

IN THE SUPREME COURT OF THE STATE OF IDAHO

BIG CITY COFFEE, LLC, dba, BIG CITY COFFEE
& CAFÉ, and SARAH JO FENDLEY, an individual,

Plaintiffs-Respondents,

v.

LESLIE WEBB, individually, and in her official
capacity as Vice President for Student Affairs and
Enrollment Management; ALICIA ESTEY,
individually, and in her official capacity as Vice
President for University Affairs and Chief of Staff,

Defendant-Appellant,

and

BOISE STATE UNIVERSITY, MARLENE
TROMP, individually, and in her official capacity as
President of Boise State University; and
FRANCISCO SALINAS, individually, and in his
official capacity as Assistant to the Vice President for
Equity Initiatives, and DOES 1-20,

Defendants.

Docket No. 52646-2025

**On Appeal from Ada County District
Court Case No. CV01-21-15332**

**BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF
PLAINTIFFS-RESPONDENTS AND AFFIRMANCE**

Appeal from the Fourth Judicial District for Ada County
The Honorable Cynthia Yee-Wallace, Presiding

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IDENTITY AND INTEREST OF AMICUS¹

Pacific Legal Foundation (PLF) is a nonprofit public interest law firm that litigates nationwide to defend individual rights. PLF's work promotes constitutional limits on government power and clear, principled rules that allow individuals to speak without fear of government retaliation. PLF has a particular interest in ensuring that businesses and individuals who work with government entities do not forfeit constitutional protections when they speak as private citizens.

INTRODUCTION

Sarah Fendley has a First Amendment right to speak on her business's social media account about matters of public concern without fear of government retaliation. Boise State University administrators, who terminated her contract as a campus coffee vendor because students complained about Ms. Fendley's social media post supporting police and first responders, should have known this.

Universities should serve as beacons of free inquiry and open debate. *See Reges v. Cauce*, 162 F.4th 979, 992 (9th Cir. 2025) ("The university is a primary generator and repository of ideas, a place in which unfettered academic debate and open discourse promotes the search for truth and prepares students for a discordant world lacking in orthodoxy."). Instead, campuses are boiling with free speech controversies, and university leaders have too often sided with silence, not free

¹ Pursuant to I.A.R. 8(c), Amicus Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

discourse. A university quick to prune dissenters from its ranks will drift from its core function. As a federal appellate judge recently put it, “A university that turns itself into an asylum from controversy has ceased to be a university; it has just become an asylum.” *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1130 (11th Cir. 2022) (Marcus, J., concurring).

It is bad enough when a university culls dissent within its walls among its own. Yet something even worse occurs where, as here, a university reaches outside its cloistered halls to punish speech uttered in the public square by someone who is neither employed by nor enrolled at the university. Then the university becomes more than an asylum—it becomes a roving speech tribunal. This Court should remind the university of the constitutional limits of its authority; while it can discipline its actual employees for speech that disrupts its educational mission, it cannot reach outside its walls to penalize speech on a topic unrelated to the university’s activities, uttered in the public square, by a member of the general public.

I. Strict Scrutiny, not *Pickering* Balancing, Is the Appropriate Standard Here.

In any First Amendment dispute, courts must decide how to decide—i.e., what test to apply. Here, the lower court erred in applying the balancing test under *Pickering v. Board of Education*, 391 U.S. 563 (1968), created for government employee speech, rather than strict scrutiny. The reason is simple: Sarah Fendley was not a government employee.²

² Appellees were not required to cross-appeal the district court’s application of *Pickering* for this Court to consider the proper standard of scrutiny. See *Jennings v. Stephens*, 574 U.S. 271, 276 (2015). Nor does the Court’s authority to determine the governing First Amendment framework depend on whether the prevailing parties elected to contest that framework in their briefing, where

Pickering balancing is an exception to the rigorous scrutiny that would otherwise apply to government retaliation for protected speech. *See id.* at 568 (“[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.”). Rather than the standard strict scrutiny test, the Supreme Court carved out a more forgiving standard to accommodate the unique interests of the government employer, requiring courts to balance the employee’s First Amendment interests against “the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” *Id.*

A business owner sub-contracted with a prime contractor for the government is not a government employee within the meaning of *Pickering*. In *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 38 (2d Cir. 2018), the Second Circuit held that *Pickering* did not apply to speech by vendors sub-contracted with a prime contractor to offer food services for a government outdoor lunch program on public property.

Sometimes *prime* contractors may qualify as employees under *Pickering* if they are contracted to perform government services. For example, in *Board of County Commissioners v. Umbehr*, 518 U.S 668 (1996), a county board terminated a contract with a waste disposal company assigned to carry out the county’s statutory mandate to provide waste disposal services because of

the applicable standard of scrutiny is a threshold legal question. Appellees’ response brief cogently explains why the judgment should be affirmed even under *Pickering*; but if the Court concludes otherwise, it may properly consider whether *Pickering* was the correct test to apply in the first instance.

the CEO's criticism of the board. The Court noted that "[i]ndependent contractors appear to us to lie somewhere between the case of government employees, who have the closest relationship with the government, and our other unconstitutional conditions precedents, which involve persons with less close relationships with the government." *Id.* at 680. The Court concluded, however, that the contractor's relationship to the government was close enough to justify the use of *Pickering*. *Id.* at 677. The Court nonetheless "emphasize[d] the limited nature" of its holding, cautious not to impose a broad rule governing future cases that fell along the spectrum between government employee and member of the public. *Id.* at 685.

Even then, subsequent caselaw cautions against a categorical rule that would place all prime contractors within reach of *Pickering*. For example, the Eighth Circuit recently declined to extend *Pickering* to a bank employee who worked at a bank location inside a public school, where the bank held a direct agreement with the school to arrange for students to intern there. *See McNeally v. HomeTown Bank*, 155 F.4th 1000, 1007 (8th Cir. 2025). By contrast, in *Smith v. Cleburne County Hospital*, 870 F.2d 1375, 1381 (8th Cir. 1989), a doctor who independently contracted with a county hospital fell within reach of *Pickering* because he was treated by the hospital like other employees, had working relationships with hospital staff, and executed duties assigned to him by the hospital.

Considered together, these cases point to at least three primary indicia of government employment within the meaning of *Pickering*: (1) the existence of a direct contract with the government, (2) entanglement with government functions, and (3) remuneration from the

government. These factors keep *Pickering* moored to its core purpose of protecting the government employer's ability to control speech that "impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). At some point, contractors, volunteers, and similar entities that work closely with government are distant enough from the actual workplace that curtailing their speech does not relate sufficiently to these interests.

Weighing these factors here, Ms. Fendley falls well outside the reach of *Pickering*. First, while Ms. Fendley strove to maintain a good relationship with Boise State, Big City Coffee did not have a direct contractual relationship with the university, and the contract with Aramark did not place the university in a close supervisory capacity over Big City Coffee's daily operations. *See* Record on Appeal at 16–20 (Def.'s Ex. 1009). While the university ultimately had the final word over whether Big City Coffee remained on campus, this tangential sub-contracting relationship is more akin to the sub-contracted food vendors in *Wandering Dago* than the waste disposal company in *Umbehr* or the doctor in *Smith*, where speakers had a direct and binding contract with the government. *Compare Wandering Dago*, 879 F.3d at 27, *with Smith*, 870 F.2d at 1377.

Second, Big City Coffee was not entangled with government staff, nor did it perform any sort of government function. Big City Coffee's services are not intertwined with the university's

educational mission, like a visiting guest lecturer might be. Like the food trucks in *Wandering Dago*, Big City Coffee engaged in normal commercial activity, not a government service. Unlike in *Umbehr*, where a county had delegated waste disposal services—a traditional and statutorily mandated government responsibility—to a prime contractor, the university had not delegated any quintessential government function to Big City Coffee. Thus, Ms. Fendley’s speech rights should not be weighed against the university’s interest “in promoting the efficiency of the public services it performs *through its employees.*” *Pickering*, 391 U.S. at 568 (emphasis added). Nor is this akin to *Smith*, where contracted staff labored alongside government workers such that speech control played a role in protecting “close working relationships.” *Connick v. Myers*, 461 U.S. 138, 154 (1983).

Lastly, Boise State did not pay Big City Coffee. The lack of this traditional indicator of employment places Big City Coffee once again closer to the sub-contracted food vendors in *Wandering Dago* than the prime contractor in *Umbehr*, where the government “agreed to pay public moneys to private individuals for services to be rendered, and therefore had a stronger interest in restricting those individuals’ speech than in restricting the speech of the public at large.” *Wandering Dago*, 879 F.3d at 38. Lacking this financial connection, many ordinary citizens who are entangled with the government, such as volunteers, may find themselves under the stricter speech controls allowed by *Pickering*. *But see Hyland v. Wonder*, 972 F.2d 1129 (9th Cir. 1992) (applying *Pickering* to a volunteer who performed a government function, had close working

relationships with government staff, and was volunteering as a preliminary step toward a paid position).

While the outcome below upheld Ms. Fendley’s First Amendment rights, the erroneous expansion of *Pickering* threatens the speech rights of the millions of businesses who contract and sub-contract with the government. Ordinary citizens enter into agreements of various kinds with the government all the time, from performing artists to IT contractors. *Pickering* never intended to extend censorship authority outward to the vast ecosystem of those who do limited contract or volunteer work with the government. And where the line between employee and contractor becomes unclear, the guiding rule ought to be that “the tie goes to the speaker.” *Fed. Election Comm’n v. Wis. Right to Life*, 551 U.S. 449, 474 (2007).

None of this is to say that a subcontractor will not say something that affects a government workplace. So could any ordinary citizen. As a subcontractor engaged in mundane commercial activity, Ms. Fendley is in the same position as any other citizen—she did not waive her right to full First Amendment protection by opening a coffee shop that happens to be on a state university campus.³

³ To the extent that the Court deems this question of the proper level of scrutiny unclear, that lack of clarity cannot redeem defendants’ qualified immunity defense. The law regarding viewpoint discrimination is clearly established under *Pickering*, as appellees’ response brief ably proves. If anything, such law is even more clearly established under strict scrutiny. Thus, the question over what standard should apply can only raise the already high bar for establishing qualified immunity.

II. Even If *Pickering* Applies, the Balance Tilts Toward Sarah Fendley’s First Amendment Rights.

If *Pickering* does indeed apply, then Ms. Fendley’s attenuated relationship to the government should play some role in reconfiguring the balance between speaker and employer. But even so, *Pickering* balancing should favor Ms. Fendley because *Pickering* should never become a heckler’s veto, nor should it appoint the government as a roving curator of its staff’s social media.

A. *Pickering* does not enable a heckler’s veto.

If a university can penalize employees for expression on personal social media because it offends students, then *Pickering* will enable a heckler’s veto that reaches far beyond the employment context.

Disruption under *Pickering* does not include the upset inevitable from speech that stirs up controversy. Speech that does not cause upset is speech that needs no defenders. The greatest advances in free expression have caused tumult. The printing press brought unprecedented freedom of thought, but it also gave wings to speech that fomented peasant uprisings across Europe.⁴ The Birmingham Campaign’s marches, protests, and sit-ins led by Martin Luther King Jr. stoked a violent response vicious enough to shake a nation from its stupor.⁵ In fact, the First Amendment “may indeed best serve its high purpose when it . . . stirs people to anger” by

⁴ See JACOB MCHANGAMA, *FREE SPEECH: A HISTORY FROM SOCRATES TO SOCIAL MEDIA* 70 (2022).

⁵ See CLAYBORNE CARSON, ET AL., *MARTIN LUTHER KING, JR. ENCYCLOPEDIA* 28 (2008).

“strik[ing] at prejudices and preconceptions.” *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

Every hammer blow that has broken shackles on the human mind has ignited sparks.

Given that some disruption is an inevitable element of speech targeted for censorship, *Pickering* becomes a dead letter if disruption caused by offended listeners can outweigh the speaker’s First Amendment interests. *See Reges*, 162 F.4th at 992 (“But if [unrest and anger] are downsides, they are considered too fleeting to outweigh the foundational values underlying the First Amendment’s protections for academic speech.”). Government employers cannot claim an overriding interest in halting “the disruption that necessarily accompanies controversial speech.” *Dodge v. Evergreen Sch. Dist. 114*, 56 F.4th 767, 782 (9th Cir. 2022) (cleaned up). Even when it comes to the lighter protections offered to K-12 students’ speech, the Supreme Court affirmed the need to allow for some disturbance:

Any word spoken . . . that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength. . . .

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508–09 (1969) (citation omitted).

Some allowance for disruption among offended listeners is even more vital in the outrage culture permeating college campuses. A mild suggestion that Yale students are mature enough to choose their own Halloween costumes is enough to spark career-ending protests.⁶ A polite email

⁶ *See* GREG LUKIANOFF & RIKKI SCHLOTT, *THE CANCELING OF THE AMERICAN MIND* 276–79 (2023).

declining to grade based on race can whip up a social media storm.⁷ Indeed, the need to allow for “student discomfort and anger” is *more* imperative in the university workplace than most other government settings because “[s]tudent unrest is an inevitable byproduct of our core First Amendment safeguards in the higher education context.” *Reges*, 162 F.4th at 1000–01.

If courts are quick to defer to university worries about disruption in these hypersensitized climates, *Pickering* will cease to offer any shelter to university staff. Students with eggshell ears and the administrators who dote on them will enjoy a heckler’s veto that shuts down speech whenever students cause a ruckus.

If courts incorporate student outrage into the *Pickering* analysis, they will place a bolt hole for viewpoint discrimination within the *Pickering* framework. Punishing speech because it upsets listeners results in favoring a “positive or benign” statement “but not a derogatory one.” *Matal v. Tam*, 582 U.S. 218, 249 (2017) (Kennedy, J., concurring). In other words, viewpoint discrimination. This clashes with the fundamental First Amendment tenet that the “proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’” *Id.* at 246 (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

Ms. Fendley no doubt upset some students when she expressed her support for law enforcement and first responders. Such upset is an “inevitable byproduct” of life on a university campus. *Reges*, 162 F.4th at 1001. Relying on such upset as grounds to impose adverse action on

⁷ *See id.* at 50.

Ms. Fendley embeds viewpoint discrimination into the *Pickering* balancing test. If, for instance, Big City Coffee had posted a message such as “defund the police” on its public social media page, it may not have provoked the same outrage. Such a post may have offended *other* students, however, which only reflects the reality that *Pickering* could become a rule allowing universities to turn themselves into padded cloisters where no one in the university environment ever experiences discomfort. Thus *Pickering* would undermine, rather than protect, the core public service offered by a university.

B. The *Pickering* balance should shift toward the speaker for online speech away from work.

The risk of a heckler’s veto grows as *Pickering* reaches beyond the workplace. Here, Ms. Fendley had expressed her views on her business’s social media accounts. This Court should take the United States Supreme Court’s lead in refusing to expand the government’s censorial interests to online expression.

When it comes to government’s interest in avoiding disruption, the Supreme Court has drawn a line at personal social media, which it has called the “modern public square.” *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017). In *Mahanoy Area School District v. B.L.*, 594 U.S. 180 (2021), the Supreme Court held that the government’s traditional authority to curate the speech of K-12 schoolchildren did not reach online speech. There, a local high school had suspended a high schooler from the cheerleading team for lambasting the school on Snapchat for not placing her on varsity. *Id.* at 183–84.

Although the speech upset students and staff at the school, the Court held that granting the school say over social media activity just because it upsets students and teachers would make the school curator of “all the speech a student utters during the full 24-hour day,” which, when it comes to controversial topics, “may mean the student cannot engage in that kind of speech at all.” *Id.* at 189–90.

This reasoning applies with even greater force in the context of university employee speech under *Pickering*. Government employees are not minors with diminished speech rights under a secondary school’s unique *in loco parentis* role. Likewise, the university community is made up of adults, not susceptible minors who may be unduly affected by the expressive activity of peers and mentors. *Cf. Lee v. Weisman*, 505 U.S. 577, 593 (1992) (reasoning that minors are susceptible to psychological effects from others’ expression). The courts have sometimes granted greater leeway to government regulation when speech recipients are minors. *See FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978) (The Supreme Court has held “that the government’s interest in the well-being of its youth . . . justified the regulation of otherwise protected expression.”) (internal quotation marks omitted). *But see Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 802 (2011) (affirming “the rule that only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to minors.”) (cleaned up). But such leeway does not extend to the university.

Thus, if K-12 schools must carry a “heavy burden” to justify disciplining high schoolers for intemperate SnapChat posts, then the burden a university must carry to prove a need to curate

a government employee’s personal social media feed—where both the speaker and the listeners are adults—should require a herculean rationale. Public employment cannot become a waiver of the right to speak on touchy subjects for the “full 24-hour day” in the modern public square. The reasoning of *Mahanoy* thus applies with even greater weight here. *Pickering* balancing favors online expression away from work absent extraordinary circumstances.

A handful of students upset by a social media post of their campus coffee shop owner is not such an extraordinary circumstance. If *Pickering* applies to a coffee vendor’s public post about supporting the police, then *Pickering* would offer no protection to any university employees who post on their own social media pages about political matters.

III. Courts Should Hesitate to Grant Qualified Immunity to Deliberative Decisions by University Administrators to Curtail Speech Rights.

A government officer may shelter behind qualified immunity only if “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Sometimes defendants frame this inquiry solely in terms of whether a right was “clearly established” in the abstract, but the United States Supreme Court has made clear that the test turns on objective reasonableness under the circumstances. This reasonableness standard should take into account time and opportunity to deliberate.

Qualified immunity’s “reasonable person” standard requires courts to assess what a reasonable government official in the defendant’s position would have understood the law to

permit. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The question is whether, under the given circumstances, “officers are on notice their conduct is unlawful.” *Pearson v. Callahan*, 555 U.S. 223, 244 (2009) (cleaned up). The context in which such officers make decisions affects this notice question, as courts should look to reasonableness based on “the situation he confronted.” *Saucier v. Katz*, 533 U.S. 194, 195 (2001), *abrogated on separate grounds by Pearson*, 555 U.S. 223. As in the Fourth Amendment reasonableness inquiry, the qualified immunity reasonableness standard should “embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.” *Graham v. Connor*, 490 U.S. 386, 396–97 (1989).

The opposite is therefore also true: if courts should consider exigency, then they should also consider lengthy time to deliberate and consult counsel with no emergency imminent. Justice Thomas applied such reasoning to this very setting: “But why should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting?” *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement respecting denial of cert.).

This case underscores why the distinction between fast-moving and slow-moving circumstances matters. The defendants here deliberated and discussed the controversy over Ms. Fendley’s expressive activity for about two months. On multiple occasions, they met with each other and with concerned students to discuss the matter and maintained an ongoing dialogue

over email and telephone. They also met with university counsel. Few circumstances could provide more opportunity to be on notice of the First Amendment's demands.

This long, unwinding saga is a far cry from, for instance, *Bailey v. Ramos*, 125 F.4th 667 (5th Cir. 2025), where hostile belligerents were filming officers at an active crime scene, and the officers' use of force to subdue one was entitled to qualified immunity against a First Amendment retaliation claim. Or *Wood v. Moss*, 572 U.S. 744 (2014), where Secret Service officers were entitled to qualified immunity against a viewpoint discrimination claim for moving protesters out of weapons range from where President George W. Bush had made an unanticipated decision to eat dinner. These officers acted in tense situations with no time for phone calls, emails, and meetings with each other, no chance to consult legal counsel, and without the benefit of several months to reflect.

The lower court was correct to reject the university defendants' qualified immunity defense.

CONCLUSION

The university asks this Court to place countless ordinary businesses and individuals—vendors, speakers, artists, volunteers, and others with fleeting business relationships with the government—under perpetual threat of government retaliation for core protected speech in their personal lives with no bearing on the protection of public services. This Court should allow the jury verdict to stand.

Dated: April 13, 2026.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 13, 2026, I filed the foregoing electronically through the iCourt System, which caused the following parties or counsel to be served by electronic means:

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