in the classroom, his reprimand for such speech, and his public grievances about the reprimand. *Id*. at 811. The case has nothing to do with preemployment speech. In addition, the interests of the school – a university in that matter – included "maintaining the confidentiality of student sexual harassment complaints, disciplining teachers who retaliate against students who file sexual harassment claims, and creating an atmosphere free of faculty disruption." *Id. at 824*.

Hanover Public Schools' other Sixth Circuit case fairs no better. In *Bennett v. Metropolitan Government of Nashville & Davidson City*, the court held that had the government employee's social media profile been private or had the employee not identified where she worked in the profile, the government employer's argument for terminating the employee "would not be as strong." 977 F.3d 530, 541 (6th Cir. 2020).

Neither of these cases is analogous to the case currently before the Court. MacRae's speech did not take place in the classroom. Nor did her speech identify her as a Hanover Public Schools employee. In fact, MacRae could not have spoken in the classroom or identified herself as an employee because she had not yet been hired by Hanover Public Schools when she pseudonymously posted the memes on TikTok. Therefore, the Sixth Circuit's holdings are inapposite.

Because of these distinctions, MacRae suggests that the Ninth Circuit's analysis in *Moser v. Las Vegas Metropolitan Police Department* is more on point because, although the speech took place while the teacher was employed, it occurred outside the classroom. Therefore, different interests were at stake and, as the court succinctly stated, "The government can meet its burden by showing a reasonable prediction of disruption. But the government cannot rely on mere speculation that an employee's speech will cause disruption." *Moser*, 984 F.3d 900, 908-909. Hanover Public Schools simply ignores this holding in its response. This Court should not follow suit; it should conclude that the mere speculation that an employee's speech will cause a disruption is not enough to outweigh an employee's interest in engaging in political speech – especially preemployment speech.

B. The reasonableness of a government employer's prediction of disruption is a question for a jury.

Hanover Public Schools also does not seriously address whether the District Court should have presented the question of reasonableness to a jury. It entirely ignores MacRae's citations and fails to address the Second Circuit's holding that reasonableness of a government employer's prediction of disruption is a question of fact. *Melzer v. Board of Education*, 36 F.3d 185, 192 (2d Cir. 2003). Because this Court has not previously addressed the issue, the District Court should have presented the reasonableness question to a jury. It should not have superimposed

its view on whether Hanover Public Schools' predictions were reasonable.

C. Hanover Public Schools' prediction of disruption was not reasonable.

Hanover Public Schools tries to support its position that its prediction of disruption was reasonable by citing *Curran v. Cousins*, 509 F.3d 36 (1st Cir. 2007). However, *Curran*'s facts are inapposite. In that case, the government employer – a sheriff's office – fired the employee for several reasons, including the reason that "his conduct was threatening and menacing" and that "he made highly inappropriate and violent comments regarding Adolf Hitler and the Nazis" in which it was clear that he identified "Hitler as the Sheriff, the Jews as the Correctional Officers, the Nazi generals as the Department's deputies and captains, and another group – including himself – as those who may attack the Nazis." *Curran*, 509 F.3d at 47-48. In sharp contrast, MacRae's pseudonymously posted memes did not threaten anyone – let alone anyone associated with Hanover Public Schools – with violence. Nor did MacRae compare any Hanover Public Schools' administrator, teacher, or student to Hitler or the Nazis. The memes are nothing more than commentary on very public, national debates. Predicted disruption from preemployment, political speech cannot be compared to the potential disruption from an employee's suggestion that his boss be assassinated by his coworkers. The fact that Hanover Public Schools solely relies on this case is telling.

CONCLUSION

MacRae respectfully requests the Court reverse the District Court's decision.

Dated: February 29, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief contains 2,124 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 a proportionally spaced typeface using Microsoft Word 365 with 14-point typeface and Times New Roman type style.

/s/ Michael Bekesha

CERTIFICATE OF SERVICE

I hereby certify that on February 29, 2024 I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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