THE SUPREME COURT OF THE UNITED STATES

SPRING TERM, 2025

DOCKET NO. -- - ----

JOAQUIN PROFETA,

Plaintiff-Petitioner,

v.

DUNCAN SCHOOL DISTRICT,

Defendant-Respondent.

ON APPEAL FROM THE

UNITED STATES COURT OF APPEALS

FOR THE THIRTEENTH CIRCUIT

Brief for Petitioner

Team 25

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Attorneys for Petitioner

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Questions Presented

1. Whether Respondent violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e17, by firing Petitioner because of his sexuality.
2. Whether Respondent violated Petitioner's First Amendment right to free speech by firing him for speaking on a matter of public concern after receiving only one negative, non-threatening email.

Opinion Below

Profeta v. Duncan School District, No. 24–1210 (13th Cir. Dec. 10, 2024)

Constitutional Rules and Provisions

U.S. Const. amend. I

42 U.S.C. §§ 2000e–2000e17

Introduction

This case concerns the firing of Petitioner, Joaquin Profeta, by Respondent, Duncan School District. Petitioner was a librarian who was fired for two reasons: (1) he is asexual, and (2) he posted a TikTok video explaining how librarians can respond to anti-queer book bans. The Court should find that Respondent's firing violated Petitioner's rights under Title VII

prohibition of sex discrimination, as well as Petitioner's First Amendment rights to free speech.

Petitioner is protected under Title VII as an asexual man. First, following *Bostock v. Clayton County*, courts have interpreted Title VII as prohibiting discrimination on the basis of sexual orientation; asexuality is one such sexual orientation. Second, following *Price Waterhouse v. Hopkins*, courts have recognized the applicability of gender stereotyping discrimination to petitioners who are queer or perceived to be queer. Discrimination against asexual individuals is prohibited because discrimination against individuals of minority sexual orientations punishes such individuals for non-conformance with traditional gender stereotypes, which presumes heterosexuality. Finally, irrespective of *Bostock* and *Price Waterhouse*, the Court should find that asexuality is protected under Title VII because the meaning of the term "sex" has developed such that discrimination on the basis of sexual orientation is now understood as a form of sex discrimination.

Petitioner's TikTok video is speech protected by the First Amendment under the *Pickering-Garcetti* framework. The Court should find that the TikTok video was made in Petitioner's capacity as a private citizen on a matter of public concern. While the video was filmed on a school campus, this does not automatically render it government speech. Likewise, the content

of the TikTok does not strip its constitutional protection even though it touches on Petitioner's field of employment. Petitioner's TikTok video was not an assigned or expected job function, nor was it created in furtherance of his duties as a librarian. As such, the Court should find that the speech remains protected under the first step of the *Pickering-Garcetti* test.

Further, Respondent failed to show that their interests in maintaining an efficient and disruption-free workplace outweigh Petitioner's free speech interest. Though Petitioner's speech was broadcast to many viewers on TikTok, Respondent did not receive any messages that would support a reasonable belief that their office function, authority, or worker relationships were undermined. Nor did Petitioner's speech implicate any of his colleagues or take place during work hours. Thus, the Court should find that Respondent violated Petitioner's First Amendment right to free speech.

Statement of the Case

Petitioner began employment at Duncan Middle School before the 2019-2020 school year. R. at 3. His work hours were during the school year, which ended in June and began in August. R at 5. Petitioner did not work over the summer. R. at 5. His job responsibilities were as follows: (1) Maintaining the catalogue

of the Duncan Middle School Library, (2) teaching periodic Library classes and organizing the annual book fair and reading challenge, and (3) abiding by all federal, state and local policy when conducting school business. R. at 5. The principal also had authority to discuss additional responsibilities. R. at 6.

Duncan Middle School has 400 enrolled students and is located in Duncan, Florachusetts. R. at 3. Duncan has a population of approximately 8,000 people. *Id.* The Duncan Town Council adopted Ordinance 1-5-2023 on May 1, 2023. R. at 3. The ordinance requires classrooms and libraries owned or operated in Duncan to limit access to material concerning sex, gender identity, and sexual orientation. R. at 3. Specifically, Duncan libraries are prohibited from keeping or promoting books that address "gender identity or sexual orientation" or contain content that a reasonable parent would want to know about. R. at 3.

At the end of the 2022-2023 school year, Petitioner went through the library catalogue and brought home all books that were subject to removal under the Ordinance. R. at 4. Petitioner and some friends of his built a small box to be displayed outside of Duncan Downtown Coffee House for the banned books. R. at 4. The box is labeled "Free Little Library." R. at 4. It directly faces Duncan Middle School. R. at 4.

Petitioner filmed a TikTok video to discuss the Free Little Library. R. at 4. Petitioner recorded the video from inside of the Duncan Middle School Library and posted it on Sunday, July 9th, 2023. R. at 4. In the TikTok, Petitioner calls upon librarians who "live in a red state or a red town that passes a book ban" to construct a "Little Free Library" of banned books. R. at 4. In the video, he shares that he identifies as an asexual person. R. at 4. He then identifies that he is in his library at Duncan Middle School. R. at 4.

Petitioner's TikTok account is public and has approximately four thousand followers. R at 5. The video posted on July 9th received over 100,000 likes and 200 comments. R. at 5. The following week, Duncan Middle received six emails in support of Petitioner's TikTok video. R. at 5. The principal of Duncan Middle also personally received one email criticizing the video. R. at 5. None of these emails were violent or threatening in nature. R. at 5.

As a result of Petitioner's TikTok post and his asexuality, Duncan Middle's principal terminated his employment. R. at 5. Both parties agree that these were the two reasons for Petitioner's termination. R at 5. In October 2023, Petitioner filed suit in federal district court against Duncan Middle School. R. at 6.

Argument

I. THE COURT SHOULD FIND THAT DISCRIMINATION BASED ON SEXUAL ORIENTATION, INCLUDING ASEXUALITY, VIOLATES TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

Title VII of the Civil Rights Act of 1964 makes it unlawful "for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2(a)(1). In passing Title VII, Congress hoped that employers "would focus on the qualifications of the applicant or employee." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 (1989). Accordingly, in *Bostock v. Clayton County, Georgia*, this Court held that Title VII protections extend to homosexuality and transgender status. 590 U.S. 644 (2020). *Bostock* laid the groundwork for similar protections for other sexualities, including asexuality.

In the case at bar, the Court should find that discrimination on the basis of asexuality violates Title VII because (1) numerous lower courts have interpreted *Bostock* and Title VII to broadly prohibit discrimination on the basis of sexuality; (2) courts have previously found Title VII violations for gender stereotype discrimination cases analogous to asexuality discrimination; and (3) the definition of "sex" in Title VII encompasses not only the biological distinctions between male and female, but also gender and sexuality.

A. *Bostock* establishes protections for sexuality-based discrimination, including asexuality-based discrimination, under Title VII.

This Court most recently considered Title VII's application to instances of sexuality-based discrimination in *Bostock v. Clayton County, Georgia*, 590 U.S. 644 (2020). There, this Court proceeded upon the definition of "sex" as referring to "biological distinctions between male and female." *Id.* at 655. This definition was stipulated by the parties, though petitioners presented evidence suggesting that the term encompassed "at least some norms concerning gender identity and sexual orientation." *Id.* This Court further reasoned that "because of" referred to the concept of but-for causation and that "to discriminate" meant "to make a difference in treatment or favor." *Id.* at 656–58. Using these definitions, this Court found that it was "impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id.* at 660. Sex was a but-for cause of homosexuality- or transgender status-based discrimination. *Id.* at 661. Sex, this Court reasoned, is a but-for cause of such discrimination as "homosexuality and transgender status are inextricably bound up with sex." *Id.* at 660–61. A homosexual man is homosexual both because he is attracted to men and because he is a man. *Id.* at 660–62. Thus,

to discriminate against him because he is homosexual is to discriminate against him in part because of his sex. *Id.*

By the same reasoning, *Bostock* laid the foundation to extend Title VII protections to bisexual and pansexual individuals, as well as to individuals with similar minority sexualities. Relying upon the same definition of "sex" as used in *Bostock*, a person is bisexual both because they identify as one sex and because they are attracted to members of that same sex and to members of the opposite sex. A person is pansexual because they identify as one sex and are attracted to members of that same sex and to members of other sexes and genders. A similar argument can be made in the case for Title VII protection of asexual individuals. This is the case at bar. A person is asexual both because they identify with one sex and because they are not sexually attracted to members of the opposite sex or to members of their own sex. At the heart of *Bostock* is an acknowledgement that an individual's sexuality is necessarily defined in relation to their sex. Thus, *Bostock* laid the precedential foundation for claimants to assert Title VII protections against employer discrimination on the basis of bisexuality, pansexuality and other like sexualities. In 2020, the 6th Circuit held that *Bostock* ensured Title VII protections for bisexual individuals. *Breiner v. Bd. of Educ.*, No. 19-5123, 2020 U.S. App. LEXIS 33103 (6th Cir. Oct. 20, 2020). Other recent

cases similarly rely upon *Bostock* to extend Title VII protections to sexual orientations beyond homosexuality. *Ames v. Ohio Dep't of Youth Servs*, 87 F.4th 822 (6th Cir. 2023) (per curiam), *cert granted*, No. 23-1039, 2024 WL 4394128 (S. Ct. Oct. 4, 2024); *Molina v. John Jay Inst. for Just. & Opportunity*, 23 Civ. 1493 (DEH), 2024 WL 4276913 (S.D.N.Y. 2024).

Additionally, numerous circuit courts have interpreted *Bostock* to broadly prohibit workplace discrimination based on sexual orientation and gender identity, as opposed to the limited context of homosexuality and transgender status. *Olivarez v. T-Mobile USA, Inc.*, 997 F.3d 595, 598 (5th Cir. 2021) ("Under *Bostock v. Clayton County* . . . discrimination on the basis of sexual orientation or gender identity is a form of sex discrimination under Title VII."); *Adams by and through Kasper v. School Board of St. John's Cnty.*, 57 F.4th 791, 808 (11th Cir. 2022) ("*Bostock* involved employment discrimination under Title VII of the Civil Rights Act of 1964 . . . specifically, various employers' decisions to fire employees based solely on their sexual orientations or gender identities."); *Frith v. Whole Foods Market, Inc.*, 38 F.4th 263, 271 (1st Cir. 2022) ("In Bostock, the Court considered whether Title VII prohibits employment actions taken at least in part on the basis of a plaintiff's sexual orientation or gender identity."). Thus, *Bostock* is widely recognized to have

established Title VII protections for individuals of different sexualities and gender identities.

The issue at bar is whether Title VII protections prohibit workplace discrimination based on asexuality. Asexuality is properly understood as a sexual orientation. R. at 9 (Bouton, J., dissenting). As acknowledged by this Court in *Bostock*, an individual's sexuality is necessarily defined in relation to their sex. *See supra* p. 7–8. This Court's precedent thus suggests that asexuality-based discrimination is prohibited under Title VII.

A finding otherwise would illogically limit the scope of Title VII's protections and create precisely the kind of "curious discontinuity" in the law that *Bostock* sought to avoid. 590 U.S. at 673. The Thirteenth Circuit's interpretation of *Bostock* would leave asexual individuals with no actionable sex discrimination claim where identical claims are explicitly available to homosexual and transgender individuals and implicitly available to individuals with other minority sexualities. *See* R. at 6–7. Thus, this Court should hold that Petitioner is protected under Title VII's prohibition of sex discrimination.

B. Courts have prohibited discrimination based on gender stereotypes in ways applicable to protecting asexuality.

Even if the Court does not explicitly extend the reasoning in *Bostock* to include all sexualities, Title VII protects asexual individuals because discrimination on the basis of sexuality punishes individuals for violating traditional gender stereotypes, which Courts have previously recognized as a form of sex-based discrimination. Specifically, sexual orientation is interconnected with notions of traditional gender roles, such that discrimination based on an individual's perceived sexual orientation evinces sex discrimination.

In *Price Waterhouse v. Hopkins*, a plurality of the Court recognized that discriminatory treatment "resulting from sex stereotypes" was a violation of Title VII. 490 U.S. at 251. Lower courts subsequently recognized that prohibiting stereotype-based discrimination could protect gender non-conforming or sexual minorities, even without categorizing them as a protected class under Title VII. *See, e.g., Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (being "'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity"); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068 (9th Cir. 2002) (en banc) (Pregerson, J., concurring) ("gender stereotyping of a male gay employee" actionable under

Title VII); *Anonymous v. Omnicom Grp., Inc.*, 852 F.3d 195, 200 (2d Cir. 2017) ("at a minimum, 'stereotypically feminine' gay men could pursue a gender stereotyping claim under Title VII (and the same principle would apply to 'stereotypically masculine' lesbian women").

In contrast, in a pre-*Bostock* case, the Sixth Circuit rejected the application of a gender-stereotype discrimination argument to a plaintiff who was perceived to be gay, as it was unwilling to "*de facto* amend[] Title VII to encompass sexual orientation as a prohibited basis for discrimination." *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006). Post-*Bostock*, this concern is unwarranted. *Roberts v. Glenn Indus. Grp., Inc.*, 998 F.3d 111, 120-21 (4th Cir. 2021). Since this Court found that discrimination on the basis of homosexuality or transgender status is a form of sex discrimination, it should also recognize the applicability of its holding to sex-stereotype-based discrimination.

Specifically, the Court should follow lower courts in recognizing that sexual orientation and gender stereotypes are interlinked. *See Vickers*, 453 F.3d at 764 (noting that "any discrimination based on sexual orientation would be actionable under a sex stereotyping theory"); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 213 (2d Cir. 2005) ("stereotypical notions about how men and women should behave will often necessarily blur into

ideas about heterosexuality"); *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 346 (7th Cir. 2017) (In a country that "views heterosexuality as the norm . . . the line between a gender nonconformity claim and one based on sexual orientation . . . does not exist at all."). Discriminatory coworkers and employers have certainly made this connection already. *See, e.g., EEOC v. Boh Bros. Constr. Co., L.L.C.*, 731 F.3d 444, 461 (5th Cir. 2013) (Male plaintiff called "queer" for perceived effeminacy). Thus, given the interconnected nature of sex stereotypes and sexual orientation, the Court should recognize that discrimination on the basis of sexual orientation is a form of sex discrimination.

As it relates to asexuality, courts have previously considered conduct aimed at plaintiffs' perceived failure to perform (hetero)sexuality as evidence of sex discrimination. *See Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874 (9th Cir. 2001) (male plaintiff "was derided for not having sexual intercourse with a waitress"); *Brodsky ex rel. S.B. v. Trumbull Bd. of Educ.*, No. CIV. 3:06CV1947PCD, 2009 WL 230708, at *7 (D. Conn. Jan. 30, 2009) ("Depending on context, the use of gendered or sexually loaded insults such as . . . 'prude' . . . can certainly be indicative of animus on the basis of sex"); *Lively v. Flexible Packaging Ass'n*, 830 A.2d 874, 893 (D.C. 2003) (male employees referred to women as "old maids"); *Wirtz v. Kansas*

Farm Bureau Services, Inc., 274 F.Supp.2d 1198, 1210 (D. Kan. 2003) (coworker spread rumors "that she propositioned the plaintiff and he turned her down"); *Termilus v. Marksman Sec. Corp.*, No. 15-61758-CIV, 2016 WL 6212990, at *4 (S.D. Fla. June 27, 2016) (Workplace harasser "commented that the plaintiff had 'not f**ked for a long time and that she was acting like an old maid'"). These cases illustrate that not only is sexual orientation closely interlinked with sex stereotypes, but that the failure to have sex at all, which for some will be due to their asexuality, violates gender norms such that individuals may be subjected to sex discrimination.

Additionally, discrimination against an asexual man or woman for failing to conform to their respective gender stereotypes is sex discrimination even if an employer discriminates against asexual employees of both genders. Thus, in *Bostock*, the Court recognized:

> "So an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. But in both cases the employer fires an individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it." 590 U.S. at 659.

The Court should therefore find that discrimination on the basis of sexual orientation, including asexuality, punishes

individuals for not conforming to heteronormative gender stereotypes, and is categorically a type of sex discrimination.

C. The Court should interpret "sex" under Title VII to encompass sexuality.

The Court should also re-examine its understanding of the term "sex" under Title VII as encompassing not only biological features and social constructions of gender, but also sexuality. If the Court were to find that the reasoning under *Bostock* and *Price Waterhouse* does not protect asexuality under Title VII, the Court should instead recognize that a broader understanding of the term "sex", to encompass "sexual orientation", is needed today.

Previous Title VII cases have noted that although Title VII's prohibition of sex discrimination was primarily aimed at discrimination against women, this does not restrict the Court from "go[ing] beyond the principal evil to cover reasonably comparable evils." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79, (1998). Thus, the meaning of Title VII's prohibition of sex discrimination has undergone expansions. This includes changing understandings of what discrimination can look like. *See Dothard v. Rawlinson*, 433 U.S. 321, 337 (1977) (disparate impact); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986) (hostile work environment); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753 (1998) ("quid pro quo" sexual

harassment); *Price Waterhouse*, 490 U.S. 228 (1989) (gender stereotypes).

Similarly, courts have addressed which classes of plaintiffs can bring certain types of claims. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (former employees); *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 452 (5th Cir. 1994) (same-sex sexual harassment is not actionable); *Oncale*, 523 U.S. at 79. (same-sex sexual harassment is actionable); *Smith*, 378 F.3d at 575 (transgender individuals can claim stereotype discrimination); *Anonymous*, 852 F.3d 195 (2d Cir. 2017) (gay individuals can claim stereotype discrimination).

Additionally, courts have developed their understanding of what "sex" encompasses. *See Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) ("anatomical characteristics", as opposed to "gender"); *Ulane v. E. Airlines*, 742 F.2d 1081, 1087, 1083 n.6 (7th Cir. 1984) ("biological male or biological female," i.e. an individual's unchangeable chromosomes and other biological characteristics); *Price Waterhouse*, 490 U.S. at 239 ("gender"); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000); ("Title VII encompasses both sex—that is, the biological differences between men and women—and gender.").

These developments in Title VII jurisprudence reflected changing understandings of sex discrimination since the passage of Title VII, ensuring that the statute did not become outdated.

Finally, this culminated in the recognition that sex discrimination encompasses discrimination against homosexual or transgender individuals. *Bostock*, 590 U.S. 644 (2020). However, absent an extension of *Bostock* or *Price Waterhouse* reasoning, this leaves unanswered whether other minority sexual orientations or gender identities are protected under Title VII. The Court can rectify this confusion by re-examining the scope of the term "sex."

As argued previously, either the *Bostock* or *Price Waterhouse* reasoning can be extended to protect individuals with minority sexual orientations. If not relying on their reasoning, however, this Court should still recognize that a common lesson across *Bostock*, *Price Waterhouse*, and the many lower court cases involving queer plaintiffs (or plaintiffs perceived to be queer) bringing Title VII claims, is that "sexual orientation is a function of [] sex." *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 135 (2d Cir. 2018). In other words, our understanding of sex encompasses sexual orientation. Thus, "there is no reasonable way to disentangle sex from sexual orientation in interpreting the plain meaning of the words 'because of . . . sex.' The first term clearly subsumes the second, just as race subsumes ethnicity." *Id.* (Lohier, J., concurring).

Although this may not be the original meaning of "sex" as understood at the time of enactment of Title VII, the Court is

not restricted to interpreting sex as the biological categories of male and female. Just as the Court recognized that sex discrimination encompasses quid pro quo sexual harassment or gender-stereotype discrimination, the Court should today "interpret[] on the basis of present need and present understanding." *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 352 (7th Cir. 2017) (Posner, J., concurring). By recognizing that sexual orientation is a subset of our understanding of sex, and that sexual orientation discrimination is a form of sex discrimination, the Court can "avoid statutory obsolescence and concomitantly [] avoid placing the entire burden of updating old statutes on the legislative branch." *Id.* at 357. Thus, the Court should find that discrimination on the basis of sexual orientation, including asexuality, is sex discrimination.

II. THE COURT SHOULD FIND THAT PETITIONER'S FIRST AMENDMENT RIGHTS WERE VIOLATED BECAUSE HIS TERMINATION WAS BASED ON PROTECTED SPEECH.

Terminating a public employee for engaging in private speech on a matter of public concern violates their First Amendment right to free speech. The First Amendment, among other protections, safeguards individuals from government interference when expressing their views. U.S. Const. amend. I. However, government entities have the ability to restrict speech when

acting as an employer. *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006). Nevertheless, this Court has recognized that "a citizen who works for the government is nonetheless a citizen." *Id.* Teachers and students do not automatically "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

To determine whether the government may lawfully restrict the speech of its employees, this Court has long applied the *Pickering* framework, later refined by *Garcetti*. This two-step test aids in sifting through the complexity of the relationship between government employment and free speech protections. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 508 (2022). The threshold inquiry of the *Pickering-Garcetti* test involves whether the public employee spoke "as a citizen addressing a matter of public concern." *Id.* If the speech was made pursuant to the employee's ordinary job duties, it does not qualify as private speech for First Amendment purposes and the inquiry ends there. *Garcetti*, 547 U.S. at 421. However, if the employee spoke as a private citizen on a matter of public concern, the possibility of a First Amendment Claim arises.

The second step requires balancing the employee's free speech rights against the government's interest in maintaining "effective and efficient fulfillment of its responsibilities to

the public." *Connick v. Myers*, 461 U.S. 138, 150 (1983). When an employee is simply performing their job duties, there is no need for similar scrutiny. *Garcetti,* 547 U.S. at 423. To conclude otherwise would improperly expand judicial intervention "to a degree inconsistent with sound principles of federalism and the separation of powers." *Id*.

A. Petitioner spoke as a private citizen on a matter of public concern, not pursuant to his official duties.

Petitioner's TikTok video on Respondent's book ban was not made within the scope of his ordinary job duties. Prior to this Court's decision in *Garcetti*, the primary focus of the first step of the *Pickering* test was whether the speech addressed a matter of public concern. The Court's decision in *Garcetti* created an additional inquiry to be assessed before *Pickering*: whether the employee spoke pursuant to their official duties or spoke plainly as a citizen. *Garcetti*, 547 U.S. at 421. Under the *Pickering-Garcetti* framework, if an employee's speech falls within the scope of their official duties, it is treated as government speech, and First Amendment protections do not apply. *Id*. Therefore, the critical preliminary question at issue is whether or not Petitioner's speech is ordinarily within the scope of his duties. *Lane v. Franks*, 573 U.S. 228, 240 (2014). This inquiry is to be taken practically instead of "with a blinkered focus" on a "formal and capacious written job

description.” *Garcetti*, 547 U.S. at 424. Courts should consider the facts surrounding “the substance of the speech and the nature of its utterance,” though these factors are not exhaustive. *Wood v. Fla. Dep't of Educ.*, 729 F. Supp. 3d 1255, 1275 (N.D. Fla. 2024).

For purposes of the second element of this test, both parties have agreed that Petitioner’s speech in question addressed a matter of public concern. Accordingly, this brief will not analyze this element.

1. The location and circumstances of Petitioner’s speech do not render it government speech.

The circumstances and location of the Petitioner’s speech are not dispositive in determining whether it was an ordinary part of his duties as a librarian at Duncan Middle School. Petitioner’s particular scenario is unique in that it can arguably be characterized as occurring in two separate locations: (1) inside the library of Duncan Middle School and (2) publicly in the online forum of TikTok. Regardless of how the Court chooses to categorize the location of his speech, neither setting precludes the argument that he was speaking as a citizen on a matter of public concern.

The Supreme Court has consistently held that the location and circumstances of an employee’s speech do not automatically render it a part of their official duties. *Garcetti,* 547 U.S. at

420. Many citizens do much of their speaking inside of their workspaces, especially employees at public schools. *Id.* For instance, in *Kennedy*, the Supreme Court held that a public high school football coach's post-game prayers were not a part of his official job duties. *Kennedy*, 597 U.S. at 509. Notably, these prayers took place on school grounds. *Id.* at 530. The facts of *Kennedy* are similar to Petitioner's in that both were employees at a public school and both were in their respective places of work when the speech in question occurred. *Id.* at 514, 530. Neither were actively performing job duties when the speech occurred. Kennedy was on the football field directly after the game, which is the location of his regular coaching duties, but was utilizing an explicit time allotted to him to attend to personal matters. *Id.* at 531. Similarly, Petitioner was in the location of his normal work duties, the Duncan Middle School library, but notably was there during the summer when no students were present. The Circuit Court was correct in recognizing that *Kennedy* is controlling, yet their application misses this element of the case. Just as Kennedy's location at school did not negate his free speech claim, neither should Petitioner's. Additionally, the fact that Petitioner shared his speech via TikTok does not preclude his claim. Public speech is also not inherently government speech. *Pickering v. Bd. Of Educ. Of Twp. High Sch. Dist. 205, Will Cnty.*, 391 U.S. 563, 574

(1968). The deciding factor is neither the audience nor the location of the speech in question.

Accordingly, the Court should find that neither the location nor the circumstances of the Petitioner's speech undermine its constitutional protection.

2. The content of Petitioner's speech does not strip it of First Amendment protection.

The content of the Petitioner's speech does not automatically place it within the scope of his employment. Courts distinguish between speech that merely touches on work-related issues and speech that is directly tied to an employee's assigned duties. Only the latter falls outside First Amendment protection. The fact that speech touches on matters related to public employment is not enough to categorize it as government speech. *Lane,* 573 U.S. at 245. The First Amendment protects some expressions related to an employee's job, even when the subject matter concerns their workplace. *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 413 (1979).

In *Pickering*, a public-school teacher was dismissed after writing a public letter to a newspaper criticizing the school board's financial decisions. 391 U.S. at 564. The letter was essentially a criticism of the "allocation of school funds between educational and athletic programs" and accused the superintendent of preventing "teachers in the district from

opposing or criticizing the proposed bond issue." *Id.* at 569. Despite the direct connection to Pickering's workplace, the Court held that his speech remained protected. *Id.* at 574. The Court noted that teachers are "members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent." *Id.* at 563. The Court reasoned that it is crucial that teachers be able to speak freely on such questions without fear of retaliatory dismissal. *Id*. The Court noted that this is not limited to teachers but many other categories of public employees. *Garcetti,* 547 U.S. at 521.

In this case, the substance of Petitioner's speech surrounds the establishment of "the little library," which he indicated was in response to being in a "red town that passe[d] a book ban." R. at 4. Like in *Pickering*, where speech about school funding remained protected despite its direct relevance to the speaker's occupation, the mere fact that Petitioner's speech mentions "Duncan," books, and public education does not automatically strip it of constitutional protection. Even though Petitioner learned about the book ban by virtue of his position, R. at 4, that alone does not transform his speech into government speech. As the Supreme Court has recognized, public employees are uniquely qualified to comment on government policies that concern members of the public. *City of San Diego,*

Cal. v. Roe, 543 U.S. 77, 80 (2004). Speech that references employment does not lose First Amendment protection unless it is performed as a job function.

The Court should find that the substance of Petitioner's speech, in mentioning his location and his position, does not preclude it from constitutional protection.

3. Petitioner's speech was not an assigned or expected job function.

At the heart of determining whether Petitioner's speech satisfies the first step of the *Pickering-Garcetti* test is assessing whether it was a part of an assigned job function. While factors such as location and substance can aid this analysis, as discussed above, they are not dispositive. Speech is unprotected when it is a core function of the employee's job, expected by the employer, or part of an official directive. *Lane*, 573 U.S. at 240. While formal job descriptions can provide guidance, they are neither necessary nor sufficient "to demonstrate that conducting the task is within the scope of the employee's professional duties, for First Amendment purposes." *Garcetti*, 547 U.S. at 425. Instead, courts look at whether the speech "owes its existence" to the employee's job responsibilities and whether it is a product of performing tasks the employee is paid to perform. *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1127 n.2 (9th Cir. 2008). An

employee speaks in a personal capacity when they have an official duty to make the questioned statements. *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 778 (9th Cir. 2022).

Garcetti involved a deputy district attorney who wrote an internal memorandum recommending dismissal of a criminal case based on his concerns about a warrant's accuracy. *Garcetti,* 547 U.S. at 413. He later claimed that he was subjected to retaliatory employment actions for his recommendation. *Id.* at 415. He argued that his speech was constitutionally protected under the First Amendment. *Id.* at 418. However, the Supreme Court held otherwise. *Id.* at 421. The Court reasoned that Ceballos' role as a prosecutor includes evaluating evidence and making recommendations on pending cases. *Id*. Writing memoranda to supervisors was an expected function of his job, rather than a voluntary act of public commentary. *Id*. His speech arose directly from his professional responsibilities and was therefore unprotected government speech. *Id*.

Petitioner's case is distinguishable from the Court's reasoning in *Garcetti*. Just as Ceballos was not acting as a private citizen when writing memoranda to supervisors, Petitioner was not acting as a private citizen when he carried out his official duties as Duncan Middle School's librarian. While he is maintaining the school catalog, acquiring and removing library materials, or organizing the annual book fair,

he is acting in his capacity as a government employee. R. at 5. These are prescribed functions of his job that owe their existence to the position. *Id*. However, unlike *Garcetti*, there is no indication to suggest that filming and posting TikToks is in any way an expected job function of Duncan Middle School librarians. Never in the past was Petitioner paid by Duncan Middle School to produce a TikTok. Petitioner did not post the TikTok at issue for the purpose of organizing the annual book fair or to acquire material for Duncan. R. at 4-5. Instead, he posted the video of his own volition, on a personal account, and on a matter of public concern. R. at 4, 7. He did not "seek to convey a government-created message" or engage "in any other speech the District paid him to produce." *Kennedy,* 597 U.S. at 529.

The Thirteenth Circuit considered Petitioner's his job responsibilities and the location of his speech and as evidence that the speech fell within his ordinary duties. R. at 7. Precedent contradicts this conclusion. One could argue that it is inherent to the job of Petitioner to *speak* in the library of Duncan Middle School and that is precisely what he did at the time in question. It is true that teachers, coaches, and librarians alike serve as vital role models, and our courts have acknowledged this. *Kennedy* 597 U.S. at 530. However, this Court has rejected this line of reasoning, arguing that it improperly

relies on an overly expansive interpretation of job duties, effectively categorizing all speech made by public school employees as government speech. *Garcetti*, 547 U.S. at 424. Because Petitioner's speech was neither assigned nor expected by his employer, and otherwise did not arise from his job responsibilities, his speech remains protected under the first step of the *Pickering-Garcetti* test.

B. Respondent failed to show that their interest in maintaining an efficient and disruption-free workplace outweighed Petitioner's right to free speech.

Petitioner's free speech interests outweigh Respondent's interest in maintaining an efficient and disruption-free public workplace. Under the second prong of the *Pickering-Garcetti* test, the government bears the burden of establishing that its interests outweigh Petitioner's First Amendment right to free speech. *Connick*, 461 U.S. at 151–52; *Pickering*, 391 U.S. at 568. Such "particularized balancing" requires careful consideration of the nature of the expression at issue. *Connick*, 461 U.S. at 150. Relevant to this inquiry is the "manner, time, and place of the employee's expression," *Id.* at 152, as well as "the context in which the dispute arose," *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). An adverse hiring decision may survive this balancing exercise if the government "reasonably believed" that an employee's speech would "disrupt the office, undermine [its]

authority, and destroy close working relationships." *Connick*, 461 U.S. at 154. This Court's precedent suggests that such a belief must be supported by a "substantial showing" on behalf of the government. *Waters v. Churchill*, 511 U.S. 661, 673—74 (1994) (plurality opinion).

Here, Petitioner filmed and uploaded his TikTok post midway through Duncan Middle School's summer recess. R. at 4. Petitioner's post was thus very unlikely to disrupt the academic year or to otherwise interfere with any aspect of Duncan Middle School's operation and working environment. Further, though Petitioner's video garnered a large number of views on social media, Respondent received no threatening emails in relation to the video. R. at 5. Of the seven emails that Respondent did receive regarding the merits of the book ban and Petitioner's employment, R. at 5, none were of a nature that would support a reasonable belief that Duncan Middle School's workplace or operation would be disrupted. Neither did Petitioner's TikTok post undermine Respondent's authority: Petitioner criticized Ordinance 1-5-2023, not Respondent or Duncan Middle School. R. at 4. Thus, a "particularized balancing" of Petitioner's free speech rights and Respondent's interest does not support a finding for Respondent. *Connick*, 461 U.S. at 150.

In the decision below, the Thirteenth Circuit relied upon *Connick v. Myers*, 461 U.S. 138 (1983), to find that Petitioner's

TikTok video disrupted Respondent's workplace and undermined the public services there rendered. R. at 7–8. There, Myers, a public employee employed by Connick, challenged a hiring action related to her choice to distribute a questionnaire to her colleagues during working hours. *Connick*, 461 U.S. at 140–42. *Connick* is meaningfully distinguishable from this case, where Petitioner did not implicate or involve his colleagues in his TikTok post and filmed the post outside of working hours. R. at 4–5. Unlike Myer's speech in *Connick*, Petitioner's speech did not disrupt the workplace or threaten close working relationships by implicating colleagues.

Thus, Respondent failed to show that their interests in maintaining a disruption-free workplace outweigh Petitioner's free speech rights.

Conclusion

For the foregoing reasons, Petitioner respectfully requests that the Supreme Court reverse the decision of the Thirteenth Circuit and hold that discrimination based on asexuality is prohibited under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 20000e–2000e17, and that Respondent's adverse hiring action violated Petitioner's right to free speech under the First Amendment, U.S. Const. amend. I.

Respectfully submitted,

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